

SOUTH AFRICA / JUDGMENT

Administrator of Moroka and Others v Kubheka and Another (A13/2020; A14/2020) [2024] ZAMPMHC 26 (23 April 2024) [2024] ZAMPMHC 26

COURT

Middelburg High Court, Mpumalanga

BEFORE

L J Bam, T V Ratshibvumo, MBG Langa

CASE / FILE NUMBER

A13/2020; A14/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NO. A13/2020

CASE NO. A14/2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE: 23 April 2024

SIGNATURE.

In

the matter between:

ADVOCATE
MXOLISI ZONDO
FIRST APPELLANT
S.
S.
MASONDO
SECOND APPELLANT
ADVOCATE
THAMI NCONGWANE SC
TENTH APPELLANT
IN

RE: THE
ADMINISTRATOR OF DR JS MOROKA
FIRST APPLICANT
DR
JS MOROKA
MUNICIPALITY
SECOND APPLICANT
MEC
FOR COGTA,
MPUMALANGA
THIRD APPLICANT
MINISTER
OF COGTA, MPUMALANGA
FOURTH APPLICANT
And
THAMI
GOODWIN
KUBHEKA
FIRST RESPONDENT
ECONOMIC
FREEDOM FIGHTERS
SECOND RESPONDENT

JUDGMENT

BAM AJ

1. This is an appeal against the judgment of the Mpumalanga Division of the High Court, Middelburg Local Seat (court a quo). On 3 April 2020, the court a quo handed down a judgment in terms of which adverse orders were made against the ten appellants under case number 1170/2020 all but one of whom are legal practitioners. The findings and orders made by the court a quo that are relevant for purposes of this appeal are the following:
 - 1.1 The applicant attended court on 31 March 2020 without a permit, (in relation to the tenth appellant).
 - 1.2 Advocate Zondo, may not charge his client, alternatively instructing attorneys' any fees or expenses in respect of preparation, travelling to, and from court, and attending court in Middelburg on 31 March 2020.
 - 1.3 Advocate Ncongwane SC and Adv Zwane, may not charge their client/s, alternatively their instructing attorney/s any fees or expenses in respect of preparation, travelling to and from attending court in Middelburg on 31 March 2020.
 - 1.4 Me P Kwaza, and TM Kgomo and Associates Inc, may not charge their clients any fees or disbursements for the preparation, travelling to and from Middelburg, and appearing in court on 31 March 2020.

1.5 Messers Setsoalo and A Rampatla may not charge their clients any fees or disbursements for the preparation, travelling to and from Middelburg (if applicable), and appearance in court on 31 March 2020.

1.6 The Registrar of this court is directed to send a copy of this judgment to the Directors of the Mpumalanga and Gauteng Legal Practice Councils.

1.7 The attorneys acting on behalf of the individual applicants, and the attorneys for the respondents are ordered to serve a copy of this judgment on their clients before the return date of the rule nisi on 07 May 2020, and file the sheriffs returns on the court file.”

2. As with the application for leave to appeal, the appeals have been consolidated because the facts and grounds are the same, as will the outcome. Going forward, reference will be made to the appellants jointly unless the context dictates otherwise. It is noted that although there is no order made against the Second Appellant, he has joined the appeal in his capacity as the instructing attorney of the First Appellant and in support of the latter’s appeal.[1] The order that the First Appellant must forfeit his fees by implication directs that the briefing attorney must withhold payment

of such fees or not charge the client for such. This Court therefore does not agree with the court a quo’s view that the Second Appellant has no interest in the matter and therefore lacks locus standi to join as an appellant.

3. The appeal is with leave of the court a quo, albeit on a narrow basis. The appellants on the other hand have ventured into arguments pertaining to the whole judgment in a bid to drive home their contention that the first order, pertaining to permits, should also be set aside.[2]
4. The impugned judgment followed close on the heels of another that was decided in this Division, wherein an applicant was refused permission to travel to the Eastern Cape for his grandfather’s funeral.[3] Even though the court was sympathetic to the applicant’s plight, it held that the law – the disaster management regulations that restricted movement – must be upheld, otherwise allowing him to go to the funeral would be tantamount to “authorising the applicant to break the law under judicial decree – that no court can do”[4]
5. The appellants, legal practitioners and their respective counsels, came to Middelburg High Court on 31 March 2020 to attend to an urgent application involving their clients. The matter was concluded by way of a rule nisi with a return date of 7 April 2020 after the parties were afforded the opportunity to discuss a mutual solution and produced a draft order in that regard which the court then endorsed. The court had then decided to reserve the issue of costs “as it was always intended to deal with the practitioners’ lack of legitimate permits and breach of the regulations.”[5]

6. The two orders that the court a quo made relate firstly to contravention of the Covid 19 disaster management regulations, particularly Regulation 11B(1)(a)(iii) which restricted movement of persons in a bid to contain and prevent the spread of the corona virus, and secondly to forfeiture of the appellants' fees for the day.
7. As indicated above, the grounds for appeal address the full order of the court a quo, in line with the appellants' prayer that the whole judgment be set aside, and are briefly stated below as follows:

7.1 the judgment against the appellants was made mero motu in the absence of any application being made by any party to the court,

7.2 the court made adverse findings against the appellants without prior notice and thus denied them their constitutional right to be heard and by so doing, breached the principles of natural justice and section 34 of the Constitution,

7.3 the court a quo falsely accused the appellants of having come to court without permits, thereby impugning their integrity as officers of the Court and under circumstances where the court was not legally permitted to review the permits,

7.4 the court committed a gross irregularity by assuming the role of complainant and judge in breach of section 165 of the Constitution,

7.5 the court misinterpreted the disaster management regulations, in particular the nature and content of "urgent and essential" services,

7.6 the judgment on leave to appeal is imprecise, making it hard to follow the court's reasoning,

7.7 the court failed to consider the role of the LPC's regulatory authority over the legal profession of protecting the interests of the profession and the public. The court therefore erred in finding that the LPC-issued permit presented by the 10th appellant was in breach of regulation 11B(a)(iii) and (iv).

MOOTNES

8. The issue of permits, raised by the appellants, and the major subject of the court a quo's judgments, is now water under the bridge as it were because the Regulations have since been scrapped. Secondly, the decision of this court regarding the impugned costs order will have a bearing on the order relating to the court a quo's finding on the issue of permits. The appellants have conceded as much. In the premises, this court will confine itself to the second

order relating to forfeiture of fees on which leave to appeal was granted, the basis of which warrants a brief background.

BACKGROUND

9. At the hearing of case number 1170/2020 for which all the appellants had attended court on 31 March 2020, the court a quo had delayed the proceedings and instead initiated an inquiry into the legitimacy of the appellants' presence in view of the travel restrictions imposed under the disaster regulations.[6] They were particularly prohibited from crossing the provincial border between Gauteng and Mpumalanga.[7] From the court's main judgment, it appears as if the Second Appellant had been informed, on 30 March 2020, a day before the

application was heard, that the matter would not proceed, in a bid "to avoid any possible postponement as a result of practitioners not having valid or no permits, alternatively attending court in breach of Regulation 11B(1)(a)(iii). The Court wanted to avoid having to turn practitioners around or refusing to hear them in court, to their and the Court's embarrassment." [8]

10. On that date however, some of the practitioners did have, or presented their permits, while others "lied" about having permits and later applied to the Legal Practice Council to have backdated permits issued in order to present them, so the court a quo found. Irrespective of their respective situations in this regard, they were all, except for one, found by the court to have contravened

the disaster management regulations. Advocate Matlala, from the Mpumalanga Bar association produced a permit that was issued by the Mpumalanga Provincial Council of the LPC, and same was accepted by the court a quo as compliant with the regulations.[9]

11. The court a quo then went on to demonstrate how serious the noncompliance by the appellants was by citing the much publicised "lockdown lunch" a government minister had recently shared with friends which resulted in her being criminally charged and fined R1000.00 and being docked a month's salary in addition to a two-month suspension.

THE ORDER FOR FORFEITURE OF FEES

12. The court a quo had then, in its judgment, proceeded to make an order that the appellants should forfeit their fees for preparing for the urgent

application, for travelling to and from court, and for appearance on 31 March 2020. This was apparently to penalise them for contravening

the disaster management regulations. It is on this aspect that leave was granted, the court a quo having surmised that the appellants might have prospects of success since they were not given an opportunity to make representations

before the order was made.[10]

13. It is so that none of the appellants were afforded an opportunity to be heard and this, according to the first appellant, is reason enough for the appeal to succeed. He has cited, as authority, the case of Chithi[11] where the Land Claims Court made a punitive costs order

against the legal representatives of land claimants after dismissing their case. The appellants in that case had apparently been warned by the presiding judge during a pre-trial conference to reconsider their stance of proceeding with a community claim in the absence of any evidence that their clients constituted a community as defined in the Act. At paragraphs 11 and 14 of the judgement, the SCA on appeal notes and then affirms that:

“In support of their application, the applicants relied, amongst others, on procedural grounds, that the LCC in adjudicating the matter, breached the principles of procedural fairness that are fundamental to the rule of law. As it turns out, and for the reasons that follow, this contention has merit. I am thus of the view that the application for leave to appeal should be granted and the appeal itself determined..... The principle that the courts should not grant adverse court orders, without providing the affected parties an opportunity to be heard, is trite and sacrosanct.”

14. The appellants further argue that the court a quo should not have made orders not sought by any of the parties to the litigation and which had nothing to do with the case in front of it. Their contention finds resonance in the case of Westwood.[12] In that case, the full bench agreed with the appellants that the court a quo should not have raised issues that were not traversed in the affidavits or pleadings. The court had imposed adverse costs orders

against municipal officials based on its perceived misconduct or fraud in the awarding of a tender for the provision of insurance for water loss. The applicant had neither sought an adverse costs order, nor alleged any misconduct or fraud on the part of the municipality and its officials.

15. Punitive costs orders against legal representatives are usually made to mark the court's displeasure at unprofessional conduct and abuse of process, as well as negligence to a serious degree in the conduct of litigation. Authorities on the subject matter of punitive costs orders, all without fail, refer to the conduct of litigation; even contemptuous behavior is always invariably linked to litigation. That is the only instance in which a court can deprive a practitioner of its fees or make him or her pay out of own pocket.[13] In the case of the appellants, the court a quo diverted focus from the urgent application that was the object of the proceedings of 31 March 2020 and instead opened a summary inquiry into the validity of the practitioners' permits. The court then proceeded to impose a penalty of forfeiture of their fees for the day, despite the urgent application having been heard to some extent and then postponed. The costs order was in fact to punish them for the alleged “illegal” conduct and had nothing to do with how they respectively conducted themselves during the proceedings. In terms of the regulations alleged to have been contravened, this called for a criminal process as it does not even constitute civil contempt. The case of the Minister that the court a quo has cited is a perfect example of enforcement of the regulations and how to deal with noncompliance.
16. For this reason, this Court agrees that the court a quo misdirected itself by imposing a punitive costs order against the appellants without affording them an opportunity to address it.

17. In the result, I propose the order in the following terms:

1. The appeal is upheld and the order of the court a quo dated 3 April 2020 is set aside.
2. There is no order as to costs.

L J BAM

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

I agree, and it is so ordered

T V RATSHIBVUMO

ACTING DEPUTY JUDGE PRESIDENT

I agree

MBG LANGA

JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANTS: T G MADONSELA SC INSTRUCTED BY: FINGER ATTORNEYS

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SEPTEMBER 2023 DATE OF JUDGMENT: 23 APRIL 2024

Judgment

handed down by way of delivery to the parties' representatives via email.

- [1] Paragraph 14 of appeal bundle, paginated page 9.
- [2] Notice of Appeal in respect of First and Second Appellants (A13/2020) – paginated page 6 – and of Tenth Appellant – paginated page 19
- [3] Ex parte: van Heerden (1079/2020) [2020] ZAMPMBHC 5 (27 March 2020)
- [4] At paragraph 16
- [5] Paginated page 111, paragraph 40 6 Paragraph 13 of the main judgment – paginated page 43
- [5] Paginated page 111, paragraph 40
- 6 Paragraph 13 of the main judgment – paginated page 43
- [6] Paginated page 98 – paragraph 27 of leave to appeal judgment.
- [7] Paginated page 116 – paragraph 50 of the leave to appeal judgment
- [8] Paginated page 114 – paragraph 46

- [9] Paragraphs 71-72 of the main judgment – paginated pages 66-67
- [10] Paragraph 148 of the leave to appeal judgment – paginated page 173
- [11] Chithi and Others; In re: Luhlwini Mchunu Community v Hancock and Others (243/2020) [2021] ZASCA 123 (23 September 2021)
- [12] Ethekekwini Municipality and Others v Westwood Insurance brokers (Pty) Ltd (AR 230/2018) [2020] ZAKZPHC 2 (31 January 2020)
- [13] See In Re: Alluvial Greek Limited, 1929 CPD 532, at 535 Kambamba v S (A15/2021) [2021] ZAFSHC 51 (2 March 2021) and the cases cited therein.
- [13] See In Re: Alluvial Greek Limited, 1929 CPD 532, at 535 Kambamba v S (A15/2021) [2021] ZAFSHC 51 (2 March 2021) and the cases cited therein.

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Prepared on 13 October 2026 · Esheria