

SOUTH AFRICA / JUDGMENT

Bridge Corporate v Zisile and Another (2408/2019) [2020] ZAECHGC 80 (5 August 2020) [2020] ZAECHGC 80

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan

CASE / FILE NUMBER

2408/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO.2408/2019

Date

heard: 14 May 2020

Date

delivered 05 August 2020

In

the matter between:

BRIDGE

CORPORATE

Applicant

and

ANDILE

WELLINGTON ZISILE

First

Respondent

NJ

DU PLESSIS & ASSOCIATES INCORPORATED

Second Respondent

JUDGMENT

RUGUNANAN, J

- [1] This application arises from a dispute regarding a tender for costs following withdrawal of an appeal launched by the second respondent ostensibly in the name of the first respondent under case number CA 237/18 (“the appeal”). The appeal was against a punitive costs order *de bonis propriis* by the magistrate at Hankey on 9 March 2018 against the second respondent. The first respondent is nominally cited in these proceedings. No specific relief is claimed against him.
- [2] Mr. N. J. Du Plessis is an attorney who practises as N. J. Du Plessis Incorporated of which he is a director [1] and its driving force. He appears for the second respondent and is the deponent to its answering affidavit. He is also the author of the second respondent’s heads of argument. In argument Du Plessis indicated that he had nothing further to add in amplification of his written submissions where these relate to the content of his affidavit traversing the merits of the application. Absent

significant disputes of fact on the merits of the matter, reluctantly, I permitted him to continue to represent the second respondent. I doubt if I will in future be inclined to allow a similar departure. The independence of a legal representative is compromised if he has identified with the issues by also being a witness (see *Carolus and Another v Saambou Bank Ltd* 2002 (6) SA 346 (SCELD) at 346H-J).[2]

- [3] In its notice of motion the applicant essentially seeks orders that:

“1. ... the second respondent pay (sic) the costs of the withdrawn appeal, including the costs of the application for condonation under case number CA 237/18 de bonis propriis on the scale as between attorney and client;

2. ... the second respondent pay (sic) the costs of this application *de bonis propriis* on the scale as between attorney and client; and
3. Further and / or alternative relief.”

BACKGROUND

- [4] On 19 May 2012, in the magistrates’ court at Hankey under case number 1848/2013 a judgment was granted by default in favour of the applicant against the first respondent. On 4 December 2015, and following lodgement of an application for rescission, the second respondent, acting on behalf of the first respondent, obtained a rescission order.[3] The taxed costs for the rescission application were paid to the second respondent on 23 March 2016.[4] A second application for rescission of the same judgment, previously rescinded, was launched on 11 July 2017 and following delivery of an opposing affidavit accentuating the duplication of rescission proceedings, the second application was withdrawn on 6 February

2018 without a tender to pay costs.

- [5] Owing to the impropriety and needlessness of the second application, and the rescission being *res judicata*, the applicant insisted that costs be paid by the second respondent. Eventually, a tender was forthcoming from the second respondent,

albeit in the name of the first respondent. Attached to the applicant's papers is an affidavit by the first respondent.[5] Quoting in relevant part, he states:

"16. I vehemently deny that the second respondent had any authority to tender any costs on my behalf. There was never any agreement for that. I was never asked in respect of any tender of costs nor did I give such permission".

- [6] The costs issue apropos the second rescission application was argued before the magistrate on 9 February

2018. In a judgment dated 9 March 2018 the magistrate awarded costs *de bonis propriis* against the second respondent.

IN LIMINE

- [7] The second respondent contends that there is no proof that the deponent to the founding affidavit has been authorised by the applicant to depose thereto, nor proof that the applicant has sanctioned the launching of this application.[6] On the latter aspect, the complaint is that there is no evidence to show that the applicant has duly resolved to institute these

proceedings and that the proceedings are instituted at its instance (see *Creative Car Sound and Another v Automobile Radio Dealers Association* [2007] JOL 1937 (D) at paragraph [26]). On an overall conspectus of the matter it seems to me rather that the primary issue is that the applicant lacks the requisite *locus standi* (legal standing) for instituting these proceedings. Where an essential point of law such as this is not manifest from the applicant's papers, it is incumbent not to disregard it (see *Dilley v Changing Tides 17 (Pty) Ltd* [7]).

- [8] *Locus standi* for the purpose of instituting legal proceedings is a matter of law and goes further than mere failure to prove authority to depose to an affidavit[8] which frequently arises in practise.[9] As Harms JA pointed out in *Gross & Others v Penz*: [10]

"The general rule is 'that it is for the party instituting proceedings to allege and prove that he has locus standi, the onus of establishing that issue rests upon the applicant. It is an onus in the true sense; the overall onus. . .'. (Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149; 1991 (1) SA 567 (A) at 575H-I)."

(my own emphasis is in bold)

The learned judge added:

"I am unaware of a rule of law that allows a court to confer locus standi upon a party, who otherwise has none, on the ground of expediency and to obviate impractical and undesirable procedures."

[9] At the time of the default judgment on 19 May 2012, the debt occasioning the judgment arose from a loan agreement ceded to and consequently

owned by Bridge Corporate, (the applicant herein).[11] When the second rescission application was launched, Bridge Corporate was no longer the owner of the judgment debt. This is evident from what is stated by attorney Jonathan Aukett, the deponent to the affidavit filed in opposition to that application. Insofar as currently relevant the following extracts from his affidavit are revealing:

“1.2. The Respondent is Numix (Pty) Ltd with registration number 2013/133192/07 the successor in right and title to the judgment as obtained by Bridge Corporate.

...

3. The owner of the debt at the time of judgment was BRIDGE CORPORATE and we had a mandate to obtain judgment and collect the outstanding amount due from the applicant. ... The debt was subsequently sold and ceded by Bridge Corporate ... the current financial owner of the debt is Numix (Pty) Ltd”

[10] In the founding affidavit to the present application, and relevant to the applicant are the following averments:

“5. The applicant is BRIDGE CORPORATE, which is the respondent in the appeal before this honourable court under case number CA 237/18, being an appeal against the order handed down by the Hankey Magistrate’s (sic) Court under case number 1848/2013.

14. The first respondent approached SA Multiloans, a loan originator, to source a loan from a credit provider. Pursuant to this the first respondent and a credit provider entered into credit agreement.

15. At the time that judgment was entered against the first respondent the debt had been ceded to, and was owned by, Bridge Corporate, being the applicant herein.”

[11] Legal principle requires of a litigant in the guise of an artificial persona to aver and prove that it has locus standi and that the proceedings instituted at its instance have been duly authorised. Nothing emerges from these averments indicating that the applicant has averred and proven that it has locus standi in these proceedings. Nothing is said about the applicant’s legal personality, how it came into existence[12] and if it was ever authorised by Numix (Pty) Ltd to institute these proceedings on its behalf, nor whether the applicant itself did autonomously resolve to institute them. There is precedent for holding that objection may be taken if there is nothing before court to show that the applicant has duly authorised the institution of notice of motion proceedings.[13]

[12] The material in the Aukett affidavit implies that the magistrate’s punitive costs order accrued to Numix (Pty) Ltd. The applicant

(Bridge Corporate) held no direct and substantial interest in that order, and although the second respondent attempted to prosecute an appeal against that order by citing Bridge Corporate, this did not cloak the latter with locus standi to institute these proceedings and autonomously claim the relief set out in the notice of motion. If I am mistaken in this regard, I am however unable to hold that the applicant has placed evidence before this court indicating that it has duly resolved to institute these proceedings and that same are instituted at its instance. In this regard the contention by the second respondent that there is no evidence that the applicant has properly launched these proceedings presents a clear challenge to the applicant's authority to have instituted them and is not devoid of merit.[14]

COSTS

[13] The general rule in matters of costs is that the successful party should be awarded his costs, and this rule should not be departed from except where there are good grounds[15] for doing so such as unbecoming conduct.

[14] On 13 April 2018 the second respondent filed a notice of appeal against the magistrate's punitive costs order. The notice was filed in the name of the first respondent and it is not contested that the appeal was facilitated in the name of the first respondent where the order was against the second respondent only.

[15] Quoting once again from the first respondent's affidavit, he avers:

"17. ... I was not aware of the appeal or the condonation application that was brought. I never gave my blessing or instruction for this."

[16] The first respondent's averments were quoted in this judgment stand uncontradicted. They attribute conduct unbecoming of the second respondent and by extension, Du Plessis. Such conduct, where it is undisputed is by no means anything trifling.

[17] On the papers before me the issues between the parties have been fully ventilated and it does not appear that there are material disputes of fact. It is common cause that the appeal was initially erroneously noted in the Port Elizabeth Local Division of the High Court and was not duly prosecuted in accordance with the prescripts of sub-rules (1), (4)(a) and (7)(a) of uniform rule 50 which regulates the prosecution of an appeal in the high court against the decision of a magistrate in a civil matter. It is apposite to repeat the contents of a letter dated 14 February 2019 from the registrar:[16]

"A civil appeal file was opened on 12th September 2018 under case number CA237/18."

The original Notice of Prosecution of Appeal is not filed neither the required copies of the record.

The file contents consists of an Application for Condonation which has no founding affidavit, and is thus defective, as well as an Answering Affidavit and Replying Affidavit.

The relevant copies of the appeal record together with the original Notice of Prosecution must be filed as a matter of urgency."

[18] Du Plessis sought condonation in the High Court in Grahamstown for his failure to have duly prosecuted the appeal. He deposed to the founding affidavit in which he states:[17]

“3. I am the Appellant’s legal representative to these proceedings and duly authorized (sic) to depose to this affidavit.”

[19] No confirmatory affidavit was obtained from the first respondent. Distressingly, Du Plessis also sought to absolve himself from assuming responsibility for the duplicated rescission proceedings by stating:

“19. The Appellant had, however, upon discovery of his error, withdrawn the application for rescission of judgment and tendered costs.”

[20] It is unnecessary to traverse further detail of the failings by Du Plessis. His mistakes and errors where he faulted in prosecuting the appeal comes down to gross negligence which exhibits conduct unbecoming of an attorney. The present case is not an isolated

instance (see *Seng v Experato (Pty) Ltd* [18]). Above all, his apparent lack of candour does not accord with the standard of integrity required of an attorney and may conceivably be the type of conduct condemned by *Eloff JP in Algemene Balieraad van Suid-Afrika v Burger en ‘n Ander* [19] where the learned judge stated:

“Dit betaam nie ‘n man in sy posisie om so op te tree nie”.

[21] The condonation application was opposed. It was withdrawn and so was the appeal. Costs of both the purported appeal and the condonation

application became an issue - the applicant’s attorneys insisting for costs on a punitive scale as between attorney and client; the second respondent on the other hand making a tender for such costs as between party and party.[20] Du Plessis refers to a letter dated 2 October 2019 from the applicant’s attorneys[21] and alleges that the parties agreed that the second respondent would tender the costs on the party and party scale.[22] To say the least, the letter does not support his contention. To my mind the entire scenario commencing with the purported appeal was a ruse intended to frustrate execution of the magistrate’s costs order (as in *Seng supra*). The papers are unequivocally telling in this regard.

[22] In view of the foregoing no order as to costs will be made.

[23] Accordingly, I order as follows:

- (a) The point in limine is upheld and the application is dismissed;
- (b) The Registrar of this Court is directed to forward a copy of this judgment to the Eastern Cape Provincial Office of the Legal Practice Council for an investigation into the conduct of Mr. N. J. Du Plessis of N. J. Du Plessis & Associates Incorporated.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

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This judgment was handed down electronically by circulation to the parties' attorneys by email and release on the SAFLII website.

The date and time for hand-down is deemed to be 10h00 on 05 August 2020.

To: The Eastern Cape Provincial Office of the Legal Practice Council (Tel: 043 - 050 1025, email: infoec@lpc.org.za)

[1] Founding affidavit, Annexure Z, page 309

[2] See also rule 15(e) of "The Joint Rules of Practice for the High Courts of the Eastern Cape Province" (28 January 2020)

[3] Magistrate's Judgment, page 138

[4] Founding affidavit, page 10, paragraph 20

[5] Replying Affidavit, Annexure “BB” pages 364-368

[6] Answering affidavit, page 336, paragraph 29

[7] (47807/2016)

[2020] ZAGPPHC 61 (28 February 2020) at paragraph [50]

[8] It was held in *Ganes and Another v Telecom Namibia Ltd* 2004

(3) SA 615 (SCA) at 624G-H that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit...

it is the institution of the proceedings and the prosecution thereof which must be authorised.

[9] see, for example, *East London Municipality v BKK Meats CC t/a Heinz Meats* 1993 (2) SA 67 (E); *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and others* 2007 (1) SA 142 (N).

[10]

[1996] ZASCA 78; 1996

(4) SA 617 (AD) at 632D

[11] Founding affidavit, Pienaar, page 9, paragraphs 14-15

[12] *SA Cooling Services (Pty) Ltd v Church Council of the Full Gospel Tabernacle* 1955

(3) SA 541 (N) at 542H-543D

[13] *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957

(2) SA 347 (C) at 351D

[14] Answering Affidavit, page 336, paragraph 29; heads of argument paragraph 13

[15] *Nxumalo v Mavundla* 2000

(4) SA 349 (D) at 354A

[16] Founding affidavit, Annexure MA, page 268-270

[17] Founding affidavit, Annexure K1 “Condonation application” pages 159-171

[18] (CA&R) 2/2018 [2019] ZANCHC 23 (17 May 2019)

[19] 1993

(4) SA 510 (T) at 526G

[20] See Answering affidavit, Annexures NDP2, NDP3 and NDP4

[21] Answering affidavit, Annexure NDP4

[22] Paragraph 3 thereof

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