

SOUTH AFRICA / JUDGMENT

De La Rey v PH De La Rey Family Trust and Others (79354/2017) [2020] ZAGPPHC 797 (30 December 2020) [2020] ZAGPPHC 797

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse Van Nieuwenhuizen

CASE / FILE NUMBER

79354/2017

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IN THE

HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE:

30 DECEMBER 2020

Case

Number: 79354/2017

In

the matter between:

DE
LA REY, PIETER JACOBUS
Applicant
And
PH
DE LA REY FAMILY TRUST
First
Respondent
CHRIS
DE LA REY TRUST
Second
Respondent
KOOS
DE LA REY TRUST
Third
Respondent
MARITA
SCHOLTZ TRUST
Fourth
Respondent
JACO
DE LA REY KINDER TRUST
Fifth
Respondent
MARIANNE
HILL TRUST
Sixth
Respondent
DE
LA REY, CHRISTIAAN
Seventh
Respondent
DE
LA REY, CHRISTIAAN
Eighth
Respondent
FERREIRA,
DAWID N.O.
Previous
Ninth Respondent (deceased)
DE
LA REY, PIETER N.O.
Substituting
Ninth Respondent
FERREIRA,
DAWID
Tenth
Respondent
DE
LA REY, ANNA BOUWER
Eleventh

Respondent
DE
LA REY, ANNA BOUWER
Twelfth
Respondent
SCHOLTZ,
MARITA
Thirteenth
Respondent
HILL,
MARIANNE
Fourteenth
Respondent
VAN
DEN BERG, GERT PETRUS JOHANNES
Fifteenth
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The applicant applies for leave to appeal to the Supreme Court of Appeal against the judgment and order of this court dated 22 May 2020 as well as certain directives issued by De Vos J and Potterill ADJP.
- [2] The application is opposed by the 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 11th, 12th and 15th respondents, who will collectively herein be referred to as “the respondents”.

Grounds of appeal

- [3] The grounds of appeal appear in annexure “PJR05” attached to the application and are directed at three separate decisions, to wit:
- 3.1 the directive issued by De Vos J on 5 June 2018 directing that the jurisdiction point raised by certain of the respondents be heard in limine and that all other procedural and substantive issues of the application be stayed pending judgment on the jurisdiction issue;
- 3.2 the failure by Potterill ADJP to issue the directive applied for by the applicant on 4 February 2020; and
- 3.3 the judgment and order of this court in respect of adjudicating the jurisdiction point in limine (procedural point) and the merits of the finding that the court lacked jurisdiction (merits).

Directives: D Vos J and Potterill ADJP

- [4] The applicant did not refer to any authority authorising this court

to sit as a “court of appeal” in respect of the directives issued by De Vos J and Potterill ADJP referred to supra. Section 17(2)(a) of the Superior Courts Act, directs that leave to appeal may be granted by the judge against whose decision an appeal is to be made. The only exception provided for by the subsection is the unavailability of the judge who delivered the judgment and order.

[5] In the result, I am of the view that the jurisdictional factors pertaining to an application for leave to appeal have not been met and the application for leave to appeal the respective directives

should, for this reason alone, fail.

[6] Furthermore, the directives issued by De Vos J and Potterill ADJP

were merely procedural in nature and no reasons were provided for the issuing of the directives. Whether the directives are appealable at all, is doubtful.

[7] Be that as it may and due to the clear provisions of section 17,

the application for leave to appeal the directives issued by De Vos J and Potterill ADJP is dismissed.

Jurisdiction adjudicated as a point in limine procedurally flawed

[8] The submissions in respect of the procedural point were raised by the applicant for the first time in this application. The applicant contends that, in view of this court’s finding that the lack of jurisdiction point will be heard in limine; he did not have an opportunity to properly, or at all, deal with the

submissions.

[9] The respondents did, during the address, have an opportunity to deal with the point and I am of the view that the point should be considered.

[10] The applicant maintains that this court erred in having directed the separation of the issues and having dealt only with the issue of jurisdiction as a point in limine.

[11] In hearing the point in limine separately from the remainder of the issues, the court utilised the accusatorial system that is applicable to civil litigation and not the inquisitorial system as envisaged by section 21(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (“the Act”).

[12] The respondents did not agree and submitted that the court is at liberty to direct its own process.

[13] In *Manong and Associates (Pty) Ltd v Eastern Cape Department of Roads and Transport & Others* 2009 (6) SA 589 (SCA), the court held as follows in paragraphs [71] and [72]:

“[71] The correct question was to ask whether Manong’s complaint fell within the purview of the Equality Act. Clearly, it did. The next step was to look at the powers and functions of the Equality Court referred to above. In the event of the complaint being sustained, any one of the orders set out in s 21(f) to (i) was competent. That an order by the Equality Court might have the same effect as an order made by a high court on review, is merely coincidental.

- [72] The attempts to typify or categorise the proceedings brought by Manong is what led to the confusion. Labels are less important than substance. In respect of Manong’s principal complaint, the Equality Court clearly had jurisdiction. In the event of the success of that complaint, there would have been nothing further to adjudicate. However, in the light of the conclusions reached as set out above, it needs to be stated that only complaints or ‘causes of action’ provided for by the Equality Act are susceptible to adjudication by the Equality Court. That court was set up for a particular purpose. Other causes of action are accommodated in other appropriate fora. The Equality Court was especially set up to deal with unfair discrimination and the other issues provided for by ss 10 to 12 of the Equality Act, as described above.” (own emphasis”)
- [14] In order to determine whether the applicant’s complaint was susceptible to be heard by the Equality Court, this court had to determine if the complaint falls within the ambit of the Act. The mere fact that the applicant labelled his cause of action as a complaint in terms of the Act, does not bestow the Equality Court with jurisdiction.
- [15] The jurisdiction issue is of specific importance. Should each and every complaint that is lodged with the Equality Court be adjudicated, the Court roll will be inundated and the Court would be unable to speedily attend to the complaints of complainants for whom the Court was intended.
- [16] The provisions of section 20 of the Act pertaining to the procedure to be followed when a complaint is lodged with the Equality Court may, however, appear to be at odds with the raising of a jurisdiction point when the Equality Court is already seized with the complaint.
- [17] Section 20(3)(a) provides that the presiding officer to whom the matter has been referred must decide whether the matter should be dealt with by the Equality Court or whether it should be referred to “another appropriate institution, body, court, tribunal or other forum”.
- [18] Regulation 6(5) of the regulations promulgated in the terms of the Act, directs that if the matter needs to be heard in the Equality Court the presiding officer “must refer the matter to the clerk who must, within three days after such referral assign a date for the directions hearing” and inform the complainant of that date.
- [19] At a directions hearing in terms of regulation 10(5)(b), the presiding officer “must give directions in respect of the conduct of the proceedings as he or she deems fit”.

- [20] Subsequent to the directions hearing and in terms of regulation 10(5)(c), the presiding officer may make an order in respect of a range of issues, which include inter alia the limiting of disputes.
- [21] The initial decision by the presiding officer that the matter must be dealt with in the Equality Court does not appear to be final and binding on a respondent. This follows, as the respondent had at that stage not been heard.
- [22] In my view, it is still possible for a respondent to raise the point of lack of jurisdiction at the directions hearing, as is the position in casu where the point was raised at the directions hearing in front of De Vos J. In the result, the presiding officer, De Vos J in casu, could issue the directive, in order to curtail the disputes between the parties, that the jurisdiction point be adjudicated first before any of the other issues.
- [23] The procedure to be followed and the exchange of pleadings were no doubt also determined at the directions hearing which was attended by the applicant's legal representatives. The applicant's complaint in respect of the procedure that was being followed could have been raised at the directions hearing.
- [24] As stated supra the record of the directions hearing is not available and the above observations are of a general nature.
- [25] In view of the submissions raised by all the parties coupled with the provisions of the Act, I am inclined to grant leave to appeal the procedural point. It would provide clarity for the conduct of proceedings in the Equality Court in future.

Jurisdiction: merits

- [26] In respect of the merits of the decision, the applicant's grounds of appeal are set out extensively and in considerable detail. I am of the view that, for present purposes, the grounds can succinctly be summarised as follows:

26.1 in applying the onus incorrectly. This ground of appeal is based on the court's finding that at the jurisdiction stage of the inquiry, only the applicant's complaint is evaluated and not the respondents' responses thereto;

26.2 in finding that the applicant's complaint does not fall within the prohibited ground "birth". This error was, according to the applicant, occasioned by an incorrect interpretation of the concept of "birth" for purposes of discrimination as envisaged by the Act;

26.3 in finding that the conduct did not infringe the applicant's "intrinsic worth", the applicant submits that the court erred and should have found that:

"That the family functions as an economic redistribution agency for family members where material assets tend to circulate from older

generations to the younger and from those with more economic resources to those with less and the receipt of such redistribution

results in the said self-autonomy being the ability to regulate one's own affairs as the very essence of freedom and a vital part of dignity.”;

26.4 in finding that the fifteenth respondent did not collaborated in the alleged unfair discrimination and harassment of the applicant;

26.5 in not having regard whilst considering the point in limine, that the respondents had made payments to the applicant subsequent to the lodgement of the complaint.

26.6 in granting costs in favour of the respondents, whereas the Act specifies that no cost order should be made unless the presiding

officer directs otherwise. In the result, reasons should have been given for the cost order in favour of the respondents.

[27] The issues that form the subject matter of the judgment are novel and I am of the view that the appeal does, on each of the grounds relied upon, have a reasonable prospect of success.

ORDER

[28] In the premises, I grant the following order:

1. Leave is granted to the applicant to appeal to the Supreme Court of Appeal against the judgment and order of this court dated 22 May 2020.
2. Costs of the application to be costs in the appeal.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 08 December 2020

(Virtual hearing.)

DATE DELIVERED PER COVID19 DIRECTIVES: 30 December 2020

APPEARANCES

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