

SOUTH AFRICA / JUDGMENT

Dhlamini v Schumann, Van den Heever and Slabbert Inc and Others (505/2021) [2023] ZASCA 79 (29 May 2023)

[2023] ZASCA 79

COURT

Supreme Court of Appeal

BEFORE

Dambuza, Mabindla-Boqwana, Basson

CASE / FILE NUMBER

505/2021

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 505/2021

In the matter between:

THANDI CAROLINE DHLAMINI APPELLANT

and

SCHUMANN, VAN DEN HEEVER & SLABBERT INC FIRST RESPONDENT

JAKKIE SUPRA SECOND

RESPONDENT

IZAK BOSMAN THIRD

RESPONDENT

AZELLE KLEINEN FOURTH

RESPONDENT

JACOBUS JOHANNES SLABBERT FIFTH

RESPONDENT

LEGAL PRACTICE COUNCIL SIXTH

RESPONDENT

ROAD ACCIDENT FUND SEVENTH

RESPONDENT

ALL PERSONS WITH CLAIMS

AGAINST THE SEVENTH RESPONDENT

PROSECUTED TO FINALITY BY THE FIRST

RESPONDENT WITHIN THE 5 (FIVE)

YEARS PRECEDING THIS APPLICATION EIGHTH

RESPONDENT

Neutral Citation: Dhlamini v Schumann, Van den Heever & Slabbert Inc and Others

(505/2021)

[2023] ZASCA 79 (29 May 2023)

Coram:

DAMBUZA ADP, MABINDLA-BOQWANA JA and BASSON AJA

Heard:

2 November 2022

Delivered: 29 May 2023

Summary: Civil procedure – Appeal – whether the appeal should be dismissed for mootness – s 16(2)(a) of the Superior Courts Act 10 of 2013 – relief sought in the appeal settled by a tender of the documents sought in an Anton Piller application – exceptional circumstances justifying a reconsideration of the appeal – procedure for further consideration of costs provided for in the interim order - issue of costs was not before the high court – high court costs order reversed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Adams J, sitting as a court of first instance):

1 To the extent set out below the appeal is upheld with each party paying their own costs.

2 The order of the high court is set aside and replaced with the following: ‘The matter is struck from the roll.’

Basson AJA (Dambuza ADP and Mabindla-Boqwana JA):

[1] This is an appeal against the order of the Gauteng Division of the

High Court, Johannesburg, Adams J (the high court), in terms of which the appellant's application for an Anton Piller application was struck off the roll with a costs order against the appellant. The issue to be determined is whether this appeal was rendered moot by a tender made by the respondents to release to the appellant's attorneys and the sixth respondent, the Legal Practice Council (LPC), all the files that fell within the ambit of the Anton Piller application, or whether the matter should be determined on the merits.

Background

- [2] During September 2014 the appellant, Ms Thandi Caroline Dhlamini and three other people were involved in a motor vehicle accident as a result of which she sustained neck, spinal and head injuries. In January 2015 she was contacted by someone from the firm of attorneys, Schumann, Van Den Heever & Slabbert Incorporated (the first respondent), who offered to represent her in her claim for damages against the Road Accident Fund (RAF or the seventh respondent), to which she agreed. The appellant was later informed that her claim was settled in the amount of R583 454.90, of which she received approximately R400 000. The appeal is with leave of this Court.
- [3] The second to fifth respondents are practising attorneys and directors of the first respondent. I will refer to the first, third, fourth and fifth respondents collectively as the respondents. The eighth respondent is described as 'all persons with claims against the (RAF) prosecuted to finality by the first respondent within the 5 (five) years preceding the application' (members of the class in the class action contemplated by the appellant's attorneys).
- [4] During 2019, the appellant received a tipoff from a member of the press who informed her that a whistle-blower within the first respondent had informed him that she and others were victims of the respondents' scheme of defrauding both their own RAF clients and the RAF. The appellant then launched an application for an Anton Piller order against the respondents to secure the records pertaining to her and the eighth respondents' RAF claims. The intention was to use the evidence obtained from the files to institute a class action against the respondents for losses suffered as a result of the alleged fraudulent scheme. In the application for the Anton Piller order the appellant maintained that when paying over the settlement amount of her RAF claim, the respondents, particularly Mr Schumann, misrepresented the settlement amount and paid over to her only 40% of the amount actually received from the RAF.
- [5] The respondents denied any fraudulent or unethical conduct on their part. They tendered delivery to the appellant's attorneys and the LPC, the appellant's file and the files of the four persons

who had deposed to confirmatory affidavits in support of her founding affidavit in the Anton Piller application. They pleaded, however, that the appellant's attorneys were not entitled to the files of the further respondents who were part of the eighth respondent. They emphasised that only the LPC had authority to conduct a wide ranging investigation of the nature threatened by the respondents against them.

[6] On 24 March 2020 the high court granted an interim Anton Piller order. It incorporated a rule nisi which was returnable on 6 July 2020. It authorised immediate access to the respondents' premises for the purpose of conducting a search for and examination of any items or documents, and determination of whether they fell within the ambit of the order. It provided for the preservation of the evidence, which was described as comprising 'client files' and 'accounting records' relating to the first respondent's clients whose claims against the RAF had been 'prosecuted to finality by the first respondent'. The respondents were ordered to point out the relevant files to the 'search party'. Any item or document determined to fall within the ambit of the order was to be removed from the premises and kept in the custody of the sheriff. The appellant was ordered to institute the intended class action within 30 days of execution of the interim order. In terms of the order the respondents were to file an affidavit identifying items which they contended should not be inspected or copied, if there were any.

[7] The order was served and executed two days later on 26 March 2020. A total of 30/28 files, including the appellant's, were identified as well as those belonging to the eighth respondent - the intended class of persons. In their affidavit dated 22 June 2020, filed as directed in the order, the respondents made the tender by expressing willingness to release the appellant's file together with those of her supporters in the Anton Piller application, to the

appellant's attorneys. They then tendered to release the rest to the LPC, citing lack of authority from the clients and protection

of attorney client privilege.

[8] On 6 July 2020, the return day of the rule nisi, both parties attended court. Although the respondents did not oppose the application, they raised, as a point in limine, that the Anton Piller order had lapsed because the legal action which was to be instituted against them within 30 days of execution of the interim order, had not been instituted.

[9] On the following day, 7 July 2020, the high court made the following order:

'(1) It is declared that the order made by this Court on the 24th March 2020 has lapsed and the matter is struck from the roll.

(2) The applicant shall pay the first to fifth respondents' costs of the application for the Anton Piller order and the related proceedings.'

Central to the high court's decision was the finding that the Anton Piller order was subject to a 'resolutive condition' that [the class action] would be instituted within 30 days of the execution of the interim Anton Piller order'. Because there had been non-compliance with the interim order, it had lapsed, the court concluded.

[10] Both parties were in agreement, however, that on the return day no argument was tendered on costs. The intention was to bring a separate application for costs for the Anton Piller application as provided for in the order. In the relevant part, the interim order provided that costs (of the Anton Piller application) would be determined in the anticipated class action. The interim order read as follows in the relevant part:

'COSTS

- (n) The costs of this application are reserved for determination in the further proceedings to be instituted by the applicants, foreshadowed in this application, save in the event of opposition in which a punitive costs order will be sought, and save further that:
 - (i) if no such proceedings are instituted within 30 (thirty) days of the execution of this order, either party may, on no less than 5 (five) days' notice to the other, apply to this Court for an order determining liability for such costs and determining what must be done about the identified items and any copies thereof; and
 - (ii) any other person affected by the grant or execution of this order may, on no less than 5 (five) days' notice to the parties hereto, apply to this Court for an order determining liability for the costs of such person and determining what must be done about any of the identified items pertaining to such person or any copy thereof.'

[11] On appeal the respondents contended that the proposed appeal against the order striking the matter from the roll and the resultant costs order is moot. They asserted that the tender to release to the appellant's attorneys and the LPC the files in question, rendered the appeal moot. The appellant, on the other hand, insisted on an order setting aside the high court order and confirming the rule nisi, alternatively an order extending the rule nisi and a costs order on a punitive scale. It was submitted on her behalf that despite the failure to institute the intended action the

interim order remained in operation and effective until the return date and that reference in the order to institution of legal

proceedings in the order did not constitute a resolutive condition or provide for lapse of the rule nisi issued as the respondents claimed.

MOOTNESS

- [12] In general, an appeal is moot when there no longer is ‘an existing or live controversy’[1] or where the order sought will have no practical effect or result.[2] This principle is neatly summarized in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[3] where the Constitutional Court confirmed that a ‘case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law’.
- [13] Section 16(2)(a) of the Superior Courts Act 10 of 2013 provides that:
- ‘(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
- (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.’
- [14] The purpose of the Anton Piller application was the identification, securing and preservation of evidence from the relevant files for use in the intended action.[4] Although the files were identified and secured on execution of the interim order, it remained open to the respondents to oppose the application. There can be no dispute that once the respondents tendered delivery of the files, the objective of the application was satisfied. Any threat of possible destruction of the evidence was averted once the files were uplifted from the respondents and placed in the possession of the sheriff and finally dissipated once the tender was made. There was no evidence that the respondents impeded the process of proceeding with the intended action subsequent to the tender. Moreover, despite the application having been struck off the roll by the high court, the appellant remains able to institute the intended proceedings against the respondents. Consequently, the order relating to the merits of the appeal will have no practical effect, and the appellant’s contention that the interim order remained valid and in operation perpetually is unsustainable.
- [15] That is, however, not the end of the matter. In determining whether the order sought on appeal will have a practical effect a court may in exceptional circumstances consider the question of costs.[5] The costs referred to in this section are the costs incurred in the court which granted the order against which the appeal lies – in this case, the costs granted in the high court.[6] It seems to me that in this case there are exceptional circumstances that justify consideration of the costs order made by the high court. At the hearing of the appeal both parties were in agreement that on the return date the high court was reminded that the issue of costs was not before it and that an application would be brought as provided in the Anton Piller order. As a result, no submissions were made by the parties on costs in the high court.
- [16] It is not clear why the court proceeded to award costs in the circumstances. No reasons were given for the costs order granted. For that reason, the costs order granted by that court has to be set aside. Whatever the reasons were, there could be no judicious exercise of discretion when the issue was not before the court for determination. The awarding of costs by the high court constitutes exceptional circumstances in this instance. To this extent, the

appeal must be considered. The order must be set aside and matter be left to the parties to prosecute at their election.[7]

- [17] Regarding the costs of the appeal, both parties have been partially successful. An order that each party is to pay its own costs is appropriate.

Order

- [18] In the result, the following order is granted:

1 To the extent set out below the appeal is upheld with each party paying their own costs.

2 The order of the high court is set aside and replaced with the following: 'The matter is struck from the roll.'

A C BASSON

ACTING JUDGE OF APPEAL

Appearances For first to fifth appellants: R E G Willis (with G Badela) Instructed by: Stephen G May Attorney, Johannesburg EG Cooper Majiedt Inc, Bloemfontein For first, third, fourth and fifth respondents: C E Thompson Instructed by: MCE Janse van Vuuren, Johannesburg Bezuidenhouts Inc, Bloemfontein

- [1] Member of the Executive Council for the Department of Cooperative Governance and Traditional Affairs, *KwaZulu-Natal v Nkandla Local Municipality and Others* [2021] ZACC 46; (2022) 43 ILJ 505 (CC); 2022 (8) BCLR 959 (CC) para 16.

- [1] Member of the Executive Council for the Department of Cooperative Governance and Traditional Affairs, *KwaZulu-Natal v Nkandla Local Municipality and Others* [2021] ZACC 46; (2022) 43 ILJ 505

(CC); 2022 (8) BCLR 959 (CC) para 16.

- [2] *Kruger v Joint Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu and Another* [2016] ZASCA 163; [2017] 1 All SA 1 (SCA) para 15.

- [3] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*

[1999] ZACC 17; 2000

- (1) BCLR 39 (SCA); 2000 (2) SA 1 (CC) fn 18.

- [3] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*

[1999] ZACC 17; 2000

- (1) BCLR 39 (SCA); 2000 (2) SA 1 (CC) fn 18.

[4] Non-Detonating Solutions (Pty) Ltd v Durie and Another

[2015] ZASCA 154; [2015] 4 All SA 630 (SCA); 2016 (3) SA 445 (SCA) para 19.

[4] Non-Detonating Solutions (Pty) Ltd v Durie and Another

[2015] ZASCA 154; [2015] 4 All SA 630

(SCA); 2016 (3) SA 445 (SCA) para 19.

[5] Section 16(2)(a)(ii).

[6] John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another [2018] ZASCA 12; 2018 (4) SA 433 (SCA) paras 8 and 9.

[7] Khumalo and Another v Twin City Developers (Pty) Ltd [2017] ZASCA 143 (SCA) paras 14-15.

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