

SOUTH AFRICA / JUDGMENT

Engels and Another v Minister of International Relations and Cooperation and Others (Embassy of the Republic of Zimbabwe Intervening) (58792/2017) [2017] ZAGPPHC 667 (6 October 2017)

[2017] ZAGPPHC 667

COURT
North Gauteng High Court, Pretoria

BEFORE
Kooverjie

CASE / FILE NUMBER
58792/2017

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IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 58792/2017
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED
In

the application of:

GABRIELLA
ENGELS First
Applicant
AFRIFORUM Second
Applicant
And
THE
MINISTER OF INTERNATIONAL
RELATIONS First
Respondent
AND
COOPERATION
GRACE
MUGABE Second
Defendant

THE
EMBASSY OF THE REPUBLIC OF
ZIMBABWE Intervening
Party

JUDGEMENT

KOOVERJIE AJ:

PART A OF THE PROCEEDINGS:

[1] This is an ex parte application, where the applicants sought leave to sue the second respondent by way of edictal citation and substituted service in terms of Rule 5 of the Uniform Rules of Court. The relief sought appears in Part A of the Notice of Motion, which states:

"1. An order granting leave to the above named applicants to institute these proceedings against the second respondent and:

1.1 Authorising an edictal citation and substituted service in the following terms:

1.1.1 By service of the application on the Office of the President of the Republic of Zimbabwe, with offices located at Munhumutapa Building, corner of Samora Machel Avenue and Sam Nujoma Avenue, Harare, Zimbabwe.

1.1.2 Such service to be effected by an attorney/legal practitioner duly admitted to practice in the Republic of Zimbabwe, in terms of the Uniform Rules 4(4) of the Uniform Rules of Court."

[2] For the purposes of these proceedings, Part B has no relevance. Essentially, the relief sought in Part B seeks to review and set aside the decision of the first respondent, the Minister of International Relations and Cooperation ("Minister") where immunities and privileges of the second respondent was recognised in terms of Section 7(2) of the Diplomatic Immunities and Privileges Act, 37 of 2001 as set out in the Government Notice No. 850 dated 20 August 2017. This issue will be dealt with at a later date.

[3] The Embassy of the Republic of Zimbabwe (intervening party, "the Embassy") instituted an intervention application in terms of Rule 12 of the Uniform Rules of Court. Such application had been filed on the 15th of September 2017. The relief sought is:

"1. Leave to intervene as a Respondent in these proceedings;

2. That the application for edictal citation and substituted service is dismissed with costs;

3. The Applicants' review application is dismissed with costs;

4. The Applicants is to pay the wasted costs of the application;

5. Any alternative relief."

LOCUS STANDI:

- [4] The applicants opposed the intervention application on the basis that the intervening party bears no locus standi to be joined as a party to these proceedings. I was requested to only make a determination on the point in limine raised namely, the locus standi of the intervening party in respect of Part A of the application. It would follow that, if the intervention is justified in respect of Part A, then the matter should proceed on the opposed basis with leave given to the parties to file their responses.
- [5] On its papers, the Embassy claimed its right to intervene and be joined as a party on the following grounds namely, that: it was at all material times directly involved in the diplomatic immunity of the respondent; the second respondent was not personally involved in establishing her own diplomatic immunity nor was she privy to the interactions the Embassy had with the first respondent the Embassy has an obligation to provide "consular services" for all Zimbabwean citizens in South Africa, including the second respondent especially because she is not resident in South Africa; the intervening party and its counsel of record, Advocate Chitando were at all material times directly involved with the interactions of the South African Police Service("SAPS") regarding the allegations made by the first applicant.[1]
- [6] In response thereto, counsel for the applicants argued that an application for authorisation for edictal citation is simply a process which is necessary to bring the proceedings into being between the applicants and the respondents. Accordingly, the Embassy has no entitlement to be heard in respect of Part A It is standard practice that applications for leave to sue by edict are always brought ex parte. To illustrate his point, he relied on *Orion Pacific Traders Inc. v Spectrum Shipping Ltd* 2006 (2) SA 586 C ("Orion matter") and made reference to the following passages therein: "It is simply not possible to have a hearing as to whether leave to sue by edict should be granted".[2] ,2. "It is wrong to speak of final relief or provisional relief when examining leave given by a court to sue by edictal citation. It is simply a process to bring an action into being."[3]
- [7] It was contended that the intervention is properly before court in terms of Rule 6(4)(b) of the Rules of court which stipulates: " Any person having an interest which may be affected by a decision on an application brought ex parte, may deliver a notice of an application for leave to oppose, supported by an affidavit setting forth the nature of such interest and the ground upon which such person deserves to be heard." (My emphasis)

In this regard, I was further referred to *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at p 348:"There is nothing inherently wrong or contrary to public policy if an interested party in opposing an ex parte application which has come to his notice fortuitously or by an informal notice. Rule of court 6(4)(b) provides for this very contingency. On principle, any person who shows a direct and substantial interest in proceedings and whose affidavit indicates that his opposition might contribute something to a just decision of the case, should not be deprived of an opportunity of being heard." (My emphasis)

[8] Having considered the aforementioned authorities, I find that the circumstances in the "Orion matter" are distinguishable on the facts. There is no reason why, in principle, an interested party should be precluded from opposing in instances where an ex parte application comes to its attention prior to the granting such the order.

[9] On the papers before me, this intervention has been instituted in terms of Rule 12 of the Uniform Rules of Court which stipulates:

"Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notices to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant."

[10] It is settled law that irrespective of whether the intervention is based on Rule 6(4)(b) or Rule 12, an intervening party must show that it has a "direct and substantial interest" in the subject matter of the proceedings; in this instance, in respect of Part A of the application. Our courts have consistently applied this principle and a plethora of authorities on this point exists. Summarise the approach and the test applied by our authorities, namely:

10.1 "Direct and substantial interest" means interest in the rights which is the subject matter the litigation and not merely a financial interest which is only an indirect interest in such litigation. [4]

10.2 The test is where a party that is alleged to be a necessary party has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. [5]

10.3 The question of joinder should not depend on the subject matter but on the manner and the extent to which the court's order may affect the interest of the parties. [6]

10.4 Legal interest is said to exist when "the order or judgment sought cannot be sustained and carried into effect without prejudicing the interest of the party or parties not joined in the proceedings then that party or parties have a legal interest in the subject matter and must be joined." [7] (My emphasis)

10.5 The aforesaid test was most recently upheld by the Constitutional Court in *SA Riding for Disabled Association v Regional Land Claims Commissioner* 2017 (8) BCLR 1053 CC where it was held (at paragraph 9) "it is settled law that an application for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought." (My emphasis)

[11] Particularly with regard to Rule 12 proceedings, our authorities have also laid down criteria that an intervening party is required to meet, namely that: it has substantial interest in the subject matter of the litigation, the outcome of which would prejudice it; the said application is not frivolous but lodged seriously; and the allegations made by the Applicant constitutes a prima facie case or defence.[8]

[12] Having considered the papers and the submissions made on behalf of the intervening party I take particular cognisance of the following facts namely that:

12.1 The Embassy has an obligation to provide "consular services" for all Zimbabwean citizens in South Africa, including the second respondent;

12.2 The Embassy has been directly involved in the diplomatic immunity negotiations in respect of the second respondent.

12.3 I also take note of the correspondence directed to the second applicant dated 18 August 2017, and I reiterate the relevant extract therefrom:

"(1) That you are considering legal action that will affect the rights of Dr. Grace Mugabe a Zimbabwean citizen.

(2) Our client has an obligation to assist all Zimbabwean citizens, particularly those here;

(3) To formally request that our client be notified, and joined, to any legal action concerning Dr. Grace Mugabe.[9]

12.4 It has been vehemently argued that at no stage was the Embassy informed nor were they joined in these proceedings. In argument, the Applicants contended inter alia that there was no reason to inform the Embassy as they have not demonstrated a direct and substantial interest.

[13] Subsequently on 15 September 2017, the applicants' instructing attorney forwarded correspondence to the Embassy's instructing

attorney. It becomes apparent therein that the Embassy had become aware of the application (namely Part A and B thereof), duly filed its notice to intervene thereto and subsequently its intervention application. Although such correspondence did not form part of the application, submissions were made by both counsel in respect thereof.

[14] In the said letter, the applicants sought clarity on the basis of the Embassy's intervention. I reiterate the relevant portion thereof: "We acknowledge receipt of your client's notice in terms of Uniform Rule 12 filed and served on behalf of the Embassy of the Republic of Zimbabwe. Our client takes note of your intention to apply for intervention in the review proceedings instituted by our client against the Minister of International Relations and Cooperation and to oppose part A of the application filed on our client's behalf."

"It is not clear from your application:

- Whether it is brought in the interest and/or on behalf of the Respondent, Mrs Grace Mugabe;

· Whether you have a mandate to accept service on behalf of Mrs Mugabe, either at your offices or at the offices of your Pretoria correspondents or at the office of the Embassy of the Republic of Zimbabwe, Pretoria.

Kindly confirm as a matter of urgency whether you are mandated to accept service on behalf of the Second Respondent in writing by no later than close of business on Monday, 18 September 2017, to enable us to timeously take instructions on the appropriate way forward with regard to the application that has been set down for Tuesday, 19 September 2017." (My emphasis)

[15] I must emphasize that this letter was transmitted shortly before the hearing of this matter and there has been no response, in writing, from the Embassy at the time this matter was heard. On the same day, 15th of September 2017 the said intervention application was filed. On the papers before me, the said application does not make reference to the letter or even address the contents thereof. In particular:

- Whether the intervention is brought in the interest or on behalf of the second respondent?; and
- Whether the Embassy has a mandate to accept service on behalf of the second respondent?

[16] Certainly an intervention where the Embassy is unable to demonstrate direct and substantial interest cannot be sustained.

[17] Due to its uncertain status in these proceedings, during the course of the hearing, the Embassy had difficulty in demonstrating that it had a legitimate interest so much so, that eventually counsel for the Embassy conceded that its basis for intervening was to merely alert this court of the defectiveness of the ex parte application. On this basis alone, it was entitled to be joined as an interested party.

[18] It was argued that such defectiveness emanated from the applicants' failure to disclose the full ambit of the second defendant's whereabouts as counsel argued "The applicant must show all sources of information about the defendant's whereabouts have been investigated. [10]

[19] Aligned to this argument, the further points raised were that, the second respondent does not reside in "the Presidency", moreover the usage of such term is non-sensical; and the second respondent does not reside nor work at the Office of the President.

If one considers the aforesaid decisive test in securing one's right to intervene, the basis of the aforesaid intervention does not pass muster.

[20] In my view the uncertain status of the Embassy lies at the heart of this matter. This court is placed in an unfortunate position where it is expected to make a determination without the benefit of being fully apprised of the Embassy's position. I make particular

reference to the issues which emanated from the papers and in argument, namely that:

20.1 The Embassy has an obligation to provide "consular services" for all Zimbabwean citizens in South Africa is vague and does not assist this court. At this point I am left in the dark as to what the nature of such "consular services" entail. The Embassy was unable to and to an extent dismissive in addressing this aspect

20.2 Even upon accepting that the Embassy is involved in diplomatic immunity negotiations in respect of the second respondent, a lacuna exists particularly in respect of its involvement in these proceedings(Part A)

20.3 The Embassy concedes to accepting service on behalf of the President of Zimbabwe but remains silent as to service on behalf of the President's wife, the second respondent.

20.4 When submissions were made by the Embassy that it was not necessary to effect service in Harare since service can be effected here, reference was made to the President, but no response was forthcoming in respect of the second respondent;

20.5 In the correspondence of 18 August 2017, the Embassy requested that it be notified and joined to any legal action concerning Dr. Grace Mugabe. The question which begs an answer is: - on what basis does the Embassy seek joinder in these proceedings?

20.6 The first applicant states in her affidavit "I am advised that the High Commissioner of Zimbabwe in South Africa (like any other mission) refuses to accept service of any court process." [11] This may be her version, however I have not been apprised of such response from the Embassy on the papers."

[21] The only plausible and possible conclusions one is able to deduce from the aforesaid; is either the Embassy has been deliberately

evasive or has not had an opportunity to make its status in respect of the second respondent known to this court. In this regard I must bear in mind that the Embassy was not notified of these proceedings and only filed their papers as late as 15 September 2017.

[22] It is accepted practice that service of process in foreign countries is governed by Rule 4 of the Rules of Court and there is no apparent reason why the Embassy should not accept service on behalf of the second respondent.

[23] More specifically: Rule 4(3)(a)(iii) allows for service in a foreign country to be effected by any person who is a diplomatic or consular office of such country serving in the Republic; Rule 4(3)(a)(ii) allows service to be further effected through any foreign diplomatic and consular officer attending to the service of process or documents on behalf of the Republic in such country.

- [24] Nothing precludes the applicants from following the alternative service process set out in Rule 4(4), which they have chosen where service may be effected by "an attorney, solicitor, notary public or other legal practitioner in the country concerned who is under the Jaw of that country authorized to serve process of court or documents and in a state to which independence has been granted by a person in the state concerned who is under the Jaw of that state authorized to serve process of court of documents".
- [25] Certainly, proceedings must be conducted with parties being afforded a fair hearing and where I am required to consider the matter fairly, observe the audi alteram partem rule and remain impartial. Furthermore, these proceedings are to be conducted with the accepted decorum of court.
- [26] The general rule is that an applicant must stand or fall by its founding affidavit and the facts alleged therein. However, in certain circumstances a court has a discretion to allow further affidavits. This discretion prevails when fairness to both parties is warranted.
- [27] As pointed out by Krause J in *Pountas Trustee v Lahanas* 1924 WLD 67 at page 67: "An applicant must stand or fall by his petition and the facts alleged therein and that although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein because those are the facts which the respondent is called upon to either affirm to or deny."
- [28] There is no proper and satisfactory explanation on the aforesaid aspects raised. As alluded to above, during argument certain

facts

arose which were not properly canvassed in the papers. Neither of the parties dealt with the 15 September 2017 letter and no explanation was proffered as to why the Embassy was not notified of the application. The Embassy's response to the aforesaid letter is material for the purposes of determining its locus standi in these proceedings.

- [29] It is trite law that factors which a court will consider when allowing the filing of further affidavits are inter alia that: the reason why the evidence was not produced timeously and the degree of materiality of the evidence. This is an instance where justice requires that the intervening party be allowed to place certain further information before the court. Such discretion is to be exercised judicially upon a consideration of the facts of the matter. It boils down to a question of fairness to both sides. In my view special circumstances exist which warrant the filing of further affidavits.[12]
- [30] On the face of it, it seems as if the Embassy embarked on this attempt to intervene and probably without a mandate from the second respondent. If that is so, my prima facie view is that the application to intervene in respect of Part A of the applicants' application cannot succeed because of a lack of locus standi. In light of fortuitously learning of this application, it may be that the Embassy was caught unaware and therefore unable to present its

contentions properly to the court. In the circumstances it is my view that the matter should be referred to the opposed court but that the intervening party must be given an opportunity to clarify its case, if so advised. I am also of the view that the applicants would not be prejudiced by this approach.

- [31] Ex abundanti cautela it will be fair to both parties if leave is granted to the Embassy to file an affidavit within 7 court days from date of this judgment, if so advised, to deal only with the following aspects:

31.1 Whether it has a mandate from the second respondent to represent her in respect of Part A of the application?

31.2 If not, on what basis does it allege that it has locus standi to represent the second respondent in respect of Part A of the application?

31.3 Why, in the particular circumstances of this matter, service on the second respondent at the Embassy would not be sufficient to inform the second respondent of the action against her?

- [32] It must be emphasized that the Embassy's interest in respect of Part 8 is not challenged at this stage and therefore it is not necessary to deal with its interest in respect thereof when supplementing its papers. The issue before court is whether the Embassy has locus standi in Part A of the proceedings.

- [33] The mere purpose of the relief sought in Part A is merely to notify the person intended to be served of the nature of the process before court.

- [34] At this juncture, I further deem it necessary and appropriate to clarify the circumstances in which this matter was heard. During the proceedings I noted a tone of hostility between the parties. This also caused counsel for the Embassy to direct some unfounded and inappropriate remarks in court. These remarks related to the applicants' counsel approaching me in chambers without their opponent, before court had resumed. With respect, such remarks would not have been necessary if counsel made enquiries as to what had actually transpired.

- [35] The events unfolded as follows: This matter was placed on the interlocutory motion roll for the said day as an unopposed matter. A few minutes before court was to resume both counsel for the applicants came to introduce themselves to me in chambers. Upon enquiring if the matter was to be opposed, they informed me that an intervention application was filed in this matter and left shortly

thereafter. It was only then that I learnt of the said application. At that stage no such application was in the court file nor had counsel for the Embassy approached me in chambers. When this matter was called in court, counsel for the Embassy handed up the said intervention application and also proffered an explanation why same was not in my possession. I nevertheless accepted his submissions and the application. Counsel then requested that an opportunity to discuss this matter with his opponent and possibly resolve the way forward. Such indulgence was granted. It

was only upon their return that I proceeded to hear the matter, particularly on the point in limine raised by the applicants in respect of the locus standi of the intervening party to Part A of the application.

[36] A further observation made and I find it necessary to remark upon is that the deponent to the founding affidavit is none other than the intervening party's instructing attorney namely Mr Titus. Ex facie it is questionable whether he was duly authorised to depose to the main affidavit. Certainly Annexure "C" does not constitute a mandate but merely instructions to appoint counsel. Our courts have frowned upon attorneys deposing to affidavits on behalf of their clients. In this regard I refer *Ntuli and Others v Smit and Another* 1999 (2) SA 540 LCC at 551 C/D - E/F it was held: "Where, in application proceedings it is clear that the attorney representing the applicants cannot have personal knowledge of much of the information upon which the application is based and there is doubt whether the proceedings were properly authorized by all of the applicants, the attorney to avoid these difficulties and also to protect his position as an independent advisor, should avoid making the main affidavit in the application proceedings lodged on behalf of his client."

[37] This again questions whether the Embassy is properly before court.

[38] In the premises I therefore make the following order:

ORDER:

- (1) The matter is referred to the opposed court to be heard as an opposed matter;
- (2) Leave is granted to the intervening party to file an affidavit within 7 days from this order, if so advised, to set out whether it has a mandate from the second respondent to represent her in respect of these proceedings (Part -A) of the application and if not, to set out concisely on what basis it has a right to intervene in these proceedings (Part A);
- (3) Leave is granted to the applicants to file an affidavit in answer to an affidavit filed in terms of paragraph 2 above within 7 days from receipt of such affidavit;
- (4) Costs of this hearing are reserved.

KOOVERJIE AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 19 September 2017

Date of Judgment: 6 October 2017

Attorneys for the applicants:

Hurter Spies Attorneys, Centurion

Counsel for the applicants:

Adv. E Labushagne SC

Adv. K Harding

Attorney for the intervening party:

Thomson Wilks Inc., Cape Town

Counsel for intervening party:

Adv. S Chitando

- [1] Paragraphs 3.1, 3.2 & 3.3 of the affidavit to the intervention application
- [2] *Orion Pacific Traders v Spectrum Shipping Ltd* 2006 (2) SA 586 C (Orion matter) p 590 B.
- [3] Orion matter supra at p 590 D - G.
- [4] *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 O at 167, *United Watch and Diamond Company (Pty) Ltd v Disa Hotels Limited and Another* 1972 (4) SA 409 C at 416 B, *Minister of Local Government and Land Tenure v Sizwe Development* 1991(1) SA 677 (Tk) at 678 I, *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 SCA at 308
- [5] *Gordon v Department of Health, Kwa-Zulu Natal* [2008] ZASCA 99; 2008 (6) SA 522 SCA at par 9 (Gordon matter).
- [6] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 A
- [7] Gordon matter supra at par 9.
- [8] *Minister of Local Government and Land Tenure v Sizwe Development* supra at 678 Hand p 679 D.
- [9] Annexure C to the intervention application
- [10] Page 33 of the transcript of proceedings
- [11] Par 16 of the applicant's founding affidavit.
- [12] *Milne N.O v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) at 65A; *South Municipality v Evans* 2001 (1) SA 271(C) at 283 A - H; *Transvaal Racing Club v Jockey Club of SA* 1958 (3) SA 599 (W) at 604 A - H

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