

SOUTH AFRICA / JUDGMENT

Equistocks 8 (Pty) Ltd v Oosthuizen and Others (6238/2021) [2023] ZALMPPHC 43 (27 June 2023) [2023] ZALMPPHC 43

COURT

Limpopo High Court, Polokwane

BEFORE

G J Diamond

CASE / FILE NUMBER

6238/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

CASE

NO: 6238/2021

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date:

27/06/2023

In

the matter between:

EQUISTOCKS
8 (PTY) LTD
APPLICANT
And
WILLEM
JACOBUS SAAIMAN
FIRST
RESPONDENT
OOSTHUIZEN
KAREN
OOSTHUIZEN
SECOND
RESPONDENT
LADUMA
BISCUITS (PTY) LTD
THIRD
RESPONDENT
ALI
IFTIKHAR T/A PAN AFRICAN FURNISHERS
FOURTH
RESPONDENT
BANANAWORLD
(PTY)LTD
FIFTH
RESPONDENT
LUCAS
VAN VUUREN T/A MFG
SIXTH
RESPONDENT
GERHARDUS
MARTHINUS OOSTHUIZEN
SEVENTH
RESPONDENT
T/A
DC MOTORS

JUDGMENT:

APPLICATION FOR LEAVE OF APPEAL
DIAMOND

AJ:

[1]
This court delivered judgment, on 27 March 2023 dismissing
the
application of the Applicant and ordering that the Deponent to the
founding affidavit shall pay the costs of the Respondents.
[2]
The Applicant filed an application for leave to appeal
on 18 April
2023, and Hendrik Andre Coetzee, the deponent to the founding
affidavit against whom the cost order was made, filed
an application
for leave to appeal on 19 April 2023.
[3]

The application
for leave to appeal of the
Applicant states
the three grounds for the application
for leave to
appeal: Firstly, the
Applicant contend
that the court erred in that the court failed to properly apply the
test in motion proceedings, rephrased in National
Director of Public Prosecutions v Zuma [1]
;
Secondly, the
Applicant contend that the court erred in not applying the dictum as
set out in Oudekraal
Estates (Pty) Ltd v City of Cape Town and Others [2]
and repeated by
the Supreme Court of Appeal in the second Oudekraal
[3]
judgement, in that
the court held that the deponent to the founding affidavit was not a
director of the First Respondent despite
his name appearing in the
Company and Intellectual Property Commission's ("CIPC")
register of directors; and thirdly,
that the court erred in holding
that the Applicant
had an alternative remedy, and that this application was simply an
application intended to while the main application
was "in
limbo".
[4]
As part of the second ground of appeal, viz that the
court erred in
failing to apply the dictum in the Oudekraal judgements, the
Applicant submit that this court erred to find that the Application
was not properly authorised, and the Applicant
makes this contention
since the Respondents did not file a challenge in terms of Rule 7 of
the Uniform Rules of Court. I will deal
with this
particular ground for leave to appeal together with the application
for leave to appeal by Hendrik Andre Coetzee.
[5]
The first ground
of the application for leave to appeal: the Applicant submits that
this court found, without any evidence whatsoever,
that the Trust of
the deceased held the shares merely as security for the loan. I do
not agree. This court referred extensively
in paragraphs 47 -
53 of the

judgement to
the evidential basis for its conclusion.
The
Applicant further
contend that the Respondents failed to apply for an order in terms of
Section 161 of the Companies Act[4],
to protect their
securities. The Applicant do not explain how this neglect of the
Respondents fits into the contention that the
court erred in applying
the principles in Zuma correctly.
Be that as it may,
and insofar as it may be relevant, the Respondents did institute
proceedings in the content High Court to claim
transfer of the
disputed shares. That much is common cause between the parties.
A further
contention of the Applicant is that the court accepted that the
Respondents had paid of the loans to the deceased. This
ground for
the application for leave to appeal is equally untenable. This court
never made a finding that the loans were in fact
paid off.
What the court did
find though, is that, should the version of the Respondents,
which
version
includes
the
allegation
that
they
did
paid
off
the loans, be
proven eventually in the court action pending in the North Gauteng
High Court, then they would have made out a case
for the transfer of
the shares into their name. What the court did find further, was that
the Respondents allege, with support
by the auditor of the Applicant,
that the loans were indeed paid off, while the Applicant did not, and
was not in any position
to dispute this version. Be that as it may,
this is exactly the dispute pending in the North Gauteng High Court.
The Applicant
further contend that, to lend credibility to the
version of the Respondents, the Respondents had to advance evidence
how receipt
of the monthly rental was eventually reflected in the

books of the Applicant. This court fails to see why this piece of evidence is essential to sustain the version of the Respondents. The Applicant submit further that this court erred in considering the fact that the Deponent cannot have any knowledge with regard to the historical relationship between the parties. What is of importance, so they contend, is the Applicant's current entitlement to receive the rental income. I once again do not agree. It is the version of the Respondents, that given the historical relationship between the parties, that they have always been receiving the rental income of the buildings. It is consequently important to assess the historical relationship between the parties to come to a conclusion whether the Respondent's placed a credible version before the court.

[6]

For the above reasons, I believe there is no reasonable possibility that another court will conclude other than the conclusion reached by this Court, on the above issues.

[7]

In my view, the second ground for the application for leave to appeal is equally untenable. The argument of the Applicant is for as long as the deponent's name is reflected as a director in the information systems of CIPC, it's cannot simply be ignored, at least until and unless the appearance of the name reviewed and is set aside. For this proposition the Applicant relies on the judgment of Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic (Pty) Ltd and others [5].

This judgement can in no way be applicable to the current situation. This judgement deals with the registration status of a company, and in terms of the Companies Act, it is the act of registration of CIPC that brings the legal personality of the company into being.[6]

With regard to directorships, there is no provision that it is a prerequisite for a person that his or her name shall appear in the information systems of CIPC, before a person shall be a director endowed with all the applications of the director. There is a single stipulation[7], stipulating that a company shall file a notice within ten business day after a person becomes or ceases to be a director. What is required is simply the filing of the notice after the fact. The fact that the name of the person appears as a director, or does not appear as a director, in the information system of CIPC, is neither here nor there to establish whether a person is indeed a director of the company. If a person cannot indicate, that he/she became a director pursuant to the requirements of the Act, such a person cannot claim to be a director, despite the fact that his or her name appears on the CIPC system as being a director. For these reasons, there is, in my view, no possibility that another court will come to another conclusion.

[8]

The third ground for the application for leave to appeal is, in my view, not sustainable. The Applicant states in this ground for application for leave of appeal that "The Respondents have failed to prosecute the action for almost a decade but in that time collected the rental income". This court found that the only evidence before this court (placed by the Respondents before the court) was that, the practice that the Respondents collected the rental income commenced from the inception of the registration of the First Respondent, that is as from October 1999, that is more than a decade before the action in the North Gauteng High Court was instituted. What this court found that the Applicant (Deponent), was unable to place even the slightest evidence before the court, to dispute this version of the Respondents.

[9]

I now turn to the application for leave to appeal of Mr Hendrik Andre

Coetzee ("Coetzee"). The Appellant also raised the same grounds for the application for leave to appeal and what follows below applies to both applications for leave to appeal.

[10]

The applications for leave to appeal state that the grounds for the application are, in summary, twofold, firstly that this court erred in finding that the Deponent did not have the authority to institute proceedings on behalf of the Applicant and, secondly, against the cost order granted against the Deponent of the founding affidavit.

[11]

The broad background of the first ground of appeal is that the Applicant filed an application, and the Respondent never challenged the attorney of the Applicant in terms of Rule 7 to prove its authority to bring the application and to act on behalf of the Applicant. Despite this failure of the Respondents, this court eventually found that the Deponent to the founding affidavit could not prove that he was authorised to bring the application on behalf of the Applicant.

[12]

The first ground of appeal relates to paragraphs [77] - [142] of the judgment, and in particular the way in which the court applied the judgements of ESKOM v SOWETO CITY COUNCIL ("Eskom") [8] and GANES AND ANOTHER v TELECOM NAMIBIA LTD ("Ganes"). [9].

[13]

This court held, in a nutshell, that Rule 7, interpreted in the light of Eskom and Ganes judgments means the following: That Rule 7 is clearly intended to apply to the authority of an attorney to act on behalf of a party; that should that authority not be challenged in the way prescribed in the rule, the attorney can continue act to act on behalf of the party; that it is up to the attorney to place evidential material before the court in support of the relief sought; that the evidential material before the court should be sufficient to support the relief prayed for, and that includes allegations that

the company resolved to institute and prosecute proceedings; and that it is not sufficient for the Respondent to try to attack the authority of the deponent by mere textual criticism of the allegations in the affidavit, and not even when a deponent states in an affidavit by way of a bald statement that he is authorised to bring an application.

[14]

What this court did find, however, was that where a Respondent attacks the authority of a deponent to bring an application, in his answering affidavit, and where the respondent does so in detail and places substantial evidence before the court, which points to the Applicant not having resolved to institute and prosecute the application, then an applicant still has the duty to reply to the attack of the respondent. If he fails to do so, and if it appears that, given that the totality of the evidence before the court that a company never resolved to institute and prosecute legal proceedings, then a court may, and should conclude that the institution of the proceedings was not authorised.

[15]

It is this interpretation of the court, so it seems to me, which is the ground of the first application for leave to appeal.

[16]

This court is of the view that the above-mentioned interpretation and application of the Eskom and Ganes judgements in casu is correct. However, should this court have misconceived the implications of the Eskom and Ganes judgments, then an appeal against the judgement of the court would have a reasonable prospect of success.

[17]

The second ground of appeal relates to the cost order granted against Coetzee since the court concluded that the Applicant did not resolve to institute the legal proceedings before this court.

[18]

The Respondents gave an indication in the answering affidavit that they would, at the date of the hearing, apply that the cost order be given against the Deponent, since the institution of the proceedings was not authorised.

[19]

The second ground of appeal states that this court erred in this regard and

questions the sufficiency of the notice given to Coetzee in the answering affidavit.

[20]

Both Coetzee and the Applicant indicate in their applications for leave to

appeal that they understood the cost order to be an order to pay costs de bonis propriis against Coetzee.

[21]

Nowhere in the judgment of the court did the court indicate that the cost order

against Coetzee, is an order de bonis propriis.

[22]

Cilliers[10]

states the

following:

"The principle of awarding costs de bonis propriis is applicable only where a person acts or litigates in a representative capacity. (The converse situation, where a person purports to act in a representative capacity, or believes that he is doing so, but where this turns out not to be the case, may lead to cost orders that have similar practical results, even though they may not be costs orders de bonis propriis in the strict sense.)

[23]

The

author

states

further[11]

:

"Until recently, there was apparently no South African authority directly in point in respect of the liability of practitioners for the costs of proceedings brought on behalf of a non-existing client (such as a company which has been wound up) or brought without authority. In English law solicitors can be held liable for costs in such circumstances, the basis of the liability apparently being a warranty of authority. In *Babury Ltd v London Industrial PLC*, solicitors were ordered to pay costs where they had in good faith pursued an action on behalf of a company that had been dissolved. In this case it was accepted that a solicitor acting without authority is (generally) in breach of a warranty of authority, and on that account liable for costs incurred.

However, in the form

of the decision in *Motala and Others v Master of the High Court*

(North Gauteng) and Others, there is now local authority dealing with the issue. In that case the appellants (Applicant before the High Court) were liquidators of a company that had deliberately been dissolved yet continued with litigation notwithstanding this. They had applied for an order declaring the dissolution to have been void (with a view to continuing the aforesaid litigation, against certain of the respondents). Their appeal was dismissed with costs. As to costs, the court held as follows in paragraph 19: "On any footing the liquidators have been discharged from office as a result of the dissolution of the company. It follows that the costs order must lie against them personally and should be joint and several." Although there can be no quarrel with this result, it is perhaps unfortunate that the court did not make clear what it regarded as the conceptual basis of the order, that is, precisely what is the basis for imposing personal liability for costs in such circumstances. Although one may of course look to the example of English law, discussed above, in search of a plausible rationale, the Supreme Court of Appeal's cryptic and straight-forward formulation of the matter in paragraph 19 of its judgment (quoted above) suggests the possibility that no doctrinal justification is needed for such an order except to say that the persons in question were responsible for the litigation and that in such cases there is by definition no available principal to whom the consequences of their actions could be attributed."^[12]
^[24]
See also

the
following
dictum
in
Interim
Ward
S19
Council
v
Premier
Western Cape Province &
others
[13]:
"It is clear,
in my view, that somebody has to be liable for the legal
costs incurred by a respondent as a result of a
failed application. I leave aside special circumstances which
indicate a special costs order. It cannot be so that an
entity with no legal standing at common law can bring a person
to court and then simply disappear like mist before the sun, leaving
the respondent with the burden of paying the legal costs
incurred in
the process. The non-existence, in law, of the entity does not change
the fact that there is a real person behind that entity,
giving instructions to attorneys and signing the papers necessary to
pursue the litigation. When
the entity fails, that person must take
responsibility.
The view I take of
this matter is that fourth respondent is
entitled to a costs order in its favour from the person or
persons who instituted the main application...I
do not consider it the duty of the court in this
application to seek to go behind the identity of
the person or persons who instituted and conducted the litigation in
the name of applicant. Nor do I consider it necessary
to investigate
the circumstances that led to the institution of the main application
in the name of applicant.
Whether or not the
person or persons who instituted the main application did so in the
bona fide belief that they were acting for
a universitas
personarum; whether they were actively misled or allowed themselves
to be misled, is not in issue here. Those questions will only
arise when the person or persons who are ordered to pay the costs
seek to recover a share from others or seek to claim
reimbursement from a party or parties who may be liable for
misleading them.
Fourth respondent is
entitled to look to the person or persons who are the immediate cause

of the costs they incurred in defending themselves against the claims made in the main application. The person or persons liable are those who announced that he, she or they represent the applicant and are standing up to act on its behalf

If such person is found to have been incorrect then that fact should not prejudice the innocent opponent. The representative who was prepared to act without adequate authority must stand in for his or her error." [14]

[25]

Even if the cost order against Coetzee is to be regarded as a cost order de bonis propriis, uncertainty still exists.

In the case of Chithi and others

In Re Luhlwini Mchunu Community v Hancock and Others [15]

the Supreme Court of Appeal ruled that an order costs de bonis propriis, can only be made against a person once such a person at least has had the opportunity to address the court regarding such a possible costs order.

The issue that was not clearly determined in that case, is what is the nature of the notice that should be given to a person, that he should make representations to the court regarding a possible costs order de bonis propriis against him. Hence, in a situation where a court decides that it contemplates granting such a court order, it is conceivable that a court will have to resort to some mechanism, such as a rule nisi with a return date, affording a person the opportunity to make representations to the court.

If, however, on

the other hand, one of the parties to the litigation indicates beforehand, in the answering affidavit, that it intends to apply for a cost order de bonis propriis, the question is whether such a notice would be sufficient enough to give the person that is exposed to the de bonis propriis order, notice that he/she has the opportunity to make representations to the court. In the case of Hlumisa Technologies (Pty) Ltd and another v Voigt NO and others^[16] the court ruled that such a notice is sufficient.

[26]

This court found explicitly that the proceedings in casu were unauthorised, and that being the case, a cost order was granted against the deponent to the founding affidavit, Coetzee, and there was no cost order de bonis propriis.

[27]

If, however, this court misconceived the distinction between orders of costs de bonis propriis on the one hand and unauthorised proceedings on the other hand, or if notice in the answering affidavit is insufficient notice of intention to argue a de bonis propriis costs order, then an appeal would have a reasonable prospect of success.

[28]

Mr Wessels, appearing for Coetzee and Mr Kruger SC, appearing for the Applicant, both applied that leave to appeal shall be granted to the Supreme Court of Appeal, on the basis of the fact that there are compelling reasons that the Supreme Court of Appeal should rule clearly on the implications of a failure by a litigant to file a Rule 7 challenge and further to rule on the nature of a cost order that follows in the event of unauthorised proceedings and the requirement of the nature notice to persons exposed to de bonis propriis costs orders.

This

court consequently
makes the following
order:

- a. The
Applicant is granted leave to the Supreme Court of Appeal against the
order of this court delivered
on 27 March 2023.
- b. Mr HA
Coetzee is granted leave to appeal to the Supreme Court of Appeal
against the judgement and paragraph
(b) of the order of 27 March
2023.
- c. Costs
is to be costs in the appeal.
- G.
J. DIAMOND
ACTING
JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD

ON:

13
June 2023 [Virtually]

JUDGMENT

DELIVERED ON: 27 June 2023 This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 27 June 2023 at 16:15 FOR THE APPLICANT: Adv. H Wessels INSTRUCTED BY: Hurter Spies Incorporated c/o Clarence Mangena Incorporated FOR THE 1st - 3rd RESPONDENTS: Mr. J Moolman INSTRUCTED BY: Pratt Luyt & De Lange FOR THE 8th RESPONDENT: Adv. TP Kryger SC INSTRUCTED BY: Cilliers & Associates Attorneys c/o Becker Attorneys

[1]

[2009] ZASCA 1; 2009 (2) SA 277 (SCA).

[2] 2004 (6) SA 222 (SCA).

[3] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010

(1) SA 333 (SCA).

[4] Companies Act, 2008 (Act 71 of 2008).

[5]

[2012] 3 All SA 183 (WCC).

[6] See Section 14(4).

[7] Section 70(1) of the Companies Act, 2008.

- [8] 1992 (2) SA 703 (W).
- [9] 2004 (3) SA 615 (SCA).
- [10] Cilliers, AC, 'Law of Costs, Chapter 10 Costs in Relation to Certain Types of Litigants, COSTS DEBONIS PROPRIIS.' (LexisNexis). In par 10.22.
- [11] 'Law of Costs, Chapter 15 Costs in Relation to Certain Types of Litigants, Par 15.28, Liability of practitioners for the costs of unauthorised proceedings (non-existing principal), and other comparable situations.'
- [12] Emphasis added. The author referred to *Motala and others v Master of the High Court (North Gauteng) and others* (2014] 2 All SA 154 (SCA).
- [13]
- [2003] JOL 11650 (C).
- [14] My emphasis
- [15]
- [2021] JOL 51092 (SCA).
- [16]
- [2020] JOL 49141 (ECG).
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