

SOUTH AFRICA / JUDGMENT

Gcora and Others v Nelson Mandela Bay Municipality and Others (1414/16) [2016] ZAECPEHC 55 (30 August 2016) [2016] ZAECPEHC 55

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

C Plasket

CASE / FILE NUMBER

1414/16

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH

CASE

NO: 1414/16

DATE

HEARD: 18/8/16

DATE

DELIVERED: 30/8/16

NOT

REPORTABLE

In

the matter between:

SIPHO

GCORA

FIRST APPLICANT

KHUSELWA

GOBO-GCORA

SECOND APPLICANT

GOBO

GCORA CONSTRUCTION AND

PROJECT

MANAGEMENT

CC

THIRD APPLICANT

AND

NELSON

MANDELA BAY MUNICIPALITY
FIRST RESPONDENT
PUBLIC
PROTECTOR OF SOUTH AFRICA
INTERESTED PARTY
INVALID
/ UNLAWFUL TRUSTEES
SECOND TO FIFTH RESPONDENTS
IMPROPERLY
CITED PARTIES
SIXTH TO SEVENTH RESPONDENTS

JUDGMENT

PLASKET J

- [1] I am required to decide on two applications that are part of a larger dispute between the three applicants, Mr Sipho Gcora, his wife, Ms Khuselwa Gobo-Gcora and Gobo Gcora Construction and Project Management CC, on the one hand, and the first respondent, Nelson Mandela Bay Municipality (the Metro), on the other. The first application is one in which the Metro applied for leave to file an additional affidavit in the second application. The latter is an application purportedly brought in terms of rule 30 and rule 30A of the uniform rules.
- [2] At the heart of the dispute lies two interrelated matters, an application brought by the applicants to enforce compliance on the part of the Metro with an order of the Public Protector directing the Metro to take certain remedial action, contained in a report entitled Cost of Deviation, and an application by the Metro to review and set aside that order.

Background

- [3] Before turning to the applications before me, it is necessary to set out, briefly, the factual background.
- [4] In the Public Protector's report, she ordered the Metro to take specified remedial action in favour of the complainant, Gobo Gcora Construction and Project Management CC, represented by Mr Gcora and Ms Gobo-Gcora (in their capacities as the close corporation's members).
- [5] The Metro had not complied with the Public Protector's order by the time the applicants brought an application to compel it to do so.[1] On 12 April 2016, when this application was to be heard, an order was made by agreement by Smith J which foreshadowed the Metro applying to review and set aside the Public Protector's order. It read:

'IT IS ORDERED: BY AGREEMENT

1. That the application brought by Applicants under case number 992/2016 is postponed sine die.
2. That the aforesaid application is to be heard simultaneously with the application for review to be brought by the Nelson Mandela Bay Municipality (the Respondent in this application).
3. That the Nelson Mandela Bay Municipality is directed to institute its proposed application to review and set aside the Remedial Action contained in the report of the Public Protector dated 29th January 2016 by no later than the end of April 2016.
4. That the Nelson Mandela Bay Municipality is directed to serve such application upon the Applicants in this application, the liquidators

of the First Applicant and the Public Protector.

5. That the Nelson Mandela Bay Municipality is directed to comply with its obligations to promote co-operative governance and inter-governmental relations as enshrined in Section 41 of the Constitution, in pursuing the review application referred to more fully above.
6. That the costs occasioned in this application thus far be reserved.'
- [6] On 29 April 2016, the Metro launched its review application. It cited as respondents the Public Protector, the liquidators of Gobo Gcora Construction and Project Management CC, it being under a provisional winding-up order at the time,[2] and the liquidators of both Mr Gcora and Ms Gobo-Gcora, both of whose estates have been sequestrated.[3] None of the present applicants were parties in the review application, even though Smith J ordered that the papers were to be served on them.
- [7] The launching of the review application was the spur for the rule 30/rule 30A application brought against the Metro by the applicants.

In addition to citing the Public Protector as an 'interested party' the application cited as the second to fifth respondents

parties that are only identified as 'Invalid / Unlawful Trustees' and as the sixth and seventh respondents parties

identified as 'Improperly Cited Parties'. I presume this is intended to refer to the various liquidators, the MEC for the Department of Human Settlements in the provincial government, WK Construction SA (Pty) Ltd and WK Pipelines (Pty) Ltd, all of whom had been cited as respondents in the review application.

[8] In the rule 30/rule 30A application, the following relief was sought:

- '1. The review application under case number 1414/2016 be set aside;
2. Alternatively the review application be struck out;

3. Declaring that the Applicant under case number 1414/2016 is in contempt of the order dated 12 April 2016 under case number 992/2016.
 4. That the Applicant under case number 1414/2016 is acting in violation of s 41 of the Constitution by approaching the above Honourable Court without raising the issues it wants the above Honourable Court to hear, with the Public Protector first;
 5. That the Nelson Mandela Bay Municipality be ordered to comply with the Remedial Action of the Public Protector in “cost of deviation” as it opted to waste all the time it had to engage the Public Protector;
 6. That the Nelson Mandela Bay Municipality is [in] contempt of the Public Protector.’
- [9] Two primary points were taken by the applicants in the rule 30/rule 30A application. They were that the review application was irregular because it was instituted after the end of April 2016 and that the Metro has not complied with s 41 of the Constitution.[4]
- [10] It was in the context of the second point that the Metro sought leave to file a supplementary affidavit and two letters which were attached to it. As the letters were relevant and the explanation as to why they were not produced earlier was satisfactory, I made an order granting the Metro leave to file the supplementary affidavit to which the letters were attached and that the costs of the application were to be costs in the cause of the rule 30/rule 30A application. I also took into consideration additional information filed by the applicants after the hearing of the matter.
- [11] Rule 30 deals with irregular proceedings. It provides:
- ‘(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –
- (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
- (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
- (c) the application is delivered within 15 days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.

- (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.’

[12] Rule 30A is headed ‘Non Compliance with Rules’. It reads:

‘(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of ten days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

- (2) Failing compliance within ten days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.’

[13] A number of defences have been raised to the rule 30/rule 30A application by the Metro. They deal with both procedural and

substantive issues and I intend to deal with most of them.

Procedural

issues

Rule 30 and rule 30A

- [14] Rule 30 creates a mechanism for ‘a party to a cause’ to remedy an irregular step taken by an ‘opponent’. Rule 30 was not available to the applicants because they were not parties to the cause that they complain about – the review application. Smith J’s order that the papers in the review application be served on them did not make them parties to it. They have, furthermore, never so much as applied to be joined and, on the basis of what I say below as to their standing, nor could they be joined. They accordingly have no standing in this application which is interlocutory to the review application. For the same reason, they have no standing to seek relief in terms of rule 30A.

Standing

- [15] Both Mr Gcora and Ms Gobo-Gcora are unrehabilitated insolvents, final orders sequestrating their estates having been made by this court on 3 December 2013 and joint trustees having been appointed by the Master on 28 March 2014.
- [16] In terms of s 20(1)(a) of the Insolvency Act 24 of 1936, the effect of their sequestration is, inter alia, that they have been divested of their estates which first vested in the Master and then, on their appointment, in their trustees. That would include their member’s interests in Gobo Gcora Construction and Project Management CC.

- [17] In terms of s 23 of the Insolvency Act, the capacity of an insolvent to institute legal proceedings is limited. For instance, s 23(6) provides that an insolvent may 'sue or be sue in his own name without reference to the trustee of his estate in any matter relating to status or any right insofar as it does not affect his estate or in respect of any claim due to or against him under this section . . .'. Neither this subsection nor any of the other subsections of s 23 have any application to this matter.
- [18] The result is that Mr Gcora and Ms Gobo-Gcora have been divested of their member's interests and have no standing to represent the close corporation. As they are not vested with the capacity to sue in their own names in terms of any of the subsections of s 23, they have no standing in their personal capacities.
- [19] A similar finding was made in this court by Chetty J in *Sholto Douglas NO & others v Gobo Gcora Construction and Project Management CC & others*.^[5] In that matter, as in this, Mr Gcora and Ms Gobo-Gcora engaged in litigation in their personal capacities and, as Chetty J put it, 'purportedly on behalf of' the close corporation. Because they had no capacity to do either as a result of their own sequestration, and because of the 'plethora of litigation'^[6] they had engaged in after their sequestration, Chetty J issued an order that, inter alia, interdicted and restrained them from:
- '1.1 authorising the initiation, pursuit or defence of any legal proceedings of any nature by the first respondent [the close corporation];
- 1.2 directly an/or indirectly participating in the management of the business of the first respondent in contravention of section 47(1)(b)(i) of the Close Corporation Act 69 of 1984.'
- [20] Having purported to bring the present application in the name of the close corporation, and to represent it, as they had also done in the application to enforce the Public Protector's order, Mr Gcora and Ms Gobo-Gcora appear to have disobeyed Chetty J's order, and consequently be in contempt of his order. This conduct, prima facie, constitutes a criminal offence.^[7] I accordingly intend referring this judgment to the Director of Public Prosecution in Port Elizabeth for her consideration.
- [21] As Mr Gcora and Ms Gobo-Gcora have no standing in their personal capacities, and have no authority to litigate in the name of the close corporation, the application must fail on this account.
- [22] Furthermore, none of the applicants are parties to the review application. Not being parties, they have no standing to complain of irregularities in it.

The merits

- [23] Although it may be strictly speaking unnecessary to decide on the merits of the application, it seems to me to be desirable to do so in this case. Two points were taken by the applicants. The first was that the review application was not initiated before the end of April 2016 and the second was that the Metro had failed to comply with its obligations in terms of s 41 of the Constitution.

Paragraphs 3 and 4 of Smith J's order

- [24] Paragraph 3 of Smith J's order directed the Metro to 'institute its proposed application to review and set aside the Remedial Action contained in the report of the Public Protector dated 29th January 2016 by no later than the end of April 2016'. Paragraph 4 directed the Metro to serve the application 'upon the Applicants in this application, the liquidators of the First Applicant [the close corporation] and the Public Protector'.
- [25] The application papers were issued by the Registrar on 29 April 2016. This means that paragraph 3 was complied with. The papers were, however, only served on the applicants a few days later in early May 2016, but no time was prescribed in paragraph 4 for the service of the papers. There is accordingly no merit in this point. Even if the review application had been initiated after the end of April 2016, I am not convinced that this would have meant that it was a nullity.

Paragraph 5 of Smith J's order

- [26] Paragraph 5 of Smith J's order directed the Metro to 'comply with its obligations to promote co-operative governance and inter-governmental relations as enshrined in Section 41 of the Constitution, in pursuing the review application referred to more fully above'.
- [27] The argument advanced by the applicants seems to be that the Metro has not done enough to comply with s 41 because it has not even met with the Public Protector to try to resolve the matter.
- [28] The Metro wrote to the Public Protector to request a meeting. It, however, received a response from her attorneys which stated that much as the Public Protector would want to settle the matter, she is *functus officio* and cannot change her decision; and that, in these circumstances, little point would be served by meeting. The letter also stated that chapter 9 institutions are not organs of state for purposes of s 41 and that s 2(2)(e) of the Inter-Governmental Relations Framework Act 13 of 2005, which gives effect to s 41, provides expressly that it does not apply to chapter 9 institutions. The Metro's attorneys responded by saying that they agreed with these views and that, in the circumstances, the review application 'must follow its course'.

[29] The core question to be answered is what obligations are contemplated by paragraph 5. The answer is clear. It envisaged those obligations, whatever they may have been, that applied in terms of s 41 and the Act to the dispute between the Metro and the Public Protector. The answer is equally clear. No such obligations arise because the Public Protector is excluded from s 41 and the Act. Consequently, there was absolutely nothing that the Metro was required to do in terms of paragraph 5. This point must therefore fail.

The result

[30] The application brought by the applicants fails on all of the grounds that I have dealt with in this judgment. It must therefore be dismissed. In my view, the Metro is entitled to its costs, including the costs of two counsel. It is also entitled to the costs of the application for leave to file the supplementary affidavit as the costs of that application were costs in the rule 30/ rule 30A application. In addition, I intend referring this judgment to the Director of Public Prosecutions in Port Elizabeth for the

reasons

given above.

[31] I make the following order.

- (a) The application is dismissed with costs, including the costs of the application for leave to file the supplementary affidavit, and the costs of two counsel.
- (b) The Registrar of this court is requested to furnish a copy of this judgment to the Director of Public Prosecutions, Port Elizabeth and to bring her attention to paragraphs 15 to 22 thereof.

C Plasket

Judge of the High Court

APPEARANCES

For the applicants: In person

For the first respondent: R Buchanan SC and ZL Mapoma instructed by Gray Moodliar

- [1] See Gobo Gcora Construction and Project Management CC & others v Nelson Mandela Bay Municipality & another ECP (case no. 992/16).
- [2] I was informed from the bar that the provisional winding-up order has now been discharged.
- [3] See Nelson Mandela Bay Municipality v Public Protector of the Republic of South Africa & others ECP (case no.1414/16).

- [4] Section 41 is concerned with inter-governmental relations and inter-governmental disputes. Section 41(3) provides: ‘An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.’
- [5] Sholto Douglas NO & others v Gobo Gcora Consruction and Project Management CC & others ECP 27 June 2014 (case no. 1970/14) unreported.
- [6] Para 3.
- [7] S v Beyers 1968 (3) SA 70 (A); Milton South African Criminal Law and Procedure (Vol II – Common Law Crimes) (3 ed) at 189.
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