

SOUTH AFRICA / JUDGMENT

**Gebhardt N.O. and Another v Nicolaas Kotze
Boerdery CC and Another In re: Nicolaas Kotze
Boerdery CC v Gebhardt N.O. and Another
(3049/2021) [2022] ZAFSHC 228 (27 July 2022)
[2022] ZAFSHC 228**

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, P. Zietsman

CASE / FILE NUMBER

3049/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Reportable:

YES/NO
Of
Interest to other Judges: YES/NO
Circulate
to Magistrates: YES/NO
Case
No: 3049/2021
In

the matter between:

JACOBUS
JOHANNES GEBHARDT N.O.
First Applicant
HENDRINA
JOHANNES GEBHARDT N.O.
Second Applicant
and
NICOLAAS
KOTZE BOERDERY CC
First Respondent
MAGISTRATE
MATLOU EZEKIEL
Second Respondent
In

re: NICOLAAS
KOTZE BOERDERY CC
Plaintiff
JACOBUS
JOHANESS GEBHARDT N.O.
First Defendant
HENDRINA
MARIA EDWARD GEBHARDT N.O.
Second Defendant

CORAM: REINDERS, ADJP et
ZIETSMAN, AJ
HEARD

ON: 25 JULY 2022
DELIVERED

ON: 27 JULY 2022

JUDGMENT

BY: REINDERS, ADJP

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down are deemed to be 14:00 on 27 July 2022.

- [1] The applicants are the defendants in the Frankfort Magistrate's Court where the first respondent has instituted an action against them under case number 308/2019.
- [2] The applicants defended the action and filed a plea thereto. Simultaneously a counter-claim was filed. The matter has not been concluded and is pending before the second respondent who is cited in his official capacity as the presiding magistrate.
- [3] Ostensibly a pre-trial conference was held between the parties, but when the matter was to proceed the applicants in terms of Magistrate Court Rule 29(4) requested the second respondent to order a separation of issues in that the applicants wanted the magistrate to make a ruling on claims 2 and 3 of first respondent's particulars of claim which in short boiled down thereto that those claims were not contractually permitted and should be dismissed at that stage and for that reason.
- [4] The matter was postponed by the magistrate and the parties filed heads of argument. The magistrate on 27 May 2021 made the following

orders:

"1). Plaintiff is granted leave to proceed with claims 2 and 3.

2). Trial to proceed on merits and quantum as agreed at the parties' pre-trial conference (par 9) and

3). Costs in favour of the plaintiff including counsel's costs occasioned by the postponement."

[5] Aggrieved with this ruling the applicants embarked on review proceedings in terms of Rule 53 of the Uniform Rules for an order as set out in the notice of motion:

"1. Reviewing and setting aside the decision of the Second Respondent dated 27 May 2021 under case number 308/2019, which was granted against the First and Second Applicants in the Magistrates' (sic) Court for the Magisterial district of Frankfort;

2. That the Second Respondents' (sic) decision be substituted with the following order:

2.1 Claims 2 and 3 of the Plaintiff are dismissed with costs.

3. That the costs of this review be granted against any Respondent opposing this application; ..."

[6] I have difficulty in understanding how the magistrate's order was an order which constitutes a "gross irregularity" in that he "refused to dismiss the claims" as averred by the applicants. On the contrary, the order of the magistrate did not dispose of the disputes in respect of claims 2 and 3 of the action pending before him and therefore is not an order granted against the applicants as averred. The magistrate made no finding in respect of

those two claims which by any stretch of the imagination can be considered to have been disposed of or finalized. It merely stated

that the first respondent can proceed with those two claims and the magistrate found that the action is to proceed on the basis as agreed at the parties' pre-trial conference. The magistrate will ultimately still have to conclude or adjudicate claims 2 and 3 and therefore has to adjudicate the legal points the applicants wish to raise. This has not been done yet. Should the magistrate ultimately agree with the applicants, those claims of the first respondent will be dismissed. It might even be that those claims are dismissed on other grounds – the point being that the magistrate must still decide those issues and has not done so yet. What the applicants therefore wish to attain through this process is to have this Court to adjudicate the legal points whilst the magistrate has not done so yet and at a time when it is the magistrate who is clothed with the jurisdiction to do so. I need not say more in this respect.

[7] It is trite that it is undesirable and a High Court will not by way of entertaining an application for review interfere with incomplete proceedings in a lower court. Obviously the High Court has such power. It is however to be exercised sparingly. When a High Court does so it will use its power in rare cases where grave injustice might otherwise result or where justice might not by other means be attained.

See: *Motata v Nair N.O. and Another* 2009 (2) SA 575 (T) at 578 and the authorities referred to therein.

[8] This matter is certainly not the rarest of cases. The applicants did not except to the particulars of claim in respect of claims 2 and 3 as they were entitled to do. On the contrary, they filed pleas in this respect. The magistrate has made no final ruling and might (without me expressing any opinion thereon) ultimately still find in favour of the applicants. There is no basis upon which I deem it fit to review and set aside the order made by the magistrate on 27 May 2021. There is no reason to deviate from the usual order that cost should follow the successful party.

[9] Consequently I make the following order:

The application is dismissed with costs.

C. REINDERS, ADJP

I concur.

P.ZIETSMAN, AJ

On behalf of the applicants: Adv NMA Muller

Instructed by:

Corne Boshoff Attorneys

c/o Phatshoane Henney Inc.

BLOEMFONTEIN

On behalf of the first respondent: Adv AM Jardine

Naude Attorneys

c/o Bezuidenhouts Inc

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Prepared on 11 October 2026 · Esheria