

SOUTH AFRICA / JUDGMENT

Harris and Another v Burger N.O. and Another (786/2017) [2017] ZAFSHC 133 (21 August 2017)

[2017] ZAFSHC 133

COURT

Free State High Court, Bloemfontein

BEFORE

MH Rampai

CASE / FILE NUMBER

786/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 786/2017

In

the matter between:

RUDOLF

JOHANNES

HARRIS

1st

Applicant

[Identity

number: [5...]]

RACHEL

SOPHIA ELIZABETH HARRIS

2nd

Applicant

and

ZANDER

CHRIS BURGER N.O
1st
Respondent
[BLUE
GINGER TRUST – IT 276/2009]
THE
MASTER OF THE FS HIGH COURT
2nd
Respondent

CONSIDERED: IN CHAMBERS

JUDGMENT

BY: RAMPAL, J

DELIVERED: 21 AUGUST 2017

- [1] This is an application for leave to appeal. The current applicants were the first and second respondents in the main application. On 11 May 2017 I gave an order against them in favour of the current first and second respondents as the applicants
- then.
- [2] I declared the two agreements between the parties null and void, directed the parties to restore the respective performances and directed the respondents to pay the costs of the main application. They were aggrieved. From now on I shall refer to the parties as they are cited in the instant application.
- [3] The instant application was enrolled for hearing on Monday 12 June 2017 at 14:15. The legal representatives duly attended court to present oral argument. However, for medical reasons, I was not readily available to hear them. In view of that, they agreed that I should deal with the matter in chambers on the strength of their written heads of argument. In other words they mutually dispensed with their right to present oral argument. I am indebted to them and their clients.
- [4] There are 12 grounds of appeal relied upon by the applicants. I deem it unnecessary to deal with each one of them. The collective thrust of all of them is that the main application was opposed; that the respondents erroneously placed it on the unopposed motion court roll contrary to the provisions of Practice Directive 1 of 2012; and that on 11 May 2017 I erroneously entertained the matter.
- [5] It is common cause that the main application was issued on 15 February 2017; that the sheriff served it upon the applicants

on the same day; that the applicants filed the required notice of opposition on 2 March 2017; that the applicants had time until 24 March 2017 to file their answering affidavit; that they failed to do so; that on 25 April 2017 the respondents filed a notice of setdown for the hearing of the matter; that the registrar placed the matter on the unopposed motion court roll; that on 11 May 2017 I was seized with the matter; that by then the applicants had still not filed the required answering affidavit; that I took their omission to do so as an inexcusable disregard of the court rules and that I then made the court order without hearing counsel for the applicants, Mr Olivier.

[6] The applicants had signalled their intention to oppose the main application. However, they neglected to file their answering

affidavit in terms of the rules of procedure. As on 11 May 2017, they were 48 calendar days in default. Notwithstanding such appalling default, I had no jurisdiction, sitting as I was on the bench of the general forum for the unopposed motion proceedings, to entertain the matter. Since it was an opposed matter it was not supposed to have been on an unopposed motion court roll. The failure of the applicants to file the answering affidavit did not, by itself, cure the procedural irregularity by conferring on me the jurisdiction I did not have. By overlooking the fact that the matter remained opposed, I committed procedural irregularity in entertaining it.

[7] In the light of those circumstances, I am persuaded by Mr Benade's submission that I erred. Considerations of procedural fairness dictate that I should grant leave to the applicants. Consequently I am satisfied that the matter has a reasonable prospect of success on appeal. Given the material and appealable procedural irregularities I committed, I am inclined to believe that another may well come to a different conclusion.

[8] In the result I make the following order:

- (a) The applicants' application for their late filing of their heads of argument is granted;
- (b) There is no order of costs made as regards the condonation application;
- (c) The applicants are granted leave to appeal to the full bench of this division;
- (d) The costs of the application shall be costs in the appeal.

MH RAMPAI, J

On behalf of applicant: Adv HJ Benade

Instructed by:

Symington & De Kok Attorneys

Bloemfontein

On behalf of defendants: Adv DM Grewar

Instructed by:

Adrie Hechter Attorneys

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2017/133.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/harris-and-another-v-burger-unknown-topic-afshc-2017>

Prepared on 12 October 2026 · Esheria