

SOUTH AFRICA / JUDGMENT

Hassim v Bekker and Others (17/46707) [2018] ZAGPJHC 414 (8 June 2018)

[2018] ZAGPJHC 414**COURT**

South Gauteng High Court, Johannesburg

BEFORE

L T Modiba

CASE / FILE NUMBER

17/46707

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE
NO: 17/46707
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED
8
JUN 2018
In the

matter between:

RAYHAAN
HASSIM Applicant
and
RENE
BEKKER 1st
Respondent
MASTER OF THE HIGH
COURT,
JOHANNESBURG 2nd
Respondent
SIMAYIA ABDOOL GAFAAR
KHAMMISSA
N.O. 3rd

Respondent
GERT
DE WET
N.O. 4th
Respondent
BETHUEL
BILLYBOY MAHLATSI
N.O. 5th
Respondent
KEHEDITSE DESIREE
JUDITH
MASEGE
N.O. 6th
Respondent
GURWANTRIA
LAZMAN BHIKA
N.O. 7th
Respondent
JOHAN
ENGELBRECHT
N.O. 8th
Respondent
GRACE HAVEN INDUSTRIES
(PTY) LTD
AND
25
OTHERS Intervening
Respondents

JUDGMENT

MODIBA, J:

[1] This is an unopposed interlocutory application brought by the Intervening Respondents in terms of directive 9.8.2.12 of the

Practice Directives of this court.[1] They seek an order compelling the applicant to deliver his heads of argument and practice note within 3 (three) days of the order.

Simultaneously, they also seek an order that should the applicant fail to comply with the order compelling him to deliver his heads of argument and practice note, then the applicant's claim in the main application be struck out and the main application be dismissed with costs.

[2] The applicant's failure to file his practice note and heads of argument is a jurisdictional basis for this application. This he is required to do in terms of directive 9.8.2.1. He is also required to paginate and index the papers and to enrol the main application for hearing. This he also failed to do.

- [3] The intervening respondents have filed their heads of argument and practice note in the main application. They have also attended to the pagination and indexing of the papers. In compliance with directive 9.8.2.12, the intervening respondents have simultaneously enrolled the main application for hearing on 11 June 2018 and brought this application on notice to the applicant. The applicant is not opposing it.
- [5] The only issue for determination is whether the sanction in directive 9.8.2.12 automatically strikes out the defaulting party's claim or defence in its entirety in the event that the defaulting party fails to comply with the court order granted in terms of that directive. The applicant contends that it does. I disagree. This prompted me to reserve judgment in order to consider the question and to deliver a reasoned ruling. The intervening respondents requested leave to file heads of argument. For this I am indebted to them.
- [6] On 17 May 2018, I granted the following order in terms prayers 1 and the amended prayer 3 of the notice of motion with reasons to follow:

"1. The Applicant is directed to file his heads of argument and practice note within 3 (three) days of the Court handing down this order along with an application to condone the late filing thereof ("this Court order");

"3. The Applicant is ordered and directed to pay the Intervening Respondent's costs of this application."

I set out the reasons hereunder.

- [7] The question to be determined turns on the interpretation of directive 9.8.2.12. The golden rule of interpretation contended for by counsel for the intervening respondents in his written heads of argument has been amplified in several judgments and is no longer the prevailing rule of interpretation. The prevailing approach to the interpretation of text is set out in the widely referred to judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[2] where Wallis JA stated as follows:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure

is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[8] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[3] elaborating on the principle conjured in *Natal Joint Municipal Pension Fund*, Wallis JA said:

‘Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is ‘essentially one unitary exercise’. Accordingly it is no longer helpful to refer to the earlier approach.’

[9] Directive 9.8.2.12 states as follows:

“Where a party fails to deliver heads of argument and/or a practice note within the stipulated period, the complying party may enrol the application for hearing. Such party shall simultaneously bring an application on notice to the defaulting party that on the date set out therein, (which shall be at least 5 days from such notice), he or she will apply for an order that the defaulting party delivers his or her heads of argument and practice note within 3 days of such order, failing which the defaulting party’s claim or defence be struck out. Such application shall be set down on the interlocutory roll referred to in 9.10 below.” [Emphasis added].

[10] The emphasised words in the quotation above are hanging, rendering directive 9.8.2.12 capable of two meanings. It could mean, ‘it shall be struck’. It could also mean ‘it is struck.’ The latter is the interpretation contended for by the intervening respondents. However, as I reason blow, when regard is had to the purpose of the directive and its context, the interpretation preferred by the intervening respondents does not promote the meaning probably intended by the drafters. The former meaning was more probably intended by the drafters.

[11] The directive is mirrored on Rule 30A (1). This rule provides a mechanism for compelling a defaulting party to comply with the Uniform Rules of Court. It provides as follows:

“(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 10 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 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.” [Emphasis added]

- [12] The emphasised words in the quotation above are missing from directive 9.8.2.12. These words amplify the drafters' intention regarding the procedure to be followed when the defaulting party fails to comply with the order to compel in Rule 30A. Here it is clear that the aggrieved party must bring an application to strike out and that the court has a discretion to grant such an order.
- [13] The primary purpose of the directive is not 'to explicitly punish the defaulting party in circumstances where he is in contempt of court' as contended on behalf of the intervening respondents. Rather the primary purpose of the directive is to ensure that the opposed motion court roll is relieved of matters that are not ripe for hearing. The directive also empowers the complying party not to be helpless against a defaulting party but to seek an order compelling the defaulter to file his practice note and heads of argument. Without this ammunition, the complying party as well as the court were heavily prejudiced by the defaulter's failure to file a practice note and heads of argument.
- [14] Under the superseded practice directive, the only ammunition at the disposal of the complying party was to address a letter to the defaulter calling on him to comply, failing which the complying party would address a letter to the Deputy Judge President requesting him to issue a directive compelling the defaulter to file these documents. Complying parties seldom availed themselves of these measures. As a result, the roll was clogged with matters that are not ripe for hearing. Where a complying party resorted to these measures and the defaulter still remained non-compliant after receiving a letter from the complying party and a directive from the Deputy Judge President, the matter would remain on the roll to the prejudice of the complying party and the inconvenience of the court. Sanctioning the defaulter by striking the matter off the roll would prejudice the complying party particularly where the defaulting party is recalcitrant and deliberately dilatory.
- [15] Compared to previous practice directives, directive 9.8.2.12 carries a more biting sanction against a defaulter and inadvertently against the complying party too. Should the defaulting party remain non-compliant after an order compelling him to comply with practice directive 9.2.8.12 is granted, he or she stands to have his cause of action or defence struck out. Should the complying party fail to bring an application to compel in terms of directive 9.8.2.12, he or she runs the risk of his or her matter being struck from the roll. By not bringing an application to compel in terms of directive 9.8.2.12, the complying party would have orchestrated his own prejudice because the terms of directive 9.8.2.12 in this regard are peremptory.
- [16] Further non-compliance with an order granted in terms of directive 9.8.2.12 is not inferred contempt as contended for by the intervening respondent's counsel. Therefore the striking out of the defaulter's cause of action or defence is not automatic.
- [17] Contempt of court is a serious infraction which attracts serious sanction. It does not flow automatically from a party's failure to comply with a court order. This is so because the consequences that flow from contemptuous conduct are harsh and far-reaching and for that

reason the question whether a party is in contempt of court is never left to the judgment of the party at whose instance the compelling order was granted. An order of contempt follows a finding by a court, made on application by the party in whose favour the order was granted. To succeed in such an application, the applicant has to establish the following[4]: the existence of the order, service or notice of the order and non-compliance. Upon proof of these requirements, the presence of wilfulness and bad faith on the part of the defaulter would normally be inferred. The respondent could rebut this inference by contrary proof on a balance of probabilities. There could well be a dispute between the parties regarding the existence of the order, the defaulting party's knowledge of it or the defaulter's alleged non-compliance or the presence of mala fides.

- [18] There could also be other reasons why rendering the defaulter to be automatically in contempt of court is inappropriate. For example, the order could be subject to rescission proceedings where, as it transpired in *casu*, the order was granted by default.
- [19] Directive 9.8.2.12 clearly provides for the striking out of the defaulting party's claim or defence where he or remains non-compliant. The striking out of the defaulting party's claim would have the effect that there is no cause of action that requires an answer or defence from the complying party. In that event, the defaulting party's claim, including all the facts in support of the claim, are struck out from the affidavit as if no such cause of action, or facts in support of the cause of action have been pleaded. In the case of a defence, the defence is struck out from an affidavit, with the consequence that there is no opposition to the relief sought.
- [20] It is improbable that the drafters intended such a drastic consequence to flow automatically from non-compliance with the order granted in terms of the directive 9.8.2.12. It is more probable that the drafters intended that the consequence is invoked by the complying party on application brought on notice to the other party. Such an application may even be set down for hearing on the date the main application is set to be heard.
- [21] Further, the drafter's probably intended the remedy provided for in 9.8.2.12 to be discretionary. The interpretation preferred by the intervening respondents would take away the court's discretion to grant an order commensurate with the circumstances of the case where striking out the defaulting party's claim or defence is deemed to be disproportionate to the circumstances.
- [22] In the premises, I find that the sanction in directive 9.8.2.12 does not automatically strike out the defaulting party's claim or defence in the event that the defaulting party fails to comply with the court order granted in terms of that directive. It is for the reasons set out above that I only granted prayer 1 and the amended prayer 3 of the notice of motion. Prayer 2 stands to be postponed *sine die*. In the event that the applicant fails to comply with prayer 1, the intervening party may bring an application on notice to the applicant in respect of prayer 2. Leave to supplement its papers should the intervening respondents so wish, stands to be granted.

[24] I therefore make the following order:

1. The order granted on 17 May 2018 is confirmed.
2. Prayer 2 of the notice of motion is postponed sine die.
3. In the event that the applicant fails to comply with the order of 17 May 2018, should intervening respondents wish to bring an application to strike out the applicant's claim, leave to supplement the intervening respondents' papers is granted.

MS JUSTICE L T MODIBA

JUDGE OF THE HIGH COURT

APPEARENCES:

Applicant's Counsel: Adv. WH Pocock

Instructed by: Fluxmans INC

Date heard: 08 May 2018

Order granted: 17 May 2018

Reasons

given: 9 June 2018

- [1] Practice Manual – Gauteng Local Division: Johannesburg – February 2018.
- [2] 2012 (4) SA 593 (SCA) at para 18.
- [3] 2014 (2) SA 494 (SCA) at para 12.
- [4] Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA).

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