

SOUTH AFRICA / JUDGMENT

Hlatswayo and Another v Maake and Others (24833/20) [2020] ZAGPPHC 651 (11 September 2020) [2020] ZAGPPHC 651

COURT

North Gauteng High Court, Pretoria

BEFORE

V M Nqumse

CASE / FILE NUMBER

24833/20

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

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

11/09/2020

Case no: 24833/20

In the matter between: -

NOMAKHOSI GAY HLATSHWAYO

1st Applicant

DUMISANI JONAS CHRISTOPHER NTULI

2nd Applicant

and

MOKHUTAMANE KENNETH MAAKE & 5 OTHERS

1st Respondent

COLLABORATE ADVISORY & SOLUTIONS (PTY) LTD

2nd Respondent

THE COMPANIES & INTELLECTUAL PROPERTY

3rd Respondent

COMMISSION (CIPC)

STD BANK OF SOUTH AFRICA LIMITED

4th Respondent

REGISTERED BANK

FOOD & BEVERAGES & MANUFACTURING SETA

5th Respondent

COLLABORATE HOLDINGS (PTY) LTD

6th Respondent

JUDGMENT

NQUMSE AJ

INTRODUCTION

- [1] The main relief in this application concerns the re-appointment and restoration of the applicants as directors of the second respondent (“CAS”) by the third respondent (“CIPC”) and removal of the first respondent (“Mr. Maake”) as a sole director of the second respondent and a signatory to its bank account held at Standard Bank Limited.
- [2] The main relief has since become moot after CIPC removed the first respondent as a director of second respondent and restored the applicants as its directors. The actions of CIPS were done and effected before the hearing of the main application and thus rendered the merits therefor moot bar the issue of costs that requires determination by this court.
- [3] Whilst the merits have rendered the main application moot, their consideration became necessary since much turns on them for arriving at a just determination of the costs. Therefore, I will hereunder deal briefly with the merits as far as they are relevant to the issue of costs that lies for determination by this court.

BRIEF

BACKGROUND

- [4] The applicants who are directors of the second respondent were removed as directors of the second respondent allegedly through a meeting of shareholders convened by the first and sixth respondent in non-compliance with the relevant provisions of the Companies Act, 71 of 2008, more specifically sections 61 (1) to (3) thereof. Much as there was contention in the beginning in regard to lawfulness of the said meeting of shareholders, the respondents did

not launch a counter-claim to prove the validity thereof and neither did they pursue their entitlement to convene such a meeting.

- [5] In its papers, the respondent did not furnish an attendance register of the shareholders who attended the alleged meeting nor any minutes thereof. The applicants contend that any resolutions that were taken therein have no force and effect in so far as they affect the applicants nor did they have the effect to remove the applicants as directors of CAS or install the first respondent as the sole director.
- [6] According to the applicants, when they became aware of the developments affecting their status and the appointment of first respondent as sole director of second respondent, they filed a notice on 23 May 2020 with CIPC challenging the status quo.
- [7] When they did not receive a response from CIPC, they launched an urgent application with the court on 10 June 2020 in which they sought the relief indicated in paragraph 1 above.
- [8] According to the sheriff's return of service, the application was served on the 10 June 2020 to all the respondents. On the very same date, the CIPC made changes to the directorship of CAS by removing the first respondent as a director and reinstated the applicants as directors therefore.
- [9] Upon the respondent becoming aware of the changes that were effected by CIPC, they caused a letter dated 14 June 2020 to be written to the applicant's attorneys which reads thus.

"Dear Sir/Madam

Re: URGENT APPLICATION CASE NO 24833/2020 N G

HLATSHWAYO / M K MAAKE

1. We refer to the above matter and our previous correspondence in this regard.
2. Kindly take note that following the launch of this application and while we were preparing the relevant documents for the answering affidavit following our consultation with counsel, our offices conducted search to get the latest CIPC certificate for the second respondent ("CAS")
3. Upon receipt of the latest certificate it came to our attention that our client is no longer the director of CAS and your clients have been re-instated as the directors of CAS. We attach a copy of the CIPC certificate as annexure "A" in this regard.
4. This change in directorship came as a direct result of the notice challenging the filed information (FA, annexure NH18, p87), which was filed with the CIPC by your clients on 23 May 2020 challenging our client's appointment as a director of CAS. The notice by your clients also requested that they be appointed as the directors of CAS and our client should be removed as the director of CAS.

5. The attached certificate indicates that the CIPC made the change and gave effect to the applicants' request on 12 June 2020.
6. Further to this, our client has instructed us that he no longer has online access to CAS's bank account held with the fourth respondent ("Standard Bank"). It would appear that his online login credentials have been revoked in this regard.
7. In the light of this, the relief sought against our client in prayers 2, 4, 5 and 6 of the notice of motion has become moot. Accordingly, we request that this application should be withdrawn and that the applicants should tender the wasted costs for the withdrawal.
8. Kindly be advised that our request for a withdrawal of this application in this regard is not in anyway an admission of the serious and scandalous allegations levelled against our client by the applicants in their founding affidavit. Our client denies those allegations.
9. The requested withdrawal is the prudent thing to do given that the application has become moot. Proceeding with this application would unnecessarily burden the court's urgent roll.
10. Kindly provide us with your response by close of business 15 June 2020.
11. Our client's rights remain strictly reserved.

We trust that you will find the aforesaid to be in order".

- [10] The respondent's request to withdraw the application was acceded to partially in a response contained in a letter dated 15 June 2020. Paragraph 2 annexed as "NHR1" wherefore reads thus

"2 We agree to remove the matter from the urgent roll, costs reserve and provide your client time to answer by 2 July 2020 on the remaining issues i.e

2.1 the notice of shareholders meeting and

2.2 resolution passed in the course of the Rules and

2.3 and the matter to be heard on the normal opposed roll once the affidavits have been filed"

- [11] The applicants had in essence effectively refused to withdraw the application even though conceding that the matter had become moot. Thereby causing the respondents to file their answering papers in response to the main application.
- [12] Following the refusal to withdraw the application, the matter was nonetheless removed from the urgent roll and placed on the opposed roll for the court to determine the issue of costs.

[13] It is worthy to note that the only issue that was to be determined in the opposed roll is the issue of costs. The applicants were no longer pursuing the other remaining issues that are stated in the letter referred to above. The abandonment of the two outstanding issues by the applicant is in my view a clear acknowledgment that the applicant was well aware that the matter has become moot and there was no longer a need for the applicants to pursue the two outstanding

issues.

[14] The applicants submitted in their heads of argument that as a result of the change that was effected by the third respondent in the directorship of CAS, the applicants achieved a substantial success which entitles them to costs.

[15] In his oral submissions Mr. Scheepers for the applicants submitted that the applicants could not have been expected to buy time and wait for the decision of the CIPC regarding their restoration as director of CAS and therefore, were justified to approach the court for a remedy. He further argued that it must be borne in mind that the respondents conceded that their actions for removing the applicants from their directorship was not justified in law. Nevertheless they elected to oppose the application. The court will therefore need to evaluate if their opposition constituted a defence whereas they were the sole cause for the developments at CIPC. He further submitted that the respondents had adopted a hardline stance when they demanded the withdrawal of the application as well as costs.

[16] The respondents in their heads of argument submitted that the applicants would have been reinstated as directors of CAS without the need for them to launch the urgent the application. This submission is based on the reasons that were given by CIPC for the reinstatement of the applicants as contained in a document marked annexure 'NM 18' where it is stated, that the removal of the first respondent and reinstatement of the applicants as directors is due to the C.O.R 168 Form in which the applicants were challenging their removal.

[17] Therefore, so the argument continued, any success that the applicants claim to have achieved had nothing to do with this application. The sum total of the respondents' submission is that the applicants are not entitled to any costs. At best for the applicants so the argument went, is for the court to consider making an order directing each party to bear its own on costs. In this regard the court was referred to the matter of 'HSPCA v Minister of Environmental Affairs and Others 2020(1) SA 249 (GP), where the court, notwithstanding the success achieved by the applicants, ordered that each party bear its own costs.

DISCUSSION ON COSTS

- [18] It is trite that the award of costs is a matter within the discretion of the court[1]. Whilst a successful party should as a general rule be awarded costs, this will be departed from where good grounds exist for doing so[2]. (See generally *Ferreira v Levin No and Others*; *Vryenhock and Others v Powell No and Others* (CCT5/95 [1995] ZACC 13; 1996 (1) SA984 (CC); 1996 (1) BCRL 1 (6 December 1995))
- [19] The basic rule regarding the making of cost orders was set out in *Kruger Bros & Wasserman v Ruskin*[3] as follows:
- “the rule of our law is that all costs unless expressly otherwise enacted are in the discretion of the judge”*
- [20] In *HSPCA v The Minister of Environmental Affairs*
- [4] referred to above, the court, whilst it recognized the success the applicant had achieved in its litigation, in determining the costs it considered a number of factors being: the applicant had conducted its litigation in a manner that had resulted in inconsiderable duplication; a prolonged final determination of the matter; the prejudice caused to the respondents in their preparation for various additional affidavits and other legal costs associated therewith.
- [21] In this matter it is common cause that the matter became moot before the respondents filed their answering affidavits. The applicants were nonetheless not amendable in the matter being withdrawn, thus causing the respondents to file opposing papers and thereby accumulating costs associated therewith.
- [22] Counsel for the respondent referred the court to a Namibian case of *Standard Bank Namibia Limited v Stephanus No and Others*,[5] wherein the applicant had filed a notice to withdraw the application, but refused to tender costs to the respondents. The court in that matter found that due to the applicant’s conduct and that of its legal representative, the applicant ought to be ordered to pay the costs of the respondents on an attorney client scale.
- [23] In response, counsel for the applicant argued that the Namibian matter is not applicable in the circumstances of this matter since the applicants in this matter did not withdraw their application, but had only removed it from the urgent roll. I agree that the facts of that matter are distinguishable from the facts in this application. That authority has therefore little assistance, if any.
- [24] In *Ferreira* , the following was stated: “The Supreme Court, has over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted , is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs...The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting to either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings[6].

In casu the material facts and the conduct of the litigation fortifies a departure from the general rule where costs should be awarded to the successful party[7]

[25] The conduct of the first and sixth respondent has undoubtedly triggered the launch of the main application, more so when they did not receive a response from the third respondent. Neither any were time frames from CIPC as to when a reply is to be expected by the applicants. I turn to agree with counsel for the applicants that the applicants could not have been expected to fold their arms and wait endlessly. It is my view that the costs incurred by the applicants in launching the main application ought to borne by the respondents.

[26] However, I am also not persuaded that the applicants are entitled to any other costs occasioned beyond 14 June 2020, a time on which they became aware that the application has become moot and had confirmed same in their letter of 15 June 2020. In my view, this is the kind of conduct the court cannot close its eyes to when it considers the awarding of costs as adumbrated in HSPCA supra.

[27] I accordingly take the view, that any costs incurred by the applicants after 14 June 2020 were unnecessary or ineffectively incurred, and I find it to be onerous to expect the respondents to be mulcted with those costs.

ORDER

[28] In the result, I make the following order:

1. Save for the costs incurred after 14 June 2020, the respondents are jointly and severally ordered to pay the one paying the other to be absolved, the applicants costs such costs to include the costs of counsel.

V M NQUMSE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

Date of Hearing

: 27 August 2020

Date of Judgement : 11 September 2020

For the Applicant : Adv. Scheepers

Instructed by

: Vermaak Beelaar Attorneys

For the Respondent : Adv. Musandiwa

Instructed by

: P.M. Mositsa Inc

- [1] Beinesh v Wixley (1997) 2 ALLSA 24
- [2] generally Ferreira v Levin No and Others; Vryenhock and Others v Powell No and Others (CC CCT5/95 [1995] ZACC 13; 1996 (1) SA984 (CC); 1996 (1) BCRL 1 (6 December 1996
- [3] 1918 AD 63 at Graham v Codendaal 1972 (SA) 611 (A) at 616; Claude Neon Lights (SA) Ltd v Pereglou 1977 (1) SA 575 (C); Intercontinental Exports (Pty) Ltd v Fowles 1999 (2) SA 1045 (SCA) at 1055 F-G; Coetzee v National Commissioner of Police 2011 (2) SA 227 (GNP) at 259
- [4] Paragraph 17 above
- [5] Case no: HC – MD- (IV-MOT-GEN 2019/00065
- [6] At 624 B-C (par [3])
- [7] Levben Products (Pty) Ltd v Alexander Films (SA) (Pty) Ltd 1957 (4) SA 225 (SR) at 227

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/ZAGPPHC/2020/651.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/hlatswayo-and-another-v-maake-unknown-topic-agpphc-2020--6a3ea51b3b1caa912981195e>

Prepared on 13 October 2026 · Esheria