

SOUTH AFRICA / JUDGMENT

Hoerskool Piet Potgieter and Another v K obo K (6114/2018, HCAA11/2019) [2020] ZALMPPHC 66 (19 August 2020) [2020] ZALMPPHC 66

COURT

Limpopo High Court, Polokwane

BEFORE

M. Naude, E.M. Makgoba, M.F. Kganyago

CASE / FILE NUMBER

6114/2018, HCAA11/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

COURT

A QUO CASE

NO: 6114/2018

APPEAL

CASE NO: HCAA11/2019

19/8/2020

In

the matter between: HOERSKOOL
 PIET POTGIETER
 FIRST
 APPELLANT
 JIMMY
 STEELE
 SECOND APPELLANT
 and
 M[....]
 M[....]
 K[....]
 RESPONDENT
 Obo
 LEARNER MINOR CHILD
 K[....]
 K[....]

JUDGMENT

NAUDE AJ:

- [1] This is an appeal against the judgment and order of Sikhwari AJ confirming a rule nisi on the 22nd of November 2019 in favour of the Respondent. The appeal is with leave of the Court a quo .
- [2] The Respondent's minor child is a learner at the First Appellant School where the Second Appellant is the school principal or headmaster. The parties before this court have a long history. It was not the first time the Respondent approached this division for urgent interim relief.
- [3] During March 2018 the Respondent on behalf of the minor child approached the Polokwane High Court on an urgent basis for an interdict against the Appellants. The Appellants had expelled the minor child from school on 7 February 2018 on the grounds that he had hair which was longer than 4(four) cm.
- [4] On 13 March 2018 Kganyago J granted an interim order in the following terms:
- "1. The Application is hereby enrolled and heard on ex parte as one of urgency in terms of Rule 6(12) (of the Uniform Rules of this Honourable Court and the forms and service provided for in the rules of this Honourable Court are hereby dispensed with.
2. The First and Second Respondents are hereby ordered to re-instate the Applicant with immediate effect from the date of the granting of this order.
3. The First and Second Respondents are hereby interdicted and or prohibited from discriminating, victimizing and harassing the Applicant

emotionally, physically and otherwise. (Own emphasis as this prayer will be dealt with later in this judgment.)

4. The First and Second Respondents are hereby ordered to pay the costs of this application on the scale as attorney and own client scale, the one paying the other to be absolved.
5. The interim order shall operate with immediate effect.
6. A Rule nisi is hereby granted calling upon Respondents to show cause on the 17th April 2018 to show cause as to why (t)his court order should not be made final. "
- [5] On 17 April 2018 prayers 2 and 3 of the interim order supra was by consent of the parties confirmed by Makgoba JP in the Polokwane High Court.
- [6] It can be accepted that the minor child is not a model learner. The minor child attracted penalty points and in terms of the Code of Conduct of the 1st Appellant, was supposed to sit detention on 3 August 2018, which the minor child learner did not attend in violation of the Code of Conduct.
- [7] A notice of a disciplinary hearing to be conducted on 15 August 2018 at 16h00 was issued to the learner. The learner only attended at approximately 16h33 and was unrepresented by either his guardian or any other representative.

The Disciplinary Committee was chaired by Mr. Van der Hoven. Van der Hoven, in the circumstances where the learner was unrepresented,

postponed the proceedings indefinitely in order to afford the learner an opportunity for representation.

- [8] On 27 August 2018, the learner was found in possession of so-called "space-cakes" which contained an illegal substance namely cannabis (dagga). The learner also consumed some of the "space-cakes" and sold the aforesaid "space-cakes" to other learners during school hours.
- [9] As a consequence, further disciplinary proceedings were instituted by the Disciplinary Committee of the School Governing Body of the First Appellant. The learner was charged with contravention of four school policies and regulations, to wit
 - (i) absence from detention on 3 August 2018, (ii) bringing "space-cakes" containing illegal substance to school on 27 August 2018, (iii) consuming "space- cakes" containing illegal substance at school on 27 August 2018, and (iv) trading with "space-cakes" containing an illegal substance at school on 27 August 2018.
- [10] Notice to attend the disciplinary hearing was given to the learner so that he could dispatch same to his mother and guardian, the Respondent in this appeal. The Respondent and the learner did not attend the disciplinary hearing.

Despite there not being any proof that the Respondent was served with the charge sheet and/or notice of disciplinary hearing, it is common cause that she did know about the hearing date as her counsel was informed, at her request, through an e-mail.

[11] A hearing was held on 28 September 2018 and a finding of guilty was made by the Disciplinary Committee on 9 October 2018. The School Governing Body accepted the recommendations made by the Disciplinary Committee and the sanction imposed was a suspension pending the decision of expulsion by the Head of the Department of the 3rd Respondent in the court a quo. It is this sanction imposed on the learner that sparked the bringing of yet another urgent application against the Appellants on 12 October 2018. The urgent application was brought ex parte. No notice was given to the Appellants.

[12] An interim order was granted by M.G. Phatudi J on 12 October 2018, which interim order was confirmed by Sikhwari AJ on 22 November

2018. Sikhwari AJ made the following order:-

"1. That the rule nisi granted on the 12 October 2018 is confirmed in the following terms:-

1.1 That the decision taken by first and second respondents to suspend the minor child, namely K[....] K[....], is hereby suspended pending the outcome of the decision of the Head of Department of the Limpopo's Department of Basic Education regarding the expulsion of the aforesaid minor child from school.

1.2 That pending the decision of the Head of Department of Limpopo Department of Basic Education regarding the expulsion or otherwise of K[....] K[....] from Hoerskool Piet Potgieter (first respondent,) the first and second respondents are hereby ordered to reinstate the learner, K[....] K[....], with immediate effect from the date of granting of the interim order.

1.3 That the first and second respondents are interdicted and or prohibited from discriminating, victimizing and harassing the applicant emotionally, physically and otherwise. (own emphasis)

1.4 That the first respondent is ordered to pay costs of this application, including costs of 12 October 2018 and costs for the points in limine, on party and party scale.

2. That the application for contempt of court is postponed sine die."

[13] It is paragraphs 1.3 and 1.4 supra of this order of Sikhwari AJ which are the subject of this Appeal. The Appellants seek an appeal against the order of the Court a quo to the effect that paragraphs 1.3 and 1.4 of the order be set aside and substituted with the following:

- a) Prayer 4 of the Notice of Motion is dismissed (Paragraph 1.3 of the order).
- b) The Applicant is ordered to pay the costs of the application on a scale as between attorney and client, which costs include the reserved costs of 12 October 2018.

[14] First, this court will deal with the appeal against paragraph 1.3 of the order of the court a quo dated 22 November 2018. In the Respondent's Founding Affidavit in support of the Respondent's ex parte urgent application the Respondent only dealt with allegations in respect of victimization of the minor child and furthermore only dealt with this allegation in paragraph 11.4 and 11.5 of her founding affidavit.

[15] In paragraph 11.4 of the founding affidavit the Respondent stated as follows:-

"Since the learner was re-instated through an order from this court, the learner was victimized from time to time until such time his attorneys of record wrote a letter to the attorneys who were representing the school and the principal. I humbly attach hereto a copy of such a letter dated 20/04/2018 and its proof of fax marked annexure "K3" and "K4".

[16] In Annexure "K3", a letter sent to the then attorneys of the Appellants by the Respondent's attorneys of record dated 20 April 2018, only the following allegation was made:-

"We have been informed by our client about the victimization he is facing at school by whites teachers to such an extent that he is restricted to use the toilets."

and furthermore:-

"We were informed that teachers are making public statements in front of everyone to say, "it does not mean that if you take our school to court you are untouchable."

[17] It should be noted that this letter was dated 20 April 2018 and was already sent on 21 April 2018 as per the fax report, Annexure "K4". No further letters were sent or allegations were made in respect of victimization, discrimination or harassment of the learner emotionally, physically and otherwise.

[18] It should be borne in mind that an order as per paragraph 1.3 of the order dated 22 November 2018 was already made on 17 April 2018 as highlighted here above.

[19] The Respondent failed to set out any new facts, and/or for that matter any facts whatsoever, as to what the purported victimization entailed. The Respondent alleges victimization but failed to prove any form of victimization. Furthermore the allegation was already made in a letter during April 2018, which does not render the relief claimed in this paragraph urgent.

[20] In terms of Section 1(1) of the Protection from Harassment Act, 17 of 2011 "harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to know-

- (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-
- (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or a related person;

[21] Furthermore, in terms of Section 1(1) of the Protection from Harassment Act:- "harm , means any mental, psychological, physical or economic harm"

[22] In terms of Section 3(2) of the Protection from Harassment Act a court must be satisfied that:-

"..there is prima facie evidence that-

(a) the respondent is engaging or has engaged in harassment;

(b) harm is being or may be suffered by the complainant or a related person as a result of that conduct if a protection order is not issued immediately; and

(c) the protection to be accorded by the interim protection order is likely not to be achieved if prior notice of the application is given to the respondent, the court must, notwithstanding the fact that the respondent has not been given notice of the proceedings referred to in subsection (1) issue an interim protection order against the respondent".

[23] This court is of the view that the court a quo erred in granting an interdict where the 1st and 2nd Respondents were interdicted from harassing the learner emotionally, physically and otherwise. The Respondent did not allege or prove any grounds for an interdict based on harassment. There is no prima facie evidence that the Appellants engaged in harassment, nor of any harm being suffered of which may be suffered by the Respondents as a result of the conduct of the Appellants if an interdict protecting the learner is not granted.

[24] Discrimination is defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as:-

"any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-

(a) Imposes burdens, obligations or disadvantage on; or

(b) Withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds."

The Respondent also failed to allege or prove any grounds of discrimination.

- [25] It is trite law that in motion proceedings an applicant must make out his or her case in the founding affidavit. (Moloi and Others v Vogers N.O. 2016 (3) SA 370 (CC))
- [26] It is further held that the court a quo could not grant paragraph 1.3 as the relief ordered in paragraph 1.3 was already ordered on 17 April 2018. No new facts or cause of action arose since the granting of the order on 17 April 2018. It is trite law that a court order stands for 30 (thirty) years and is valid and binding until set aside or varied. As a result, this court is of the view that the second order for exactly the same relief constitute *res judicata*, especially in the light thereof that the Respondent did not allege or prove any new cause of action.
- [27] It is in light of the above that this court is of the view that the appeal against paragraph 1.3 of the order of the court a quo should succeed.
- [28] This court now deals with the appeal against paragraph 1.4 of the order of the court a quo
- costs.
- [29] The award of costs is a matter wholly within the discretion of the Court but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at.
- [30] In leaving the judge with a discretion,
- "...the law contemplates that he should take into consideration the circumstances of each case, (Cronje v Petzer 1967 (2) SA 589 (A) 593; Baptista v Stadsraad van Welkom 1996 (3) SA 517 (O) 520, [1996] 1 All SA 378 (O)) carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties. And if he does this, and brings his unbiased Judgment to bear upon the matter and does not act capriciously or upon any wrong principle, nor know of no right on the part of a court of appeal to interfere with the honest exercise of his discretion. (Fripp v Gibbon & Co 1913 AD 354 at 363)"
- [31] The Appellants argue that the application brought before court has grave deficiencies. Firstly, one would be hard pressed to find any justification in the founding affidavit for the Respondent not to have given notice of the proceedings to the Appellants prior to the initial hearing and secondly that the application was predicated on an express allegation that the minor child had been expelled from school without charges and without having committed any misconduct, and without any hearing. This positive allegation was made in paragraph 12.2 of the founding affidavit. These allegations are met true: Both the Respondent and her Counsel knew of the date of hearing before the Disciplinary Committee on 28 September 2018.
- [32] The Respondent then further in paragraph 13.3 of the founding affidavit stated as follows:-

"This matter is urgent because my child was dismissed without any commission of any misconduct since 2016 as a scholar at the first Respondent and the worse part without any hearing."

- [33] It is common cause that both the Respondent and the learner were full- well aware of the charges levelled against the learner, the disciplinary proceedings which had pre-empted to expulsion, and in general had been kept abreast of these proceedings at all stages, whilst electing not to attend the proceedings.
- [34] The court a quo correctly found that the Respondent was in fact aware of these disciplinary proceedings in contradiction to the express allegations by the Respondent that no such proceedings were held prior to the expulsion of the learner.
- [35] Counsel for the Appellant correctly argues that failure to disclose salient information in ex parte applications is a serious matter.
- [36] The Court a quo erred in giving too little consideration to the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and as a result it is just and equitable for this court to interfere with the cost order granted by the court a quo.
- [37] Counsel for the Appellants referred to the judgment in *Recycling and Economic Development Initiative of South African NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at [46], [50], [90] and
- [148] where the majority of the court held:-

"The duty of utmost faith, and in particular the duty of full and fair disclosure in ex parte applications, was imposed, because

orders

granted without notice to affected parties were a departure from a fundamental principle of administration of justice, namely audi alteram partem. If material non-disclosure was established, a court should be astute to ensure that a plaintiff, who obtained an ex parte order without full disclosure, was deprived of any advantage they may have derived by such breach of duty. The Minister's skewed disclosures and non-disclosures were extensive. They related to matters that must have influenced the Judge's hearing the ex parte applications, the ex parte orders would not have been granted if fair disclosure had been made."

- [38] This court has also been referred to *National Director of Public Prosecutions v Sasson* 2002 (1) SA 419 (SCA) where the Supreme Court of Appeal held:-

"Where an order is sought ex parte it is well-established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or mala fide (Schlesinger v Schlesinger 1979 (4) SA 342 (VV) at 348E-B)"

- [39] The Appellants only launched an appeal against paragraphs 1.3 and 1.4 of the court a quo's order. As a result this court will not deal with any of the other grounds and arguments raised by the legal representatives for the parties.
- [40] In light of the above it can be said that the Respondents were still successful in their urgent application as paragraphs 1.1 and 1.2 of the court a quo's order stands.
- [41] Although the general rule is that the successful party should be awarded costs, the court can, in the exercise of its discretion, deprive a successful party of costs wholly or partly. The court may even order such party to pay the whole or a portion of the costs incurred by the unsuccessful party.
- [42] Although the Respondent was in essence successful in her application in the court a quo, the manner in which the application was brought and the material non-disclosure of facts, leaves much to be desired. This Court's displeasure should be marked by depriving the Respondent, as successful litigant, of her costs in the court a quo. In the circumstances, it will be just and equitable for each party to pay its own costs incurred in the application in the court a quo.

Order

[43] The following order is made:-

1. The appeal is upheld.
2. Paragraphs 1.3 and 1.4 of the order of Sikwari AJ is set aside and substituted with the following:-
 - 2.1 Prayer 4 of the notice of motion is dismissed.
 - 2.2 Each party to pay his/her own costs.
3. The Respondent is to pay the Appellants costs of Appeal in this Court.

M. NAUDE

ACTING JUDGE OF

THE HIGH COURT

I AGREE:

E.M. MAKGOBA

JUDGE PRESIDENT

LIMPOPO DIVISION

M.F. KGANYAGO

JUDGE OF THE

HIGH COURT

APPEARANCES:

HEARD ON:

14 AUGUST 2020

JUDGMENT

DELIVERED ON: 19 AUGUST 2020

For the Appellants:

Adv. S.G. Gouws

Instructed by:

De Bruin Oberholzer Attorneys

27 General Joubert Street, Polokwane

For the Respondent:

No Appearance

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