

SOUTH AFRICA / JUDGMENT

January N.O and Others v January (860/2019) [2020] ZANCHC 45 (10 July 2020) [2020] ZANCHC 45

COURT

Northern Cape High Court, Kimberley

BEFORE

N Mayet

CASE / FILE NUMBER

860/2019

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

Source record

Reportable: NO

Circulate

to Judges: NO

Circulate

to Magistrates: NO

Circulate

to Regional Magistrates: NO

IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Case

No: 860/2019

Heard

on: 12/06/2020

Delivered

on: 10/07/2020

In

the matter between: ERNEST
 JANUARY
 N.O
 First
 Applicant
 HILEL
 C JANUARY
 N.O
 Second
 Applicant
 ROBERT
 JANUARY
 N.O
 Third
 Applicant
 and
 ROLAND
 JANUARY
 Respondent

JUDGMENT

MAYET, AJ

Introduction

- [1] This is the extended return day of the rule nisi interdicting and restraining the Respondent from acting alternatively from holding out that he is acting for and on behalf of the JP January Trust.
- [2] The Applicants are brothers and trustees of the JP January Trust (“the Trust”). The Trust is the registered owner of five immovable properties situated in Kimberley (“the properties”). The Trust derives an income from the properties. The Respondent is the eldest brother responsible for the management of the properties.
- [3] It is apparent that the members of the January family are at loggerheads with each other and that a family feud exists. As a result, the Applicants lost control over the management of the properties. This prompted the Applicants to launch this application to interdict the Respondent from acting for and on behalf of the Trust and to compel him to account to the Trust.
- [4] On 13 December 2019, Dauds AJ granted the following order:
- “1. The relief sought in prayer 1 of the Notice of Motion is granted;
2. Prayer 1 of the Notice of Motion is to operate as a rule nisi returnable on 28 February 2020;

3. Adjudication of prayers 2 and 3 of the Notice of Motion is stayed pending finalisation of the Magistrates Court action brought by the Applicants against the Respondents;
4. The issue of costs is to be decided on the return day of the rule nisi, i.e. on 28 February 2020.”
- [5] The reasons for the order are set out in Dauds AJ judgment. On the return date the rule nisi was extended to 13 March 2020 and further extended to 12 June 2020.

Issues

- [6] The order granted by Dauds AJ is unusual. It is an interim interdict operating as a rule nisi, but not subject to the institution or finalization of proceedings or the filing of supplementary affidavits. At issue is whether the rule nisi should be confirmed or discharged.
- [7] During the course of argument, the Respondent referred to the findings in the Dauds AJ judgment in support of the contention that the rule nisi be discharged. Given the peculiar nature of the order, I raised mero motu the question as to the nature of the order granted by Dauds AJ and whether I was bound by the findings in the judgment. I convey my gratitude to both Advocate Aucamp and Advocate Eillert who appeared for the Applicant and the Respondent respectively, for the further supplementary heads of argument addressing this issue.
- [8] To this end, the Applicants are of the view that when considering whether to discharge or confirm the rule nisi this court is entitled to revisit the issues de novo. The Applicants rely on *Delta Motors Corporation (Pty) Ltd v Van der Merwe* 2002 JDR 0893 (T) in support of this contention. The Applicants submit that when the papers are seen in their entirety, a case has been made for a final interdict and that the rule nisi should be confirmed.
- [9] The Respondent’s stance is that this court is bound by the finding of Dauds AJ that the Applicants only have a prima facie right. The Respondent contends that Dauds AJ made a final decision and point to paragraph 7 of the judgment in support of this contention:

“[7] It is no doubt odd that an Applicant would distinctly make out a case in the founding papers in support of interim relief, but then address the Court on final relief. If it were final relief that the Applicant sought one would expect such a case to be made out in the founding papers. There may well be instances where the Court may see its way clear to making an order for final relief even though an Applicant had distinctly in his founding papers made out a case for interim relief. However, the Court does not believe that this is such a case.”
- [10] The Respondent distinguishes *Delta Motors supra* on the basis that in that matter an action was pending and on the return date the parties had filed further affidavits. In this application, since no action is pending and in the absence of supplementary affidavits, the Respondent submits that the order granted by Dauds is of final effect and the rule nisi must be discharged.

[11] There are two questions to be determined:

[11.1] whether the judgment and order of Dauds AJ is of final effect; if not

[11.2] whether the Applicants have made out a case for final relief.

[12] Against this background, I turn to consider.

Effect of Order

[13] At first blush, the order, interim interdict operating as a rule nisi appears to be final as it is not subject to the institution or finalization of any proceedings or the filing of supplementary affidavits.

However, when examined closely, this is more apparent than real.

[14] A rule nisi is by its very nature, interim, intended to govern a situation for a period, until it is discharged or confirmed. As the court stated in *Apleni v Minister of Law and Order* 1989(1) SA 195(A) “An interim interdict is a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.” The question whether an interdict is interim or final is not a matter of form but of substance.[1] In *Metlika Trading Ltd & Others v Commissioner of SARS* 2005 (3) SA 1 (SCA) the court held at paragraph [23] that: “In determining whether an order is final, it is important to bear in mind that “not merely the form of the order must be considered

but also, and predominantly its effect...”

[15] Turning again to the present matter, it is necessary to determine the effect of the order in relation to the test set out in *Cipla Agrimed v Merck Sharp Dohme Corporation* [2017] ZASCA 134 at paragraph 18 “Generally a ruling does not constitute a decision unless it has three attributes: it must be final in effect; it must be definitive of the rights of the parties; and it must have the effect of disposing of at least a substantial part of the relief claimed.”

Definitive of Rights

[16] Although further affidavits have not been filed, this court has the benefit of the full set of papers, heads of argument in the initial application, the judgment of Dauds AJ as well as supplementary and further supplementary heads of argument augmented by submissions from the contesting parties at the hearing. The conspectus of evidence before this court is certainly wider than that considered in the initial application.

[17] When one examines the written judgment of Dauds AJ together with the order, it is implicit that the Applicants have a *prima facie* right and the rule nisi affords the Respondent the opportunity to provide reasons why he should not be finally interdicted. In this context, the conclusion in paragraph 7 of the judgment when read with the order granted is indicative of an expression of Dauds AJ view but is not definitive of the rights of the parties.

Dispose of substantial portion

[18] There is no doubt that Dauds AJ envisioned that the order would operate as an interim measure subject to reconsideration on the return date. This does not amount to a refusal the final interdict and cannot be said to be tantamount to a dismissal of the application. The order did not dispose of a substantial portion of the issues. I am fortified in this conclusion by the fact that Dauds AJ did not dismiss the application outright.

Final Effect

[19] The Respondent's argument creates an anomaly. An order which is final in effect cannot be confirmed or discharged. A party aggrieved by such an order has to lodge an appeal against it. In the event that Dauds AJ made final and definitive decision which is not susceptible to alteration, then this court is functus officio and cannot confirm or discharge the rule nisi.

[20] The inherent nature of an interim interdict operating as a rule nisi is that it is both temporary and provisional until the issues are fully ventilated and argued on the return date. As the court held in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A), for a decision to be final, it must not be susceptible of alteration by the court of first instance.

[21] In this regard *Delta Motors supra* is applicable, buttressed by *Phakedi v Dr Kenneth Kaunda District Municipality and Another* (J1461/11) [2011] ZALCJHB 83; (2012) 33 ILJ 700 (LC) (22 September

2011) where the court held at paragraph 22 "...the court considering the matter on the return day has an independent discretion to exercise and is not bound by the finding of fact or law made by the court that granted the interim order."

[22] Similarly in *Polyoak (Pty) Ltd v Chemical Workers Industrial Union and Others*

(1999) 20 ILJ 392 (LC) at 394H–395B the court confirmed that on the return date of a rule nisi, all aspects raised by the parties are considered. Brassey AJ summarized the position in the following terms: "By the time the return day arrives, however, the dust is settled, and then it becomes necessary for a court to consider whether a case has been made out for the relief sought. That an interim order has been granted in no way prevents this process, for, being interlocutory, it serves to dispose of none of the issues that arise in the case. On the return day, in short, the court must be satisfied that a proper case has been made out for each facet of relief sought." [2]

[23] In *SAFCOR Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982

(3) SA 654 (A) at 676 C-E. the Court held that "Nor am I impressed by the argument that the Judge issuing the rule might be called upon to give a ruling on a matter of law which would be binding on the Judge who finally heard the matter, unless clearly wrong. Very often legal rulings are inextricably bound up with the facts placed before the Court. Obviously in such a case a ruling at the rule nisi stage could not bind the Court finally hearing the matter on a more broadly-based factual foundation. In some instances the ruling of law might transcend

the particular facts and be applicable both at the rule nisi and the final stages.”

[24] It is my considered view that as this court is in a position to consider the application in a wider ambit, the judgment and order are capable of alteration.

[25] To conclude this section, notwithstanding the sui generis nature of the order granted in this matter, it is not final in effect, definitive of the rights of the parties and it does not

dispose of a substantial part of the relief claimed. For this reason, it is not final and binding. As such, I am satisfied that I may proceed to consider the merits.

Merits

[26] In considering whether the rule nisi should be confirmed or discharged, it is essential to examine whether the Applicants comply with the three requirements for the grant of a final interdict: (1) a clear right; (2) an act of interference; and

(3) no other remedy.[3]

Clear Right

[27] The Applicants submit that the application makes out a case for relief that is both final (prayer 1) and interim (prayers 2 and 3). The Applicants right in prayer 1 is based on the ownership of the properties whereas the Applicants rights in prayers 2 and 3 are based on an oral agreement between the Applicants and the Respondent.

[28] It is important to appreciate the precise nature of the right the Applicants seek to protect in these proceedings. In terms of the Deed of Trust, the properties are trust assets. Clause 5.3 of the Deed of Trust provides that the trust assets vest in the Applicants in their official capacities as trustees in order that they may deal with the capital and income for the benefit of the beneficiaries.

[29] The Respondent admits that the Trust is the owner of the properties but contends that the Applicants have failed to establish a clear right in relation to the terms of the oral agreement between the Applicants and the Respondent. I disagree with the Respondent’s characterization of the Applicants right. The Applicants right in respect of prayer 1 stems from the Deed of Trust not the oral agreement.

[30] The powers of the Applicants are set out in clause 10 of the Deed of Trust which reads inter alia:

“The TRUSTEES shall have plenary powers to do all acts and execute all documents relevant to or to the carrying out of the objectives and the administration and distribution of the Trust, and, without derogating from the generality of the foregoing, the TRUSTEES shall be empowered:”

- [31] Clause 10.13 empowers the Applicants “to deal with the trust assets and to conduct the affairs of the trust as fully and effectually as they might or could do in respect of their individual and personal property.” In addition, clause 10.13 specifically authorizes the Applicants to make decisions in relation to the trust assets in their discretion with a view to maximizing income for the benefit of the beneficiaries.
- [32] The Applicants as trustees, have a duty to administer the Trust. The terms of the oral agreement cannot be used as a basis to prevent the Applicants from administering the Trust and exercising their authority to cancel or revoke any mandate given to the Respondent to act for and on behalf of the Trust in any capacity whatsoever including but not limited to acting as collecting and/or rental and/or property agent. The Deed of Trust is the basis for the Applicants clear right. As owner, the Trust is entitled to appoint or remove managing agents. This is a clear right.

Harm and no other remedy

- [33] The Applicants have the responsibility to act in the best interests of the beneficiaries of the Trust and have a duty to safeguard the interests of the Trust. The Respondent’s conduct has resulted in a situation where the Applicants are unable to comply with their duties set out in clause 6 of the Deed of Trust.
- [34] It appears that the family feud continues despite the interim interdict and the ongoing proceedings in the Magistrates Court. I am satisfied that there is reasonable apprehension of harm and the Applicants cannot be protected by any other remedy.
- [35] In *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) the court that once the Applicants have established the three requisite elements for the grant of a final interdict, the scope, if any, for refusing relief is limited and there is no general discretion to refuse relief.
- [36] The Applicants satisfy the requirements for final relief. As a result, the rule nisi is confirmed.

Costs

- [37] It is impossible not to share my regret that this family dispute should be settled in a court of law. Ordinarily costs follow the result. This general rule that costs are awarded to the successful party arises to indemnify the successful party for the expense to which he has been put through having been unjustly compelled to either initiate or defend litigation.[4] The general rule is subject to the overriding principle that the court has a judicial discretion in awarding costs.[5]
- [38] The Applicants submit that each party pay its own costs. The Respondent is of the view that costs follow the result.

Order

1. THE RULE NISI IS CONFIRMED.

2. EACH PARTY TO PAY OWN COSTS.

N. MAYET, AJ

NORTHERN CAPE DIVISION

For the Applicant:

Adv. S Aucamp

For the Respondent:

Adv. A Eillert

[1] First Rand Bank Limited t/a First National Bank v Makaleng [2016] ZASCA 169; Zuurbekom Ltd v Union Corporation Ltd 1947 (1) SA 514 (A)

[2]

This approach was followed by Moshoana AJ in Southernwind Shipyard (Pty) Ltd v NUMSA and Others [2009] 4 BLLR 390 (LC).

[3]

Setlogelo v Setlogelo 1914 AD 221

[4]

Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488

[5]

Griffiths v Mutual&Federal Insurance Co Ltd

[1993] ZASCA 121; 1994 (1) SA 535 (A)

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/ZANCHC/2020/45.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/january-no-and-others-v-january-unknown-topic-anchc-2020>

Prepared on 10 October 2026 · Esheria