

SOUTH AFRICA / JUDGMENT

Jesse v Minister of Justice and Constitutional Development NO and Others (15349/2010)

[2011] ZAKZDHC 73 (18 October 2011)

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COURT

Kwazulu-Natal High Court, Durban

BEFORE

Steyn

CASE / FILE NUMBER

15349/2010

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 15349/2010

In the matter between

David Israel Ben JesseApplicant

and

The Minister of Justice and

Constitutional Development N.O.First Respondent

Nedbank LimitedSecond Respondent

General Council of the Bar of South AfricaThird Respondent

JUDGMENT

Delivered on: 18 October 2011

STEYN J

[1] On 23 June 2011 the applicant, Mr Jesse, sought the following order:

“(a) The current High Court ‘practice’ of a litigant bringing a ‘review’ by way of a uniform rule 49 appeal procedure is struck down and declared invalid, as is all common law relating to this procedure; and,

It is declared that a litigant may take the procedure/conduct employed by a single judge of the High Court of South Africa on 'review' before 2 or more judges of the same division; (a full court); and

Until new legislation/rules/procedure are drawn up by the 1st respondent in this regard, the procedure described in uniform rule 53 of the High Court of South Africa will apply thereto; and

The 1st respondent is ordered to take all necessary steps to formulate and implement rules and procedure for:

the review of a single judge of the High Court by 2 or more judges of the same division; (a full court)(and all superior courts thereafter;) and,

a full and complete set of rules and regulations for the peremptory procedure to be applied in 'fundamental rights' applications in the High Court of South Africa;

such rules aforesaid are to include the full and complete ethics required of judges; advocates and lawyers in motion proceedings.

It is declared that private persons are equally bound by the Bill of Rights and that horizontal application applies without exception and in toto and (sic), the application of the Bill of Rights is to be applied in all material cases.

Alternatively:

(*Only if the above application fails)

In terms of section 9: Supreme Court Act 59, of 1959:

(f) (i) the 'review' proceedings raised by Dr and Mrs

Jesse in *Jesse v Nedbank H.C. 13776/08* are to be heard by a 'full court' of the NPD; (in Durban; or Pietermaritzburg;)

(ii) The registrar of the High Court in Durban is to

prepare the relevant records in the requisite numbers and deliver a copy thereof to the parties and transfer the relevant record(s) to the registrar of the NPD; and

(iii) The registrar of the High Court in Durban is to

thereafter arrange a set down date with the registrar of the NPD and communicate the same to Dr and Mrs Jesse at fax 0865100356 and Nedbank's attorney Mr Bester at the fax 011-2861264.

(g) alternative and or further relief in the discretion of the Court.

(h) No order as to costs."

- [2] Mr Jesse appeared in person when the matter was argued. Mr Smith appeared on behalf of the second respondent and Mr Saks on behalf of the third respondent. In order to understand the application it is necessary to consider the background of the application, which forms the prelude to the present application.

The applicant's wife, Sharon Margaret Jesse ("the applicant's wife"), launched an application out of this court under case number 13776/2008 seeking inter alia the following relief before Mokgohloa J:

"1. that the second respondent be interdicted from removing anything from the premises situate at 25 Kirriemuir Road, for the duration of the lease agreement ("the leased premises");

2. that a contract was entered into between the applicant's wife and the second respondent suspending the operations of the lease agreement as entered into between the applicant's wife and Nomuzo Faith Nyanzi, pending the resale of the leased premises to a third party;
3. that the second respondent be ordered to pay damages to the applicant's wife in an amount of R250 000.00 for contumelia as allegedly suffered by her;
4. that the second respondent be ordered to pay the costs of the application."

The court dismissed the aforesaid application on 5 May 2009. The applicant's wife filed an application for leave to appeal against the order granted by Mokgohloa J. The application was not brought in time and was abandoned. The applicant then lodged an application for review of the order.

The second respondent opposed the application to review the order on the basis that an order granted by a Judge of the High Court cannot be reviewed, and that there is no procedure other than appeal as provided for in terms of the rules of this honourable court whereby an order of the court or its proceedings may be overturned.

The applicant thereafter launched an application for direct access to the Constitutional Court to have the order set aside. The aforesaid application was dismissed by the Constitutional Court on the basis that the applicant had not obtained the appropriate relief. The current application follows from this unsuccessful application to the Constitutional Court.

- [3] It should be evident from the aforesaid that this matter has a long history that has its genesis in the application before Mokgohloa J. The applicant's wife, and not the applicant, was a party to the matter before Mokgohloa J.
- [4] It was submitted by the respondents¹ that Mr Jesse's application is flawed on a number of levels:

First, that the applicant lacks the necessary locus standi to lodge this application;

Second, that the order of Mokgohloa J is not open to review but to appeal; and

Third, that no constitutional right had been infringed.

[5] I will at first consider Rule 49 of the Uniform Rules and what it provides. It reads as follows:

“49 Civil Appeals from the High Court

- (1) (a) When leave to appeal is required, it may on a statement of the grounds therefor be requested at the time of the judgment or order.
- (b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefore shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.
- (c) When in giving an order the court declares that the reasons for the order will be furnished to any of the parties on application, such application shall be delivered within ten days after the date of the order.
- (d) The application mentioned in paragraph (b) above shall be set down on a date arranged by the registrar who shall give written notice thereof to the parties.
- (e) Such application shall be heard by the judge who presided at the trial or, if he is not available, by another judge of the division of which the said judge, when he so presided, was a member.
- (2) If leave to appeal to the full court is granted the notice of appeal shall be delivered to all the parties within twenty days after the date upon which leave was granted or within such longer period as may upon good cause shown be permitted.
- (3) The notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against, it shall state which part and shall further specify the finding of fact and/or ruling of law appealed against and the grounds upon which the appeal is founded.
- (4) A notice of cross-appeal shall be delivered within ten days after delivery of the notice of appeal or within such longer period as may upon good cause shown be permitted and the provisions of these Rules with regard to appeals shall mutatis mutandis apply to cross-appeals.
- (5) In the case of an appeal against the judgment or order of the court of the Witwatersrand Local Division, the judge president of the Transvaal Provincial Division shall determine whether the appeal should be heard by the full court of the said local division. As soon as possible after receipt of the notice of appeal or cross-appeal, if any, the registrar of the local division shall ascertain from the judge president his direction in the particular case. If the judge president has directed that the appeal be heard by the full court of the Witwatersrand

Local Division, the said registrar shall immediately inform the parties of the direction. If not so directed by the judge president, the said registrar shall inform the registrar of the provincial division as well as the parties accordingly.

(6) (a) Within sixty days after delivery of a notice of

appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.

(b) The court to which the appeal is made may, on application of the appellant or cross-appellant, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.

(7) (a) At the same time as the application for a date

for the hearing of an appeal in terms of subrule (6)(a) of this rule the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. The registrar shall further be provided with a complete index and copies of all papers, documents and exhibits in the case, except formal and immaterial documents: Provided that such omissions shall be referred to in the said index. If the necessary copies of the record are not ready at that stage, the registrar may accept an application for a date of hearing without the necessary copies if –

the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late; or

failing such agreement, the appellant delivers an application together with an affidavit in which the reasons for his omission to hand in the copies of the record in time are set out and in which is indicated that an application for condonation of the omission will be made at the hearing of the appeal.

The two copies of the record to be served on

the respondent shall be served at the same time as the filing of the aforementioned three copies with the registrar.

After delivery of the copies of the record, the

registrar of the court that is to hear the appeal or cross-appeal shall assign a date for the hearing of the appeal or for the application for condonation and appeal, as the case may be, and shall set the appeal down for hearing on the said date and shall give the parties at least twenty days' notice in writing of the date so assigned.

If the party who applied for a date for the

hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the registrar of the application for a date of hearing in terms of subrule (7) (a) the other party may approach the court for an order that the application has lapsed.

(8) (a) Copies referred to in subrule (7) shall be

clearly typed on A4 standard paper in double spacing, paginated and bound and in addition every tenth line on every page shall be numbered.

(b) The left side of each page shall be provided

with a margin of at least 35 mm that shall be left clear, except in the case of exhibits that are duplicated by photoprinting, where it is impossible to obtain a margin with the said dimensions. Where the margin of the said exhibits is so small that parts of the documents will be obscured by binding, such documents shall be mounted on sheets of A4 paper and folded back to ensure that the prescribed margin is provided.

(9) By consent of the parties, exhibits and annexures having no bearing on the point at issue in the appeal and immaterial portions of lengthy documents may be omitted. Such consent, setting out what documents or parts thereof have been omitted, shall be signed by the parties and shall be included in the record on appeal. The court hearing the appeal may order that the whole of the record be placed before it.

(10) When the decision of an appeal turns exclusively on a point of law, the parties may agree to submit such appeal to the court in the form of a special case, in which event copies shall be submitted of only such portions of the record as may be necessary for a proper decision of the appeal: Provided that the court hearing the appeal may require that the whole of the record of the case be placed before it.

(11) Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.

- (12) If the order referred to in subrule (11) is carried into execution by order of the court the party requesting such execution shall, unless the court otherwise orders, before such execution enter into such security as the parties may agree or the registrar may decide for the restitution of any sum obtained upon such execution. The registrar's decision shall be final.
- (13) (a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.
- (b) In the event of fail by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be.
- (14) The provisions of subrules
- (12) and (13) shall not be applicable to the Government of the Republic of South Africa or any provincial administration.
- (15) Not later than fifteen days before the appeal is heard the appellant shall deliver a concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal, as well as a list of the authorities to be tendered in support of each point, and not later than ten days before the appeal is heard the respondent shall deliver a similar statement. Three additional copies shall in each case be filed with the registrar.
- (16) A notice of appeal in terms of section 76 of the Patents Act, 1978 (ACT 57 OF 1978), or section 63 of the Trade Marks Act, 1963 (*Act 62 of 1963), may be served on the patent agent referred to in the Patents Act, 1978, or the agent referred to in section 8 of the Trade Marks Act, 1963, who represented the respondent in the proceedings in respect of which an appeal is noted.
- (17) In the case of appeals to the full court in terms of the provisions of a statute in which the procedure to be followed is laid down, this rule is applicable as far as provision is made for matters not regulated by the statute.
- (18) Notwithstanding the provisions of this rule the judge president may, in consultation with the parties concerned, direct that a contemplated appeal be dealt with as an urgent matter and order that it be disposed of, and the appeal be prosecuted, at such time and in such manner as to him seems meet."

The applicant argued that Rule 49(11) does not stipulate that if a review is to be made it has to be brought under Rule 53.

- [6] I fail to understand this submission since the Rule so clearly regulates civil appeals and not reviews. A basic knowledge of procedural law would have guided a person to another rule that regulates reviews. This is premised on the understanding that there is a distinction to be made between an appeal and a review. This distinction is important since it decisively determines which of the two procedures find application. In *SA Jewish Board of Deputies v Sutherland NO and Others*² Malan J, as he then was, stated at para 25:

“[A] review is not an appeal. In Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003

- (6) SA 407 (SCA) Shutz JA remarked at 4321F-G para [52]:

‘During the course of argument for Phambili we were frequently told that something that the Chief Director had done was “wrong”.

This is the language of appeal, not review. I do not think that the word was misused, because time and again it appears that what is really under attack is the substance of the decision, not the procedure by means of which it was arrived at. That is not our job.’ ”

- [7] Leave to appeal remains a jurisdictional fact and needs to be obtained in respect of a judgment or order.³ Mr Jesse, rather than utilising the rule to challenge the order of Mokgohloa J and prosecute the appeal, opted for a procedure not provided for in either the Uniform Rules of Court or in the Supreme Court Act.⁴ The Supreme Court of Appeal, per Schutz JA, succinctly defined how a judicial error should be corrected and at the same time definitively stated the purpose of a review in *Pretoria Portland Cement Co Ltd v Competition Commission*:⁵

“[35] Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality, at the administration of ‘the law which has been passed by the Legislature’ as Bell J put it on the same page of Meintjies’s case. And throughout it has been the High Court, and only the High Court, acting through its Judges, that has enjoyed the general, inherent jurisdiction to entertain reviews. It is not itself the subject of review – see the cases cited in para [29]. There are other means, quite sufficient means, to which I shall come, by which the judgment of a Judge may be corrected.

- [36] The primary means of correction of judicial error is appeal to a higher Court, which is appropriate where a Judge has reached a final decision. But if an ex parte order has been granted, that may be corrected by another single Judge through the ordinary processes of the Court. (I shall explain the processes relevant to this case below.) Once this is so all need for the joinder of a Judge falls away. In an appeal or a rehearing of a matter in which an ex parte order has been made, grounds which before other tribunals may be raised as review grounds may equally be raised in the appeal or rehearing. But that does not make such proceeding a review.”⁶

(My emphasis)

- [8] This brings me to the founding affidavit filed on behalf of the applicant. Both the founding affidavit of the applicant as well as the written heads submitted by him reveals a plethora of authorities, which are in main neither relevant nor helpful. In my view it is in excess, and unnecessarily prolonged the proceedings. I do not intend dealing with all the authorities cited by the applicant since the majority of cases are quoted out of context and are simply not relevant to the proceedings before me.

Recently, the Court of Appeal in England commented on such excessive citation in *R v Erskine; R v Williams*⁷ as follows:

“Undoubtedly the problem of excessive citation of authority grew with the ready availability on the internet of most High Court and all Court of Appeal decisions. In Michaels and another v Taylor Woodrow Development Limited and others [2001] Ch 493, Laddie J pointed out that

*‘. . . the recent growth of computerised databases has made it an even more frequent and extensive occurrence. There are now significantly more judges, more cases and more databases than there were even two decades ago. Until comparatively recently, this was not a substantial problem . . . now there is no pre-selection. Large numbers of decisions, good and bad, reserved and unreserved, can be accessed . . . it seems to me that the common law system, which places such reliance on judicial authority, stands the risk of being swamped by a torrent of material . . .’*⁸

In my view authorities are useful if they establish new principles or are relevant in supporting a specific proposition. The founding affidavit of the applicant, on another level, leaves much to be desired, in that it does not set out the facts relied upon simply and clearly,⁹ but contains argumentative submissions.

- [9] Mr Jesse contended that rules and regulations should be easily discernible and should not require of a layperson to research the common law or additional legislation in order to know the process. He argued that in order for a layperson to comply with the uniform rules of court the procedure must be set out under the uniform rules. He further submitted that it is for this very reason that the Minister did not oppose the application. In his view the Minister must have been in agreement otherwise the Minister would have opposed the application. I am not persuaded by this argument. At the commencement of the opposed motion being argued, it became clear that the third respondent was not given proper notice. It appeared from the submissions made by Mr Jesse that he elected to inform the first and third respondent via e-mail. Whether such ‘notice’ was received by the relevant party is questionable in light of what happened to the third respondent. I am merely stating this since the applicant argued that the first respondent’s failure to file any opposing papers should be seen as an admission.

The applicant also relied on section 38 of the Constitution of the Republic of South Africa Act, 1996¹⁰ as giving him the necessary locus standi to lodge the application, since the application affected his family’s constitutional rights.

[10] Mr Smith, acting on behalf of the second respondent, submitted that there is an appeal procedure, provided for in terms of the rules, which grants a party access to court, so there could be no challenge on the basis that the applicant was deprived of a process to access justice. The mere fact that the applicant misread a rule does not result in the rule being unconstitutional.

[11] In dealing with the first issue of locus standi, I am of the view that it is doubtful, given the circumstances of the application, that the applicant has the necessary locus. The issue was however not pertinently raised, until Mr Saks, acting on behalf of the third respondent raised it in his oral submissions.

As a general rule the requirements of locus standi in judicio remain as follows:

“(a) the plaintiff/applicant for relief must have an adequate

interest in the subject-matter of the litigation, which is not a technical concept but is usually described as a direct interest in the relief sought;

(b) the interest must not be too far removed;

the interest must be actual, not abstract or academic;

the interest must be a current interest and not a

hypothetical one.”¹¹

Having duly considered the fact that the applicant acted as a layperson, and assumed locus and since no proper exception was raised I decided to proceed with the matter in light of the lateness in challenging the applicant's

locus. I am, however, not convinced that the applicant has made out a case for locus in his founding affidavit.

[12] In dealing with the second issue, it should be evident from the rules and authorities cited above that a judgment of a judge of the High Court cannot be reviewed. If a party wishes to have the judgment of the court set aside then it is entitled to challenge the judgment by way of appeal.

I am not persuaded that the decision of Mokgohloa J is open to review.

[13] This brings me to the third issue to decide and that is whether Rule 49 infringes on any constitutional right or rights of the applicant. In my view Mr Jesse is faced with an insurmountable hurdle and that is that Rule 49 does not deprive him of a process to challenge the judgment of Mokgohloa J. Should the rule have limited Mr Jesse's right to approach another court (i.e. his right to access to courts¹²) then I would have been persuaded that a constitutional analysis should have followed.

There is, however, no basis for a constitutional challenge given the circumstances of this case. The Uniform Rules clearly provide for a procedure to challenge a judgment of a judge of the High Court. Accordingly, there has been no serious challenge that the rule does not comply with section 171 of the Constitution. I agree with the submissions made on behalf of the second and third respondent, that Mr Jesse's attack on Rule 49 is ill-founded.

[14] There is also no basis to grant any relief as is alternatively claimed by the applicant.

Costs

[15] On the papers before me, I cannot find anything sufficiently cogent to support a finding to not award costs against the applicant. The conduct displayed, in my view, shows a disregard of the court process, if not an abuse. I am not persuaded that the applicant could have been mistaken in lodging this application. I am therefore satisfied that the circumstances of this application justify a cost order against the applicant.

Order

[16] The applicant's application is dismissed with costs, such costs not to include any costs of the third respondent who appeared pro amico for the first respondent.

Steyn, J

Date of Hearing: 23 June 2011

Date of Judgment: 18 October 2011

Counsel for the applicant: In person

Instructed by: In person

Counsel for the first respondent: No appearance

Instructed by: No appearance

Counsel for the second respondent: Adv HJ Smith

Instructed by: Cliffe Dekker Hofmeyer Inc

c/o King-Essack & Associates Inc

Counsel for the third respondent: Adv DJ Saks

Instructed by: Nichols Attorneys

1Second and Third respondent.

2 2004

(4) SA 368 (W).

3See Harms 'Civil Procedure in the Supreme Court' Butterworths (Service issue 43) at B49.4.

3See Harms 'Civil Procedure in the Supreme Court' Butterworths (Service issue 43) at B49.4.

4Act 59 of 1959.

52003

(2) SA 385 (SCA).

6At page 402B-E.

7(2009) EWCA Crim 1425 at para 71.

8At para 71.

9See Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 78I-J.

10Section 38 of the Constitution provides as follows: "38. Enforcement of rights. – Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are – anyone acting in their own interest;

anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members."

10Section 38 of the Constitution provides as follows:

"38. Enforcement of rights. – Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

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anyone acting as a member of, or in the interest of, a group or class of persons;

anyone acting in the public interest; and

an association acting in the interest of its members."

11See Erasmus 'Superior Court Practice' Rev 36 at B1-126A.

12See section 34 of the Constitution, 1996.

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