

SOUTH AFRICA / JUDGMENT

K v S and Another (1609/04) [2005] ZANWHC 15 (17 February 2005)

[2005] ZANWHC 15

COURT

North West High Court, Mafikeng

BEFORE

L T Sibeko

CASE / FILE NUMBER

1609/04

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IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO.: 1609/04

In the matter between:

K K

APPLICANT

AND

THE STATE 1st RESPONDENT

Ms G. I. 2nd RESPONDENT

REASONS

SIBEKO AJ:

1. This is an unopposed application in which the Applicant seeks an order, inter alia:

“1. To rescind the setting aside of the proceedings for the rescission of an interdict before Mr H Monageng.

2. To set aside an interdict granted against the Applicant by Magistrate Court Molopo.”(sic)

2. At the hearing of the matter, the Applicant appeared without any legal assistance. It would also appear from the manner in which the papers on application have been prepared, that the Applicant drafted the papers himself. After having heard the Applicant, and after having explained to the Applicant what was expected of him in application procedures as set out in the Uniform Rules of this Court, I dismissed the application, and undertook to provide full reasons for my decision. These are the reasons.
3. A brief sketch of the facts may provide a useful background to these

reasons.

4. On or about 17 July 1998, a certain G. I., cited in the papers as the Second Respondent and hereinafter referred to as such, applied for and was granted an interdict against the Applicant, in terms of the provisions of the Prevention of Family Violence Act No. 133 of 1993 (hereinafter referred to as “the protection order”). In terms of the protection order, granted by the Molopo Magistrate’s Court the Applicant was interdicted from:
 - 4.1 assaulting or threatening to kill the Second Respondent or a child living with the Second Respondent; and
 - 4.2 entering the place where the Second Respondent was resident, in particular, flat No. [...], Unit 7, Mmabatho.
5. It would appear that the Applicant and the Second Respondent had a love affair out of which a minor child G. [the minor child] was born. This love affair came to an end sometime before the protection order was granted.
6. On or about 20 November 1998, the Applicant brought an application to the Molopo Magistrate’s Court, under case number 37/98 to have the protection order set aside [primarily, it would appear from the affidavit filed in that Court in support of that application, to enable him to exercise his “right of access” to the minor child]. That application was opposed by the Second Respondent.
7. It appears that on or about 29 June 1999, the aforesaid application came before Mr H. Monageng, an additional magistrate in the district of Molopo. Mr H. Monageng heard evidence in chief of the Applicant as well as cross-examination of the Applicant by the Second Respondent. The matter was then postponed “due to lateness”. It consequently became part-heard.
8. On 11 November 1999, both parties appeared before Mr Monageng when the Applicant indicated that he had been detained at [...] Hospital for treatment; that he had to go back to the hospital; and was consequently not fit to proceed with the application on that day. The matter was postponed sine die.

9. At some stage after the postponement of the application in the Magistrate's Court sine die, Mr Monageng was transferred to Brits Magisterial district, and it became difficult to have the matter set down in the district of Molopo for hearing of further

evidence, as it was difficult to arrange a date when all the parties including Mr Monageng were available at the same time.

Furthermore, during December 2001, Mr Monageng was suspended from service and subsequently had criminal charges levelled against him. It thus became apparent that the application instituted by the Applicant in the Molopo Magistrate's Court could not be finalised by Mr Monageng within a reasonable time or at all.

10. Gura J, then Cluster Head: Judiciary of the North West, and presently a Judge of this Court, intervened in the Applicant's plight. During or about October 2002, and as a result of Gura J's intervention, agreement was reached with the Applicant that the part-heard proceedings before Mr Monageng would be referred to this Court for purposes of being "reviewed and set aside", so that the matter could be started de novo. In a letter written by the Applicant to the Director-General (I assume that is a reference to the Director-General of the Department of Justice and Constitutional Development) dated 11 November 2002, and annexed to the founding affidavit as annexure "Q", the following is, inter alia, recorded:

"Discussion I held on 17 October 2002 with the office of the North West Cluster head of judiciary and yours on 8 November refer.

Allow me to express my sincere gratitude to your kind office and that of the cluster head of judiciary for the commitment shown in seeing this case resolved lawfully and procedurally.

I do accept the cluster head's recommendation of presenting the case before a Judge to be set aside, to enable the matter to be heard a new by a new magistrate." (My underlining for emphasis).

11. The matter was then referred to this Court under case number CA 44/2003 for determination. After a careful and thorough

consideration of the matter, on 3 April 2003, Leeuw J and Pistor AJ granted the following order:

"The proceedings for the rescission of an interdict before Mr H. Monageng be and are hereby set aside. The application for rescission be referred back to the Magistrate Molopo to be heard de novo by another magistrate."

The proceedings in the Magistrate's Court Molopo have not resumed, despite the Order referred to above. The reason(s) why these proceedings have not resumed are not easily and readily ascertainable from the founding affidavit. It is this order that the Applicant seeks to rescind in these proceedings.

12. What needs to be pointed out at the outset is that the task of this Court, based upon the judicial oath of office, is to do justice according to the law. That means ascertaining the facts according to the rules of the law of evidence, and then duly applying the rules of law to the facts so ascertained. If a party to proceedings does not present the facts that support its case in an orderly and intelligible manner so that their significance can quickly be grasped, and thereby adopts a disorderly and unintelligible presentation that characterise the present case, justice may yield results that seem to be unfair.

13. Rule 6(1) of the Uniform Rules of this Court provides that:

“Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.”

In *Shakot Investments v Town Council Borough of Stanger* 1976 (2) SA 701 (D& CLD) at 704 E-G, Miller J stated as follows as to what facts ought to be contained in a founding affidavit:

“The practice of the Courts ... is that an applicant must, generally speaking, stand or fall by his petition (or founding affidavit) and the facts alleged therein.

...

In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would at the same time, sufficiently inform the other party of the case he is required to meet.”

In *Titty’s Bar & Bottle Store v A.B.C Garage and Others* 1974(4) SA 362 (T) at 369B, Viljoen J stated the rule thus:

“It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant’s founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which is then sought to be covered in flesh in the replying affidavit.”.

13. In the present case, the Applicant has not made out even a skeleton case. He has set out a sequence of events that does not begin to support the relief he seeks, insofar as the sequence of events is intended to support prayer 1 of the notice of motion. In fact when regard is had to the contents of annexure “Q”, read with annexure “Z” of the founding affidavit, one cannot begin to understand what the facts set out in the founding affidavit seek to establish. They certainly do not attempt to support the relief sought in prayer 1, or justify the grant of that relief.

14. The order granted by this Court in favour of the Applicant, and, at his instance, is a final order. This Court has no authority to correct, alter or supplement it, save on certain narrow grounds set out in Rule 42 (1) of the Uniform Rules of this Court, or in terms of the common law (*West Rand Estates, Ltd v New Zealand Insurance Co. Ltd* 1926 AD 173 at 176; 186-187; *Fire Stone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) at 306 F-307H; *Seatle v Protea Assurance Co. Ltd* 1984 (2) SA 537 (C) at 542H – 543A).
15. The Applicant has not made out a case or set out sufficient facts in his founding affidavit which would justify the relief set out in prayers 1 and 2 of the notice of motion. The application could, consequently be dismissed on this basis alone.
16. There is another basis upon which the application was dismissed. The relief sought by the Applicant in prayer 1 of the notice of motion is an attempt, on his part, to resile from the election he made, as is fully described in his letter to the Director General (of the Department of Justice and Constitutional Development) dated 11 November 2002, annexure “Q” to the founding affidavit. In that letter he agreed to the resolution of the problem he was experiencing by referral of the part-heard proceedings before Mr H Monageng to this Court to be set aside, and be referred back to the Magistrate Molopo to be heard de novo by another Magistrate. By agreeing to that course of conduct, the Applicant made an election to which he ought to be bound.
17. The Applicant’s conduct in seeking the relief as is set out in prayer 1 of the notice of motion, without a proper basis being set out therefor, also constitutes a violation of a recognised and fundamental principle of our law that a contracting party who has once approbated cannot thereafter reprobate (*Administrator, Orange Free State v Mokopanele* [1990] ZASCA 69; 1990 (3) SA 780(AD) at 787G).
18. With regard to prayer 2 of the notice of motion, no facts have been placed before this Court to justify the relief sought. It has been held that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. A party to motion proceedings is therefore required to define the relevant issues and, if the onus regarding such issue rests upon it, to set out the evidence upon which it relies to discharge such onus (See. e.g *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South African and Others* 1999 (2) SA 279 (T) at 323F-325C). The Applicant has not, in his founding affidavit set out facts on the basis of which he could be said to even have attempted to comply with this principle of our law.
19. It is on the basis of the reasons set out above that the application was dismissed.

L T SIBEKO

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING

: 10 FEBRUARY 2005

DATE OF REASONS

: 17 FEBRUARY 2005

APPEARANCE

FOR THE APPLICANT

: IN PERSON

FOR THE 1ST RESPONDENT : NO APPEARANCE

FOR THE 2ND RESPONDENT : MR KGOMO

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Prepared on 14 October 2026 · Esheria