

SOUTH AFRICA / JUDGMENT

Kungwini Estate (Pty) Ltd and Another v Kungwini Manor Homeowners' Association NPC (A162/2016, 67684/2015) [2017] ZAGPPHC 374 (9 June 2017) [2017] ZAGPPHC 374

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher, Murphy, Crutchfield

CASE / FILE NUMBER

A162/2016, 67684/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

no: A162/2016

GDP

Case no: 67684/2015

In

the matter between:

KUNGWINI
ESTATE
(PTY)LTD First
Appellant
(Registration
number
1973/000527/07) (First
Respondent a quo)
JOHANN
WALTERS Second
Appellant
(Second Respondent a quo)
And
KUNGWINI
MANOR HOMEOWNERS'
ASSOCIATION
NPC

Respondent
(Applicant a
quo)

JUDGMENT

NEUKIRCHER AJ:

1. Section 34 of the Constitution[1] states

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

2. Thus, entrenched in our Constitution is the observance of the fairness of proceedings before our courts which, it is trite, should be meticulously observed and protected whether the proceedings are of a civil or a criminal nature, failing which the judicial proceedings became tainted as the right to a fair hearing before a court lies at the heart of the rule of law. [2]

3. It is on this principle that this appeal turns.

4. On 24 August 2015 the present respondent launched an urgent application against the first and second appellants in which it sought a declaration of contempt of court against both and a committal to prison in respect of second appellant for 60 days.

5. The matter was set down for 1 September 2015 when it was heard in the court for urgent applications on that date.

6. The second appellant appeared both in person and to represent the first appellant. Of course, the latter issue is problematic in itself given the prevailing legal prohibitions[3] but this was never pointed out or dealt with at all which, in effect, left the first appellant unrepresented at the hearing and

without a voice.

7. At the hearing a quo, the second appellant stated that the appellants had not filed answering affidavits and that he had approached the Legal Resource Council to ask them for advice. They had, in turn, advised him "...to appear today in person here, to explain to the court that I cannot afford currently, legal representation and then the court will decide how the matter will..."

8. The second appellant then, on a number of occasions, specifically informed the court that he wanted legal representation.

9. It is also important to note that, as to the issue of contempt, this he denies which, in effect, puts the allegations of the respondent in dispute and creates a dispute of fact on the issue of contempt.
10. There can be no doubt that part and parcel of the right to a fair hearing includes the right to be represented, if the party so chooses.[4]

"I accept Mr Trengove's submission that, even though there be no specific mention of the right to legal representation in civil cases, the right of access to court and of

having justiciable disputes settled by courts would be rendered entirely nugatory if, in respect of civil proceedings, it were to be held that there is no constitutional right to legal representation. As submitted by Mr Trengove, even the best educated

lay people need the assistance of professional legal representation to exercise their right to access to court in a meaningful way. This applies with more force in respect of the vast numbers of uneducated and illiterate people of this country. Though there be no specific mention of the right to legal representation in respect of civil matters, in my view the conclusion I have reached is not too long a jump. It accords with an interpretation that views the Constitution for what it is - a living document"[5]

11. The appellants were not afforded this courtesy and were not given an opportunity to seek representation to place their case properly

before court because, as the second appellant so aptly put it:

"...I do not know how to do it myself."

12. In my view that should have been the end of the matter. It should have been postponed with directions as to the time periods for the filing of further affidavits. Instead what followed was the grant of the application and consequently a complete miscarriage of justice which, given the principles set out in *Fakie NO v CCII Systems (Pty)Ltd* [6], on the application as it stood with the appellants' denial, could not have withstood proper scrutiny at that stage.
13. Thus it is clear that the order granted a quo must be set aside.
14. However, the appellants seek not only an order that this appeal succeeds, they seek an order substituting the order a quo with one in which the application is dismissed with costs.
15. Paragraph 4 of the order granted by Ledwaba DJP, the underlying order in respect of which the appellants were allegedly contemptuous, provides as follows:

"That the first defendant is to connect Kungwini Country Estate township to the Eskom Power grid at its own cost."

16. Bearing in mind that, at the time the first appellant was already supplying the respondent with electricity, this order would make no sense and it would explain why the appellants have all along contended that they have always complied with the order.

17. But this is not the respondent's case: its case is that the order granted by Ledwaba DJP intended to implement a different arrangement with regard to the supply of electricity that existed at the time, than the one that appears from all the written agreements referred to by Mr Rossouw during argument. The respondent's case is that the appellants knew this to be so and that their failure to comply with the order then establishes the contempt.
18. This issue is the one that then needs to be properly ventilated as it cannot be done on the papers before us. Proper affidavits must be filed.
19. This being so, the appellants are then not entitled to the order they seek dismissing the application. It is my view that the proceedings must be properly ventilated before a court who may then, on argument

and full sets of pleadings before it, make whatever order it deems appropriate. Accordingly, that portion of the relief sought cannot succeed and it is for this reason that I make the order set out herein.

20. As to costs the following: Mr van As for the respondent submitted that if this court is of the view that the matter must be remitted to the court a quo for hearing on the issues, the issue of costs should stand over for that court to determine as well- I agree.
21. Thus the order I make is the following:
 1. The appeal succeeds and the order of Makafola J dated 1 September 2015 is set aside in its entirety.
 2. The first and second appellants are to file their answering affidavits in the application under case number 67684/2015 within 20 days of date of this order.
 3. The Uniform Rules of Court relating to the filing of further affidavits and the conduct of further proceedings shall apply.
 4. The costs of the appeal shall be costs in the application.

NEUKIRCHER AJ

I AGREE

MURPHY J

CRUTCHFIELD AJ

[1] Act 108 of 1996

[2] Twee Jonge Gezellen (Py) Ltd v Land and Agricultural Development Bank of South Africa / a The Land Bank 2011(3) SA 1 (CC) at par 57

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- [3] Yates Investments (Pty)Ltd v Commissioner for Inland Revenue 1956 (1) SA 364(1); Manong & Associates (Pty)Ltd v Minister of Public Works & another 2010 (2) SA 167 (SCA)
- [4] Bangindawo v Head of the Nyanda Regional Authority; Hlantlala v Head of the Western Tembuland Regional Authority 1998 (3) SA 262 (Tk) at 277
- [5]
- [6] 2006 (4) SA 326 (SCA)
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