

SOUTH AFRICA / JUDGMENT

Magqabi S.Z Attorneys and Another v Ntantiso and Another (EL1685/2023) [2024] ZAECELLC 6 (23 February 2024) [2024] ZAECELLC 6

COURT

Eastern Cape High Court, East London Local Court

BEFORE

A.S. Zono

CASE / FILE NUMBER

EL1685/2023

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT]

CASE NO.: EL1685/2023

In the matter between: - MAGQABI S.Z ATTORNEYS 1ST APPLICANT VUYISILE PYTHAGORAS
MAGQABI 2ND APPLICANT And ASISIPHO NTANTISO 1ST RESPONDENT NOMANDLA NDABENI,
THE SHERIFF OF THE HIGH COURT, EAST LONDON 2ND RESPONDENT

JUDGMENT

ZONO AJ:

- [1] The applicants approached this court on 7 February 2024 with a certificate of urgency. This court issued directions in terms of Practice Rule 12(a)(i) of the Joint Rules of Practice of this division. Of importance is paragraph 2.1 and 2.3 of the said directive which are couched in the following terms:

“2.1 The applicant shall serve to respondents giving them not less than 5 hours notice before time for hearing as directed below.

2.3 The hearing of this application is scheduled for 09 February 2024 at 12:00 in East London High Court.”

- [2] A return of service, which was at page 54 of the applicant’s papers reveals that, on 8 February 2024 at 09:20 notice of motion, founding affidavit with annexures and court directive were served upon Xoliswa Blaai of LEM Nomphandana & Sons Attorneys. LEM Nomphandana & Sons Attorneys are first respondent’s attorneys.

- [3] On 9 February 2024 the matter was heard. According to the court order there was no appearance for the respondents. An Order in the following terms was granted by this court:

“1. The forms and rules of service are dispensed with and leave is granting leave (sic) to bring the matter on the basis of urgency.

2. The warrant of execution issue (sic) by this Honourable Court on 2 February 2024 is stayed, pending the outcome of the application for the rescission of the default judgment ordered on 25 January 2024 and no further step in execution of the judgment may be taken until the rescission application has been finalized.
3. Pending the finalization of the rescission application pursued by the applicants, the second respondent is hereby interdicted and restrained from proceeding with the execution of the warrant of execution issued by this court under Case Number EL1685/2023.
4. No order as to costs.”

Suffices to state that the rescission application preceded this court order as it was filed on 30 January 2024.

- [4] The writ of execution referred to in the court order was issued following an order obtained by default by the first respondent, who was the plaintiff in the main action against the applicants, who were the defendants therein. The default judgment in favour of the first respondent ordered the applicants to pay to the first respondent an amount of R1 261 429.30 (One Million Two Hundred and Sixty-One Thousand Four Hundred and Twenty-Nine Rands Thirty Cents).
- [5] Aggrieved by the court order of 9 February 2024, the first respondent invoked the provisions of Uniform Rules 6(12)(c) by making an application on a notice of motion supported by supporting affidavit for reconsideration of the court order. Rule 6(12)(c) of the Uniform Rules of Court provides as follows:

“(c) A person against whom an order was granted in such person’s absence in an urgent application may by notice of set down the matter for reconsideration of the order.”

- [6] From the wording of the subrule it is clear that no notice of motion is required when seeking an order for reconsideration of the order. The respondent is only empowered to set the matter down for reconsideration of the order. It goes without saying that the first respondent adopted an improper procedure in bringing the matter before court. The notice of motion was a step that would otherwise be irregular.

- [7] The notice of motion was followed by an answering affidavit from the applicants. That again was an irregular procedure as the only step available to the applicant was the filing of replying affidavit. A further confusion and irregularity erupted by first respondent's filing of a fourth affidavit styled REPLYING AFFIDAVIT BY THE FIRST RESPONDENT. A debate in court did not assist to resolve this quagmire. However, the first respondent bravely insisted that the matter must be proceeded with as it is. No party opposed that.
- [8] The second respondent filed a notice to oppose and was represented in court by his counsel. The second respondent came to court only to oppose a relief sought against her in paragraph 5 of the notice of motion. In paragraph 5 of the notice of motion the first respondent sought costs against the second respondent in the following terms:

"5. Ordering the first and second respondents to pay costs of this application jointly and severally one paying the other to be absolved on a scale between attorney and client."

- [9] The only argument presented by the first respondent about the order sought in paragraph 5 of the notice of motion was that it was a mistake to seek that order. The order of costs against the second respondent was not intended, so the argument went. Warming up in the argument, Mr Metu, counsel for the first respondent confidentially argued that the second respondent should not have come to court as paragraph 5 of the notice of motion was clearly a mistake. There is no merit in this argument. The second respondent correctly came to court to defend her interests. She was only told of the alleged mistake when she was already in court and when the costs had been incurred already. Regardless of the outcome of the case the first respondent is liable to pay second respondent's costs as the second respondent would not have known that costs against her were not going to be pursued. The first respondent sought costs against second respondent on a punitive attorney and client scale when there

was no case made out against the second respondent.

- [10] Without dealing extensively with procedural irregularities alluded to above, I am of the view that this matter may be disposed of by simple looking at the nature of the case and what has been pleaded by the parties, especially those issues which are not in dispute. I deal with this matter without extensively dealing with those procedural obstacles because there is no party who has been prejudiced by those irregularities. In fact, the applicants themselves are not innocent as I have explained above.
- [11] Parties and legal practitioners should not be encouraged to become slack in the observance of the rules, but technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice, to interfere with expeditious and, if possible, inexpensive decision of cases on their merits[1]. I agree with the authorities which held that substance should not be sacrificed on the alter of form.

- [12] The first respondent's case stands on two legs, namely, that the service by the Sheriff was not in line with the directive. There was no service of the papers upon her. The first respondent further states under this ground that the service was effected on the firm of attorneys who represented her up to the stage of the writ of execution. Secondly, the first respondent complains about short notice. She states that she was given a short time to consult or her legal representative had a very short time to take instructions. I will deal with two grounds separately.

Service of the papers

- [13] With regard to the first ground that there was no service upon the first respondent but upon the legal representatives, the first respondent sought to distinguish herself from her attorneys. She was represented by the same attorneys when the writ of execution was issued. There is interwovenness and the relationship between the writ of execution and the stay of writ of execution. The writ of execution was issued by first respondent's present legal representatives on her behalf four days before the court's directive. On the issuing of that writ of execution the first respondent was represented. The writ of execution was issued by the legal representative for the sole purpose of instructing the Sheriff to execute on the order granted in first respondent's favour on 25 January 2024. The writ of execution was, according to the court order 9 February 2024, issued on 2 February 2024. The directive was issued on 7 February 2024. There is a clear proximity between these dates.
- [14] Mr Metu, counsel for the first respondent, as he was strongly submitting that service upon attorneys is not service upon the first respondent, was referred to the provisions of Rule 4(1) (aA) of the Uniform Rules which reads as follows:
- "(aA) where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings."*
- [15] Another debate developed as Mr Metu was not without an answer. He disputed that the definition of a party includes an attorney with or without a counsel. Again, he was referred to Rule 1 of the Uniform Rules which reads as follows:

"1. Definitions

Party or any reference to a plaintiff or other litigant in terms, includes such party's attorney with or without an advocate, as the context may require."

Mr Metu commendably abandoned this point. He conceded in so doing that the service was effected.

Short service

- [16] That leaves us with one point of short notice. The directive required the respondents to be given not less than 5 hours' notice before the hearing. According to the return of service the papers were served on the 8th day of February 2024 at 09:20. This service was in full compliance with the Practice directive of 7 February 2024, as the matter was set down for hearing on 9 February 2024 at 12:00. The first respondent had the full day on 8 February 2024, and a half day on 9 February 2024 to at least prepare a notice to oppose.
- [17] There was no explanation as to why at least a notice to oppose was not filed. Equally, there was no explanation as to why a legal representative failed to attend court.
- [18] The dominant reason of the subrule is to afford an aggrieved party a mechanism designed to address imbalances in, and injustices and opposition following from an order granted as a matter of urgency in his absence[2]. The rationale is to address the actual or potential prejudice because of an absence of "audi alteram partem" when the order was made[3]. Audi alteram Partum rule engages fair trial rights. It is about a right to be heard and a right to be informed prior the taking of a decision against a litigant or party.
- [19] Failure to accord a party a proper hearing may take different forms. To make an order against a party without providing the party an opportunity of being heard in opposition is another form[4]. One way of depriving a party of the right to be heard is by failing to serve upon the party a notice of set down.
- [20] I agree with applicant's counsel when he says the purpose of the subrule is not to afford opportunity to parties who wilfully absented themselves from court when opportunity was given to them. Purposive interpretation of the subrule is to be invoked herein. The subrule is aimed at giving the party who was not afforded opportunity to be heard on urgent basis. It is not available to parties who chose not to come to court when a reasonable opportunity was given for that purpose.
- [21] In *Natal Joint Municipality Pension Fund v Endumeni*[5] the following:
- "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*
- [22] It would be absurd to interpret Rule 6(12)(c) to mean that "absence" refers to anyone who was physically absent in court regardless of whether or not that person was served and given adequate notice to file his/her notice to oppose and to attend court. The purpose of the subrule is to afford only a person who was not afforded opportunity to be in court when an urgent application was being considered, an opportunity to be heard. A different

interpretation would result in absurdity. This subrule is for the benefit of a party who gives a good explanation for absence in court when the matter was heard.

[23] In *Cool Ideas 1186 CC v Hubbard & Another*[6] the Constitutional Court held that:

“[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.¹⁸ There are three important interrelated riders to this general principle, namely: (a) that statutory provisions should always be interpreted purposively; 19 (b) the relevant statutory provision must be properly contextualised; 20 and (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.”

[24] The purpose, again of the subrule is to honour the old principle of audi alteram partem rule. It must be in that context that Rule 6(12)(c) of the Uniform Rules must be interpreted, otherwise any other interpretation may result in absurdity.

[25] I therefore find that the first respondent was properly given an opportunity to be heard and wilfully elected not to attend court nor file a notice of opposition. Therefore Rule 6(12)(c) was not available to the first respondent. No explanation, except complaints about notice and service was made by the first respondent for their absence in court.

Urgency

[26] The last attempt made by the first respondent was to attack the urgency of the applicants' application. The first respondent made submissions from the bar about the lack of urgency when in her papers such attack had not been made. That kind of litigation is not permissible as urgency involves facts.

[27] However, the applicant's case and the court file reveal that on 25 January 2024 the first respondent obtained default judgment against the applicant. On 30 January 2024 the applicants delivered and launched an application for rescission of default judgment aforesaid. The court order granted by this court on 9 February 2024 records that the writ of execution was issued on 2 February 2024. The court file further reveals that a certificate of urgency was prepared on behalf of the applicants and in paragraph 3.17 thereof it is stated that on 6 February 2024 applicants became aware of the existence of the writ of execution when their employee visited Sheriff's office. On 7 February 2024 the court, after having considered the certificate of urgency issued the directive referred to above. The matter was heard on 9 February 2024.

[28] The relevant facts in this case that prompted applicants' urgent application is the knowledge of existence of the writ of execution. When the applicants became aware of the writ of execution on 6 February 2024 they approached this court on 7 February 2024 for a directive to be issued in terms of Practice Rule 12(a)(i) of the Joint Rules of this division. The order the applicant sought and obtained on 9 February 2024 stayed the warrant of execution aforesaid pending the finalisation of the application for rescission of default judgment. That shows the

interwovenness and synergy between the warrant of execution and the court order the applicants obtained on 9 February 2024.

[29] A writ of execution may be proceeded with if the application for rescission of default judgment does not succeed. Therefore, there is no irreparable harm that may be suffered by the first respondent if the application for reconsideration fails and the order granted on 9 February 2024 remains. Again, if the order of 9 February 2024 is set aside or otherwise upset and the rescission application at the end succeeds, the applicants would suffer irreparable harm. Finally, I find that in the circumstances, the balance of convenience favours the applicants. Accordingly, an application for reconsideration of the order of 9 February 2024 cannot succeed.

[28] In the result, I make the following order:

28.1 The application for reconsideration of the order of 9 February 2024 is hereby dismissed.

28.2 The first respondent is ordered to pay costs of the application, such costs to include costs of the second respondent's opposition.

A.S. ZONO

ACTING JUDGE OF THE HIGH COURT

APPEARANCES: For the APPLICANTS ADV MAQABUKA Instructed by MAGQABI SETH ZITHA ATTORNEYS NO.4 TYRELL ROAD BEREA EAST LONDON For the 1st RESPONDENT ADV METU Instructed by LEM NOMPANDANA & SONS NO. 16 SUFFOLK ROAD BEREA EAST LONDON TEL: 043 726 0910 EMAIL: lutando@nompandana.co.za For the 2nd RESPONDENT ADV MATI Instructed by NOMANDLA NDABENI, THE SHERIFF OF THE HIGH COURT 75 LONGFELLOW STREET QUIGNEY EAST LONDON Matter heard on 20 February 2024

Judgment

Delivered on 23 February 2024

[1] See *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) at 277 A-B; *Rabie v De Wit* 2013 (5) SA 219 (WCC) at 222 E-223A; *SAB Soc Ltd v SAB Pension Fund* 2019 (4) SA 608 (GJ) at 621 E – 622G.

[2] See *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996

(4) SA 484 (W) at 486 H-I; *Lourenco v Ferela (Pty) Ltd* (NO) 1998 (3) SA 281 (T) at 290 E-H.

[3] See *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSJ) at para 10; *Farmers Trust v Competition Commission* 2020 (4) SA 541 (GP) para 23.

[4] See *SA Motor Acceptance Corp (Pty) Ltd v Venter* 1963 (1) SA 214 (O).

[5] (920/2010)

[2010] ZASCA 13 (15 March 2012) para 18.

[6] 2014

(4) SA 474 (CC) at para 28.

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