

SOUTH AFRICA / JUDGMENT

Mathaba v Mdluli and Others (6366/2017) [2017] ZAGPJHC 71 (14 March 2017)

[2017] ZAGPJHC 71

COURT

South Gauteng High Court, Johannesburg

BEFORE

WHG van der Linde

CASE / FILE NUMBER

6366/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 6366/2017

Reportable: No

Of interest to other judges: No

Revised.

14/3/2017

In the matter between:

Mathaba, Sipho Zacharia Applicant

and

Mdluli, S'phokuhle Ncamu Kwazikwenkosi First Respondent

Carinagen (Pty) Ltd Second Respondent

Viljoen, Gerhardus Petrus Third Respondent

Hartzenberg, Ferdinand Fourth Respondent

Firststrand Bank Ltd t/a First National Bank Fifth Respondent

Dikhutso, Tshegofatso Sixth Respondent

Judgment

Van der Linde, J:

[1] This is an urgent application principally to commit for contempt of court four respondents for failure to have complied with a court order issued by Spilg, J on 28 December 2016 under case no.15943/2016. The notice of motion seeks contempt orders against

1st, 3rd, 4th and 6th respondents. Of these, only the 1st respondent was a party to the court order of Spilg, J. Given the urgency of the matter, at least on the applicant's argument, I deal with it from a tail-end vantage point, meaning from the perspective of the relief claimed.

[2] As regards urgency, in the view that I take of the matter the applicant is correct in submitting that contempt of court proceedings

are to be regarded as urgent. I will therefore grant prayer 1.

[3] In argument the applicant explained that the case for contempt against the 1st respondent was based on a failure to have complied with paragraph 3 of the court order, read with paragraph 5. Paragraph 3 interdicts the 1st respondent from implementing an arrangement that enables medical aids claims of patients seen in the 1st respondent's practice as a doctor to be processed and remitted through the practice of another doctor, particularly that of the 3rd respondent. That order is one *ad factum praestandum*, and is therefore in principle capable of sustaining the relief claimed, provided the other requirements for contempt relief are met. I return to this order below.

[4] The applicant submitted that his case against the 3rd respondent was founded on the latter having been a director of the 2nd respondent, who did not comply with paragraph 12 of the court order. Paragraph 12 directs the 2nd respondent to maintain an account of no less than R234 750 at any bank. That too is an order *ad factum praestandum*, in principle capable of sustaining the relief claimed. I return also to this order below.

[5] The case against the 4th respondent is that he acted as an accomplice of 1st, 2nd and 3rd respondents, and if this is indeed so, then his fortunes are likely to follow theirs. So I will revert below to deal with the case

against him after discussing the case against those respondents. There is also a case against him that he is in contempt of court

because he coerced the 5th and 6th respondent into committing contempt of court. I also deal with this below.

[6] Finally, as regards the 4th respondent, the applicant contends that he is guilty of an offence under s.40 of the Supreme Court Act 59 of 1959, which creates an offence for a person who obstructs a sheriff or deputy in the execution of his duties. The applicant probably had s.46(a) of the Superior Courts Act 10 of 2013 in mind, because The Supreme Court Act has been repealed.

- [7] Here the question is obviously a factual one, but more importantly, it is whether a civil court has jurisdiction to issue a declaratory order that a person is guilty of a criminal offence, not contempt of court, which is a *sui generis* procedure.[1] Assuming in the applicant's favour that a civil court does have that power, it will only exercise it if in the circumstances it exercises its discretion in favour of issuing such an order, since the issuing of declaratory orders is a matter rests within the discretion of the court.
- [8] I would decline to do so in this case, if only because it presupposes a finding that the 4th respondent is guilty of a criminal offence, without him having been afforded the opportunity to testify *viva voce* in defence of his innocence. I would therefore dismiss prayer 7. That leaves the 4th respondent's alleged role as an accomplice to which I have referred above, and with which I deal later.
- [9] The case for contempt against the 6th respondent is that she failed to execute the writ of execution of 14 February 2017, the applicant submitting that the writ was akin to a court order. That writ is challenged by the 5th and 6th respondents for its validity, because it instructs the sheriff to attach at the 6th respondent all funds of the 2nd respondent held in an account of the 2nd respondent with the 5th respondent. The 2nd respondent is not the default judgment debtor of the applicant under case number 15943/2016; the 1st respondent is.
- [10] But the applicant relies on rule 45(12) for the submission that the sheriff may legitimately be instructed to attach a debt owing by a third person, called the garnishee, to the principal debtor. And he argues that in any event under rule 45(8) incorporeal movable property of the debtor, such as money, may be attached wherever it may be found.
- [11] The one difficulty that I have with the writ, is that it is vague. I accept that the sheriff may be legitimately instructed to attach a debt owed by the 2nd respondent to the 1st respondent, but then that debt needs to be identified in the writ so that the sheriff and the garnishee knows what it is that is sought to be attached. This writ does not identify the debt owed by the 2nd respondent to the 1st respondent, nether by *causa* not by amount.
- [12] Further, it seems to me that the applicant has conflated, as the legitimate object of an attachment to execute the money judgment owed by the 1st respondent to him, money of the 2nd respondent in a credit bank account of the latter, with a debt owed by the 2nd respondent to the 1st respondent.
- [13] Under rule 45(8) incorporeal assets of the debtor may attached, and money in a bank is an incorporeal asset. But money in the bank account of the 2nd respondent with the 5th respondent does not become an asset of the 1st respondent debtor, capable of attachment under this rule, merely because the 2nd respondent owes the 1st respondent money. Put differently, rule 45(8) does not justify the attachment of assets of a person who owes the debtor money.

[14]Nor does rule 45(12) permit that. All that the latter rule permits is the attachment of a debt owed by a third person (“the garnishee”) to the debtor. Such a debt is not attached by attaching the assets of the garnishee. It is attached by securing all tangible instruments or evidence of the debt in the hands of the garnishee. Put differently, the garnishee need not have money in the bank for the debt which it owes to the debtor to be capable of attachment under rule 45(12).

[15]As I see it, however, the greater difficulty that confronts the applicant, assuming in his favour that the writ is valid and fully enforceable as if it were a court order, is that on any basis its causa is an order for the payment of money, or *ad pecuniam solvendam*. Neither of the two exceptions applies and so it cannot found a case for contempt of court.[2] Indeed, in the applicant’s reply no response at all was offered to the 5th and 6th respondents submissions in this regard. It follows that the case against the 6th respondent must fail, and so too the case against the 4th respondent for having coerced the 5th and 6th respondents into acting in contempt of court.

[16]The 5th and 6th respondents asked for a special costs order. Such an order is granted when a court wishes to mark its displeasure with a litigant’s conduct. There is a fine line between a litigant being wrong, which applies to at least one litigant in every single case; and a litigant being so wrong that s/he should not have litigated at all. And often the correct party’s conviction of being right is so strong that that party finds it difficult to conceive of the losing party having ever had any argument at all. I do not believe that here the applicant was so wrong that the court should mark its displeasure at his conduct, and costs on the party and party scale must apply.

[17]I turn now to deal with the case against the 2nd respondent for having failed to comply with paragraph 12 of the court order. That paragraph did not specify a time within which the moneys had to be maintained in the bank account. It was accepted all round that it implied a reasonable time. The moneys were paid into an appropriate account on 19 January 2016. The question is whether this was done within a reasonable time. The applicant submitted that it was not.

[18]The applicant has the onus to show that the relevant respondent breached the court order. That includes showing that the payment was not made within a reasonable time. His founding papers do not suggest that payment by 19 January 2017 was not payment within a reasonable time. Therefore the onus has not been discharged. It follows that the 3rd respondent as director of the 2nd respondent cannot be held to have been in contempt of court, nor can the 4th respondent so be held, to the extent that he was sought to be so held on the basis of having been an accomplice of the 2nd and 3rd respondents.

[19]That leaves the case against the 1st respondent and the 4th respondent, in the later instance on the basis that he was an accomplice of the 1st respondent. The applicant made out the case against the 1st respondent in his founding papers that over 334 medical aid patients were seen in the 1st respondent’s practice from 4th to 31st January 2017, and yet only three claims were submitted by the 1st respondent to medical aids in respect of services rendered during that period. In his answering affidavit the 1st respondent dealt explicitly with prayer 3. He said there that his practice number is 0268844, and he proved his February 2017 claims against medical aids in the aggregate amount of R14 026.53. So he said that in truth he processed his practice claims

through his own practice.

[20] But of January 2017 he said only that the remittance advices attached by the applicant for that month showed that those (three) had been submitted through his own practice. During argument his counsel informed me from the Bar that he had just been instructed by the 1st respondent that the 1st respondent had actually not submitted his January 2017 medical aid claims at all. He instructed counsel to convey to the court that in truth he had funded his practice in January 2017 from his own resources.

[21] That was a surprising communication, coming as it did just after the applicant had illustrated that on his founding papers the rump of the 1st respondent's January 2017 medical aid claims were unaccounted for, implying of course that those claims had been processed through some other medical practitioner in breach of paragraph 3 of the court order. The 1st respondent submitted though, and was supported in this by the 4th respondent, that the applicant had still not proved beyond reasonable doubt that, in fact, the 1st respondent had processed those claims through some other medical practitioner; and so had not proved breach of the court order.

[22] I do not agree. In my view the sting of paragraph 3 of the order is not that the 3rd respondent or some other medical practitioner should not be receiving the proceeds of the medical aid claims; the sting is that the 1st respondent should not be artificially diverting his practice income thereby prejudicing the source to which the applicant could look for satisfaction of the amount owing to him for having sold his practice to him.

[23] Matters took a turn on the second day of the hearing when the 1st respondent applied for the admission of a further answering affidavit. The applicant resisted this, but I ruled that it should be admitted provisionally, and that I would decide at the end of the matter, when deciding the merits, whether it should be allowed.

[24] The affidavit explains how the 1st respondent has had to change attorneys very late in the day; that the brief consultation that led to the first answering affidavit being prepared was not sufficiently comprehensive; and that it was only after the applicant had addressed the court that the 1st respondent appreciated the full import of the case against him. He appreciated then, he says, that a fuller explanation was required of the events of specifically January 2017.

[25] The explanation of those events is that the 1st respondent had towards the end of 2016 had a fall-out with the 2nd respondent, who was the contracted submitter of the 1st respondent's claims. The 2nd respondent claims that the 1st respondent still owes it R363, 788.74. Litigation between them is now contemplated. That had the result that the 1st respondent did not want to submit claims in January 2017 through the 2nd respondent, because he needed to have control over the bank account into moneys that would be received following on submitted claims, would be paid. So he searched for and ultimately appointed a new claims administrator, and all the outstanding claims have since about mid-February 2017 been submitted, and are still being submitted, through the new party.

[26]In urgent applications often the first casualty is the truth, because parties prepare affidavits under pressure and in haste. A court should adopt more leniency in allowing further affidavits so as to address this potential shortcoming. I have therefore decided to admit both answering affidavits of the 1st respondent.

[27]That means that next one has to consider whether the 1st respondent was in breach of paragraph 3 of the court order. I have indicated that in my view the sting of the order is to prevent dilution of the 1st respondent's practice income. The 1st respondent sees it slightly differently; he submits that the sting is against him submitting the claims other than through his own practice, where full record would then be established of those claims.

[28]It seems to me unnecessary to reach a firm view on whether the 1st respondent's interpretation is correct, because I cannot say that it is so unreasonable as to warrant the inference that it is all just a ruse to escape an inference of wilfulness, and that his explanation should be rejected on paper. I must then accept his explanation as being reasonably possibly true, as I hereby do.

[29]It follows that I conclude that assuming in favour of the applicant that breach of paragraph 3 of the order by the 1st respondent has been illustrated, the 1st respondent has not acted in wilful contempt of the order. This conclusion also immunises the remaining basis of the 4th respondent's potential exposure.

[30]On the question of costs as between the applicant and the 1st respondent, it seems to me that the litigation between them could have been avoided if the 1st respondent had played open cards with the applicant, specifically in response to the applicant's letter of 9 February 2017. The applicant should not be burdened with those costs.

[31]In view of what went before, I do not believe that any case has been made out for relief sought in prayers 4, 5, and 6. Prayer 4 has no application since no-one is being committed. Prayer 5 was explained by the applicant as being limited to the 1st to 4th respondents. But the 3rd and 4th respondents were not party to the order of 28 December 2016 by Spilg, J; and the 1st and 2nd respondents have not been shown to have been in breach of it.

[32]As regards the 1st respondent, even if his interpretation of the order is wrong, he has not been shown to have been artificially diverting his practice income. As regards the 2nd respondent, there is then by definition no evidence to suggest that it has been a party to the artificial diverting of the 1st respondent's practice income. As regards prayer 6, I have expressed my concern regarding the vagueness of the writ, and would

be exacerbating the problem by making an order that it should be complied with.

[33]In the result I make the following order:

- (a) It is declared that the application is urgent.
- (b) The application is dismissed.

(c) The applicant is to pay the costs of the 2nd to 6th respondents on the scale as between party and party.

(d) The 1st respondent is to pay one sixth of the applicant's costs.

WHG van der Linde

Judge, High Court

Johannesburg

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Ref GF/FIR28/0020

Date argued: 9, 10 March 2017

Date judgment: 14 March 2016

- [1] Fakie NO v CCII Systems (Pty) Ltd, [2006] ZASCA 52; 2006 (4) SA 326 (SCA).
- [2] Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa, 5th ed, Vol 2, p1022. Compare Hofmeyr v Fourie; BJBS Contractors v Lategan, 1975 (2) SA 590 (C) (Full Court).
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