

SOUTH AFRICA / JUDGMENT

Mawere v Master of The High Court of South Africa (123899/2023) [2024] ZAGPJHC 356 (11 April 2024) [2024] ZAGPJHC 356

COURT

South Gauteng High Court, Johannesburg

BEFORE

Pearse AJ

CASE / FILE NUMBER

123899/2023

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

- REPORTABLE: NO
- OF INTEREST TO OTHER JUDGES: NO
- REVISED: NO

Case No: 123899/2023

In the matter between

MUTAMWA DZIVA MAWERE Applicant

And

MASTER OF THE HIGH COURT OF SOUTH AFRICA First Respondent

SMM HOLDINGS (PRIVATE) LIMITED Second

Respondent

Case No: 040602/2016

In re

SMM HOLDINGS (PRIVATE) LIMITED Applicant

MUTAMWA DZIVA MAWERE

Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

PEARSE AJ:

1. The applicant, Mr Mawere, seeks leave to appeal against a judgment and order that I granted in the urgent court on 05 December 2023 in an application (the main application) to declare 'a legal nullity' a sequestration order (the sequestration order) that had been obtained, months earlier, by an intervening party, SMM. In the main application I admitted SMM as a second respondent, struck the matter from the roll for lack of urgency and directed a process and timetable (the contempt directive) for a later court to determine whether Mr Mawere's initiation of and persistence with that application was in contempt of an earlier order declaring him a vexatious litigant (the vexatious declaration). The reader of this judgment is taken to be familiar with the facts and findings set out in my judgment and order.
2. For reasons that follow, even if it is assumed in Mr Mawere's favour that the order in the main application is appealable and that this application for leave to appeal is persisted with by him, I consider that there is no (a) reasonable prospect that an appellate court would upset the order or
- (b) other compelling reason why an appeal should be permitted. In the result, this application must fail.
3. It appears that this application was initiated on 06 December 2023 but not uploaded onto CaseLines.[1] I became aware of the application when it was emailed by the attorneys for SMM to me and my registrar on 03 April 2024. Mr Mawere

replied to that email attaching a notice of motion in an interdict and stay application of that date (the interdict/stay application) and cautioning against dealing with this application in the face of that application. I enquired of my registrar whether either party had taken any step to secure a date for the hearing of this application and asked him to inform the parties that I would be available to hear this application on any morning of this week (commencing 08 April 2024). As I understand the emails that followed, SMM indicated that its counsel would appear on any date and time of convenience to the court whereas Mr Mawere adopted the position that this application should be stayed pending the determination of the interdict/stay application, in which he seeks an order:

- 3.1. interdicting SMM from asserting any right or claim in any ongoing or future legal proceedings until its impugned status as a corporate entity and standing as a litigant (the status/standing dispute) is determined;
- 3.2. declaring any judgments secured by SMM despite the status/standing dispute to be invalid ab initio;
- 3.3. staying the proceedings under this case number – presumably a reference to this application for leave to appeal – until the status/standing dispute is determined; and

3.4. declaring that “the conduct of the 1st Respondent [the President of South Africa], law firm, attorneys, and the courts involved in asserting, recognizing, and enforcing rights and claims founded on a foreign law that is inconsistent with Section 2 of the Constitution of South Africa, constitutes a violation of constitutional principles and values, including principles of equality, due process, and the rule of law.”

4. As an acting judge of this court, I have no authority to hear or decide any matter, including the interdict/stay application and the underlying status/standing dispute, beyond this application to challenge to my judgment and order in the main application; and it is in the interests of justice that I consider and determine this application without delay.
5. Following further engagements with the parties, therefore, the registrar communicated to the parties my directive of 08 April 2024 that this application would be heard virtually at 08:30 this morning (11 April 2024).
6. When the matter was called, I heard Mr Mawere in person (in opening and reply) and Mr Bothma SC on behalf of SMM (in answer). Although Mr Mawere was minded to address issues traversing the broader disputes between the parties, including the interdict/stay application and the underlying status/standing dispute, I urged him to focus his submissions on the grounds of appeal set out in his application for leave to appeal or any others that he wished to raise. I am satisfied that both parties were afforded a proper opportunity to do so in a hearing that endured for almost 90 minutes. I deal briefly with each of such grounds.
7. The application for leave to appeal begins by giving notice that:

“The Applicant contends that the Court a quo erred in finding that:

1. The judgment, delivered by Pearce [sic] AJ on December 3, 2023, struck the application from the roll for want of urgency.”
8. The five grounds on which leave to appeal is sought are then titled “Failure to Consider Pending Review”, “Disregard for Request for Reasons”, “Alleged Predetermined Judgment”, “Validity and legality of the strike-off decision” and “The Legal Status of the Intended Intervenor”. The grounds are described more fully in paragraphs 11, 13, 15, 17 and 19 below.
9. First, though, there is the issue of appealability. Whilst Mr Mawere did not address the appealability of SMM’s admission as a respondent, Mr Bothma submitted that that order bore none of the traditional characteristics established in *Zweni*[2] and that the interests of justice were not implicated by SMM’s participation in one further battle in an ongoing war between the parties. Even on the broader test for the appealability of orders that are not final in form or effect recognised in *Lebashe*,[3] Mr Mawere did not suggest that the striking-off relief granted in the main application is appealable and Mr Bothma was adamant that that order was no more than an exercise of judicial discretion. Nor did I understand Mr Mawere to contend that the contempt directive was determinative of any of the parties’ rights and Mr Bothma submitted that it was similarly not appealable as it preserved the entire dispute whether Mr Mawere is a vexatious litigant for determination by another court.

10. I do not understand any part of my judgment or order in the main application to be appealable. However, given an element of uncertainty as to the breadth of the Lebashe test and my dispositive conclusions in respect of the grounds of appeal that follow, it is unnecessary to make any finding in that regard; and I do not do so.
11. The first ground of appeal is that, in dealing with the main application, this court “failed to consider that the vexatious litigant judgment is currently subject to a pending review under Case Number 2022-16882, raising questions about the Applicant’s locus standi. The failure to acknowledge the pending review directly impacts the fairness and impartiality of the proceedings.”[4] As I understand this ground, it is that, on Mr Mawere’s version of the ongoing proceedings between the parties, there is a pending challenge – in a form of a review application – to the vexatious declaration such that the declaration is suspended and Mr Mawere is free to pursue litigation against SMM. It will be recalled that Mr Bothma conveyed a different understanding of the existence of any challenge to the vexatious declaration.
12. The main application sought no relief in respect of the vexatious declaration and, on the papers before the court at that time, it was not possible to interrogate or resolve the dispute whether Mr Mawere was entitled to initiate and/or persist with that application. For that reason, I made no finding relating to the declaration but directed a process and timetable within which the parties were to present evidence and argument to a later court that would be better placed to determine the dispute. In doing so, without making any finding in relation to any right, I afforded Mr Mawere an opportunity to convince that court that he labours under no impediment in litigating against SMM. In my view, there is no reasonable prospect that an appellate court would disturb the contempt directive.
13. The second ground of appeal is that this court “ignored the Applicant’s submission that, in terms of the review application referenced above, the matter has not been determined, and thus the legality and validity of the vexatious litigant judgment are sub judice. To date, the Court a quo has not furnished reasons for the vexatious litigant judgment that was sought and granted without the knowledge and involvement of the Applicant as the affected party.”[5] The effect of this ground, as I understand it, is that a review of Mr Mawere’s declaration as a vexatious litigant is still to play itself out yet I ignored that state of play when formulating my judgment and order.
14. There is no merit to this ground of appeal, in my view. There was and remains a dispute between the parties as to the existence of any challenge to the vexatious declaration. That dispute could not be determined on the papers before the court at the end of November 2023. I made no attempt to do so. In the exercise of my discretion, I afforded the parties an opportunity to marshal evidence and argument in support of their respective versions and it remains to be seen what a court properly seized with the matter will

make of those positions. Nothing in my judgment or order limits that inquiry. Nor do I consider there to be a reasonable prospect that an appellate court would upset the inquiry. I say this because, to my mind, it matters to the rule of law and the proper administration of justice that there be an informed and definitive answer to the question whether Mr Mawere litigates legally or illegally in these courts.

15. The third ground of appeal is that I “openly and repeatedly asserted that [I] was inclined to strike off the matter for want of urgency prior to the hearing and adjudication of the matter. Such alleged predisposition compromises the fairness and impartiality of the proceedings. The Presiding Judge struck the matter off the roll ostensibly for want of urgency, yet the Court heard the Applicant’s case and the submissions by the

opposition. The Court a quo, erred in admitting the intending intervenor without interrogating the locus dispute in order to incorporate this in the judgment on a matter that took more than one hour to hear.”[6] There are two components to this ground: that (a) my questioning of Mr Mawere betrayed a predisposition towards finding an absence of urgency and (b) I allowed SMM to participate in the hearing of the main application without getting to the bottom of whether it exists as a corporate entity capable of seeking and securing relief in the litigation, i.e. the status/standing dispute. These components are addressed in paragraphs 16 and 18 below.

16. It is so that, during the hearing of the main application, I informed Mr Mawere of my prima facie inclination, in an extremely busy urgent court in the final week of the final term of the year, not to permit him to jump a lengthy queue to have determined, in a matter of days, a challenge to the sequestration order that could and should have been initiated and pursued more than half a year before. There was nothing untoward about my doing so – it enabled Mr Mawere to deal pertinently with that inclination; and I listened to his response. Nor did I prejudge or predetermine any issue in respect of the sequestration order itself, the challenge to which Mr Mawere may set down for hearing in the ordinary course. In my view, there is no reasonable prospect that an appellate court would interfere with my exercise of discretion in the circumstances of the case.
17. The fourth ground of appeal is that, “having heard the submissions and opposition to the title and jurisdiction of the Court in granting audience to a purported applicant for leave to intervene cited as an ordinary company, when its authority to litigate in the name of SMM Holdings Private Limited, SMM, as an ordinary company was fatally defective on account of the fact that the authority to have locus was not derived from normal corporate governance protocol but from a reconstruction order issued in terms of a decree that was issued and prosecuted against SMM contrary to SA public policy, s. 2 of the Constitution of South Africa, ... as well as international law, [I made] no reference at all to the basis on which the court found jurisdiction to grant audience, recognise and enforce rights and claims in terms of a law that is invalid.”[7] I understand this ground to be that, despite Mr Mawere’s long-standing attack on SMM’s status as a corporate entity and standing as a litigant, my judgment and order disclose no basis on which the court assumed and exercised jurisdiction to admit and entertain SMM as a party to the proceedings.

18. This ground of appeal formed the subject of considerable debate at the hearing of this application.

18.1. Initially, I understood Mr Mawere to contend that I ought not to have recognised SMM in my court on the basis of some a priori acceptance of his assurance that SMM is and will ultimately be exposed as a ‘corporate nullity’ such that I enjoyed no jurisdiction even to hear from it in these proceedings.

18.2. In the course of argument, however, Mr Mawere made plain that that is not his point. His criticism is not that I allowed SMM to participate in the proceedings but rather that, having done so, I failed to proceed to determine definitively that it lacks any status as a corporate entity and/or standing as a litigant. The criticism misunderstands the consequence of a discretionary finding that an application is not urgent. Having formed that view, it would have been inappropriate of me to address the merits of any issue in dispute in the main application, including the status/standing dispute. Mr Mawere’s stance in that debate

remains intact and may be pursued in any proceeding in which it arises, including an ordinary course hearing of the main application.

There is thus no reasonable prospect of this ground’s succeeding before an appellate court.

19. The fifth ground of appeal is that this court “erred in not hearing and determining the Applicant’s opposition to the locus standi of the intended intervenor, especially given that the purported litigant ceased to be a company or juristic entity since September 6, 2004, when its affairs were placed within the ambit of a decree that is inconsistent with s. 2 of the Constitution of South Africa and SA public policy.” It concludes that the court “erred in failing to determine conclusively the conflict in relation to the legal status of the litigant before it i.e., whether it was a company in the ordinary sense or an organ of the government of Zimbabwe as represented in the affidavit in support of the application.”[8] As I understand it, the substance of the fifth ground is indistinguishable from that of the fourth ground.
20. For the reasons set out in paragraph 18 above, therefore, I find there to be no merit to this ground of appeal.
21. It may be observed that, from about 03 April 2024 and certainly by the time of the hearing of this application, Mr Mawere displayed ambivalence whether he wished this application to be heard and decided. His stated preference was for this court to adjudicate on the interdict/stay application with a view to suspending the operation of my judgment and order in the main application pending the final determination of the status/standing dispute. I explained my inability to do so and asked Mr Mawere, repeatedly, whether he wished to persist with this application and, if so, what order he asked this court to grant. I do not think I do Mr Mawere an injustice in recording my understanding that he provided no clear answer to either question. On each occasion, he reverted to the position that I should have found and should still find SMM not to be a corporate entity capable of seeking or securing relief in the litigation.

22. I have set out my reasons for concluding that I am unable to do more than to determine this application.
23. In that regard, even if it is assumed in Mr Mawere's favour that the order in the main application is appealable and that this application for leave to appeal is persisted with by him, I consider that there is no (a) reasonable prospect that an appellate court would upset the order or (b) other compelling reason why an appeal should be permitted.
24. In the result, I grant the following order:

The application for leave to appeal against the judgment and order granted by this court on 05 December 2023 is dismissed with costs.

PEARSE AJ

This judgment is handed down electronically by uploading it to the record of this matter on CaseLines. It will also be emailed to the parties or their legal representatives. The date of delivery of this judgment is deemed to be 11 April 2024.

Applicant: M

Mawere

Instructed By: AG

Mulaudzi Attorneys

Counsel for First Respondent: N/A

Instructed By:

N/A

Counsel for Second Respondent: C Bothma SC

Instructed By:

DLA Piper South Africa (RF) Inc

Date of Hearing:

11 April 2023

Date of

Judgment:

11 April 2023

[1]

The application for LTA, which bears case number 127130/2023, is still not to be found in the CaseLines record of the main

application under case number 123899/2023.

[2]

Zweni v Minister of Law and Order 1993 (1) SA 523 (A) 536B

[3]

United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others 2023 (1) SA 353 (CC) [43], [45]; see too National Commissioner of Police v Gun Owners South Africa 2020 (6) SA 69 (SCA) [15] and Economic Freedom Fighters v Gordhan and Others 2020

(6) SA 325 (CC) [49]-[51]

[4]

Application for LTA page 1 para 1

[5]

Application for LTA page 2 para 2

[6]

Application for LTA pages 2-3 para 3

[7]

Application for LTA page 3 para 4

[8]

Application for LTA pages 3-4 para 5

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