

SOUTH AFRICA / JUDGMENT

Minnaar and Another v Rock Mining Machines (Pry) Ltd and Others (2930/2023) [2023] ZAMPMHC 26 (10 August 2023)

[2023] ZAMPMHC 26

COURT

Middelburg High Court, Mpumalanga

BEFORE

BAM

CASE / FILE NUMBER

2930/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NO. 2930/2023

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE: 10/08/2023

SIGNATURE

In

the matter between:

IAN
MINNAAR
(Identity
no. 7[...])
FIRST APPLICANT
RENCIA
MINNAAR
(Identity
no. 7[...])
SECOND APPLICANT
And
ROCK
MINING MACHINES (PRY) LTD
(Registration
no. 2[...])
FIRST RESPONDENT
DERICK
WILHELM
KONIG
SECOND RESPONDENT
SINNAH
SHILLA
MAMIAMA
THIRD RESPONDENT

JUDGEMENT

BAM AJ

- [1] The applicants have approached the court asking for an order in the following terms:
1. “That this application is treated as an urgent application and that the above honorable court in accordance with the provisions of rule 6 (12) dispense with the normal forms of service.
 2. That the respondents be ordered to return the cell phone devices of the first and second applicants.
 3. That the respondents be interdicted from accessing, reading, and publishing the applicants’ personal information on their cellular phones and Gmail accounts.
 4. That the respondents destroy any and/or all information that has been downloaded of their devices and Gmail account without consent.
 5. The costs of this application by the respondents, on attorney and own client scale, including the cost of counsel.”
- [2] At the hearing of this application the court was requested to first rule on the issue of urgency and after hearing arguments from both sides the court ruled that the applicants had satisfied the requirements for urgency. Inasmuch as there was no mention of the role played by the

third respondent in the issues raised, this was not so serious as to overcome the substance of the application. It is to be further noted that the court chose to proceed with the hearing despite the fact that the Respondents' bundle was neither indexed nor paginated, the applicants having waived their right to file a replying affidavit. A postponement of this application would not have served the interests of justice.

"The question whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course." [1]

In the case of Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and others[2] the court said the following:

"[37] It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when courts are enjoined by Rule 6(12) to deal with urgent applications in accordance with procedures that follow the rules as far as possible, this involves the exercise of a judicial discretion by a court concerning which deviations it will tolerate in a specific case.

[38] It is not in every case in which the applicant may have departed from the rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its special facts and circumstances. This is implicitly recognised by Kroon J in Caledon Street Restaurants CC when he held - looking at the issue from the other perspective as it were - that the approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect and the matter must be looked at to consider whether the case is such a time or not.

[40]..... Indeed, the erstwhile Appellate Division has on a number of occasions turned its back on such formalism in the application of the rules. For instance, in Transit African Insurance Company Limited v Maluleka, Schreiner AJ held that 'technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice, to interfere with the expeditious and if possible inexpensive decision of cases on their real merits.' Most recently, in Scott v Golden Valley Supermarket, Harms JA held that the rules 'are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right contained in section 34 of the constitution.'

The Application

[3] At this point it would be apposite to give a brief background as it appears on the papers filed by the applicants. I will confine myself to issues that are largely common cause. Any reference to "Respondents" shall mean only the First and Second Respondents.

[4] It is alleged that on Friday the 7th of July 2003 at the premises of the first respondent, an investigation was carried out in terms of which both applicants and other employees of the first respondent were subjected to various forms of questioning which included a polygraph test. It was during this investigation, which was conducted by a private security company,

that the applicants' cellular phones ended up in the possession of one of the security officials. In addition to these cellular phones, a laptop belonging to the second applicant was collected from the applicants' home. Both applicants were requested to divulge or disclose their passwords for access to information on their devices. It is not denied that the second respondent ordered the security company to secure the premises to ensure that no employee walks out of the gate without his permission.

- [5] It is common cause that the devices, which are the personal belongings of the applicants, are still in the possession of the respondents as of the date of the hearing of this application.

The relief sought

- [6] The applicants are seeking a final interdict. A final interdict brings about a final determination of the rights of the parties. It is granted in order to secure a permanent cessation of an unlawful course of conduct or state of affairs. Because in a way it brings finality to the issues, an applicant for the final interdict must satisfy the following requirements:

6.1 that he has got clear right that exists in law and recognised as such under common law or statute.

6.2 that there is an act of interference with or invasion of that right. It must be a continuing act and not one that has already ceased. A past invasion of rights may, however, serve as evidence upon which the court implies an intention to continue in the same course. A reasonable apprehension of injury that is based on well-grounded facts is also an acceptable ground for the granting of an interdict.

6.3 Prejudice. The court will not grant an interdict where the applicant fails to establish prejudice or potential prejudice.

6.4 No other remedy. The applicant must prove that there is no other satisfactory remedy available to him to cure the harm or prejudice. If an alternative form of redress exists, the court may refuse to grant the interdict except in some exceptional instances such as when the respondent lacks assets or money or the injury is a continuous violation of rights.

- [7] The granting of an interdict under South African law is subject to judicial discretion after consideration of the evidence presented, the balance of convenience, and the interest of justice. This discretion ensures that interdicts are granted in situations where they are necessary and appropriate. The relief is rooted in constitutional principles and especially the right of access to courts and similar impartial tribunals for the resolution of legal disputes. This right ensures the maintenance of order in society and prevents self-help, vigilantism, and anarchy. It has been utilized by the courts long before the advent of our constitution, the locus classicus being *Setlogelo v Setlogelo* 1914 AD 221, where the relief was granted to a bona fide possessor of land.

The argument

- [8] In addressing the above requirements, counsel for the applicants, Mr Mathiba, requested the court to consider that ownership of the two cellular phones is not in dispute. In addition, the applicants have annexed proof of purchase in support of their version that the devices belong to them and not to the first respondent. He further referred the court to annexure DK11 which is a document titled “Acknowledgement of receipt” on which the items that were handed over to the security investigator, Mr Pieterse, under the heading, “Handover of company property and data” were clearly listed and reference to cellular phones had been scratched out and initialed.
- [9] Regarding the issue of harmful and continuing conduct by the respondents, counsel indicated that this is in the form of deprivation of personal property as well as invasion of privacy. The cellular phones are still in the possession of the respondents and the applicants’ privacy has already been

violated because the information has been extracted from the devices and has now been included in court papers which are public documents. This is an indication that they will in future use the private information of the applicants despite the undertaking made by the respondents in the Confidentiality Agreement (Annexure D12) at 2.1.2 that they will not use, disclose any private information without the prior written consent of the applicants. By entering into this agreement, the respondents were aware of and appreciated the fact that we all have private information

on our cell phones. The applicants have stated in their founding affidavit that they are unable to conduct their day-to-day business

without their phones. Their private information had already been extracted from the phones and used as part of the disciplinary inquiry against the first applicant. There is no reason why, after all the information had been copied and stored elsewhere, the respondents are still holding on to the phones. The applicants’ apprehension that their private information will continue to be exposed without their consent is therefore not unreasonable.

- [10] It was reiterated that the applicants did not consent to hand over their cell phones and definitely gave no consent for the respondents to use the information stored thereon, particularly their private personal information.

Counsel labelled what the respondents have done as a form of self-help in the sense that they have to date not opened a criminal case against the applicants as they allege, otherwise they would have provided a case number to the court. Secondly, none of the people who were involved in the investigation at the offices of the first respondent are police

officers. There was no warrant produced at all and their conduct was thus unlawful.

[11] On the requirement of an alternative remedy, counsel submitted that nothing could replace the relief being sought by the applicants, not even a damages claim can assist in this regard. There is therefore no alternative remedy that they can resort to other than the interdict.

[13] In response to the applicants' submissions Mr Botes argued that his clients' version remains uncontested in the absence of a replying affidavit. There is no evidence that the rights of the applicants were violated especially concerning privacy because they do not mention what the nature of their privacy is except to say that all of us have private information on cell phones. He further denies that the applicants were held hostage and

devices confiscated as alleged because both cooperated throughout the investigation process. He referred the court to Mr.

Konig's affidavit which says they were not forced to do anything, as well as to the fact that they signed Annexure DK11, which conduct constitutes consent. Counsel referred the court specifically to sub-paragraphs 3.3 up to 3. 4.8 and read same into

the record:

"3.3 you may not access the units at all after receiving this notice to ensure integrity of the handover process and whatever data is or might be on the units.

3.4.1 a forensic expert will be present during the handover of the units. He will remain present throughout the process described below. You have the right to at all stages also remain present and if you so required the proceedings will be recorded for which a recording device will be made available.

3.4.2 the expert will access the units and clone the content thereof to ensure a forensically verified and acceptable copy of the data is replicated to an external hard drive.

3.4.3 you may at any stage at your cost request the forensic expert a copy of the backed-up data but only to the extent that any of such data may relate to personal affairs and not company affairs. If you require access to any other data replicated for purposes of the conduct of any disciplinary proceedings, you may request the company for such access with reasons which access will not be unreasonably withheld.

3.4.4 the access to the units will include access to all email accounts used for the company or company business.

3.4.5 if company business or any business directly or indirectly related to the company or competitors of the company was done on any of these e-mail accounts, the forensic expert will be entitled to access such accounts in your presence and if the e-mail account is a private account, you will be entitled to be present and indicate to the forensic expert what information constitutes private and confidential information.

3.4.6 it is recorded that the company will not violate your privacy rights and you will be entitled to point out specifically what data you are of the view is private and cannot be accessed.

3.4.7 the forensic expert will there and then decide based on the content of the e-mail whether it is private or not. As a rule of thumb any business relating to mining or mining equipment or pricing on equipment or any communications with any of the existing suppliers or clients of the company will be copied and will not be regarded as private.

3.4.8 for the purposes you are to allow the forensic expert access to all e-mail accounts used on the units which will include an obligation to provide any passwords or thumb or face identification access.”

[14] Mr Botes also brought the court’s attention to the fact that Annexure DK10 was signed twice. The first time was on the 7th of July at 09h36 and a second document of similar nature was signed on the very same day at 15h27. This, he says, is an indication that the applicants had sufficient time to reflect on the process that was going on and cooperated voluntarily with the investigations because they still managed later in the day to sign the amended form that they had already signed in the morning. The document lists the two cellular phones handed over by the applicants. It then proceeds to note the particulars of the SIM cards and the phone identification numbers, that is the IMEI numbers of the units as well as a passwords, including one for cloud extraction, the Gmail address that is used by the first applicant as well as the Gmail address that is used by the second applicant. This is what was contained in the document that was signed in the afternoon at 15h27. The document that was signed earlier had additional items such as Google messages and Google Drive.

[15] I must pause to mention that there was an extensive address by counsel pertaining to a statement made by Mr Mathiba earlier regarding sim cards. This statement was to the effect that if the respondents claim that the cell numbers belonged to the first respondent, then the applicants would have told the respondents to release the units and keep the sim cards if they had had an opportunity to file a replying affidavit. Mr Botes seized on this opportunity to argue that the applicants would not suffer any prejudice in that case because the units were useless without the sim cards. It is noteworthy that there was no replying affidavit before court and that the respondents had not claimed ownership of the sim cards. They claimed that some of the company business was conducted using these numbers.

[16] In sub-paragraph 4 of the opposing affidavit, the second respondent says: “The applicants are not entitled to the relief which they apply for in that the cellular telephones they lay claim to are exhibits in a pending criminal investigation. Moreover, and even though it is not strictly relevant we contend that the devices are not the property of the applicants. The applicants furthermore failed to disclose the pertinent circumstances under which their relationship with the first respondent was terminated as described below.” And then the second respondent proceeded to narrate the history of the issue that was not before court which is accusations levelled against the applicants relating to alleged fraudulent conduct directed against the operations of the first respondent. It would not be wise for the court to be drawn into issues that have got nothing to do with the application before it but instead relate to the merits of the underlying cause of the dispute between the parties. The sheer prolixity of irrelevant information placed by the Respondents before court in this regard is

astounding.

- [17] The court finds it strange that the second respondent views the issue of ownership of the cellular phones as being “not relevant” whereas this is the reason why he has been hauled before court. Mr Botes’s argument followed the same approach of wanting to pursue the “dirty hands” narrative as justification for his clients to keep the phones away from their rightful owners. At the end of the arguments, he referred the court to paragraph 27.2 of the opposing affidavit wherein the second respondent states that the phones are currently in the hands of authorities as real

evidence. The first applicant however says in sub-paragraph 10.2 of the founding affidavit: “The second applicant and myself consulted with our attorneys of record on Friday, 14 July 2023, after realizing that our cellular devices are not forthcoming even when we were advised that we will be contacted by the Respondent’s attorneys to collect same”. This statement has not been addressed in the opposing affidavit. It is not clear why the applicants were not informed that their phones had been handed over to third parties – something that contradicts the agreement the first applicant was made to sign. They were assured that they would be given an opportunity to point out what they considered private information, but in the same breath, the final decision would be that of the forensic expert. They were afforded no such opportunity and “the expert” has decided; if one were to follow the above undertaking; not only what can be downloaded, but also what can be published. In this regard, the third prayer of the applicants has to some extent been rendered moot. Further publication can, however, still be interdicted as the conduct of the respondents has already proven that they are not bound by the agreements they themselves drafted and signed.

- [17] It is the view of the court that the applicants have made a proper case for the relief they applied for. The respondents acted unlawfully in taking the applicants’ devices from them in the manner they did. Irrespective of the so-called consent, it is quite obvious that the environment within which the investigations were conducted was both oppressive and intimidating. The court agrees with Mr Mathiba that the respondents resorted to self-help and used untoward methods to extract information from the applicants. Nothing turns on the signed documents because the applicants did not have much of a choice, seeing that even the gates were locked to prevent them from leaving the premises. The time when the security people needed to access the second applicant’s laptop, she was “accompanied” home by armed security. The court fails to see the alleged cooperation and volition in all of this.

- [18] It is also clear that under the circumstances, there is no other satisfactory remedy than the relief claimed herein. The applicants have demonstrated that they have clear rights worthy of protection. It is also the court’s view that finding otherwise would be tantamount to endorsing the unlawful conduct of the respondents. As for the statement regarding the handing over of the devices to authorities without any proof of a criminal case having been opened, the court holds that the respondents remain responsible for their safe custody and are liable to produce them. They do not even disclose which authorities they are referring

to.

[19] The application succeeds. There is no reason why the costs should not follow the result. In this case a punitive costs order is justified, the court being well aware of the circumstances under which such orders may be given. The respondents had the benefit of legal advice from the moment they started their investigations against their employees. This advice would have been available to them when they gave instructions to file a Rule 35(12) or 35(14) and subsequently, the opposing affidavit. They proceeded to bombard the court with unnecessary annexures to which a general reference was made, at best. They included irrelevant information in the opposing affidavit which resulted in a document of 52 pages containing 27 paragraphs and their sub-paragraphs most of which was meant to justify their treatment of the applicants. This deserves censure.

[20] In the premises, the court makes the following order:

ORDER:

1. The First and Second Respondents are ordered to return the cellular phones of the first and second applicants and hand same over to the applicants or their attorneys before 16h00 on date of service of this Judgment on them.
2. The First and Second Respondents are interdicted from any further publication of the applicants' personal information extracted or downloaded from their cellular phones and Gmail accounts.
3. The First and Second Respondents are ordered to destroy all information that has been downloaded from the applicants' devices and Gmail accounts or similar data storage facilities without their consent.
4. The First and Second Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, on an attorney and client scale, such costs to include those of counsel.

BAM AJ

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA (MIDDELBURG LOCAL SEAT)

FOR THE PLAINTIFF: ADV S MATHIBA INSTRUCTED BY: MC LETOKA ATTORNEYS INC
malose@mcl-inc.co.za 010 600 2032 C/O STROH COETZEE INC theuns@strohcoetzee.com 013 –
282 5730 / 31 FOR THE DEFENDANTS: ADV. F BOTES INSTRUCTED BY: TINTINGERS INC
stintinger@tintingers.co.za C/O DE JAGER HATTING ATTORNEYS mignon@djhattorneys.co.za/
admin@djhattorneys.co.za 013 – 001 027 DATE OF HEARING: 2 AUGUST 2023 DELIVERED: 11
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Hearing conducted virtually via MicroSoft Teams

Judgment handed down electronically by circulation to the parties' legal representatives via e-mail.

[1] East Rock Trading (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited (2011) SA GPJHC 196

[2] (3263/02)

[2003] ZAECHC 5 21 February 2003)

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