

SOUTH AFRICA / JUDGMENT

Mkhwatshwa and Others v Mkhwatshwa and Others (391/2020) [2020] ZAMPMHC 11 (17 April 2020) [2020] ZAMPMHC 11

COURT

Middelburg High Court, Mpumalanga

BEFORE

Brauckmann

CASE / FILE NUMBER

391/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION MBOMBELA (MAIN SEAT)

CASE

NO: 391/2020

In

the matter between:

SIPHIWE

HAPPY

MKHATSHWA 1st

APPLICANT

ISAAC

NYOMO

NTIWANE 2nd

APPLICANT

JULY

MKHATSHWA 3rd

APPLICANT

MAWEWE

COMMUNAL PROPERTY ASSOCIATION 4th

APPLICANT

And

EVA

SIMANGELE

MKHATSHWA 1st

RESPONDENT

MAWEWE

TRIBAL
AUTHORITY 2nd
RESPONDENT
CINDY
ZIDWE
MKHATSHWA 3rd
RESPONDENT
DEPARTMENT
OF RURAL DEVELOPMENT
AND
LAND
REFORM 4th
RESPONDENT
MINISTER
OF RURAL DEVELOPMENT AND
LAND
REFORM 5th
RESPONDENT
MEC
FOR AGRICULTURE, RURAL
DEVELOPMENT
AND LAND
REFORM 6th
RESPONDENT
FIRST
NATIONAL
BANK 7th
RESPONDENT
STANDARD
BANK OF SA
LTD 8th
RESPONDENT
JOHANNES
LODEWYK
BOUWER 9th
RESPONDENT
JOHANNES
PETRUS
KOEKEMOER 10th
RESPONDENT
ETTIENNE
JAQUES
NAUDE 11th
RESPONDENT
JUSTUS
VAN
WYK 12th
RESPONDENT

JUDGMENT

BRAUCKMANN AJ

INTRODUCTION

[1] On 7 and 8 April 2020 I received notices from respondents requesting reasons for the order the Court handed down on 07th April

2020. It now appears that respondents 9 to 11 are represented by different attorneys who communicated with me on 08th April

2020. Further, and on 13 April 2020, a further firm of attorneys entered the fray. When I handed down the order on the 7th April 2020, I mentioned that I have not provided any reasons therefore, and should anybody wish to receive reasons I will provide it. Herewith then the reasons. As the reasons were only requested by the respondents the reasons will only deal with their “requests” therefore, as well as what I deem relevant.

[2] This court never refused to hear arguments about urgency, or whether the matter was enrolled properly with reference to “urgent and essential services” as provided for in the Regulations issued in terms of the Disaster Management Act[1], with specific regard to the judgment made by me in the Administrator of Dr JS Moroka Municipality and Others vs Thammy Goodwin Kubheka[2] (“The Moroka-matter”). I pause to mention that an application for leave to appeal has been filed and is pending in the DR Moroka-matter. Any arguments dealing with the proper enrolment of this matter, will be entertained by me on 21 April 2020, the date determined for the hearing of the matter. From an application for my recusal, launched by the first and second respondents, represented by a different firm of attorneys, on 13 April 2020, it is suggested that I intimated to counsel in court on 7 April 2020, that I am of the opinion that my judgment in the DR JS Moroka-matter was probably wrong. The transcribed record of proceedings of 7 April 2020 will show that the allegation is blatantly untrue. The sole reason why the Court postponed the matter was to accommodate the joinder of five parties to the case as respondents. The Court, as it is entitled to, mero motu joined four respondents (the individuals that were appointed by the court to control, and administer the Mawewe Community Property Trust (“the CPA”) as the 9th, 10th, 11th and 12th respondents (“The Administrators”)), and, as correctly stated by Mr Du Plessis SC during argument, had to afford them the opportunity to provide this court with their views regarding the matter, which includes their views regarding the alleged non-compliance with the lockdown regulations, and the application by applicants for a declaratory order. I also joined Standard Bank of South Africa Ltd as 8th respondent pursuant to an application to that effect by the applicants, which was not opposed by the respondents.

- [3] I pause to mention that before the proceedings started, and after a discussion in court, it was agreed between the parties' legal representatives that respondents' points in limine would first be dealt with. Those issues were limited to the following:
- [3.1] the respondents' objection to applicants' locus standi, and non-compliance with Rule 7 of the Uniform Rules of Court ("The Rules");
- [3.2] the respondents' failure to react to applicants' notice in terms of rule 47 (1) by not posting security in terms of the notice in the amount of R 500 000.00; and
- [3.3] the applicants' failure to join the administrators appointed by the court in the final order ("The Order"), who, according to Mr du Plessis SC, has a direct and substantial interest in the matter (non-joinder).
- [4] It is therefore incorrect that this court refused to hear the arguments, and point raised by respondents dealing with "urgent and essential services" It is, and remains a technical argument which, if upheld, would mean that the matter will be struck off the roll, but does not dispose of the main dispute between the parties.
- [5] The referral to the "fourth respondent" paragraphs 7 to 9 of my order was a patent error. This should have read: " [the] fifth applicant". It is clear from the papers that the fourth respondent is a Government Institution, and that they do not oppose the application. This court could never have made the order against the Government Institution. Within the context of the disputes, it was clear that the referral to the "4th respondent" in the court order was clearly incorrect, and remediable by the court in terms of rule 42
- (1) (b)[3]. The Court remedied the patent error on 08April 2020, when it was pointed out to the Court in correspondence received from applicants' attorneys. The court requested its secretary, Mr Mavimbela, to favour the parties' legal representatives with the varied order.
- [6] Although the formulation, and effect of paragraphs 7, 8 and 9 was never argued in court, it was discussed during argument in an engagement between the court, Mr Du Plessis SC, on behalf of the first and second respondents and Mr Shokoane SC, on behalf of the applicants. Although no concession were made by either party in this regard, the indication was, in the event the court decided to join the 9th to 12th respondents to the application, the matter would have to be postponed in any way for the reason referred to earlier in this

judgment.

- [7] During the engagement with counsel in court on the aspect, no clear indication were given to the court that the orders in paragraphs 7, 8 and 9, as proposed by the Court in broad terms, will be consented to by the parties. The Court was of the view, having regard to the main dispute between the parties (whether the order constitutes a final order which, after the application for leave to appeal was lodged, suspended its operation), that making the orders would be in the best interest of the parties, pending the outcome of the application, and the appeal procedures. The interim order, would only operate pending the final hearing

on 21 April 2020. The administrators could then file their opposing papers, if any, without the possibility of another urgent approach to the court by either party, and any possible transactions by any party in the interim remains prohibited, unless the court grants such party, on application, consent to transact on 4th applicant's banking accounts, the investment of R 1 million, made by the administrators with the funds withdrawn from the 4th applicant's bank account with 8th respondent, or conduct business with the assets, or on behalf of the CPA.

- [8] It is apparent that, for the duration of the total lockdown period, the fourth applicant's game lodge, mines or farming operations cannot operate, as that would be in contravention of the regulations, in terms of the DMA.
- [9] What was of paramount importance to the court was to ensure that by 21 April 2020, all parties with a direct and substantial interest in the application was properly before court. That was achieved by joining the administrators, and Standard Bank, and by case-managing the application to prevent any further technical objections by the parties, and enable the court to hear argument on the merits of the matter before court and prevent further wasteful legal costs. It is undoubtedly in the best interest of the beneficiaries of the fourth applicant, as well as the parties to this litigation. During argument Mr Du Plessis SC mentioned that, should the court *mero motu* decide to join the administrators, they would want to have their say as to what the effect of the court order is, as well as to consider whether they want to file opposing affidavits, although Mr Koekemoer, the 10th respondent deposed to the opposing and founding affidavits on behalf of the 1st and 2nd applicants. For this reason alone the matter was always going to be postponed. Sight must also not be lost of the respondents'

continuous efforts, by corresponding with the Judge President of this division to secure a postponement of the application. The respondents initially proffered the lockdown regulations by the minister of COGTA, in terms whereof NO individual was allowed to cross provincial borders, as ground for a postponement of the matter on 7th April 2020. When the Minister promulgated amendments to the regulations, the respondents changed their tack, and as appears from

their heads of argument, and relied on the fact that only "urgent and essential" matters may be enrolled the roll during the lockdown period. To put it differently, the respondents all along wanted the matter to be postponed to a day after the lockdown period terminated.

- [10] In the light of the fact that the court, in the interest of justice and in order to finalise this dispute, decided to join the five respondents, I also decided to postpone the matter as I deemed it as convenient and in the best interest of the litigation, to finalise the application by the 21st April 2020. Pending the judgment in this application, and outcome of the appeal, I made the interim orders in paragraphs 7, 8 and 9 in an attempt to avoid any further urgent applications during the lockdown period.

- [11] By granting the orders in paragraph 7 to 9 it was never the court's intention "...granting the relief sought by the applicants in the application". As set out in paragraph [6] to [9], supra, if the court wanted to grant the relief "sought by the applicants", it would not have worded the order as it did. In terms of the order neither the applicants nor the respondents are allowed to conduct any business on behalf of the fourth applicant pending the outcome of the application, or any appeal. One would have thought that if the court favoured the applicants in this matter, it would not have included the condition that the applicants are not entitled to trade with any of the assets of the fourth applicant, as the respondents allege applicants are doing. For the reasons above the court made the order pending the outcome of the urgent application to be heard on 21 April 2020.
- [12] While considering the terms of the order, the Court was alive to the fact that farming operations, mining, game farms and tourism business are conducted on properties belonging to the fourth applicant. As I understand from the first and second respondents, the business is conducted, albeit as alleged, unlawfully, by the first to third applicants for their own profit, and not for the benefit of the CPA, or its beneficiaries.
- [13] In paragraph 35 of the respondents opposing affidavit the respondents deny the applicants' averment that workers had to be paid from the fourth applicant's funds. It is categorically stated by the respondents that the wages, and other expenses, like Eskom and other business related expenses, claimed by applicants are the responsibility of the first to third applicants who farms on the farms for personal gain. This is accordingly not any concern of the respondents, and cannot cause any urgency pendente lite.
- [14] It is therefore apparent, that according to the respondents, none of the business conducted by the applicants were conducted on behalf of the fourth applicant. Therefore, interdicting all business from proceeding until this court is in a position to hear the full application on 21 April 2020 does not prejudice any of the parties. It only served to preserve the assets and funds until the joined parties had been given an opportunity to answer to applicants' affidavit in this matter. This court did not have an opportunity to decide on the applicants application, in other words whether the order of 10 March 2020 was final or not, or the counter application. If the court finds that the order (10 March 2020 does not constitute a final order, the execution will on all probabilities be allowed to proceed and the application for leave to appeal and subsequent appeal would not realise.
- [15] The applicants as well as the respondents, if the need arises for the conducting of the business of the 4th respondent, may approach a court on an urgent basis, in terms of the court order of 7 April 2020. The respondent's version, as I understand it to be in all the applications, is that the business of the fourth applicant was conducted by the so-called "rogue" committee-members of the CPA, for their own profit, and as the respondents further attitude is that no committee existed, it is

clear that no prejudice is suffered by the respondents. As stated, nothing prevents them from approaching this court on an

urgent basis should such need arise for orders to enable them to conduct the business of fourth respondent, pending the outcome of this application.

[16] I also specifically reserved the costs in order to establish, inter alia, whether the submissions made on behalf of the administrators' legal representative, Mr du Plessis, to wit that they would like to consider whether they would want to file further opposing affidavits after they were joined as parties to the application. That will assist this court in arriving at a just conclusion in respect of costs.

HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

REPRESENTATIVE FOR THE APPLICANTS: ADV SHOKOANE SC

ADV NGWENYA

INSTRUCTED BY: JF SHABANGU ATTORNEYS (joy@jfshabanguattorneys.co.za)

REPRESENTATIVE FOR THE FIRST AND SECOND RESPONDENTS: ADV DU PLESSIS SC

INSTRUCTED BY: DU TOIT SMUTS & PARTNERS (mvdwesthuizen@dtsa.co.za)

REPRESENTATIVE FOR FIRST AND SECOND RESPONDENTS (RECUSAL APPLICATION): WNA ATTORNEYS (waltern@mweb.co.za)

REPRESENTATIVE FOR 9th TO 12th RESPONDENTS: PRINSLOO BEKKER ATTORNEYS

(rick@pblaw.co.za)

DATE OF HEARING: 07 APRIL 2020

DATE OF JUDGMENT: 17 APRIL 2020

[1] No 57 of 2002 ("the DMA"),

[2] (1170/20) [2020] ZAMPMHC 3 (3 April 2020)

[3] 42 Variation and rescission of orders (1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary: (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

[3] 42 Variation and rescission of orders

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