

SOUTH AFRICA / JUDGMENT

Moshabane v Mtshagi (Kave) and Others - Application for Leave to Appeal (70/2022) [2023] ZAECQBHC 39 (20 June 2023)

[2023] ZAECQBHC 39

COURT

Eastern Cape High Court, Gqeberha

BEFORE

T.V Norman

CASE / FILE NUMBER

70/2022

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION – GQEBERHA]

CASE NO.: 70/2022

In the matter between: -

THANDIWE ANGELA MOSHABANE APPLICANT And PAMELA NOSIPHO MTSHAGI (KAVE) 1ST
RESPONDENT REMAX ESTATE AGENT 2ND RESPONDENT XHANTI MTONGANA 3RD
RESPONDENT ZONKE BUDAZA INC. 4TH RESPONDENT ZONKE BUDAZA 5TH RESPONDENT
SIMONE JONKER 6TH RESPONDENT MASTER OF THE HIGH COURT 7TH RESPONDENT

JUDGMENT

ON APPLICATION FOR LEAVE TO APPEAL

NORMAN J:

[1] This is an application for leave to appeal against an order that this court granted on 16 February

2023. The order reads:

“1. The matter be and is hereby postponed to 20 April 2023.

2. The applicant is to pay today’s wasted costs and those of the application for postponement.”

[2] The order came about as a result of an application for postponement which was brought by the applicant. The applicant was legally represented and so were the respondents.

Grounds for seeking leave

- [3] The main ground for seeking leave is that because the main application relates to the validity of a will this court had no authority to sit as a single judge to deal with the postponement application. On this basis the applicant contends that, this court erred. The applicant accepts that the main issue, namely, the validity of the will was not dealt with at all on that day and only a postponement application was entertained.
- [4] The other ground raised is that when the court furnished reasons for the order, when they were sought, it directed the registrar to amend the order by including, “for postponement” after the words application. In this regard the applicant contends that the court abused its powers as it was *functus officio*.
- [5] The applicant also sought condonation for the late filing of the application for leave to appeal. The reasons advanced for the delay were:
- (i) The applicant could not file the application for leave to appeal, fifteen days, after the reasons were furnished because the applicant was acting as a Magistrate and after her acting stint, she had to wait two weeks to get a copy of the court order to be sent to her attorney.
 - (ii) Applicant collected the court order. Upon receiving the court order she requested reasons for the judgment or order. She was only given reasons from a single judge instead of reasons from two judges as the court had to be constituted by two judges,
 - (iv) Upon reading the court order, she wrote an email to the Deputy Judge President’s secretary and the registrar requesting the second judge’s reasons. The applicant did not receive any response or explanation.
 - (v) The applicant continued with a follow request up on 27 April 2023 to be provided with reasons of the second judge. The applicant still was not furnished with the reasons of the second judge. However, the first respondent’s attorney decided to respond on behalf of the court whereas the applicant did not request the first respondent’s attorney to reply on behalf of the court officials. This became a surprise to the applicant as the respondents’ attorney is not employed by the court and cannot respond on behalf of the court officials or the judiciary.
 - (vi) The applicant continued to request from the registrar to be provided with the rule and the practice directive which grants a registrar authority to provisionally set the matter down without the parties. The applicant still did not get any response from the Deputy Judge President.
 - (viii) She concluded by stating that the delay in filing the notice of appeal was not her fault but it was caused by the court and therefore the applicant is not obligated to bring an application for condonation.

- [6] The other ground raised for leave to appeal was that the court erred in finding that the first respondent was entitled to costs of 16 February 2023 because the first respondent was not properly before court on that day. This, applicant argued, was because the first respondent had not complied with a certain order of court that had been issued prior to 16 February 2023.

Applicant's legal submissions

- [7] Applicant appeared in person. She is a legal practitioner. She submitted that another court would find that this court erred in postponing the matter as a single judge and in awarding costs of the postponement against her.
- [8] She relied on the matter in *Zuma v Office of the Public Protector & Others*[1] where the court stated that: "An appellate court will not interfere with the exercise of that discretion, unless there was a material misdirection by the lower

court." On this basis she submitted that the discretion that the court had was not properly exercised and the appeal court will certainly interfere with the decision of this court.

- [9] She submitted that she had been severely prejudiced in pursuing the case because the court in respect of every matter she brought, she was not successful. She made several remarks that had racial connotations, she lacked court decorum, was unruly and disrespectful to the court.

Respondents

submissions

- [10] Mr Marais appeared for the first respondent. The respondent's contention is that there is no merit in the application for leave to appeal. He submitted that an objection to the jurisdiction of the court must be taken in limine and that a party that submits to the court's jurisdiction cannot now complain for the purposes of seeking leave to appeal. He submitted that there are limitations imposed on a court deciding whether leave to appeal ought to be granted or not.
- [11] In this regard he relied on section 17 of the Superior Courts Act 10 of 2023 (SCA Act). He submitted that leave may only be granted if this court is of the opinion that the appeal would have reasonable prospects of success or there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration. The decision also does not dispose of all the issues in the case and the appeal would not lead to a just and prompt resolution of the real issues between the parties.
- [12] He further relied on section 16(2)(a) of the SCA Act for the submission that in any event the order that is being appealed would have no practical effect. He raised the fact that the application for leave to appeal was defective because it purported to appeal against the order.

[13] He submitted that in any event the main application was disposed of on 20 April 2023 by the Full Court and

the parties were awaiting judgment on the main issue of the validity of a will and therefore any appeal that relates to the orders

(relating to postponement) that this court made, is rendered of no practical effect.

[14] He submitted that this application was vexatious and in this regard he relied on the decision by Southwood J in Johannesburg City Council v Television and Electrical Distributors[2] where the Court referred, with approval to In re: Aluvia Creek Ltd[3] in support of its statement that “in appropriate circumstances the conduct of a litigant may be ‘adjudged vexatious’ within the extended meaning that has been placed upon the term in a number of decisions, that is, when such conduct has resulted in ‘unnecessary trouble and expense which the other side ought not to bear’”.

[15] He submitted that the applicant is not a layperson. The applicant had conveyed that she is an attorney and therefore an officer of the court. She must have been aware that the application is baseless yet she persisted with it causing the first respondent untold trouble and expense. On this basis, he submitted that the court should dismiss the application for leave to appeal and that costs should be ordered on an attorney and client scale.

Discussion

Condonation

[16] On 8 March 2023 the applicant requested reasons for the order. Those reasons were furnished, two days later, on 10 March 2023. The application for leave to appeal was only brought on 24 May 2023, two months later.

[17] The reasons advanced for the delay are spurious. The applicant knew that the order was made by a single judge and any request for reasons from a “second judge” was simply a waste of time. As aforementioned the applicant was duly represented by counsel on the day in question. He did not object to the fact that for the purposes of the application for postponement the court was not constituted as a Full Court. In any event there was no prejudice to the applicant because the applicant was granted the postponement that she sought. I had furnished the reasons for having made the costs order. The applicant was seeking an indulgence. A substantive application for postponement was brought on the day of the hearing.

[18] In Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others[4] , the Supreme Court of Appeal stated:

“[11] Factors which usually weigh with this court in considering an application for condonation include the degree of non – compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice..”

(footnotes omitted).

- [19] The explanation advanced for the delay is not satisfactory and does not justify condonation of the late lodgment of this application. On this basis, condonation is refused.
- [20] I hasten to record that after argument on the day when the application was heard, the court had to afford the applicant an opportunity to reply to the ex gratia heads of argument submitted by the first respondent, in writing, since she complained that those heads of argument were only furnished to her at the hearing.
- [21] In replying to the first respondent's heads of argument, the applicant filed what she termed 'APPLICANT'S APPEAL REPLYING AFFIDAVIT'. She prepared an affidavit instead of an argument in reply. She complained in that affidavit that she had not been afforded a fair trial. In that affidavit the applicant went on to deal with cases that relate to contempt of court, which in my view, do not find application to the matter at hand.

Amendment of the order

- [22] I considered the complaint that the court was functus officio and ought not to have amended the order. The amendment was not an invention of a new order. The transcribed record revealed the correct order made by this court. The typed order omitted the two words "for postponement" as aforementioned. That was simply intended to clarify with certainty (as properly recorded in court) that the costs related to the postponement application. It was in the interests of justice to do so.
- [23] In *HLB International (South Africa) v MWRK Accountants and Consultants*[5], the Supreme Court of Appeal dealt with a matter where the high court had interpreted and corrected its order. The Supreme Court of Appeal stated at paragraph 19:

"[19] Rule 42(1)(b) of the Uniform Rules of Court provides that the high court may, in addition to any other power it may have, on its own initiative or upon the application of any party affected, rescind or vary 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..." (my emphasis).

- [24] The words omitted were contained in the order made in court evinced on the transcript. Therefore the 'sense and substance' of the order was not altered[6]. The submission that the correction amounted to an abuse of the court's powers, is accordingly, not supported by the provisions

of Rule 42, above.

- [25] I have considered the heads of argument from both parties and "the applicant's appeal replying affidavit" and I am of the view that there is no merit in the application. The order was interlocutory in nature and did not determine any of the issues in the main application. I have not come across any decision where an applicant seeks to undo a postponement that has already been granted and the applicant did not advance any.

[26] I find that there is no merit in any of the grounds advanced in this application. To the extent that leave is sought against the costs order, that too, will have no practical effect as envisaged in section 16 (2) (a) of the Superior Courts Act. For these reasons the application must fail. I am satisfied that the court on appeal would not interfere with the orders made.

Costs of this application

[27] On the issue of costs, the first respondent, asked this court to grant costs on an attorney and client scale. I do not deem it appropriate to do so. However, I must add that due to the indecorous conduct of the applicant during the proceedings of 9 June 2023, I will direct that the transcript of those proceedings be forwarded to the Legal Practice Council. I did inform Ms Moshabane and Mr Marais at the hearing that I intended to issue that order.

Order

[28] In the circumstances I make the following Order:

- (i) The application for leave to appeal is dismissed with costs.
- (ii) The Registrar is directed to forward the transcribed record of the proceedings of 9 June 2023 to the Legal Practice Council, Eastern Cape within fourteen (14) days hereof.

T.V NORMAN

JUDGE OF THE HIGH COURT

Matter heard on:

09 June 2023

Judgment

Delivered on: 20 June 2023

APPEARANCES: For the APPLICANT: MS MOSHABANE (In person) 117 CALEDON STREET, SHERWOOD GQEBERHA Instructed by: MOSHABANE ATTORNEYS c/o: MR PONGOLA GODSMITH STREET NORTH END GQEBERHA REF: Moshabane/t/Kave/Estate/007808/2021 Email: Moshabaneattorneys@mweb.co.za CELL: 074 114 8099 For the 1ST RESPONDENT: ADV MARAIS Instructed by: JACO HATTINGH ATTORNEYS 28 SEVENTH AVENUE NEWTON PARK GQEBERHA REF: MR HATTINGH/rh/KAV04 EMAIL: jaco@jhla.co.za TEL: 041 364 2624

[1] 2020 (ZASCA) 138 at para 19.

[2] 1997 (1) ALLSA 455 (A); [1997] JOL 507 (A); 1997 (1) SA 157 (A) 177 D-E.

[3] 1929 CPD 532.

[4] (619/12) [2013] ZASCA 5 (11 March 2013) at para 11.

[5] (113/2021)

[2022] ZASCA 52 (12 April 2022), para 19.

[6] HLB International, *supra*, para 20.

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