

SOUTH AFRICA / JUDGMENT

Msimango and Others v National Director of Public Prosecutions and Another, Ex parte: In re National Director of Public Prosecutions v Msimango and Others (1880/2008, 1334/2008) [2011] ZAFSHC 17 (3 February 2011)

[2011] ZAFSHC 17

COURT

Free State High Court, Bloemfontein

BEFORE

S. Ebrahim

CASE / FILE NUMBER

1880/2008, 1334/2008

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 1880/2008

In the matter of:

SIBUSISO MSIMANGOFirst applicant

(In his personal capacity and as a Trustee of
the Tabana Trust)

ANDREW SIFELANE MSIMANGOSecond applicant

McDONALD MSIMANGOThird applicant

RISE MSIMANGOFourth applicant
the Tabana Trust

SYLVESTER MAHAMOFifth applicant

SICELOSENKOSI MTHIMKULUSixth applicant

MESHACK SITHOLESeventh applicant

MZALA SITHOLEEighth applicant

ADOONS KNIGHTNinth applicant

NDUMISO DUBETenth applicant
 LUCKY SITHOLEEleventh applicant
 CHARLES SITHOLETwelfth applicant
 MOROESI PATIENCE MSIMANGOThirteenth applicant
 BUYELWA ROSE SOMHLAHLAFourteenth applicant
 SOLOMON OSWELL SITHOLEFifteenth applicant
 and

NATIONAL DIRECTOR OF PUBLICFirst respondent
 PROSECUTIONS

ADV. J LUBBE SC NOSecond respondent
 (In his capacity as curator bonis)

IN RE:

Case No. : 1334/2008

In the ex parte application of:

NATIONAL DIRECTOR OF PUBLICApplicant
 SIBUSISO MSIMANGOFirst defendant
 (In his personal capacity and as a Trustee of
 ANDREW SIFELANE MSIMANGOSecond defendant
 McDONALD MSIMANGOThird defendant
 RISE MSIMANGOFourth defendant
 SYLVESTER MAHAMOFifth defendant
 SICELOSENKOSI MTHIMKULUSixth defendant
 MESHACK SITHOLESeventh defendant
 MZALA SITHOLEEighth defendant
 ADOONS KNIGHTNinth defendant
 NDUMISO DUBETenth defendant
 LUCKY SITHOLEEleventh defendant
 CHARLES SITHOLETwelfth defendant

TABANA TRUSTFirst respondent
MOROESI PATIENCE MSIMANGOSecond respondent
BUYELWA ROSE SOMHLAHLAThird respondent
SOLOMON OSWELL SITHOLEFourth respondent
ISRAEL MAIKETSO MOTLHABANEFifth respondent
M.D. MOSOKHOTSOANESixth respondent
F.R. NHANTUMBO F.R. NHANTUMBOSeventh respondent
HEARD ON: 20 MAY 2010

JUDGMENT:

EBRAHIM, J

DELIVERED ON: 3 FEBRUARY 2011

- [1] The applicants are to stand trial in due course on several charges relating to dealing in unwrought gold, racketeering and money laundering.
- [2] On 20 March 2008, the respondent launched an application ex parte in this Court for the restraint disclosure and surrender of the applicants' realizable property as specified in terms of section 26 of the Prevention of Organised Crime Act, 21 of 1998 ("POCA"). In terms of the order sought and granted the applicants were obliged to furnish to the curator bonis within ten days of the date of the order, a description as well as the whereabouts of all property not surrendered as well as of property belonging to the applicants in the possession of third parties and particulars of gifts received by the applicants together with the names and addresses of the donor/doneness. This application was referred to by counsel, in argument, as "the restraint application".
- [3] At a meeting held between the legal representatives of the parties to the restraint application on 16 April 2008 and attended by the curator bonus, it was agreed that an amount of R160 000,00 would be paid into the trust account of applicants' attorney of record so as to enable the applicants to obtain legal advice relating to the applicants' prospects of success in opposing the restraint application. This amount was paid to the applicants and the provisional restraint order confirmed on an unopposed basis on 12 June
2008. The total value of the applicants' properties, restrained and thereafter confiscated and forfeited to the State, was approximately R5,5 million.

[4] In the meantime, on 15 April 2008, the applicants brought, on an urgent basis, the present application in terms of section 26(6) of POCA (“the release application”) which was argued before me on 20 May 2010, for the release of the following amounts, for payment of current and prospective legal and living expenses, from the proceeds of certain of their properties subject to the restraint order:

First applicant R375 942.92

Second applicant R289 676.99

Third applicant R201 862.50

Fourth applicant R326 658.30

Seventh applicant R264 081.42

Eighth applicant R264 081.42

Tenth applicant R90 000.00

Eleventh applicant R90 000.00

Thirteenth applicant R90 000.00

Fourteenth applicant R90 000.00

Fifteenth applicant R90 000.00

TOTAL R2 172 303.55

These amounts are specified in annexures “B”, “C”, “D”, “E” and “F” to the Notice of Motion.

[5] It is common cause that only the stated eleven applicants have proceeded with the release application for the stated amounts, the claim for living expenses having been abandoned. It is not disputed in oral argument before me that the purpose of applicants’ claim is to meet legal expenses in respect of proceedings instituted against them in terms of Chapter 5 of POCA, which embodies a mechanism for the confiscation by the State of proceeds derived from criminal activity, and/or any criminal proceedings to which such proceedings relate.

[6] The respondents opposed the release application and filed answering papers on 26 May 2008. Applicants replied on 4 June 2008 and on 24 April 2009, filed an interlocutory application, in which they sought to supplement their replying papers. Respondents responded by filing a rejoinder affidavit.

[7] The first respondent resists this application on three principal grounds:

7.1 The underlying rationale for the release of funds fell away when on 16 April 2008 the second respondent agreed to pay and thereafter made payment of R160 000,00 into applicants’ attorney’s trust account for legal expenses to be incurred in respect of their opposition of the rule nisi in the restraint application. No reference is made in the founding affidavits to obtain funding so as to

place the applicants in a financial position to instruct legal representatives to advise them on the merits and demerits of charges they face in the criminal proceedings. On the contrary, it was argued, the expenses referred to as being the very purpose and essence of the release application is to be found repeatedly referred to in the founding affidavit as those which would enable the applicants to pay attorneys' and counsel's fees for advice on the merits of the restraint application which, it is alleged by applicants, is of a complex nature. The release application is, accordingly, on this ground alone fatally flawed and falls to be dismissed.

7.2 The jurisdictional requirement relating to all disclosure in terms of subsection 26(2) of POCA must exist at the time the release application is brought; that means that the basis for such an application and the requirement of full disclosure of assets as a necessary prerequisite for the granting of the relief sought, must be met in the founding papers and not in the replying affidavits.

7.3 The applicants have failed to make full disclosure of how the property subject to the restraint application was acquired and paid for and did not disclose the origin of the money with which the property was bought. The respondents have on these grounds denied that applicants have made full disclosure of their interest in the property.

[8] Section 34 of the Constitution of the Republic of South Africa Act 108 of 1996 guarantees every citizen the right to have any dispute which can be resolved by the application of law decided in a fair public hearing before a court of law. Section 26 of POCA gives effect to this right through the provision of a mechanism by which a needy litigant, facing a criminal trial within the framework of the machinery provided for in Chapter 5 of POCA, can obtain a court order for the payment of reasonable legal expenses. The need for such expenses to be provided for, is regarded as a fair trial requirement for, of all the rights that an accused person has, it has been held that the right to legal representation is the most persuasive because it affects his ability to assert any other rights he may have by a person trained and qualified to do so.

See section 35(3)(d)(f)(g) of the Constitution of the Republic of South Africa Act 108 of 1996.

[9] The test, off course, for the grant of an order in terms of section 26(6) is full disclosure by the applicant, to the court's satisfaction, of his/her interest in the property subject to the restraint and a failure on his/her part to meet the expenses for which the order is sought out of his/her own pocket / unrestrained property. Should the court be satisfied in this regard, the section allows the court a discretionary power: it may make such provisions as it thinks fit for the applicants reasonable expenses.

[10] As a court of first instance, this court will, in the exercise of the discretion vested in it by subsection 26(6), have of necessity to take a robust approach based on the particular facts put up by the applicants in order to arrive at a determination which is fair and just. This involves the balancing of the competing right of the respondents to enforce the restraint in order to preserve the assets under restraint so that alleged ill-gotten gains are not used or retained by the applicants and of the right of the applicants not to be prejudiced in the

conduct of their defence due to a failure to meet legal expenses. The applicant does not bear an onus to justify his claim to reasonable legal expenses.

[11] It is well documented in case law in the various divisions of the High Court in this country that a person requiring the exercise of that discretion in their favour, should place before the court sufficient evidence of factors in its founding papers guaranteed to influence the court in exercising that discretion. These factors have been usefully set out in the decision *FRASER v ABSA BANK LTD (NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AS AMICUS CURIAE)*

[2006] ZACC 24; 2007 (3) SA 484 (CC) at 510 in par. [72]:

“[72]

Circumstances to be considered in the case of legal expenses would include: (a) the seriousness and complexity of the charges against the defendant or of the civil proceedings in which he or she may be involved;

(b) the conduct of the defendant, preceding, and in, the s 26(6) application proceedings (including whether a full disclosure of all his or her interests in the restraint property has taken place and whether the defendant is attempting to benefit from a restraint order, or has acted fraudulently); (c) the value of his or her assets; (d) the number and amount of known creditors' claims; and (e) the history of the specific claim of the creditor who seeks intervention.”

But it is wise to keep in mind that additional factors may have to be considered in different circumstances affecting the exercise of the discretion which arises in different cases. Because such an application constitutes civil proceedings any question of fact must be determined on a balance of probabilities.

[12] I did not understand respondents to argue that the amount of the funds claimed, as set out in applicants' founding papers, was not reasonable or to dispute that applicants do not have the funds to meet such expenses out of unrestrained property. Mr. Fischer, respondents' counsel, was not able to draw my attention to any specific evidence to the contrary.

[13] I turn to deal with the issues before me.

13.1 On my reading and interpretation of subsection 26(6) of POCA no distinction is made in the Act between the applicants' constitutionally entrenched right to have legal representation in connection with the proceedings instituted against them for a restraint order or the criminal proceedings to which that order relates. The Act empowers this court with the statutory authority to make an order for the applicants' reasonable legal expenses in connection with either court proceeding, be it civil or criminal. Whilst it is true that the applicants have restricted the basis of their application for funding in their founding papers to a claim in respect of the restraint proceedings, that that claim has been extinguished by their acceptance of the sum of R160 000,00 and no mention is made of the forthcoming criminal trial, the evidence provided of the amount

of the legal expenses claimed has not been challenged at all by the respondents. Respondents have not categorically denied that the figures provided represent a reasonable claim for prospective legal expenses in connection with the forthcoming criminal trial. That, in my view, is the essence of the matter. Had this been the gravamen of the first respondent's objection, I might have viewed its arguments in a stronger light and as being more persuasive in an attempt to find favour with this court on this particular aspect of these proceedings. To my mind the "issue" raised by the respondents is a non-issue; created by the respondents where no such issue exists. The respondents are not entitled to exploit a lacuna in applicants' case of the nature complained of and I find that they have signally failed to make out a case for dismissal of the release application on this ground.

It is trite that an applicant for relief in motion proceedings must make out a case for that relief in his founding papers. No case for the relief sought will be allowed to be made in reply absent the making out of a case in the original application.

See: TITTY'S BAR AND BOTTLE STORE (PTY) LTD v ABC GARAGE (PTY) LTD AND OTHERS 1974 (4) SA 362 (T); SHAKOT INVESTMENTS (PTY) LTD v TOWN COUNCIL OF THE BOROUGH OF STANGER 1976 (2) SA 701 (D); PUNTAS' TRUSTEE v LAHANAS 1924 WLD 67 at 68.

Mr. Van Amstel SC, for the applicants, sought leave to file a supplementary replying affidavit on the basis that applicants' replying affidavit had been drafted by junior counsel representing the applicants at the time and that important matter, not necessarily new matter, but matter which served to embellish upon facts already placed before the court in the founding papers and which was necessitated by disputes of fact raised as a result of allegations in the respondents' answering papers had been omitted in reply.

Mr. Fischer opposed this application on the basis that it was sought thereby to cure a fatal defect in the founding papers viz a failure to fully and properly disclose the applicants' interest in the property subject to the restraint. He contended that such a defect should not be permitted by this court to be cured by the filing of a fourth set of affidavits. The rule of practice that an applicant must, generally speaking, stand or fall by his founding papers, is not one cast in stone but has been bent from time to time, because of the existence of a judicial discretion which permits the filing of further affidavits so as to give effect to a salutary practice and fundamental consideration in the administration of justice, that a matter should be adjudicated upon all the facts relevant to the issues in dispute. Despite the cogency of this rule of practice, it has been frequently stated that it does not operate to preclude the introduction of further affidavits when considerations of fairness and justice to both parties dictate that this should be done. The rule remains subject to the discretionary power of the court and the mere fact that the matter sought to be introduced in the new affidavits should properly have been included in the founding affidavit and not in reply, does not negative the existence of that discretionary power - TRANSVAAL RACING CLUB v JOCKEY CLUB OF SOUTH AFRICA 1958

(3) SA 599 (W); DAWOOD v MAHOMED 1979 (2) SA 361 (D).

In JAMES BROWN & HAMER (PTY) LTD (PREVIOUSLY NAMED GILBERT HAMER & CO LTD) v SIMMONS, NO 1963 (4) SA 656 (A) at 660 Ogilvie Thompson JA said:

“It is in the interests of the administration of justice that the wellknown and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable.”

See further: COHEN, NO v NEL AND ANOTHER 1975 (3) SA 963 (W); PAT HINDE & SONS MOTORS (BRAKPAN) (PTY) LTD v CARRIM AND OTHERS 1976 (4) SA 58 (T).

I am mindful that the discretion should be judicially exercised in the sense that the presence of mala fides or culpable remissness as to the cause or reason for the failure of the facts or information in question not being placed before me in the ordinary way, should incline me to refuse to admit the supplementary replying papers. I think it is clear on the evidence before me that no such mala fides or culpable remissness is to be found in the reasons for the applicants' failure to produce the evidence it now seeks to admit, timeously. A careful and close reading of the applicants' case has revealed that the junior counsel who drafted the replying affidavit saw fit to deal with the numerous disputes of fact raised in the respondents' answering papers with the minimum of effort and the replying affidavit contains a litany of bald and bland allegations with no fleshing out where it is clear that amplification and detail are required. That remissness on his/her part has not been shown to have been induced by mala fides or culpable laxity and could possibly be due to inexperience in the drafting of affidavits or of motion proceedings in general. It is however not for this court to speculate on those reasons, save to make a finding which negatives mala fides, based on the facts and not on probabilities and I make that finding on the factual evidence before me.

See: ADMINISTRATOR, TRANSVAAL, AND OTHERS v THELETSANE AND OTHERS [1990] ZASCA 156; 1991 (2) SA 192 (A) at 196 J - 197 D.

The explanation advanced by Mr. Van Amstel for the failure to properly reply in the first instance, is to my mind reasonable and sound. The supplementary replying affidavit contains evidence which is material and relevant and ought to have been dealt with in reply. I do not find that the evidence is of such a calibre that it ought to have been included in the founding papers. It is clear to me that the applicants have made full disclosure in their founding papers of all of their interest in the property under restraint. Furthermore they have disclosed to the Asset Forfeiture Unit, conducting investigations on behalf of the first respondent, that all manner of applicants' assets, be it immovable property, cash money, investments, savings or motor vehicles have been disclosed. Even contractual rights to the use of property where property is held through agents or

nominees has been disclosed. The need for the supplementary affidavit did not arise as a result of the applicants' failure to make proper and full disclosure in their founding papers.

In addition, the respondents have not raised any counter-argument to the explanation advanced by Mr. Van Amstel, they neither accept the explanation nor deny it. In the circumstances it is clear to me that those advising the applicants at the time of the drafting of the replying affidavit failed to fully appreciate how far they should go and what particularity was required. But I do not find that their conduct can be stigmatised as mala fide and of such a nature and degree so as to disentitle the applicants from now being afforded an opportunity to remedy the defect, especially if the consequence of the remissness can be corrected without causing prejudice to the respondents. The respondents have filed a rejoinder affidavit, so no real prejudice has been occasioned to them and none was brought to my attention by Mr. Fischer. As the degree of culpability is not so great, such as to force me to refuse to exercise my discretion on this ground alone in applicants' favour I am inclined to grant the relief sought by the applicants. To do otherwise, would result in me being distracted by technicalities which would have the effect of diverting me from ascertaining the full set of facts and adjudicating

the real issues between the parties based on all the material and relevant evidence.

[14] Mr. Van Amstel has requested that, in the event that I am disposed to exercising my discretion in applicants' favour, I make an order for payment of the sum of R1 445 382,64.

After hearing argument on 20 May 2010, I accordingly granted an order in the following terms:

1. Leave is granted to the first, second, third and fourth applicants to each file a supplementary replying affidavit;
2. The said applicants pay the costs of the application for such leave, on an unopposed basis;
3. The second respondent in his capacity as curator bonis of the applicants estates, is authorised, permitted and directed by the above honourable Court to forthwith release the amount of R1 445 382.64 of the liquid funds under his control in respect of an interim contribution towards the first, second, third, fourth, seventh, eighth, tenth, eleventh, thirteenth, fourteenth and fifteenth applicants' reasonable current and prospective legal expenses of an application in connection with any proceedings instituted against him/her in terms of chapter 5 of the Prevention Of Organised Crime Act, no 12 of 1998 and/or any criminal proceedings to which such proceedings relate payable to the trust account of the said Applicant's Attorneys

of Record.

4. Leave is granted to each of the said applicants to approach the above Honourable Court on the same papers, duly amplified for further or additional liquid funds or additional realisable property of the said applicants' individual estates to be released from time to time for additional legal expenses, should and when the need arises.

5. No orders of costs is made in respect of the proceedings relating to paragraphs 3 and 4 above.

S. EBRAHIM, J

On behalf of applicants: Adv. Ploos van Amstel SC

Instructed by:

Peyper Sesele Attorneys

BLOEMFONTEIN

On behalf of respondents: Adv. P.U. Fisher

S. Chetty

Office of the State Attorney

(Ref. Mr. Johan Slabbert)

/sp

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