

SOUTH AFRICA / JUDGMENT

Naidoo v Duki and Another (D5741/2019) [2021] ZAKZDHC 47 (14 December 2021)

[2021] ZAKZDHC 47

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Chetty

CASE / FILE NUMBER

D5741/2019

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THE

HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

D5741/2019

In

the matter between:

GONASEN
SOOBRAMANY NAIDOO
APPLICANT
and
DESIREE
DUKI
FIRST RESPONDENT
BASIL
KING, REGIONAL COURT MAGISTRATE,
PORT
SHEPSTONE
SECOND
RESPONDENT

JUDGMENT

Chetty J:

- [1] The applicant sought an order on 4 November 2019 directing the first respondent, his estranged wife, to show cause why the order granted by second respondent ('the magistrate') on 30 April 2019 in the context of divorce proceedings, should not be reviewed and set aside. The order granted by the magistrate was in the following terms:

'The plaintiff/respondent's claim as set out in his Particulars of Claim dated 7 November 2017 is hereby dismissed.

Plaintiff/Respondent's defence to the Plaintiff's/Applicant's counter claim as contained in the Respondent's/Plaintiff's Plea to the Applicant's/Defendant's Claim in Reconvention dated 7 June 2018 is hereby struck out.

Defendant/Applicant is granted leave to set the action down for hearing and lead evidence to seek judgment in her favour and as sought in her claim in Reconvention (as may be amended) without further notice to the Plaintiff or Respondent.

As far as costs are concerned the Court orders Respondent in this application, that is Plaintiff to bear the costs of the applications.'

- [2] The applicant and the first respondent are currently married to each other, out of community of property and without accrual, but are in the process of getting divorced. There is one minor child born of the marriage. The first respondent defended the divorce action and brought a counterclaim. I am given to understand that the issues of divorce and that of co-parenting responsibilities are not issues in dispute. The aspects which are in dispute between the parties is that of rehabilitative maintenance for the first respondent, in which she claims an amount of R28 805 per month for a period of five years, with an annual escalation of 10 per cent per annum. In addition, she claims maintenance for the minor child at the rate of R 14 581 per month, with an escalation of 10 per cent per annum, as well as an order directing the applicant to be responsible for the child's educational and reasonable medical expenses. In respect of the proprietary consequences of the marriage, the first respondent seeks a declaration that a universal partnership exists in respect of the businesses known as Imvusa Trading, Imvusa Trucking and Inymeko Trading. Arising from such declaration, the first respondent seeks an order that the applicant is directed to pay over to her 50 per cent of the value of the businesses referred to above.
- [3] The divorce action has proceeded in the Regional Court, Port Shepstone. In preparation for the trial, the first respondent delivered pre-trial notices in terms of Uniform rule 23 and s 7 of the Matrimonial Property Act 88 of 1984 ('the MPA'), respectively, in which the first respondent sought various details in relation to the bank accounts of the applicant's businesses, as well as a statement of the assets currently held by these businesses. The applicant's attorney's failed to comply with these notices, resulting in the first respondent's

attorneys bringing applications to compel the production of such documents to enable the first respondent to prepare for trial which was set down on 6-8 March 2019.

- [4] The applications to compel were both dated 12 February 2019 and set down for hearing on 4 March 2019. It is not disputed that on 4 March 2019 the applicant's attorney consented to an order in terms of the applications, in other words, that the applicant would deliver his responses to the first respondent's notices within ten days of the order. A further term of the consent order was that in the event of the applicant failing to furnish the information contemplated in the notices, the first respondent would be entitled to apply for an order dismissing the applicant's claim and striking out his defence to the first respondent's counterclaim, 'and for such further order as the Court may deem fit'.
- [5] It is not in dispute that the applicant was served with copies of the consent order taken on 4 March
2019. Despite indulgences being granted to the applicant's attorneys to file the necessary documents, there was no compliance with the terms of the consent order. On 30 April 2019 the first respondent brought an application to dismiss the applicant's claim and strike out the applicant's defence to her counterclaim. The applicant's attorney was present in court on the day (30 April 2019) and sought to apply for a postponement in which he submitted that the court had no jurisdiction to entertain the claim for a universal partnership.[1] The applicant's attorney further submitted that after consultation with counsel, it was concluded that the applicant had

incorrectly (or inadvertently) consented to the order on 4 March 2019 and accordingly an adjournment was being sought in order to apply for the consent order to be set aside.

- [6] The magistrate, after hearing submissions from the representatives of both parties, was alert to the discretion he had as to whether to grant the applicant the adjournment, where costs had been tendered. The magistrate also considered whether the adjournment being sought was nothing more than a tactical manoeuvre for the applicant to obtain an advantage over the first respondent, ultimately to her prejudice. After considering the circumstances, the magistrate was of the view that even the awarding of an adverse costs order against the applicant would not assist the first respondent in bringing the matter to finality, particularly where a pre-trial conference had been held as far back as August 2018 when the claim by the first respondent to the existence of a universal partnership was known. Despite the passage of time, the applicant took no steps to challenge the first respondent's claim in so far as the magistrates' court's jurisdiction was concerned, and went further to consent

to an order to comply with the applications to compel. The magistrate was furthermore of the view that the applicant's conduct

indicated a tendency to ignore the sanctity of court orders, leading the applicant to apply for the adjournment on 30 April 2019. The court consequently refused the adjournment, dismissed the applicant's action for a divorce, struck out his defence to the first respondent's counterclaim, and granted the first respondent leave to set her counterclaim down for adjudication, without notice to the applicant, and to lead evidence to obtain judgment in terms thereof.

[7] In light of the second respondent's ruling, the applicant instituted the present review application contending that the effect of the order is that the counterclaim will proceed to be finalised without the applicant's participation in the eventual outcome, and that orders pursuant to the first respondent's claim to maintenance and parental responsibilities will similarly be made without his input.

[8] Mr Morgan, who appeared on behalf of the applicant, submitted that once the magistrates' court makes a ruling on the first respondent's

claim for maintenance for herself and the minor child, these orders must be complied with. Failure to comply therewith by the applicant

could result in contempt proceedings being brought by the first respondent. Similarly, it was submitted that if an order were to be made granting the first respondent a half share in the applicant's business, this would be 'disastrous' for the running of the applicant's business, especially on issues of liquidity and dealing with creditors of the businesses. Mr Morgan further submitted that if a maintenance order were to be granted (with or without amendments, which the applicant would not be

entitled to oppose) the applicant would be obliged to pay significant sums on a monthly basis to the first respondent. If the magistrate

were to grant an order in respect of the universal partnership, this would have a direct bearing on the applicant's financial

ability to comply with such orders. Although it was contended that the magistrate lacked the necessary jurisdiction to hear the issue of the universal partnership in the form of the declaratory relief sought, Mr Morgan did not persist with this argument with any conviction before me. In any event, s 29(1B)(a) of the Magistrates' Courts Act 32 of 1944 refers to the jurisdiction of the court to 'decide upon any question arising' from 'suits relating to . . . divorce between persons'. [2] I am satisfied that there is a sufficiently close nexus between the primary dispute (the divorce) and the ancillary relief (universal partnership) for the court a quo to have jurisdiction over both issues, despite the value of the assets in the universal partnership exceeding the monetary jurisdiction of the regional court.

[9] The first respondent opposed the review application and filed a detailed answering affidavit in which she contends that the applicant's conduct in the matter is indicative of his intention to delay the resolution of the divorce proceedings, and to drag the matter out for as long as he can. It was submitted by Ms Sponnek on behalf of the first respondent that no irregularity took place in the proceedings in the court a quo in as much as the applicant's

attorney was present on the day and brought an application for an adjournment. The matter was then argued as an opposed application after which the magistrate refused the adjournment and gave his ruling dismissing the application and striking out the

applicant's defence to the counterclaim. It was contended that the decision of the magistrate was fair in the circumstances and that the application for a review is misplaced as it is based on the applicant's fears and speculation as to the possible outcome of proceedings which are yet to take place. For this reason, the crux of the first respondent's opposition to this application is that this court must determine whether review proceedings are appropriate in the case of incomplete proceedings in the court a quo.

[10] Ms Sponnek further submitted that the matrimonial regime of the parties did not per se bar the magistrates' court from issuing a declaratory order of the nature sought by the first respondent in as much as where the spouses carried on a bona fide business (*societas universorum quae ex quaestu veniunt*) and the essential elements to create a partnership agreement are present, a partnership exists. See *Mühlmann v Mühlmann* 1984 (3) SA 102 (A) where the court found that a universal partnership existed between parties who were married to each other out of community of property.

[11] Essentially the applicant contends that the order granted by the magistrate has the effect of locking him out from further participation in the proceedings, that his right to a fair trial has been infringed, and is prejudicial to him. If the proceedings are allowed to continue to their finalisation, he states that he will suffer a 'grave injustice'. Counsel for the applicant submitted that the order by the second respondent constitutes a reviewable irregularity in terms of s 22(1) of the Superior Courts Act 10 of 2013, presumably on the basis that it is a 'gross irregularity' in terms of subsection (c).[3] In this regard it was emphasised that the applicant will not be permitted to lead any evidence at the ensuing determination of the first respondent's counterclaim, equating to a rejection of competent evidence from the applicant. Counsel for the applicant

contends that the first respondent would have *carte blanche* in respect of the extent of her counterclaim before the court a quo, as she would be free to amend her claim, without notice to the applicant. This brings sharply into focus the applicant's rights to a fair trial in terms of s 33 of the Constitution.

In *De Beer NO v North Central Local Council and South Central Local Council and Others* 2001 (11) BCLR 1109 (CC) para 11, the Constitutional Court said the following about a fair hearing:

‘A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair.’

[12] During the course of argument I enquired from Mr Morgan what irregularity took place in the course of the proceedings before the court a quo. I accept for the purposes of this application that the order granted by the second respondent was far-reaching and prejudicial to the rights of the applicant in so far as advancing his claim, and defending the counterclaim brought by the first respondent. The high watermark of Mr Morgan’s argument was that the review application was brought in order to avert what he termed ‘a grave injustice’, in that if the matter were to proceed effectively unopposed, at the conclusion thereof a liquidator would be appointed to take charge of the affairs of the various businesses of which the applicant is supposedly the sole owner. Several courts have considered the meaning of the term ‘gross irregularity’ in the context of review proceedings. In *Ellis v Morgan* 1909 TS 576 *Ellis v Dessai* 1909 TPD 576 the court stated the following at 581:

‘... an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial,

such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined. The magistrate ought not, of course, to have made a garnishee order against the divisional paymaster when it is clear that the railway department was the only person indebted to the white labourers; but though his conclusion of the law was wrong his procedure was regular.’ (emphasis added)

[13] In *Goldfields Investment Ltd. and Another v City Council of Johannesburg and Another* 1938 TPD 551 at 560-561 the court elaborated on the circumstances in which a gross irregularity can be said to have occurred:

‘The law, as stated in *Ellis v Morgan* (supra) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate’s reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing

to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits but to its misconceiving the whole nature of the inquiry, or

of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section. That being so, there was a gross irregularity, and the proceedings should be set aside.' (emphasis added)

[14] Counsel for the applicant submitted that the prejudice to the applicant's business interests would commence 'the moment a liquidator is appointed'. I understood this to mean that the prejudice would commence as soon as the judgment of the court a quo was handed down granting the first respondent the relief in terms of her counterclaim. It may well be that creditors of the applicant's business may assume the worst if an order is granted in favour of the first respondent in terms of the declaratory order, and if a liquidator is appointed to take charge of the assets of the partnership.

[15] However, the point advanced by Ms Sponek is that the submissions of the applicant as to the grave injustice that would result is based entirely on speculation that the

magistrate presiding over the matter would grant relief to the first respondent precisely in the form for which she has prayed. This fails to take into account that the magistrate is obliged to consider the evidence, bearing in mind that the first respondent carries the onus to prove her case for rehabilitative maintenance, as well as maintenance for her minor child, together with the further relief sought in the counterclaim. One cannot accept that the magistrate presiding over the counterclaim would simply grant the relief sought, albeit on an unopposed basis, without even applying his or her mind to the matter.

[16] A fundamental difficulty standing in the way of the relief sought by the applicant is that our courts do not condone piecemeal litigation until the matter is finalised. In *Ferreira and Another v Magistrate, Mr Koopman NO and Another* (2448/2018) [2020] ZAECHGHC 102 (8 September 2020) paras 15-16, the court held the following:

'[15] . . . generally a High Court will be reluctant to review incomplete proceedings in a Magistrate's Court.

[16] This is so unless the review Applicant can show grave injustice would otherwise result, or whether justice would not be attained by any other means.'

[17] In *PM v Road Accident Fund* [2019] 3 All SA 409 (SCA) paras 21-22, the court stated the following in regard to uncompleted proceedings in a magistrates' court being the subject matter of review applications:

[21] . . . The authorities are clear that it is only in very rare circumstances that a court will review a decision, or allow an appeal before the proceedings have been terminated. As Howie P stated in *S v Western Areas Ltd*:

“Long experience has taught that in general it is in the interests of justice that an appeal await the completion of a case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course.”

[22] Even where there is a power of review, as is the case with uncompleted proceedings in a magistrates' court, there is

long-standing authority that such proceedings will not ordinarily be reviewed by the High Court until they have run their full course, at which stage an appeal or review may be brought. In *Ismail and others v Additional Magistrate, Wynberg and another*, applying the decision in *Wahlhaus*, the following was stated: “[I]t is not every failure of justice which would amount to a gross irregularity justifying interference

before conviction . . . [W]here the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory

remedial procedure would be to bring the . . . decision under appeal at a stage when no appeal lies.”

[18] In the final analysis, while the applicant may have good grounds to contend that the decision of the second respondent not to grant him an adjournment was wrong in law, and that the further relief of effectively excluding him from contesting the first respondent's counterclaim infringes on his rights to a fair trial, he is not without remedy. Section 18(1) of the Superior Courts Act 10 of 2013 provides for suspension of the decision pending appeal and states that ‘unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.’ It follows therefore that any perceived prejudice that would follow from the decision arising from the determination of the first respondent's counterclaim can be immediately halted by the noting of an appeal against the outcome of the counterclaim as well as the decision of the second respondent not to grant the adjournment on 30 April 2019. As stated earlier, I have been unable to find any irregularity in the procedure followed by the second respondent in arriving at the decision on 30 April 2019. While the applicant (and this court) may have misgivings about the correctness of that decision and the further relief granted, that in itself does not lay the foundation for a review.

[19] In the result, the application for the review must fail. Ordinarily costs would follow the result. However, in this case I consider that each party should bear their own costs. I say so because the grounds on which the applicant has come unstuck lies in a legal assessment of whether he ought to have proceeded by way of appeal or review. The application was generated by the rather far-reaching order of the second respondent, which on the face of it, infringes the applicant's right to a fair trial. There is no doubt that this is an issue which is appealable, but that option can only be considered at the conclusion of the final outcome of the counterclaim. I consider an award that each party bear their own costs to be fair in the circumstances.

[20] I make the following order:

- a. The application is dismissed.
- b. Each party is to pay their own costs.

Chetty J

Appearances

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Ref:

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Date of Judgment reserved: 22 October 2021

Date of delivery:

14 December 2021

[1] Section 29(1B) of the Magistrates' Courts Act 32 of 1944 provides the following: '(1B) (a) A court for a regional division, in respect of causes of action, shall, subject to section 28 (1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).

(b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such a matter.' (my emphasis)

[1] Section 29(1B) of the Magistrates' Courts Act 32 of 1944 provides the following:

'(1B) (a) A court for a regional division, in respect of causes of action, shall, subject to section 28 (1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).

(b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such a matter.' (my emphasis)

[2] Emphasis added.

[3] Section 22(1) of the Superior Courts Act 10 of 2013 states that 'the grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are: (a) absence of jurisdiction on the part of the court; (b) interest in the cause, bias, malice or corruption on the part of the presiding officer; (c) gross irregularity in the proceedings; and (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

- [3] Section 22(1) of the Superior Courts Act 10 of 2013 states that ‘the grounds upon which the proceedings of any Magistrates’ Court may be brought under review before a court of a Division are:
- (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.’
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