

SOUTH AFRICA / JUDGMENT

# Nel v Clur (Nel) and Another (EL744/2011, ECD1177/2011) [2011] ZAECELLC 3 (4 May 2011)

[2011] ZAECELLC 3

## COURT

Eastern Cape High Court, East London Local Court

## BEFORE

Y Ebrahim

## CASE / FILE NUMBER

EL744/2011, ECD1177/2011

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## JUDGMENT

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IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE No.: EL744/2011

&amp; ECD1177/2011

DATE: 4 MAY 2011

In the matter between:

LEON NEL .....Applicant

and

CHANTEL CLUR (born NEL) .....First Respondent

GREGORY CLUR .....Second Respondent

EX TEMPORE JUDGMENT

Y EBRAHIM J:

This is the return day of a rule nisi which the applicant obtained on an urgent basis on 30 March 2011. The Rule reads as follows:

*“IT IS ORDERED:*

THAT a Rule Nisi do hereby issue calling upon the respondents and/or any other interested party to show cause on 3rd May 2011 at 09h30 why an order in the following terms should not be made final:

1.1 That Warrant Officer MICHAEL POTGIETER and/or any other member of the South African Police Service be and is hereby authorized and directed to arrest and detain the First Respondent and thereafter to take all reasonable and necessary steps to deliver the First Respondent to the Niewefontein Treatment Centre, De Aar (hereinafter referred to as “The Treatment Centre”) for treatment forthwith;

1.2 That the First Respondent remain at the Treatment Centre and undergo treatment for a minimum period of 8 months;

That the Second Respondent be and is hereby interdicted and restrained from contacting the First Respondent whilst she is receiving treatment at the Treatment Centre.

THAT this matter is referred to the Public Prosecutor for an enquiry in terms of the Prevention and Treatment of Drug Dependency Act 20 of 1992, which enquiry is to be conducted as soon as practicable.

THAT pending the finalisation of this application or the proceedings in terms of the Prevention and Treatment of Drug Dependency Act 20 of 1992, whichever occurs first, paragraphs 1.1, 1.2 and 1.3 hereof shall operate as an interim interdict/mandamus.

THAT warrant officer Michael Potgieter be and is hereby authorized and directed to serve a copy of this Order on the respondents forthwith.”

Preceding the rule nisi the applicant had the previous day, 29 March 2011, obtained an interdict against the 1st and the 2nd respondents in the following terms:

THAT the First Respondent be and is hereby interdicted and restrained from departing the Republic of South Africa pending the finalization of the application in the East London Circuit Local Division under case no. EL744/11, ECD1177/11.

THAT a member of the South African Police Service be and is hereby authorized to serve a copy of this Order and the application referred to in paragraph 1 above on the First and Second Respondent.

THAT upon service referred to in paragraph 2 above the First Respondent is to surrender her passport to the member of the South African Police Service.”

The applicant now seeks to have the rule confirmed. The 1st and 2nd respondents oppose confirmation of the rule and contend it should be discharged.

In view of the need for this Court to render its decision urgently I do not have the luxury of time within which to prepare a written judgment which hopefully may have been far more comprehensive than this ex tempore judgment.

The rule nisi raises crucial issues concerning a person's right to freedom and security, freedom of association, freedom of movement, the right to dignity and the right to privacy. Each of these rights is entrenched in the Bill of Rights in the Constitution, Act 108 of 1996. It appears, in view of what has transpired in this matter, necessary to emphasise in which terms these rights have been entrenched in the Bill of Rights.

*"Section 12: Freedom and Security of the Person:*

Everyone has the right to freedom and security of the person which includes the right –

not to be deprived of freedom arbitrarily or without just cause;

not to be detained without trial;

to be free from all forms of violence from either public or private sources;

not to be tortured in any way; and

not to be treated or punished in a cruel, inhumane or degrading way."

(I will not at this stage worry about subparagraph (2)).

Section 18:

*"Freedom of Association:*

Everyone has the right to freedom of association."

Section 21:

*"Freedom of movement and residence:*

Everyone has the right to freedom of movement.

Everyone has the right to leave the Republic.

Every citizen has the right to enter, to remain in and to reside anywhere in the Republic.

Every citizen has the right to a passport."

Section 10:

*"Human Dignity:*

Everyone has inherent dignity and the right to have their dignity respected and protected."

Section 14:

*"Privacy:*

Everyone has the right to privacy which includes the right not to have –

their person or home searched;

their property searched;  
their possessions seized; or  
the privacy of their communications infringed.”

It may be appropriate, since it has been raised during argument, that section 36 of the Constitution governs circumstances in which rights in the Bill of Rights may be subject to limitation. In this regard section 36 reads as follows:

*“S 36. Limitation of Rights:*

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including -
  - (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relations between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.
2. Accept as provided in subsection
  - (1) or in any other provision of the Constitution no law may limit any right entrenched in the Bill of Rights.”

It needs to be emphasised at the outset that the 1st respondent is an adult woman, 21 years old, and is married to the 2nd respondent. As an adult the 1st respondent is vested in law with full capacity to make decisions on her own behalf, which include the right to determine her own future and more specifically whether or not a particular course of action affecting her well-being is acceptable or not to her. Her rights in this regard cannot be curtailed by another person, nor may anyone else determine how she may exercise her rights. I exclude, for present purposes, those instances where a Court has empowered someone else to make such decisions on her behalf consequent upon a proper application to exercise such rights and provided appropriate medical evidence regarding her mental well-being has been presented and the requisite legal basis therefor has been laid.

Some attempt has been made by Mr Clark, who appears for the applicant, to suggest that the 1st respondent is incapable of independent decision making but there is no acceptable medical evidence to justify such a conclusion. In my view, the mental capacity of the 1st respondent is beyond question and the attempt by the applicant to suggest otherwise lacks any proper foundation either medically or legally. I am not called upon to determine her mental capacity in this matter but on all the available evidence I am satisfied that the 1st respondent appears to be

capable of making decisions on her own behalf. What is very evident is that her decisions do not meet with the approval of the applicant.

The gist of the applicant's case, as it emerges from the papers, which runs into over 500 pages, is that his daughter, the 1st respondent, is a drug addict and in urgent need of treatment for her addiction or else she will suffer irreparable harm. In this regard he says that he fears she may resort to sexual acts in order to obtain drugs and could contract HIV/Aids that could lead to her ultimate death. It is very obvious from what the applicant has stated that he blames the 2nd respondent for the 1st respondent's ill considered decision to partake of drugs and the unfortunate consequences that flow from this, namely drug abuse and, more unfortunately, ultimately drug addiction. It is necessary that I stress that the pertinent issue in this case is not the protection of the right of the 1st respondent to partake in and abuse drugs and pursue a lifestyle with detrimental consequences for her health. What is in issue, as I have said at the outset, is the freedom of the 1st respondent and certain ancillary rights that the Bill of Rights enjoins must be respected.

Mr De La Harpe, who appears for both respondents, has, quite understandably, attacked the rule nisi for its violation of the Constitutional rights of the respondents. He has directed trenchant criticism not only at the applicant for having sought a rule nisi in such terms but also at the Court for granting it. I accept that the respondents, driven by what they consider is an injustice perpetrated against them, are aggrieved that the Court granted an order of this nature, but categorising it as one unprecedented even in the pre-Constitutional era is unwarranted hyperbole.

I turn to the issue of the applicant's locus standi which is interrelated with the requirement that an applicant must establish a clear right that needs protection. It must not be a mere moral right – it must be a strict legal right. See: *PRETORIUS STATE & MARKET COMPANY LIMITED AND ANOTHER v ROODS TRUSTEES* 1910 (TPD) 1080 at 1084. The fact that the applicant is the father of the 1st respondent does not per se vest him with the right to institute proceedings on her behalf, nor does it vest him with the right to seek relief that personally affects and impacts on her no matter how much he may consider that such relief is in her best interest and is for her benefit. As I have said the 1st respondent is an adult vested with all the legal rights that such status entails. I cannot sufficiently stress this and it is self-evident what such legal capacity entails. The Court may not disregard her legal capacity and must strive to protect her from any unjustified intrusion of her rights in every respect, no matter how well intentioned her father's actions may be.

Mr De La Harpe is correct that it behoves this Court to protect an individual's rights as entrenched in the Bill of Rights.

Mr Clark was at pains to argue that the applicant had a right to seek the order he did as he could not stand idly by and let his daughter pursue a path of drug addiction and an early death. These are admiral sentiments, but do not translate into a legal right as that required for an interdict. When Mr Clark was confronted by the unassailable legal mountain he had to climb in this regard he resorted to contending that all the applicant was required to show was a prima facie right even though it may be open to doubt.

In my view, no matter how much one may attempt to dress up the concern of the applicant for his daughter as a right, it remains a concern and not a right actionable in law.

I asked Mr Clark to address me on the issue of the rule nisi in effect being a final order and not a temporary interdict. Needless to say, despite his vigorous efforts to the contrary he was unable to present cogent reasons to support his contention that the interdict was of a temporary nature. In this regard he relied on the fact that paragraph 2 of the Order was that this matter be referred to the Public Prosecutor for an enquiry into the Prevention and Treatment of Drug Dependency Act 20 of 1992 which was to be conducted as soon as practical.

I need to observe that in the application the applicant clearly stated that he could not rely on the provisions of Act 20 of 1992 as to seek relief in terms of that Act would be a lengthy process and an urgent order was needed to have the 1st respondent committed to an institution. I find it ironical and it is contrary to what the applicant has asserted that the applicant now seeks to rely on the provisions of Act 20 of 1992. It seems to me a case of saddling two horses at the same time without being aware that they are heading in different directions.

Mr De La Harpe adopted a contrary view. He pointed out that the order provided that the 1st respondent be arrested and detained and delivered to the Niewefontein Treatment Centre at De Aar for treatment. This was put into effect and the 1st Respondent is presently at this centre against her will. The order provided further that the 1st respondent remain there for a minimum period of 8 months. In addition the 2nd respondent has been interdicted from contacting the 1st respondent. These aspects of the order are not of a temporary nature but permanent and paragraph 3 of the rule endorsed this as a mandamus.

I cannot but agree with the submissions of Mr De La Harpe. The respondents were not called on to show cause why these provisions should not be put into effect, but were subjected to the consequences thereof on service of the order being effected on them. It is clear therefore that these provisions of the order were final in nature and not temporary.

Much of the criticism Mr De La Harpe has directed at the rule and its effects and more particularly at the manner that it has violated the Constitutional rights of the 1st and 2nd respondents is well founded. I set out at the outset that the interdict the applicant obtained on the 29th March 2011 prevented the 1st respondent from leaving the Republic of South Africa. I assume this was granted after the Judge had been presented with the application as the order also provided that the application is served on the respondents. In my view, the 1st respondent was entitled to be heard on the question of the right to depart from the Republic of South Africa and on the surrender of her passport which the order required her to do. It seems to me that the 1st

respondent's right to be heard on these issues prior to any determination thereof was not recognised. Our Courts have repeatedly stressed via the audi alteram partem rule that an individual has a right to be heard when there is a likelihood of a decision being taken that may adversely affect such person's rights. It is regrettable that this was not honoured.

A further issue that arises from this order is that the application was to be served on the respondents. The fact that the order did not specify it should be served on them personally does not derogate from the fact that the Rules of Court make it sufficiently clear that this should have been the case and specifies how service should be affected if personal services was not possible. The manner in which service was effected here flouted the provisions of Rule 4.

Mr Clark tried to paint a picture of the respondents avoiding service of the application and could therefore not claim that they were unaware of the application, nor could they complain if the rule was granted in their absence.

I can only express my dismay at these submissions. The applicant had a duty to ensure that proper service was effected. He was seeking an order invasive of the rights of the respondents and if the concern he professed for his daughter was genuine he would have taken whatever steps were necessary to ensure that she was aware of what was going to happen. The applicant has sought to use his supposed good intentions in an attempt to obscure the reality of what was taking place. In order to have the 1st respondent committed to the Nieuwfontein Treatment Centre he was prepared to go to any lengths to do this. It is the duty of this

Court to protect the vulnerable from those who are able to rely on greater resources to obtain their goals. I can do no better than quote the well-know adage that "the end does not justify the means" to underscore the unjustness of the applicant's

actions.

The respondents denied receipt of the application, which was thrown through a window, and I must accept this. Mr Clark sought to cast doubt on this denial by submitting that the 1st respondent was a liar and could not be believed. I find no merit in this submission.

Mr De La Harpe has referred me to numerous cases in his Heads of Argument in support of his submissions that the respondents', and especially the 1st respondent's, right to freedom of movement and freedom from arrest, detention and incarceration were violated.

It should be apparent from what I have said that I am in complete agreement with Mr De La Harpe that these rights, and others I have mentioned, were indeed violated. It would serve us well to note the remarks of the Constitutional Court on the issue of detention and I refer to *DE LANGE v SMUTS NO & OTHERS*

[1998] ZACC 6; 1998 (7) BCLR 779 (CC) at para [26]:

*"..... the first and most egregious form of deprivation of civil liberty which springs to mind when considering the construction of the expression "detained without trial" in section 12(1)(b), is the notorious administrative detention without trial for purposes of political control. This took place*

*during the previous Constitutional dispensation under various statutory provisions which were effectively insulated against meaningful judicial control. Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this county.”*

Mr De La Harpe has made much of this in conveying to the Court that it appeared that the Court that granted the rule nisi paid absolutely no regard to this. I have made my comments insofar as that is concerned and, save to say that it appears that the Judge may have been swayed by the emotional content of what appeared in the applicant’s affidavits, I do not consider it necessary to comment further thereon. Mr De La Harpe has also referred to the case of *THANDANI v THE MINISTER OF LAW AND ORDER* 1991 (1) SA 702 (ECD) at 707A-B:

*“..... sight must not be lost of the fact that the liberty of the individual is one of the fundamental rights of a man in a free society which should be jealously guarded at all times and there is a duty on our Courts to preserve this right against infringement. Unlawful arrest and detention constitutes a serious inroad into the freedom and the rights of an individual. In the words of Broome JP in MAY v UNION GOVERNMENT 1954 (3) SA 120 (N) at 130F:*

‘Our law has always regarded the deprivation of personal liberty as a serious injury.’”

Then, he has also referred to *ZEALAND v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER*

[2008] ZACC 3; 2008 (4) SA 458 (CC) at para [24]:

*“The Constitution enshrines the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily*

*or without just cause, as well as the founding value of freedom.”*

And further down at para [25]:

*“It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification.”*

Mr De La Harpe has referred to a number of cases but I think the three adequately demonstrate the high regard and the seriousness with which our Courts regard the deprivation of liberty of an individual. I do not think it necessary to stress this further save to say that the rule nisi also violated the 1st respondent’s freedom of movement and her right to dignity and her right to privacy. In respect of both the respondents it violated their right to freedom of association. It appears from the 1st respondent’s answering affidavit that she was arrested or detained by Warrant Officer Michael Potgieter who then instead of immediately taking her to the Nieuwfontein Treatment Centre, as stipulated in the rule, decided to incarcerate her at a police

station overnight. She spent the night in a prison cell with another individual who had been arrested for some criminal offence. The 1st respondent has described how distressed she was by what had occurred. In my view, it requires little imagination to realise that she was subjected to treatment which was totally uncalled for and certainly not authorised in terms of the rule nisi. The applicant has tried to downplay this but I think he cannot escape full responsibility for the fact that she had to suffer such indignity.

Insofar as the 1st respondent's right to privacy is concerned I am constrained to state that the social worker, Angel Nokuthokoza Mngadi, and the psychiatric social worker, Peter George Clarke McLeod, appear not to have paid much regard to this. Their claims to be concerned about the welfare of the 1st respondent did not bestow the right on them to disclose information of a personal nature that they obtained when counselling or interviewing her. This information was private information and not subject to disclosure to any other person. I would have thought that they, more than anyone else, given their claims of the extensive experience they had in assisting persons who had abused drugs, would have realised how important it was not lose the confidence of the drug user. In my view, they appear to have disregarded their ethical duties in this regard.

It should be apparent from what I have said that the applicant has failed to show that there is any basis for the rule nisi to be confirmed. For the sake of clarity, I should also state that if the rule falls to be discharged then the interdict obtained on 29th March 2011 must also be set aside, even though the rule nisi does not address this situation.

Insofar as costs are concerned, Mr De La Harpe seeks an order for costs on an attorney and client scale. In his heads of argument he addresses this and has said that the 1st respondent has been put to extra costs in being at Niewefontein Treatment Centre, which is some 500 km away. I am of the view

that the circumstances of this matter require special consideration. These are: the manner in which the order was sought – it was sought and obtained without proper service having been effected on the respondents and in their absence despite the fact that it involved serious inroads into their rights, particularly those of the 1st respondent; the order also sought, and in fact provided, for the 2nd respondent not communicate with the 1st respondent. The two of them are married, and I fail to understand on what basis they should not be able to communicate with each other as husband and wife. I accept that their right of freedom of association was violated in this regard. The drastic consequences

of the order speak for themselves. The 1st respondent was incarcerated and removed to the Niewefontein Treatment Centre and is presently still there. In terms of the order she should remain there for a period of 8 months. I take into account that there is no legal basis for the applicant to have obtained the order that he did. I am in the circumstances persuaded that costs should be awarded on an attorney and client scale.

In the result there is an order as follows:

The rule granted on 30 April 2011 is discharged.

The interdict granted on 29 April 2011 is set aside.

The applicant is to pay the costs of the 1st and the 2nd respondent, in respect of the application, on an attorney and client scale.

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Y EBRAHIM

Heard on: 3 May 2011

Counsel for the Applicant: S Clark

Attorneys for the Applicant: Andre Schoombee Attorneys

Counsel for the Respondents: D H De La Harpe

Attorneys for the Respondents: Bax Kaplan Inc

Nel v Clur & Ano.CVJ

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