

SOUTH AFRICA / JUDGMENT

Phethla v Phethla and Others

(HCA10/2022) [2023]

ZALMPPHC 8 (16 February 2023)

[2023] ZALMPPHC 8

COURT

Limpopo High Court, Polokwane

BEFORE

Muller, K L Pillay

CASE / FILE NUMBER

HCA10/2022

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

Case no: HCA10/2022

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE

JUDGES: YES/NO

(3) REVISED.

DATE: 16/2/2023

In the matter between:

REBONE

PHETHLA

APPELLANT

And

NAMUDI PHILIPE

PHETHLA

FIRST RESPONDENT

JOSEPH

PHETLA

SECOND RESPONDENT

BAKONE BA PHETLA

COMMUNAL PROPERTY

ASSOCIATION

THIRD RESPONDENT

DIRECTOR GENERAL,
DEPARTMENT OF
AGRICULTURE, LAND
REFORM & RURAL
DEVELOPMENT
FOURTH RESPONDENT
DEPARTMENT OF
AGRICULTURE, LAND
REFORM & RURAL
DEVELOPMENT
FIFTH RESPONDENT
STATION COMMANDER,
SOUTH AFRICAN
POLICE SERVICES, NEBO
POLICE STATION
SIXTH RESPONDENT

JUDGMENT

MULLER J:

- [1] The appellant instituted an urgent ex parte application on 22 November 2021 in the magistrates' court at Nebo against the respondents and was granted the following relief:
- [2] That the rule nisi be granted calling upon the Respondents to show cause on 19 January 2022 why the following is not to be made a final order:

2.1 Interdicting and prohibiting the first, second and third Respondents and/or any one acting through them, including the third Respondent's purported executive committee meeting from holding or conducting a meeting scheduled to take place on 27 November 2021 at Makgopheng Primary School and/or on any other date, pending the placing of the CPA[1] under the administration of the Director-General and verification of membership.

2.2 The first and second Respondents and/or any one acting through them including the third Respondent's purported executive committee are interdicted and prohibited from performing any functions and/or obligations in respect of the Communal Property Association pending the placing of the CPA under administration of the Director-General and verification of membership.

2.3 That members of the South African Police Services are directed and/or are ordered to arrest any person who acts contrary to this Order

2.4 That the first and second Respondents pay the costs on attorney and client scale only in the event of opposition.

- [3] That prayers 2.1 and 2.4 shall operate as an interim interdict with immediate effect pending the return date of a rule nisi.

- [4] "That the said return date may be anticipated upon 24 hours' notice to the applicant."

- [5] The first and second respondent opposed the application. The court discharged the interim order. The appeal is directed at the whole of the judgment. At the hearing Mr Mokwena who appeared on behalf of the appellant abandoned the appeal against the dismissal of the application in respect of the interdict to restrain the respondents from holding or conducting a meeting on 22 November 2021, referred to paragraph 2.1 of the interim order. He nevertheless persisted with the appeal against the dismissal of paragraph 2.2 of the order.
- [6] The respondents served and filed an application to adduce further evidence on appeal at the hearing of the appeal. The assertion is made that the respondents were precluded from opposing the ex parte application and were precluded from filing their opposing affidavits as a result of the width of the interim order granted, which prohibited the executive committee of the CPA to meet and make binding decisions. The respondents seek to place the answering affidavit filed in an application in the Mpumalanga High Court instituted by the fourth respondent to place the CPA under administration before the court, in answer to the allegations made in the replying affidavit.
- [7] The merits of the urgent application need first be considered before the application to adduce further evidence on appeal will be considered. The parties will be referred to as they were in the ex parte application.
- [8] The applicant averred in the founding affidavit that she is a member of the CPA. She acted in terms of clause 20.1 of the Constitution of the CPA which provides that:
- “Any Member of the Association shall have the right to apply to court or to the Department of Rural Development and Land Reform if any member feels that any Committee Member does not give proper effect to the principle of equity and non-discrimination, or does not implement the terms of the Constitution according to its intent and purpose.”*
- [9] The first respondent issued a notice on 9 November 2021 of a meeting to be held on 27 November 2021 at a primary school with a view to hold elections without compliance with the Constitution. The second respondent signed the said notice as the public relations officer of the CPA. The fourth respondent was cited by virtue of its administrative decision to place the CPA under administration in terms of section 13(1) of the Communal Property Association Act.[2] There was at the time when the urgent application was launched, there was no committee in place and in as much as the first and second respondents may claim that they are members of an executive committee, such committee is dysfunctional and unable to give effect to transparency and accountability of the affairs of the CPA.

- [10] The urgency for the ex parte application was alleged to be that the applicant received notice of the meeting on 10 November 2021 by means of a WhatsApp message. A hearing in due course would defeat the purpose of the meeting which was to be emotive and intended to disrupt the decision of the fourth respondent to place the CPA under administration. It is further alleged that the applicant will not be protected from an abuse of power by the first and second respondent and or the purported executive committee.
- [11] The applicant furthermore averred that the fourth and the fifth respondent as the custodians of the CPA have taken an administrative decision to place the CPA under administration in terms of section 13(1) of the CPA Act. That decision binds the first and second respondent and/or any member of the purported executive committee. It followed, therefore, that the CPA was regulated by and was under the control of the fourth respondent pending the finalization of judicial administration. For this reason there was no committee in place and consequently the first and second respondent lacked the necessary authority to call a meeting. It is only the fourth or fifth respondent that has such authority.
- [12] The applicant also referred to a letter addressed to Lawrence Phethla by the fifth respondent on 8 October 2021 which reads as follows:

“The Department has given instruction to State Attorney to finalise the process of placing the CPA under administration and as such matter is under State Attorney’s file reference MP/266/21/PE.

According to State Attorney’s office the Application is not yet finalised and is in the process.

As soon as the matter in (sic) filed in court and date of hearing has been issued they promised to let us know.

There is currently some delay in the State Attorney’s office due to the fact that their IT and all their system are hacked for the past two months.

Hope you will find the above to be in order.”

- [13] In addition to the aforesaid, the CPA resolved on 3 August 2013 at an annual general meeting:

“1. That the Executive Committee elected on 3 August 2013 shall run the affairs of Bakone Ba Phethla Communal Property Association for a period of 12 months;

2. that the Executive Committee shall facilitate the verification of claimants who have not been verified;
3. that the Executive Committee will identify and present new auditor to a general meeting of members for approval;
4. that the Executive Committee shall present that draft amended constitution to the members for their approval;

5. that another AGM will be called within 12 months for purposes of electing an Executive Committee that will manage the affairs of the Bakone Ba Phethla Communal Property Association; and
 6. that the Executive Committee shall endeavour to get the Annual Report of Bakone Ba Phethla Communal Property Association submitted to the Communal Property Association Registration Office.”
- [14] Ex facie the document, the term of office of the first and second respondent has lapsed. A verification of members has not been undertaken as per the resolution nor has an auditor been appointed. The first and second respondent has failed to comply with clause 21 of the constitution of the CPA to hold an annual general meeting before 30 June of each year.
- [15] A so-called ‘reporting affidavit’ (deposed to on 22 November 2021) of Zebulon Dintho Phethla is attached to the application. He stated in the affidavit that the purpose was to report a crime of fraud committed by the first and second respondent by unlawfully misrepresenting themselves as officials of the CPA by calling an annual general meeting. They were elected as executive committee members on 3 August 2013 for a term of 12 months. Their respective terms of office have expired on 3 August 2014.
- [16] Finally the applicant stated that service of the application will defeat the purpose of the application because the first and second respondent will delay the hearing of the application which will render it moot. The fourth respondent has been unable to arrange the affairs of the CPA since 2012 but was unable to do so since the first and second respondent are protecting the mismanagement and misappropriation of funds and assets of the CPA. Thus an order was granted ex parte.
- [17] In opposition of the application by the first and second respondent the first respondent filed an answering affidavit. They pointed out that the applicant launched a similar application in the same court in 2017 under case no 376/17. The rule nisi was discharged and the application was dismissed with each party to pay their own costs on 2 October 2020. The second respondent is in fact the brother of the applicant.
- [18] The respondents referred to the annual report of the fifth respondent to parliament for 2015/2016 in terms whereof and it was reported the that first respondent was duly elected the chairman of the executive committee of the CPA. The annual report states in paragraph 2:
- “This committee operated for a period of one year from the 3rd of August 2013 when it was mandated to amend the constitution and review the house hold list of the CPA members. All the members were re-elected into office for a duration of 3 (three years) after all electoral procedures were followed and conducted by officials from Mpumulanga Rural Development and Land Reform on 25 October 2014.”*
- [19] It was reported that the third respondent was compliant in every respect and provided the required audited financial statements.

[20] The report showed that the applicant was elected as secretary of the CPA. The applicant was an active member of the executive committee until March 2020 when she withdrew as such.

[21] The purpose of the meeting was to elect a new executive committee which is required every three years. The current committee was re-elected on 25 October 2014. The following is recorded in the minutes of the meeting held on that date:

“Johanna Phwethla suggested that the previous committee continue to serve the community, seconded by SM Makolane. The motion was counter acted by Moses Mosie Phethla who suggested that elections should be conducted. Phashwane Phethla suggested that these two motions should be put to the vote by show of hands. This was done and it was apparent that majority of members would want the previous committee led by NP Phethla, continue to serve the community for the coming three years.”

[22] A new executive committee was to be elected in 2017. The applicant launched an application a week prior to the meeting to interdict the meeting in the same way as the current application. An interim order was granted which was discharged on 2 October 2020. As a result, no elections could be held.

[23] The constitution allows for WhatsApp notices to be submitted to members 14 days before the meeting. The respondents only heard of the present application through the proverbial ‘grapevine’ on 24 November 2021. When a copy of the application was requested from the attorney of the applicant he refused and demanded payment for copies to be made. The width of the interim order is so wide that the third respondent was effectively barred from opposing the application. The consequences of the interim order was also that employees of the third respondent could not be paid their salaries.

[24] In the replying affidavit the applicant denied that the affairs of the CPA was normalised at all. With reference to the allegation that employees of the third respondent could not be paid their salaries, the applicant pointed out that the employees are really the employees of the holding company Bakone Ba Phethla CPA Holding Company.

[25] The applicant attached a letter from the fifth respondent which was a reply to a request by the CPA to cancel the AGM scheduled for 27 November 2021 as confirmation that the respondents did not have authority to convene an AGM:

“...

The Department have noted with great concern the intention of the outgoing executive committee to hold an elective AGM on the 27th November 2021 and invitations have been sent out to all CPA members informing them on plans and date to hold an elective AGM for Bakoni Ba Phethla CPA (BBPCPA).

You are kindly advised to stop such initiative, as you have been made aware of the current plans that have been undertaken by the Department to place BBPCPA under Judicial Administration in order to assist with regularizing and any related matters.

Furthermore, the Constitution of the BBPCPA clause 21.3 states; “The Annual General Meeting shall be held not later than the 30th of June of each year.” The 27th of November 2021 is much later than the 30th of June of each year. The BBPCPA has thus no legal capacity to act until it is placed under the administration by the Director-General.

Kindly take further notice that if the proposed meeting continues, it will be difficult for the Department to recognise the outcome of such AGM.

Should you still need more information/ further clarity regarding the above matter please do not hesitate to communicate with the Director: Tenure Reform Implementation, Ms. Busisiwe Motaung through an Email:....”

[26] The applicant states that the matter rested with the fifth respondent to see to it that the CPA complied with the legal prescript and that she is assisting the fifth respondent in achieving this purpose. The applicant attached to the replying affidavit a copy of the administration application issued in the Mpumalanga High Court as proof that the application was ripe for hearing.

[27] In the present matter the application was brought as an urgent ex parte application.

[28] The words of Coetzee J in *Lunar Meubel Vervaardigers (Edms) Bpk v Makin and Another*[3] are apposite:

“Undoubtedly the most abused Rule in this Division is Rule 6(12) ...”

[29] Those words are also applicable to rule 55(5) of the magistrates’ court which states:

“(a) A court, if satisfied that a matter is urgent, may make an order dispensing with the forms and service provided for in these rules and may dispose of the matter at such time and place and in accordance with such procedure (Which shall as far as practicable be in terms of these rules as the court may deem appropriate.

(b) An application brought as a matter of urgency must be supported by an affidavit which sets out explicitly the circumstances.”

[30] Rule 55(1) provides that as a general rule all applications shall be brought on notice of motion supported by affidavit after service of the application upon the respondent or respondents. Rule 55(3) provides further that:

“No application in which relief is claimed against another party shall be considered ex parte unless the court is satisfied that-

(i) The giving of notice to the party against whom the order is claimed would defeat the purpose of the application; or

(ii) The degree of urgency is so great that it justifies dispensing with notice.”

[31] The degree of urgency determines whether it justifies dispensing of notice. The applicant explained that she on 10 November 2021 received notice of the meeting scheduled for 27 November 2021 by means of a Whatsapp message. The applicant in a short sentence without any elaboration stated that she in vain, sought an indulgence from the first respondent and the application was only finalized on 19 November 2021. The application was issued on 22 November 2021 and enrolled for the same day. It was explained in *Lunar Meubelvervaardigers (Edms) Bpk supra* that:

“Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must commensurate therewith. Mere lip service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.”[4]

[32] A respondent has a right to oppose the application. Recourse to ex parte applications are exceptions to the general rule that notice be given to a respondent. The applicant sought to justify the ex parte procedure on the basis that the respondents will create an opportunity to delay the hearing which will render the application moot. Nothing was said as to how or what tactics the respondents may employ to delay the application should notice be given to them of the urgent application.

[33] In addition to the above, the applicant also referred to the fact that the fifth respondent has since 2012 endeavoured to re-arrange the affairs of the CPA because the first and second respondent have been difficult to settle their differences with the fifth respondent and that they were protecting mismanagement and misappropriation of funds and assets of the CPA. The allegations are vague, insufficient and not substantiated by any facts that the first and second respondent misappropriated any funds of the CPA and mismanaged the CPA or how they deliberately refused to work with the fifth respondent to frustrate any settlement of issues with the fifth respondent.

[34] Notice of the application was required. It seems to me more likely that the applicant resorted to ex parte procedure simply to avoid opposition to the application instead of service of the application with truncated periods to file opposing

papers to commensurate with the urgency of the situation. It is tantamount to an abuse of the process of the court. Discharge of an ex parte order may follow if the court is of the view that recourse to ex parte procedure was not justified.[5] Non-compliance with the prescripts of rule 55(3) may also result in a court exercising its discretion, in terms of rule 55(3)(g), to discharge an ex parte order. A court may do so even in a case where a proper case for relief has been established by an applicant.

- [35] It is also well established that an applicant in an ex parte application has a duty of good faith to disclose all facts which might, and not necessarily would, affect the court's decision to grant or withhold relief.[6] Importantly, the applicant has failed to disclose that she was a member of the executive committee or that she resigned for whatever reason. She also failed to disclose that she launched a similar application previously to prevent a meeting from proceeding in the same court and what the outcome of that application was. No mention was made of the resolution of 25 October 2014 in terms whereof the first and second respondent was elected to the executive committee. This court is of the view that after consideration of all the facts that the applicant has failed to disclose facts which could have affected the courts' decision not to grant the ex parte order.
- [36] This case serves to illustrate that a magistrate must be vigilant. Where none of the exceptions referred to rule 55(3) are sufficiently set out in the founding affidavit a magistrate should insist that notice of the application be given to a respondent.
- [37] A court may, of course, also discharge an ex parte order where on consideration of the facts disclosed in an answering affidavit and a replying affidavit, relief is not justified on the merits.
- [38] It will be recalled that the applicant relied heavily on a purported administrative decision of the fifth respondent to institute proceedings to place the third respondent under administration in terms of section 13(1) of the Act which provides:
- "A division of the Supreme Court or a Magistrate's Court having jurisdiction in respect of the area in which the property of the association is situated or the area in which the land which may be acquired by a provisional association is situated may, on application made by the Director-General, an association or any member thereof, or any other interested person, place the association or provisional association under the administration of the Director-General or grant a liquidation order in respect of an association or provisional association, because of insolvency or maladministration or for any other cause is unwilling or unable to pay its debts or is unable to meet its obligations, or when it would otherwise be just and equitable in the circumstances."*
- [39] The applicant averred that the third respondent is regulated and controlled by the fourth respondent in terms of the said decision which also binds the first and second respondent. The applicant misconceived the provisions of section 13(1) of the Act. The decision to place the third respondent under administration is not binding on the first and second respondent or the third respondent. Such a decision is unavoidably a precursor to the institution of an application in a competent court in terms of section 13(1) to place the third respondent under administration. The section does not empower the fourth or fifth respondent to place the third respondent under administration but it empowers a court with jurisdiction with the discretion to place the third respondent under administration. Until such an order is made by a competent court the status of the third respondent remains unchanged. The decision is not binding upon the first and second respondent as members of the executive committee of the third respondent or the third respondent itself who is a legal entity

independent from of its members. The decision to instruct the state attorney to draft an application to place the third respondent under administration is therefore not a decision as defined in section 1 of PAJA.[7] This perceived right upon which the applicant relies is non-existent and not open to doubt.

- [40] There is not a shred of evidence which was placed before the court to substantiate the allegation that it was the intention of the first, second and third respondent to disrupt the decision of the fourth respondent for the reasons alluded to above.
- [41] It is insufficient to allege that the first and second respondent called a meeting without compliance with the rules and regulations of the CPA together with the allegation that the CPA is mismanaged without evidence to substantiate the allegations with facts proving instances of mismanagement or fraud. The so-called reporting affidavit is of no help and suffers from the same defects as the founding affidavit.
- [42] The first and second respondent has pointed out in the answering affidavit that a further resolution was taken in terms whereof they were re-elected for three years. In view of the litigation history between the parties, the applicant should have been aware that the respondents will rely on that resolution but she nevertheless elected to conceal the existence of that highly relevant resolution in the founding affidavit. The balance of convenience is not in favour of the applicant. I am firmly of the view that the appeal cannot succeed.
- [43] I turn to deal with the application to lead further evidence on appeal. It is important to mention that the respondents admitted in the answering affidavit that the fourth respondent has elected to institute the application to place the third respondent under administration but added that it was slow to do so and pointed out that it was open to the fourth respondent to apply for an interdict. In the replying affidavit, the applicant attached a copy of the founding papers (as Annexure RB 12) of that application and pointed out that the application is ripe for hearing. The contents of the founding affidavit is new evidence. It was unnecessary to attach it to the founding affidavit if it was the intention to prove (a fact which admitted and thus common cause) that the application was indeed instituted. The annexure in my view is new evidence which should have formed part of the founding affidavit. It is trite that an applicant must make out its case in the founding affidavit.
- [44] The contents of the annexure should not have been considered as evidence. That being the position, evidence of the opposing affidavit filed in the Mpumalanga High court can similarly not be accepted as evidence in the present application. It follows that the application to lead further evidence on appeal be dismissed.

ORDER

1. The application to lead further evidence on appeal is dismissed with costs.
2. The appeal is dismissed with costs.

APPEARANCES

1. For the appellant

: Adv K Mokwena

2. For the respondents

: Adv K Groenewald

3. Date judgment reserved : 27 January 2023

4. Date judgment delivered : 16 February 2023

G C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

I concur

K L PILLAY

ACTING JUDGE OF THE HIGH COURT

[1] The third respondent is the Bakone Ba Phethla Communal Property Association. Hereinafter called the “CPA”.

[2] Act 28 of 1996. (Hereinafter the CPA Act).

[3] 1977

(4) SA 135 (W) 136B.

[4] 137E-G.

[5] Van Zyl v Siyaya Engine Rebuilders CC and Another Case A267/2016 (dated 19 October 2016) (WCC) para 8-9.

[6] Schlesinger v Schlesinger 1979 (4) SA 342 (W).

[7] The Promotion of Administrative Justice Act, Act 3 of 2000. (PAJA).

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