

SOUTH AFRICA / JUDGMENT

Thabazimbi Local Municipality and Others v ABSA Bank Limited Others (11869/2023) [2024] ZALMPPHC 157 (9 April 2024) [2024] ZALMPPHC 157

COURT

Limpopo High Court, Polokwane

BEFORE

Makoti

CASE / FILE NUMBER

11869/2023

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REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
LIMPOPO DIVISION,
POLOKWANE
CASE NO: 11869/2023
(1)

REPORTABLE:

YES/NO
(2)
OF INTEREST TO
THE JUDGES: YES/NO
(3)
REVISED.

In the matter between:

THABAZIMBI
LOCAL MUNICIPALITY
First
Applicant
LETSEKA
GLADWIN THOUBATLA
Second
Applicant
KEDISALETSE
JOHANNES MATLOU
Third
Applicant
And

ABSA
BANK LIMITED
First
Respondent
LINDIWE
PATRICIA MAKAYA
Second
Respondent
PAPULA
LUCKY MOGOROSI
Third
Respondent
BUTANA
BEN TLHABADIRA
SERVICES
Fourth
Respondent
Delivered: This judgment
is handed down electronically by circulation to the parties through
their legal representatives’
email addresses. The date for the
hand-down is deemed to be 09 April 2024.

JUDGMENT

Makoti AJ

Introduction

[1] The applicants touted this as an extremely urgent application which, but for logistical reasons, would have come before court on Friday 22 March 2024. It ultimately came before me on Monday 25 March 2024, still bypassing the procedures set out in the practice directives of this Division. In the end, against what the author of Luna Meubels[1] taught us over the many years since its delivery, one could hardly see what made the matter extremely urgent if it was not for the applicants’ insatiable appetite for litigation. Perhaps the reality of losing control of Thabazimbi Local Municipality’s

(the Municipality) purse proved too ghastly a proposition to accept. The hallmarks of abuse of court processes are quite palpable. All said, and owing to the litigation history of this matter, it is apt that I consider the merits with the hope that the end of this litigation battle is nigh.

Relief sought by applicants

[2] I do not deal with the intervention application which the parties have sensibly resolved amongst themselves. The intervening party, the Democratic Alliance, makes common cause with the fourth respondent on the substantive grounds for opposing the application.

- [3] Apart from the question of urgency the applicants asked for a declaration that the judgment and orders that were granted by Semenya DJP upon hearing the review application involving most, if not all, of the parties are suspended pending an application to the President of the Supreme Court of Appeal to have reconsidered the refusal by two judges of the court to grant leave to appeal the judgment. Whether an application for reconsideration suspends the operation of the judgment and orders is the only question to grapple with - as I will explain below.
- [4] In what mimics an application within the contemplation of s 18(3) of the Superior Courts Act[2] (the Act), the applicants sought another declaratory order to the effect that the orders granted by Phatudi JP on 21 December 2023 are currently operational and ought to be given effect to pending the final outcome of the appeal processes. Upfront I asked to be addressed on whether it was the intention of the applicants to invoke the said legislative provisions and what I got was an intangible answer, taking into account that they would have had to satisfy the requirements for interim interdictory relief if they intended the application to fall within the remit of s 18 of the Act.
- [5] No attempt was made to address the requirements in the founding papers. As indicated, I invited the applicants through their counsel to address me on these, more specifically as to what irreparable harm[3] the applicants would suffer if employee salaries were paid by someone other than them. That was not adequately answered. But there is yet another problem for the applicants, and that is that relief was previously sought verbatim before Muller J, which was favourably granted on 11 January 2024. To my knowledge no appeal lies against that order and that should be the end of it. There is no reason why I should re-open that question, also because I am legally disempowered to review an order granted by a judge. It is enough to say that court orders are not reviewable.
- [6] Based on the two reasons which I have expressed in the above stanza prayer 3 of the applicant's notice of motion is dismissed. I suspend dealing with the question of costs at this juncture to avoid piece meal approach of the issue. This is advised also taking into account that the applicants are seeking a punitive cost order against ABSA Bank Ltd, the first respondent.

Whether reconsideration application suspends court orders

- [7] On 28 February 2024 two judges of the SCA dismissed an application by the Municipality and a number of its councilors for leave to appeal the judgment of Semenya DJP. Upon acquiring knowledge of that outcome they issued an application to the President of that court to have that decision reconsidered. By virtue of the provisions of the Act the operation of the impugned orders was suspended when leave to appeal was applied for, first before Semenya DJP and later on at the SCA.[4] Where exceptional circumstances warrant it, an order that is subject to an application for leave to appeal can be implemented if the court orders so.[5] Both the applications failed.

- [8] Section 17(2)(f) of the Act stipulates that a party that is aggrieved by a refusal by judges of the SCA to grant an application for leave to appeal may approach the President of that court, through application, to refer the decision dismissing leave to appeal back to the court for reconsideration. The Act puts it thus:

“The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.”

- [9] As at the hearing of this case the decision of the President of the SCA was still unknown. Because of that the applicants hold the view that the implementation of the orders contained in the judgment that they impugn are suspended by operation of law in the same manner as an application for leave to appeal does. The respondents contend differently.

- [10] This matter calls for an interpretation of s 17(2)(f) of the Act, that is, to determine whether an application in terms of that provision suspends the operation of an order in relation to which a reconsideration is sought. Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[6] eruditely gave us guidance on how legal instruments are to be interpreted. He said:

“That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all

relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is “essentially one unitary exercise” [a reference to a statement of Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50,

- [2012] Lloyd’s Rep 34 (SC) para 21].” (Emphasis added)

- [11] I am deliberately making reference to the above authority to express my rejection of the notion that the court need look no further than the wording of the legislative provisions of s 17(2)(f) of the Act, a submission made by the intervening party – the Democratic Alliance. Context plays an important role whenever an interpretation of a legal instrument, including legislation, is called for.[7]

[12] There are only a handful of legal authorities which have dealt with the implications of a procedure in terms of s 17(2)(f) of the Act. In *S v Liesching and Others*[8] (*Liesching I*) the apex court in the land taught us to appreciate the dichotomy between an application for leave to appeal and an

application for reconsideration in terms of s 17(2)(f) of the Act. It has told us that an application to have a decision of the SCA reconsidered is not itself an application for leave to appeal.[9] These are its exact words:

“[35] ... The latter is not an application for leave to appeal. It is an application to the President for referral of a decision of the court, refusing leave to appeal, to the court for reconsideration. It is another bite at the cherry for an unsuccessful litigant to have the refusal of its application for leave to appeal reconsidered by the SCA on referral by the President in exceptional circumstances.” (Emphasis added)

[13] If an application for reconsideration under section 17(2)(f) is not an application for leave to appeal, can it be said that it operates in the same way as the latter to suspend the orders that are being challenged? I shall answer the question upon further considering of additional authorities. In *Cloete and Another v S; Sekgala v Nedbank*[10] (*Cloete*) the court again posited that an application for reconsideration espoused in s 17(2)(f) of the Act is not an application for leave to appeal. *Cloete* did not change what the court held about the nature of the procedure, but sought to elucidate its implications.

[14] Significantly, reconsideration was again recognised by the court in *Cloete* as part of the process of appeal. The court said:

“[33] Seen in context, as previously held by this court in Liesching I, s 17(2)(f) procedure is part of the appeal process. It involves making a judicial determination on a defined legal issue between the litigating parties. The President’s decision under s 17(2)(f) of the Act thus falls comfortably within the judicial function and purpose of the Supreme Court of Appeal leave-to-appeal process, in its instance, to be exercised by one judge of that court, its President.”

[15] It should be recognised that the court in *Cloete* was answering a different question to the one I am faced with here: that being the appealability of a decision taken by the President of the SCA under s 17(2)(f) of the Act. Thus, the court did not deal with the question whether an application in terms of that statutory provision suspended the operation of an impugned order. The courts have nonetheless repeatedly mentioned that an application in terms of s 17(2)(f) of the Act was to be granted when exceptional circumstances exist.[11]

[16] I emphasise that the exercise of discretion by the President of the SCA depends on the existence of exceptional circumstances. Much like the requirement that exceptional circumstances must exist for a court to direct that an order which is subject to leave to appeal must be implemented. I view the two provisions as signifying a deviation from the normal or ordinary course of things. I anchor my heels on the words of the court in *S v Peterson*[12] when Phatudi J likened exceptional circumstances to ‘unusual, extraordinary, remarkable, peculiar...’ factors. It is not surprising that in *Liesching I* the court said of the

procedure under s 17(2)(f) of the Act that it:

“[136] ... prescribes a departure from the ordinary course of an appeal process. Under s 17, in the ordinary course, the decision of 2 or more judges refusing leave to appeal is final. However, s 17(2)(f) allows a litigant to depart from the normal course, in exceptional circumstances only, and apply to the President for reconsideration of the refusal of leave to appeal.”

[16] The court in Cloete further held:

“[46] ... The finality of the decision is only disturbed in cases where the President exercises her discretion to ‘refer the decision’ refusing leave to appeal to the Supreme Court of Appeal for reconsideration.”

[17] In a judgment of persuasive value, Moodley AJ held in MEC for Co-Operative Governance and Traditional Affairs and Others[13] that:

“[32] ... In my view, and based on the observations referred to above in Liesching, the refusal of the petition was final determination of the application for leave to appeal against the order granted by Govern J, which refusal revived the operation and execution of his order. ... Accordingly, I am of the view that the refusal of the petition to the Supreme Court of Appeal brought the appeal process to an end, and the application for reconsideration of such refusal does not suspend the order granted by Govern J.”

[18] Likening the procedure to the one under s 18(1) of the Act, Moodley AJ further said the following:

[33] Another point which I believe is supportive of the view which I take in this matter is that under s 18(1) the operation and execution of an order would be suspended only if the court orders otherwise. In other words, the order would not be suspended merely on the bringing of the application to suspend such order. In order to attain the suspension of the order there has to be an order from the court. Similarly, with respect to the proviso in s 17(2)(f), an application for reconsideration of the refusal of a petition against an order granted would of itself not suspend the operation of the order. The President would have to rule on the matter and, until such ruling is made, and even if the proviso of s [17(2)(f)] contemplated a suspension of the order (which for reasons mentioned above, I do not think it does), the order would not be suspended until a favourable decision to the application is pronounced on the reconsideration of the petition.” (Emphasis added)

[19] I am aligned to the thinking expressed above, and for different reasons too. The fact of the matter is that it is not a unique situation that an opportunity to correct errors or vary a court order is presented. But that does not imply, on its own, that the order sought to be corrected or varied has to be suspended. By way of example, the Uniform Rules present an opportunity to correct or vary court order through a court process.[14] Invoking the procedure under the rule does not suspend the operation of the order sought to be corrected or varied.

- [20] I do not believe it to be in error that the Act does not specifically state that an application in terms of its s 17(2)(f) shall have the same effect as an application for leave to appeal. Also, I am loath to add to or impute meaning to the statutory provision that is not provided for. To do so would be to undermine the distinction that the court in *Liesching* I told us exists between an application for leave to appeal and one in terms of s 17(2)(f) of the Act.
- [21] Finally, and given the extraordinary nature of this procedure, I am of the considered view that its invocation does not result in the suspension of the operation of the order under attack. In this regard I am in agreement with the argument offered by the respondents that the institution of an application in terms of s 17(2)(f) of the Act does not suspend the operation of the order in relation to which the reconsideration is asked for. Ordinarily, a decision by the judges considering an application for leave to appeal is final. When an application for reconsideration is made, the finality of the order related thereto is not disturbed until the President has exercised the discretion to refer the decision to be reconsidered.
- [22] In my view a party that requires the operation of an order to be suspended must, in my view, obtain an order to that effect pending the final determination of the application under s 17(2)(f) of the Act. This is the procedure that parties follow when faced with the possibility of an order being implemented which they wish to have rescinded, varied or corrected under Rule 42 of the Uniform Rules.

Consideration of costs

- [23] The application was brought under extreme urgency. I have criticized this as an abuse of court processes in my opening paragraphs of this judgment. That must attract costs in the event of the application failing, though I do not believe that the costs should be on a scale higher than the ordinary party and party scale.
- [24] The applicants have in any event failed in their attempt to stymie the operation of the judgment and orders under attack. This must mean, for obvious reasons, that the application to have ABSA pay the costs of this application on an attorney and client scale must fail on account of the failure of the application in its entirety.

Order

- [24] I make the following order:

[a] The application is dismissed with costs.

MOKGERWA MAKOTI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

DATE OF HEARING: DATE OF JUDGMENT: 25 MARCH 2024 09 APRIL 2024 FOR APPLICANTS: AB ROSSOUW SC K PRETORIOUS MOHALE INCORPORATED ATTORNEYS POLOKWANE FOR FIRST RESPONDENT : KM BOSHOMANE LOWNDES DLAMINI ATTORNEYS WIERDA PARK, PRETORIA FOR FOURTH RESPONDENT : SS TEBEILA ML SHOBA ATTORNEYS POLOKWANE FOR FIFTH AND SIXTH RESPONDENTS : SG GOUWS LF TALJAARD MINDE SHAPIRO AND SMITH INC c/o DE BRUIN OBERHOLZER INC POLOKWANE

- [1] Luna Meubels Vervaardigers (Edms) Bpk v Makin and Another 1977 (4) SA 135 (W). Also, East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 (23 September 2011).
- [2] Act No. 10 of 2013.
- [3] City of Tshwane Metropolitan Municipality v Afriforum and Another (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016) para 59.
- [4] Section 18(1) of the Act.
- [5] Section 18(3) of the Act.
- [6] Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2013] ZASCA 176; 2014
- (2) SA 494 (SCA), para 12.
- [7] See University of Johannesburg v Auckland Park Theological Seminary and Another (CCT 70/20) [2021] ZACC 13 at para 65 – 67.
- [8] 2019
- (4) SA 219 (CC).
- [9] Ibid at para 35.
- [10] 2019
- (2) SACR 130 (CC).
- [11] Liesching I at para [137].
- [12] 2008
- (2) SACR 355 (C).
- [13] 2021
- (1) SA 432 (KZP).
- [14] Rule 42(1)(a) of the Uniform Rules.

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