

SOUTH AFRICA / JUDGMENT

Rabie and Another v Public Protector and Another; Rabie v Mkhwebane and Others (56029/2018; 83971/2019) [2021] ZAGPPHC 745 (2 November 2021)

[2021] ZAGPPHC 745

COURT

North Gauteng High Court, Pretoria

BEFORE

N. Janse Van Nieuwenhuizen

CASE / FILE NUMBER

56029/2018; 83971/2019

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IN THE

HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE:

2 NOVEMBER 2021

Case

Number: 56029/2018

In

the matter between:

VIRGIL
HUMPHREY RABIE
First
Applicant
ANTHEA
BERENICE RABIE
Second
Applicant
And
THE
PUBLIC PROTECTOR: ADVOCATE B MKHWEBANE
ERNST
AND YOUNG ADVISORY SERVICES (PTY) LTD
Respondent
Intervening
Respondent
AND
Case
Number 83971/2019
VIRGIL
HUMPHREY RABIE
Applicant
And
ADVOCATE
BUSISIWE MKHWEBANE(THE PUBLIC PROTECTOR)
First
Respondent
MR
JOHN STEENHUISEN (THE DEMOCRATIC ALLIANCE)
Second
Respondent
MINISTER
PRAVIN GORDHAN(DEPARTMENT OF PUBLIC ENTERPRISES)
Third
Respondent
ADVOCATE
SHAMILA BATOHI(THE NATIONAL PROSECUTING AUTHORITY)
Fourth
Respondent
THE
SOUTH AFRICAN POLICE SERVICE – SAPS(THE HAWKS)
Fifth
Respondent
THE
SPECIAL INVESTIGATING UNIT (SIU) -DR WELLS/MR NEAVE
Sixth
Respondent
THE
LAW SOCIETY OF THE NORTHERN PROVINCES
Seventh
Respondent

ERNEST
AND YOUNG (EY)
Eighth
Respondent
MR
BRIAN DAMES (PREVIOUS CEO AT ESKOM)
Ninth
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] This is an application for leave to appeal the judgment and order of this court delivered on 3 August 2021.

Legal framework

- [2] Prior to considering the merits of the application it is apposite to have regard to the test applicable to an application for leave to appeal. The test is contained in section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013 and reads as follows:

“17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (i) The appeal would have a reasonable prospect of success”

(own emphasis)

- [3] Bearing the aforesaid in mind, I proceed to deal with the merits of the application for leave to appeal.

First applicant

- [4] The first applicant raised several grounds in support of the application, which grounds are for ease of reference summarised infra.

Amended notice of motion

- [5] The first applicant contends that the relief I considered in the review application does not correspond with the relief claimed in the third intended amendment of the notice of motion that was filed on 25 January 2021.

- [6] In the third intended amendment of the notice of motion in the review application, the first applicant amended the relief claimed in prayers 4, 5 and 6 to read as follows:

“4. Declaring that the EY report of 30 July 2011 and 14 October 2011 as an act of fraudulent misrepresentation to the recipients being Eskom, Rabie and the CCMA.

5. Declaring that EY had committed deliberate perjury at the CCMA in February 2012 misleading Rabie, Eskom and the CCMA concerning the content and facts surrounding the EY Reports of August 2011 and October 2011.
6. That EY had extorted funds from Eskom and thus the South African Government to the tune of more than R 800 000 by deliberately misrepresenting facts to the Eskom CEO in its 29 August 2011 Forensics Report and deceitfully concealing such report from Rabie, and charging and accepting more than R 800 000 for a ‘white-wash.’
- [7] The facts pertaining to the EY reports and the allegation that EY has extorted funds from Eskom to “the tune of more than R 800 000” were fully dealt with when prayer 2.4 of the declaration application was considered. In paragraph [50] of the judgment, this court found that there was no merit in the allegations and declined to grant the relief claimed in respect thereof.
- [8] The aforesaid relief claimed in the third intended amendment of the notice of motion in the review application, has consequently been dealt with in the judgment, albeit in the declaration application portion of the judgment.

Condonation

- [9] The first applicant submits that this court erred in applying the provisions of the Promotion of Administrative Justice Act, 2000 (“PAJA”) when considering the question of condonation for the late launching of the review application.
- [10] The intervening party and eighth respondent, Ernest and Young (“EY”) agrees, but submit that the delay was in any event unreasonable which is in itself a reason to dismiss the review application.
- [11] Even if one disregards the prescribed time period of 180 days in terms of PAJA, the application was still brought some four years later, which is in itself an unreasonable delay. The applicants did not advance convincing reasons why the delay should be overlooked and due to the nature of the issue in dispute, there is no basis to find that the court is constitutionally compelled to do so.
- [12] Granting leave to appeal on the basis of the PAJA condonation point, does not remove the unreasonable delay and the review application would still have failed on this point.

Reliance on Settlement agreement

- [13] The first applicant contends that the Settlement Agreement reached between himself and Eskom during the labour dispute proceedings has no bearing on the merits of his whistleblowing report submitted to the Public Protector.

[14] In the result, the court erred in relying on the Settlement Agreement in paragraph [19] of the judgment. Paragraph [19] read in context, however, deals with the findings of the Public Protector and not with the findings of the court.

EY lacks locus standi in the review application

[15] This aspect was not raised during the hearing of the matter and the court did not pronounce on the point. It bears mentioning that the judgment and order of Davis J in the intervention application held that EY had the necessary locus standi to intervene in the review application. The point has therefore been finally determined by another court.

[16] Furthermore, the first applicant's third intended amendment of the notice of motion in the review application dealt with supra, claims direct relief in respect of EY.

The finding that there were no facts supporting the allegations of extortion and theft [paragraph 70]

[17] According to the first applicant the papers evidenced "clear, irrevocable proof and undisputed evidence...of fraud, deceit, perjury, unlawful conduct and criminality implicating Eskom's two employees namely the Executive in Legal and the HR Representative, EY and EY's Steyn and CDH's Aadil

Patel...".

[18] Save for the speculations amounting to a conspiracy theory by the first applicant, there are no facts proving any of the aforesaid allegations by the first applicant.

Second applicant

Failure to consider the second applicant's application to review the Public Protector's report

[19] The second applicant chose not to appear at the hearing and consequently did not address the court on her application.

[20] The second applicant did appear in person during the hearing of this application and submitted that the court erred in not dealing with the fact that the Public Protector informed her during February 2021 that the findings of the 30 June 2014 report will not be revisited.

[21] In the review application that was served on the Public Protector on 18 August 2018 the second applicant did not seek relief in respect of the Public Protector's decision during February 2021. The issue was consequently not before court.

Conclusion

[22] Having considered the various grounds in support of the application for leave to appeal, I am of the view that the appeal does not have a reasonable prospect of success and the application stands to be dismissed.

Costs

[23] EY was represented by two counsel and I am of the view that the employment of two counsel is justified in the circumstances.

ORDER

[24] In the premises, I grant the following order:

The application is dismissed with costs; which costs include the costs of two counsel.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 1 October 2021.

DATE DELIVERED PER COVID19 DIRECTIVES: 2 November 2021.

APPEARANCES

For the First Applicant (In person):

Mr V.H. Rabie

For the Second Applicant (In person):

Ms V.H. Rabie

Counsel for the Eighth Respondent: Advocate A. Govender and

Advocate M. Clark

Instructed by:

Webber Wentzel

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Prepared on 23 October 2026 · Esheria