

SOUTH AFRICA / JUDGMENT

Van den Heever N.O. and Others v Louw and Another (M285/17) [2017] ZANWHC 52 (13 July 2017) [2017] ZANWHC 52

COURT

North West High Court, Mafikeng

BEFORE

D.I Matlapeng

CASE / FILE NUMBER

M285/17

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE NUMBER: M285/17

In

the matter between:-

THEODORE

WILHELM VAN DEN HEEVER N.O.

1ST

Applicant

OTTLIE

ANTON NOORDMAN N.O.

2ND

Applicant

LOUISA

SIBIYA N.O.

3rd

Applicant

(In

their capacity as joint liquidators of

Lennard

Boerdery CC (in liquidation)

Registration

No: 2009/118795/23)

and

LENNOX

ANTONIE LOUW

1ST Intervening

(ID

NO: [6...])

Applicant

STEPHANUS

JACOBUS DANIEL SWART

2ND Intervening

(ID

NO: [5...]

Applicant

JUDGMENTMATLAPENG

AJ

[1]

The applicants, Messrs Van den Heever, Noordman and Ms Sibiya are the joint liquidators of a Close Corporation in liquidation (the CC).

They approached this Court on 15 June 2017 with an urgent ex parte

application seeking an extension of their powers in terms of s386 of the Companies Act, 61 of 1973 as liquidators of the CC.

[2]

The intervening applicants Messrs Louw and Swart (herein referred to as the intervening parties) are the members of the Close Corporation

in liquidation. They fortuitously came to know about the ex parte

application. They came to Court and when the matter was called they applied for a postponement in order to enable them to file an

application to intervene. Their application was successful and the matter was postponed to 22 June 2017.

[3]

On 21 June 2017 the intervening parties filed their application to intervene and on 22 June 2017, the day the matter was to

be heard,
the applicants filed their notice of withdrawal of the application.
The reason given for the withdrawal of the
urgent ex
parte
application is that the substratum of the application no longer
existed. In amplification hereof, this would be that, there was
an
offer to purchase the CC as a going concern which had to be accepted
on 15 June 2017. The extended powers that the applicants
sought
were to enable them, among others, to accept the offer to purchase.
As the offer was not accepted by 15 June 2017,
it lapsed, and there
was no longer any reason to seek the extension of the powers, hence
the withdrawal of the application.

[4]

The intervening parties, while admitting that the application became
moot, insist that they are entitled to their costs and
on a punitive
scale. They support their submission by the following:

4.1

The applicants were not supposed to approach the court on an ex
parte
basis. Crucially the applicants knew that the intervening parties, as
members of the CC in liquidation, had a substantial interest
in the
application and any act taken on behalf of the CC would affect them.

4.2

The applicants came to court to have their power extended when the
Master of the High Court had the capacity
to do what they had asked
the Court to do. It was not necessary for the applicants to
approach the Court.

4.3

The application was launched only for the specific purpose of
obtaining the go ahead to sell the property.

If all the above
is taken into account, it shows that the applicants acted in an
unbecoming manner hence a request for a punitive
costs order on
attorney and client scale de
bonis propriis.

[5]

On behalf of the applicants, it was submitted that the intervening parties have no interest whatsoever in the application.

Any

order sought and obtained would not affect them, hence they were not joined to the application. Despite admitting that the application is moot and it became so when the offer to purchase lapsed on 15 June 2017; on 22 June 2017 the intervening parties launched and filed the intervention application. As a result, it cannot be said that they have made out a case for intervention. A suspicion arises that they came to Court solely in order to obtain an order for costs.

[6]

In terms of Rule 6 (4) (b) of the Uniform Rules of Court, any person may at any stage of the proceedings, apply for leave to intervene.

Such a person has to show that he has a direct and substantial interest in the proceedings. What constitutes direct and

substantial interest been explained as follows in *Snyders v De Jager* (joinder) 2017 (5) BCLR 604 (CC) at paragraph 9:-

“A

person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a

person’s rights or interest. In that case the person should be joined in the proceedings. If the person is not

joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person’s rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system.

That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard”.

[7]

The intervening parties are members of the CC in liquidation. They have in their personal capacity, acted as sureties and co-principal debtors for the payment by the CC of its debts. The order sought by the applicants although at first blush appears not to have anything to do with them, would if granted directly affect their rights and interests. This would be so if account is taken of the following; the applicants seek to have their powers extended to enable them to sell a major asset of the CC and at a not best price according to the intervening party. In case of a shortfall, the creditors would have recourse against them. The order and the subsequent sale of the asset if successful, would clearly impact the rights and interests of the intervening parties. Furthermore, when the intervening parties were informed of the offer to purchase, they, in a letter directed to the applicants, vehemently voiced their objection. They did this in their capacity not only as creditors, but also as guarantors of the CC's debts. In their letter they opined that better offers which would be beneficial to the CC should be sought.

[8]

Their attorney also registered an objection on their behalf. One of the applicants, although not objecting to the applications per se, was in favour of exercising caution and to await a letter from the intervening parties' attorney. The letters from the intervening parties and their attorney clearly spelled out the interest that they had in the application. This notwithstanding, the applicants did not see it necessary to join them to the application. The conclusion that I reach is that there is no merit in the submission by the applicants that the intervening parties have no interest in this matter and would not be affected by the order sought.

[9]

An adverse costs order is one of the hazards of litigation. In his book "Law

of Costs” 3rd
edition
the author A.C.
Celliers
states at paragraph 4.9:
“The
ordinary rule is that the successful party is awarded costs as
between party and party. An award of attorney and
client
costs is not lightly granted by the court: the court leans against
awarding attorney and client costs, and will grant such
costs
only
on “rare” occasions. It is clear that normally the
court does not order a litigant to pay the costs of another
litigant
on the basis of attorney and client unless some special grounds are
present..... Where the court would in the
light of the
other facts not have hesitated to make an award of attorney and
client costs, it refused to do so where there were
faults on both
sides, as it considered itself not justified in penalising one side
only”
Flowing
from the above, it is clear that costs order on a punitive scale is
not normally made. In those exceptional cases
where it is
granted, it will be to show the Court’s displeasure at the
losing party’s conduct. The following conduct
has been taken
into consideration when deciding whether to award a costs on punitive
scale namely, whether the losing party was
wilful, or that it raised
a claim or defence that was found to be frivolous, vexatious and
totally without substance or hopeless
from the outset. The list is
not exhaustive. See *South African Liquor Traders Association and
Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565
(CC).
[10]
The applicants approached this Court ex
parte
on an urgent basis. They were made aware of the intervening parties’

interest in this matter. Notwithstanding this knowledge, they failed to join them as parties to the application and also failed to disclose their interests to the Court. It is trite that in an ex parte application all material facts which might influence a court in coming to a conclusion must be disclosed. “Non-disclosure of facts need not be wilful or mala fide to incur the penalty of suppression”.

Schlesinger
v Schlesinger 1979 (4) SA (W) at
349
A-B.

[11]

The reason supplied by the applicants for approaching the court ex parte is that in their view, the intervening parties had no interest in the matter and any order obtained would not affect them. Their attitude is that although the intervening parties have informed them about their interest and the manner in which the proposed sale of the major asset of the CC would affect them, this was merely a difference of opinion as they held a contrary view. A “litigant who approaches a Court ex parte is not entitled to omit any reference to a fact or attitude of his opponent which is relevant to a point in issue merely because he is not prepared to accept the correctness of it”.

Schlesinger
v Schlesinger supra
at 352

D.

[12]

I will take in the applicants’ favour that the order sought was never granted as a result of their withdrawal of the application.

Consequently, the penalty of suppression will not visited upon them. However, despite the withdrawal of the application, the intervening parties were before Court and they went to the expense of preparing their case for intervention.

It is not correct, as
contended by the applicants, that the intervening parties launched
their application on 22 June 2017. They
appeared in Court on 15 June
2017 and the matter was postponed to enable them to file their
application to intervene which papers
were filed at Court on 21 June
2017.

[13]

Although the application was withdrawn before they could argue their
entitlement to intervene, they have shown that already
on 15 June
2017 they were a party to the application although not formally
admitted. They had to prepare and file their application
and
they would not have known that the applicants would withdraw the
application the way they did. It is clear to me
that they
are entitled to their costs. However, in my view there is
nothing in the applicants' conduct that attract
opprobrium
which would incur a penalty of a punitive costs order in the manner
contended by the intervening parties.
In

the circumstances the
following order is made:

The
applicant in their representative capacity are liable to pay the
costs of the intervening parties on party and party scale which
costs
shall include the costs occasioned by the postponement of 15 June
2017.

D.I
MATLAPENG
ACTING
JUDGE OF THE HIGH COURT
APPEARANCES
DATE OF
HEARING
: 22 JUNE 2017
DATE OF

JUDGMENT

: 13 JULY 2017

ADVOCATE FOR THE APPLICANT : ADV A. J.WESSELS

ADVOCATE FOR THE INTERVENING PARTIES : ADV J.A KLOPPER

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