

SOUTH AFRICA / JUDGMENT

Van Rooyen N.O and Another v Mokwena and Others (2064/2021) [2021] ZALMPPHC 23 (18 May 2021) [2021] ZALMPPHC 23

COURT

Limpopo High Court, Polokwane

BEFORE

Makume

CASE / FILE NUMBER

2064/2021

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(LIMPOPO DIVISION,

POLOKWANE)

HEARD IN GAUTENG LOCAL

DIVISION, JOHANNESBURG

REPORTABLE:

YES / NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED.

CASE NO:

2064/2021

In

the matter between:

ADRIAAN
WILLEM VAN ROOYEN NO
First
Applicant
MMABATHO
SHIRLEY MOTIMELE NO
Second
Applicant
and
MORAPEDI
ROY MOKWENA
First
Respondent
TUMI
MOKWENA INCORPORATED
Second
Respondent
(Reg
No.: 2005/008085/21)
JUDGE
EBERHARD BERTELSMANN
Third
Respondent
(In
his capacity as the commissioner in
terms
of Section 417 and 418 of the
Companies
Act)
STHEMBISO
BETHUEL BOSCH NO
Fourth
Respondent
XOLILE
JOHN BOSCH NO
Fifth
Respondent
MASTER
O FTHE HIGH COURT, POLOKWANE
Sixth
Respondent
LEGAL
PRACTICE COUNCIL
Seventh
Respondent

JUDGMENT

MAKUME J:

INTRODUCTION

- [1] This matter comes before me as a result of an order granted by my brother Phathudi J on the 1st April 2021.
- [2] The Applicants seeks an order on an urgent basis setting aside that order on the basis of its unconstitutionality and a contravention of the Audi Alteram Parterm Rule Applicants rely in this regard on the SCA decision in Knoop vs Gupta Case No 115/202 dated the 19th November 2020.

FACTUAL**BACKGROUND**

- [3] There is a long history of litigation between the first and second Respondents on the one hand and Majola Trust represented in these proceedings by the fourth and fifth Respondents. In order to contextualise the dispute in this matter it is necessary to provide a short chronology of salient events leading up to the present proceedings and what follows is a summary of relevant facts that are either common cause or are not seriously disputed on the papers.
- [4] During 2019 Majola Trust obtained judgment for payment of an amount of R1.5 million against the first Respondent on the basis of a suretyship that he had executed in favour of that Trust for the second Respondent's indebtedness to the Trust.
- [5] The first Respondent is the sole Director and shareholder of the second Respondent which practices as an Incorporated Law Firm.
- [6] On the 19th December 2019 before Kgomo J the second Respondent was placed under Liquidation. What followed thereafter between December 2019 and December 2020 is a series of applications interdicting execution of the liquidation order as well as applications for rescission of that order.
- [7] The issues were finally settled on the 18th December 2020 when Acting Judge Naude dismissed the application for rescission, discharged the suspension order granted by Phathudi J on the 6th February 2020 and dismissed the application for leave to appeal the judgment by Kgomo J.

- [8] The judgment by Naude AJ was brought to the attention of the Respondents during January 2021 or the latest on the 9th March 2021. There is evidence however that the first Respondent knew as far back as December 2020 that his various applications to halt execution had been dismissed.
- [9] The Respondents noted an application for leave to appeal the judgment by Naude AJ. That application was heard on the 26th March 2021 and was dismissed. The Respondents knew about the date of hearing of that application and chose not to attend court even though the Applicants had indicated to them that they will not grant a postponement. The first Respondent who is himself a practicing attorney did not attend court and no reason was furnished.
- [10] On the 30th March 2021 at about 09h00am the first and second Respondents as Applicants filed an urgent application setting it down for hearing the following day the 31st March 2021 at 10h00am.
- [11] In the application besides seeking audience on an extremely urgent basis they also sought an order suspending the operation of the Liquidation proceedings as well as the sitting of the Insolvency Enquiry which was set down to proceed on the 31 March 2021 before the third Respondent (retired Judge Bertelsman).
- [12] The first and second Applicants supported the fourth and fifth Respondents filed papers opposing the granting of the main application by the first and second Respondents. The third Respondent filed a notice to abide but proceeded to hold the Section 417 Insolvency Enquiry on the 31st March 2021.
- [13] The application referred to in [12] above is in the papers titled as “The main Application.” It is that application that served before Phathudi J on the 31st March 2021 and the 1st April 2021. I shall henceforth refer to it in that title to distinguish it from the present. I shall refer to the parties as they are in the current application before me.
- [14] In the hearing of the main application that commenced on the 31st March 2021 Applicants as well as the first, second Respondents filed heads and were all represented by counsel. As indicated the third Respondent filed a notice to abide. The fourth and fifth Respondents did not file any heads whilst the sixth, seventh and eighth Respondents did not enter appearance to oppose.
- [15] At the commencement of the hearing on the morning of the 31st March 2021 the learned Judge indicated that he had not had sufficient time to read the voluminous papers placed before him and stood the matter down for argument at 14h00 that day. On adjournment he remarked as follows: “Because the issue is about urgency isn’t it” to this counsel for the first and second Respondents agreed.
- [16] It was during submissions by Advocate Lourens for the first and second Applicants when the court said the following:

“Yes, you know essentially Mr Lourens I would have loved to hear whether this application is urgent or not without really getting into the merits”

[17] From the record it is evident that Counsel for the first and second Respondents had said nothing in their oral submissions about urgency. Counsel for the fourth and fifth Respondents also made submissions attacking urgency only and did not deal with the merits of the application. The court in fact agreed with counsel when it indicated that urgency is indeed “the crux of the matter” and confirmed that the court will first have to decide on the issue of urgency before going into the merits of the application.

[18] Finally after Counsel for the first and second Respondents had made his submissions in reply the court said the following:

“Well I must immediately concede that this is a very complex matter involving a lot of commercial and tactical issues, but that said the focus of the day was to consider whether this application has been properly based on an urgent basis. I think that is the point of departure. I will be burning the midnight oil trying to produce something which will be in the form of ex tempore judgment on the issue of urgency alone.”

[19] The court then adjourned the hearing to the following day being the 1st April 2021 and informed all counsel that it is not necessary for them to appear they could send their local correspondent attorneys to come and note judgment.

[20] On the 1st April 2021 judgment was handed down in which the learned judge not only ruled that the matter was urgent but also proceeded to grant all the orders prayed for by the Applicants in the notice of motion. He granted them relief without having heard any of the parties on the merits of the main application.

[21] In his judgment Phathudi J says the following at page 3–130 on paginated page 132 at paragraph 20:

“The only issue I am called upon to determine is whether the present interim interdict is urgent or not. The history of the ongoing in pave between parties is for now immaterial for purposes of determining the urgency of the application.”

[22] The learned Judge went on to refer to previous judgments dealing with the aspect of urgency like the well-known Luna Meubels case as well as that of Salt and Smith and East Rock Trading. At page 137 Phathudi J added that:

“I have invited counsel to curtail their argument purely on urgency and not delve into the merits per se”

[23] Phathudi J concluded by saying the following: “In the circumstances and for the reasons set out herein I am fortified that in my view that the application is sufficiently urgent and this court should in its discretion come to the applicant’s rescue. I therefore pronounce an order as is crafted in a draft order.

- [24] The learned Judge then proceeded to read out that order as proposed by the Applicants which order granted them all the prayers on the merits. This was a grave mistake and should never have been pronounced. It is what led to the present urgent application.
- [25] It is clear that the learned Judge unfortunately misdirected himself as to what he was called upon to do. This became even more clearer when he was asked to explain his order by the Judicial Services Commission during the recent interviews for vacant position. He failed even at that level to give an explanation of how he could have made that order without affording the Applicants and other interested parties a hearing.
- [26] In the heads of argument filed in respect of the main application the Applicants as well as the fourth and fifth Respondents raised various points in limine for instance that the application does not comply with the requirements of Section 354 of the 1973 Companies Act. It was also contended that the envisaged appeal against the winding up order has in any case lapsed. All these issues raised were never dealt with in the judgment by Phathudi J.

URGENCY

- [27] I am satisfied that the current application seeking to reverse the order by Phathudi J dated the 1st April 2021 is urgent. I have no problem in the ruling by Phathudi J that the main application was urgent he exercised his judicial discretion as he saw fit. I will accordingly deal with both the main and the current applications on that basis when I determine the various points in limine and the substantive defence raised in the main and current applications.
- [28] Counsel for the first and second Respondents contend that this court is not empowered to sit as an appeal against the decision of Phathudi J who also sat as a single judge and that it is only a full bench of this Division that is empowered to interfere with the judgment or order by Phathudi J. That argument is unsustainable.
- [29] A ruling or order that a matter was urgent is not appealable. It is common knowledge that the first paragraph of relief sought in the first and second Respondents' notice of motion is for the enrolment of the application as an urgent application and for the dispensing of the forms and services provided for in the rules of court to the extent necessary.
- [30] The court in *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 at page 243 A said the following:
- "An order that a matter should proceed in terms of Rule 6(12) is in my view clearly not final nor definitive of the rights of the parties nor has it the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. An order that an application should be heard in terms of Rule 6(12) is analogous to an order giving direction in regard to evidence or referring a matter to trial."*

- [31] Phathudi J should have simply given a ruling on the first prayer and stopped there and then directed that the matter be referred to either a special motion court hearing on the merits. He overstepped his authority and made a ruling on what he had himself said he was not going to entertain on the 31st March 2021.
- [32] The ruling on the 1st prayer is not appealable accordingly that issue raised by the first and second Respondents falls to be dismissed.

CONDUCT OF THE FIRST RESPONDENT

- [33] A lot has been said about how the first and second Respondents have been prejudiced in the conduct of this matter in that they were not given a copy of the judgment by Naude AJ timeously and secondly that they were not allowed an opportunity to amend their application for leave to appeal the judgment by Naude AJ and lastly that the application for leave to appeal was heard and decided in their absence.
- [34] The first Respondent is a practicing attorney in the Limpopo Province. It is common knowledge that according to him he heard through the media during December 2020 that the application that he had brought to rescind the judgment by Kgomo J as well as the other applications had been dismissed. He is the dominus litis and should have taken steps to get a copy of the written judgment from the judge through the offices of the Register or even approach the Judge President if there was a delay to furnish him with a copy. He did not do that when in fact judgment was about him and the second Respondent. He did not act like a person who has an interest in the outcome of what he had started.
- [35] When the first and second Respondents were informed about the date of hearing of the application for leave to appeal they knew that their counsel will not be available and also that they needed time to amend their notice of appeal. The date had been set by the Presiding Judge as is the practice in these divisions. The first Applicant should have appeared in person before court and move for a postponement. He did not do that once again showing no interest in the outcome. The Respondents cannot now come before this court and cry foul. They are responsible for the outcome and have no one to blame.

IS THE ORDER OF JUDGMENT BY PHATHUDI J INVALID ON THE BASIS OF A BREACH OF SECTION 34 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 108 OF 1996

- [36] Section 2 read with Section 8 of the Constitution are the starting point in this regard. Section 2 reads as follows:

“This Constitution is the Supreme Law of the Republic, law and conduct inconsistent with it is invalid and obligations imposed by it must be fulfilled.”

Section 8

“The Bill of Rights applies to all law and binds the legislature the executive the judiciary and all organs of state.”

[37] Section 34 of the Constitution guarantees a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum. The court sitting in adjudication of the Main application on the 31st March 2021 was such a court falling within the ambit of Section 34 and its conduct falls to be scrutinised in accordance with the prescripts of Section 2 and 8 of the Constitution.

[38] In *De Lange v Smuts NO* [1998] ZACC 6; 1998 (3) SA 785 (CC) at paragraph 131 the principle enshrined in Section 34 was expressed as follows:

“The time honoured principles that no one shall be the judge in his or her own matter and that the other side should be heard [Audi alteram partem] aim towards eliminating the proscribed arbitrariness in a way that gives content to the rule of law. They reach deep down into the adjudicating process, attempting to remove bias and ignorance from it. Everyone has the right to state his or her own case, not because his or her version is right and must be accepted but because in evaluating cogency of any argument, the arbiter still a fallible human being must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than a chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest points in the direction of a violation.”

[39] The court in *De Beer NO vs North Central Local Council and Another*

[2001] ZACC 9; 2002 (1) SA 429 (CC) took the issue further in the following words at page 439 paragraph 11:

“This S34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a pre-requisite to an order being made against one is fundamental to a just and credible legal order.”

[40] None of the parties before Phathudi J were called upon to address the court on the merits, they were all directed to deal with the issue of urgency and urgency only. This much is borne out by the record itself. Counsel for the first and second Respondents maintains that all the parties did address the court on the merits that may well be so for it often happens that some aspects of the merits are closely connected with the issue of urgency.

[41] What is strange is that in his judgment Phathudi J made reference to Section 34 of the Constitution and yet proceeded to deliver an order which violated the Constitutional rights of the Applicants and the fourth and fifth Respondents including the third Respondent who was not even before court.

[42] Counsel for the first and second Respondents argue that Phathudi J's judgment cannot be annulled on the basis of the provisions of Section 172 of the Constitution because what we are dealing with in this instance is not “a Constitutional matter nor does it concern any law.” That argument is equally unsustainable when I requested counsel to address me on the issue whether the ruling by Phathudi J should not be described as “conduct” in terms of Section 172 (1) (a) of the Constitution I did not get a clear answer. For completion sake Section 172 (1) (a) of the Constitution reads as follows:

“When deciding a Constitutional matter within its power a court

- a) Must declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency.”
- [43] The conduct by Phathudi J in directing the parties to deal with urgency only and then give judgment on the merits is conduct that falls foul of the entrenched Constitutional right of a fair hearing. Not only did the court give an order that it was not asked to do there is nowhere in the record where the judge has dealt with issues on the merits. It is that conduct that must be declared invalid.
- [44] Applicants as well as the fourth and fifth Respondents referred me to the matter of Kurt Robert Knoop NO and Johan Louis Klopper NO vs Chetali Gupta and Another Case Number 115/2020. This case was heard by the Supreme Court of Appeal on the 6th November 2020 and judgment handed down on the 19th November 2020.
- [45] In that matter two aspects were dealt with firstly at paragraph 33 the court says the following:
- “It follows that the full court’s suspension order purporting to override the suspension of its execution order was invalid. It had no power or authority to make that order. It is inexplicable that it made the order without being asked to do and without having heard argument. The order was void.”*
- [46] Similarly in this matter Phathudi J never heard argument on the merits and he himself prevented the parties from dealing with the merits. His order in respect of the rest of the prayers except the prayer in respect of urgency are void and fall to be declared invalid and of no force and effect.
- [47] The second aspect that the Supreme Court of Appeal dealt with in that matter was by reference to the case of Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO and Others [2011] ZA. In that matter the trial court in making an order for judicial management of a company had named two individuals to assume the duties of Judicial Managers. This was contrary to the provisions of Section 429 of the Company’s Act 61 of 1973 which vests the power to appoint judicial managers on the Master of the High Court. The Master of the High Court in turn chose not to abide by that court order as a result the high court held the master to be in contempt. The SCA in an appeal to it set aside the high court’s order appointing certain persons as judicial manager on the grounds that, that order was void from inception because it directly contradicted the statute.
- [48] The orders by Phathudi J are in contravention of not only the Audi alteram partem rule but in conflict with Section 34 of the Constitution.

[49] In my view the conclusion I have arrived at namely that the order by Phathudi J is invalid is dispositive of all the other issues. The issue in respect of the third Respondent was well taken the third Respondent should never have been joined in the application this explains why the first and second Respondents abandoned the costs orders granted against the third Respondent in the main application.

COSTS

[50] It is trite law that the award of costs is a matter wholly within the discretion of the court. The Applicants (Liquidators) as well as the fourth and fifth Respondents are entitled to costs in this matter. What is left is whether such costs should be on a party and party or on a punitive scale and if so which of the first and second Respondents should be mulcted with such costs.

[51] The main application was launched at the instance of the first Applicant who wanted to avoid appearing in the Insolvency Enquiry hearing set down for the 31st March 2021.

[52] The main application was nothing else but a continuation of the Stalingrad type of tactics that the first Applicant embarked on since the judgment of Kgomo J.

[53] There was no appeal before the Supreme Court of Appeal when the first and second Respondents decided to approach court on an urgent basis.

[54] In my view it is only fair that the first Respondent must pay costs of his application.

[55] In the result the order marked "X" attached herein is made an order court.

DATED at JOHANNESBURG this the 18th day of MAY 2021.

M A MAKUME

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES: DATE OF HEARING 11 MAY 2021 DATE OF JUDGMENT 18 MAY 2021 FOR APPLICANTS Adv Lourens INSTRUCTING ATTORNEYS Messrs Roestoff Attorneys Pretoria FOR 1st & 2nd RESPONDENTS Adv L Sigogo SC with Adv L Khalipha INSTRUCTING ATTORNEYS Letsela Nkondo Attorneys Polokwane FOR 4th & 5th RESPONDENTS Adv M Jacobs INSTRUCTING ATTORNEYS Messers Becker Attorneys Polokwane

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