IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 7352021

In the matter between:

RICHARD KEAY POLLOCK N.O.	1st Applicant
MOHAMMED YASEEN KHAMISSA N.O.	2nd Applicant
LINDIWE FLORENCE KAABA N.O.	3rd Applicant

and

VAUGHN VICTOR	1st Respondent
MARIA MAGDALENA CATHARINA VICTOR	2nd Respondent
WONDERHOEK FARMS (PTY) LIMITED	3rd Respondent
RODGER HERNRY WILMOT	4th Respondent
S.A. AUCTION (PTY) LIMITED	5th Respondent
THE SHERIFF FOR THE DISTRICT OF WEPENER	6th Respondent
MAGISTRATE SEBE N.O.	7th Respondent
THE CHIEF MAGISTRATE FOR BLOEMFONTEIN MAGISTRATE'S COURT N.O.	8th Respondent

---

CORAM: LOUBSER, J et DE KOCK, AJ

HEARD ON: 6 JUNE 2022

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 17 JUNE 2022

---

[1] In this application the Applicants seek an order reviewing and setting aside an order made by the Seventh Respondent on 12 February 2021 under case number 19/2020 in the Magistrate's Court for the district of Wepener. The Applicants are the joint liquidators of a company by the name of Rohallion Farms (Pty) Limited, which company was finally placed in liquidation by the Johannesburg High Court on 31 July 2018.

[2] The First Respondent is an unrehabilitated insolvent and an erstwhile director of Rohallion and the Third Respondent, Wonderhoek Farms (Pty) Limited. Wonderhoek owns a number of farms, *inter alia* the farm Aanvang 1 in the district of the Wepener, where the First Respondent and his wife, the Second Respondent reside. Rohallion was the operating company through which the farming operations on the farms owned by Wonderhoek were conducted, but it never owned any fixed property.

[3] More recently, and until 2014, the First Respondent became a senior manager of Rohallion and he was then responsible for all the day-to-day activities of Wonderhoek and Rohallion. He was also entrusted with the assets of the two companies. As will be seen later hereinafter, the First Respondent played a pivotal role in the events that caused the present application to be launched.

[4] On the basis of allegations that the First Respondent had removed assets of Rohallion worth millions of Rands from the farm Aanvang 1 to an adjacent farm owned by the Fourth Respondent, and on the basis of allegations that the First and Second Respondents were renting that adjacent farm from the Fourth Respondent, the Applicants decided to approach the Wepener Magistrate's Court on 11 December 2021 for a warrant in terms of Section 69(2) and 69(3) of the Insolvency Act.[1] They did so because Section 69 obliges the liquidators, as soon as possible after their appointment, to take into possession or under their

---

[1] **Act 24 of 1936, as amended**

control all movable property, books and documents belonging to the insolvent estate. In terms of section 69(2) of the Act, if a trustee or liquidator has reason to believe that any property, book or document is concealed or otherwise unlawfully withheld, he may apply to the Magistrate having jurisdiction for a search warrant mentioned in Section 69(3). Once such a warrant is issued, it confers authority on the person executing it to search for and take possession of the property concerned and to deliver any article seized thereunder to the trustee.[2] The Applicants approached the Magistrate on 11 December 2021 *ex parte*, and the warrant was issued by order returnable or 19 February 2021.

[5] On 18 December 2021 the First Respondent, opposing the order, anticipated the return date of the order, and eventually the matter came before the Seventh Respondent on 29 January 2021. After hearing arguments by both counsel for the Applicants and the First Respondent, the Seventh Respondent postponed the matter to 12 February 2021. On that day, he dismissed the application for a warrant on an attorney and client scale.

[6] The Notice of Motion in the present application consists of a Part A and a Part B. In Part A it is prayed that the Fifth and Sixth Respondent be interdicted from releasing the goods to the First, Second, Third or Fourth Respondents attached pursuant to the warrant issued on 11 December 2020 pending the final determination of the relief sought in Part B. In the alternative, it is prayed in Part A that the goods so attached, be held and retained under the attachment. In Part B the review and the setting of the proceedings before the Seventh Respondent is sought. Before us, counsel appearing for the Applicants requested the Court to only grant the relief sought in Part B, saying that the relief sought in Part A is no longer sought by the Applicants.

[7] It is the proceedings of 29 January 2021 and the subsequent order dismissing the application on 12 February 2021 that exclusively form the basis for this review application. Apart from the main relief sought, certain ancillary relief is also sought by the Applicants, namely that the matter be referred back to the

[2] **Section 69(3) read with Section 69(4)**

Magistrate's Court of Wepener to be heard de novo by a Magistrate other than the Seventh Respondent.

[8] Now the grounds for a review of proceedings in a Magistrate's Court are clearly regulated by Section 22(1) of the Superior Courts Act[3] in the following words:

"(1) The grounds upon which the proceedings of any Magistrate's Court may be brought under review before a Court of a Division are –

(a) absence of jurisdiction on the part of the court;
(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(c) gross irregularity in the proceedings; and
(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review or proceedings in Magistrate's Courts."

[9] It speaks for itself that if any of these grounds are found to be present in the instant case, this Court will be competent to interfere and to review the decision in question and to set it aside.

[10] Before the proceedings of 29 January 2021 and 12 February 2021 are dealt with in more detail, the following needs mentioning: The Seventh Respondent has filed a Notice to Abide by the decision of this Court, and he therefore does not oppose the application for a review. Furthermore, the First Respondent and the Second Respondent have filed a counter application in response to the main application, calling for an order that the Applicants and the Fifth and the Sixth Respondent be ordered to immediately comply with the Court order of the Seventh Respondent dated 12 February 2021, namely to return the movable assets that were removed by the Fifth Respondent on 11 and 12 December 2020 at the farm Aanvang 1 and its adjacent farm to the First and Second Respondents. In addition, an order is sought in the counter-application to the effect that the Applicants should be found to be in contempt of court for their

[3] **Act 10 of 2013**

failure to return the assets so seized after the dismissal of the application for a warrant on 12 February 2021. A further order is sought that the Applicants be committed to imprisonment for a certain period for their contempt of court. Whereas a review application is normally heard by two Judges, and whereas a contempt application is normally heard by a single judge, the Acting Judge President of this Division granted leave that the contempt application be heard together with the review application by the two Judges of review.

[11] I now turn to the events of 29 January 2021 when the Seventh Respondent heard submissions by the respective counsel pertaining to the order authorizing a search warrant dated 11 December 2020. This Court has been provided with a full transcribed record of the proceedings of 29 January 2021 and 12 February 2021, and consequently the record can be accepted as a true reflection of what transpired in the Court on those two days.

[12] The record makes it clear that the First Respondent raised three points *in limine* and also dealt with the merits of the Section 69 application in his answering affidavit anticipating the return date. In Heads of Argument subsequently filed by the Applicants, the three points in limine raised in the answering affidavit and the merits of the application where duly addressed. Pursuant to the filing of these Heads, the Heads on behalf of the First and Second Respondents were then filed in reply. In these Heads, the Respondents also dealt with the three *points in limine* and the merits of the applications as raised in the answering affidavit. The Heads went further, however, to raise a further and fourth point *in limine* which was not raised in the answering affidavit at all. This point contended that the Magistrate's Court lacked the necessary jurisdiction to issue a warrant in terms of Section 69, since the Applicants should have used the remedies provided for in the Companies Act 61 of 1973.

[13] Upon receipt of the Heads of Argument raising this fourth point *in limine,* the Applicants were quick to file further Heads of Argument wherein it was submitted that the Court could not determine the fourth point *in limine* as it had not been raised in the answering affidavit. In these Heads, the Applicants referred to a number of authorities in support of their argument.

[14] On the day of the hearing, namely on 29 January 2021, counsel appearing for the Applicants only made submissions relating to the admissibility of the fourth point *in limine,* and he requested the following. “We want Your Worship to make a finding to the effect that the issue raised by my colleague … cannot be raised in this Court.” He did not deal with the remaining three points *in limine* or the merits of the application. In his subsequent address to the Court, counsel appearing for the First and Second Respondents, also focused on the question whether the fourth point *in limine* should be allowed or not. He submitted that the fourth point entailed a point of law, and that a point of law can be raised at any time during proceedings.

[15] The Seventh Respondent then indicated that he would require at least a week to finalize “the point in limine raised”, whereupon council for the Applicants had the following to say: “May I make a suggestion that we postpone until the 12th because whatever happens we can carry on if Your Worship is against me. Maybe that will give you a bit more time and then, you know, we have got the whole day to continue whatever and I see my colleagues says it is fine.” Counsel for the First and Second Respondents confirmed that he had no objection.

[16] The Seventh Respondent then adjourned the matter to the 12th of February 2021 “for the Court to make a ruling on the fourth point *in limine* raised”. Now having regard to what was said by everybody concerned in the Court on the day in question, it is patently clear to this Court that it was understood and agreed by all, including the Seventh Respondent, that the Court would only make a ruling on 12th February 2021 as to whether the First and Second Respondents would be allowed to raise the fourth point *in limine* or not.

[17] On 12th February 2021 the Seventh Respondent, however, not only dismissed the submission that the fourth point *in limine* should not be allowed, but he went further to uphold the fourth point of no jurisdiction, seemingly on different grounds than those raised in the fourth point, with costs on the attorney and client scale. In coming to this conclusion, he also dealt with the merits of the application in general. He did so without hearing the Applicants on the merits of

the fourth point *in limine* or on the question of jurisdiction, and without hearing the Applicants on the merits of the application as a whole.

[18] Before us, Mr. Ferreira appearing for the First and Second Respondents, submitted that the application for a review should be dismissed because the Applicants should have made use of the appeal procedure. This is so, the argument went, since the Seventh Respondent had *mero motu* decided the jurisdiction issue on different grounds than those raised in the fourth point, as he was entitled to do in law. This approach by the Seventh Respondent called for an appeal in the circumstances, and not a review. I do not agree. While there may be merit in the submission generally, the fact remains that in this case, there was a clear understanding between the Seventh Respondent and the respective counsel on 29 January 2021 that the Seventh Respondent would only make a ruling on the admissibility of the fourth Point on 12 February 2021, and nothing more. By proceeding beyond that issue on 12 February 2021, counsel for the Applicants was denied the opportunity to address the Court on the aspect of jurisdiction before the Court made its final decision.

[19] Section 34 of the Constitution guarantees a right to a fair hearing. The Constitutional Court formulated this right unanimously in **De Beer N.O. v North Central Local Council etc**[4] as follows: “A fair hearing before a Court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair or inconsistent with the Constitution, Courts must interpret legislation and Rules of Court, where it is reasonably possibly to do so, in a way that would render the proceedings fair. It is a crucial aspect of our law that Court Orders should not be made without affording the other side a reasonable opportunity to state their case.”

[20] It follows that the proceedings under scrutiny were irregular in so far as the Seventh Respondent went beyond the understanding that he would only make a ruling as to whether the fourth point *in limine* could be argued or not. He in fact

[4] **2002 (1) SA 429 (CC) at para 11**

upheld the fourth point, or the one on jurisdiction, without hearing the Applicants thereon and on the merits of the application as a whole. This irregularity qualifies as a gross irregularity as envisaged by Section 22(1)(c) of the Superior Court Act[5] because it caused prejudice to the Applicants and because it denied the Applicants a fair hearing. This court is therefore obliged to interfere in favour of the Applicants.

[21] It further follows that the counter application for the return of the goods and for contempt cannot succeed. The Applicants and the Respondents concerned cannot incur any liability upon a Court Order that was based on an irregular and unfair procedure.

[22] Counsel for the First and Second Respondents also urged us to dismiss Part A of the Notice of Motion with costs on the punitive scale since the relief sought in that Part caused the Respondents to respond thereto in the application papers, and now the Applicants have simply abandoned the relief sough in Part A. Again, I do not agree. Correspondence before us indicate that Part A was included in the Notice of Motion because the attorney for the First and Second Respondents had threatened to launch an urgent application for the release of the goods attached, pursuant to the order of the Seventh Respondent on 12 February 2021. This urgent application never materialized, afterwards or at any stage, and it is for that reason that the Applicants have decided not to continue seeking the relief set out in Part A. In my view there should therefore be no order as to costs as far as Part A is concerned.

[23] As for the remaining costs, I can find no reason why the Applicants should be out of pocket in circumstances where a clear and gross irregularity in the proceedings of the Magistrate's Court has occurred. The following orders are therefore made:

1. The order of the Seventh Respondent, dated 12 February 2021 under case number 19/2020 in the Magistrate's Court for the District of Wepener, is hereby reviewed and set aside.

---

[5] **Supra**

2. The matter is referred back to the Magistrate's Court for the District of Wepener to be heard *de novo* by a Magistrate other than the Seventh Respondent

3. The First and Second Respondents are ordered to pay the costs of the application for review jointly and severally on an attorney and client scale.

4. The counter application is dismissed with costs on an attorney and client scale, to be paid by the First and Second Respondents jointly and severally.

5. Part A of the Notice of Motion is dismissed, with no order as to costs.

_____

P. J. LOUBSER, J

I concur:

_____

D. DE KOCK, A.J.

For the Applicants:	Adv. J. W. Kloek
Instructed by:	Esthe Muller Inc. Northcliff
	c/o MDP Attorneys, Bloemfontein
For the Respondents:	Adv. E. J. Ferreira SC and Adv. F. G. Janse van Rensburg
Instructed by:	LB Attorneys
	c/o McIntyre van der Post., Bloemfontein

/roosthuizen