20/12/2017

IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

(1) REPORTABLE: ~~YES / NO~~ YES YES
(2) OF INTEREST TO OTHER JUDGES: ~~YES/NO~~
(3) REVISED.

20 / 12 / 2017
DATE

SIGNATURE

CASE NUMBER 2346/2017

NATIONAL EMPOWERMENT FUND — **APPLICANT**

And

ELIKWATININ THREE TAXI ASSOCIATION PRIMARY CO-OPERATIVE LIMITED	**1ST RESPONDENT**
DUDU JOANAH BEMBE	**2ND RESPONDENT**
SDUDLA JOSEPHINE MNDEBELE	**3RD RESPONDENT**
ELUKWATINI THREE TAXI ASSOCIATION SECONDARY CO-OPERATIVE LIMITED	**4TH RESPONDENT**
STSANDARD BANK SA LIMITED	**5TH RESPONDENT**

In re:

DUDU JOANAH BEMBE	**1ST APPLICANT**
SDUDLA JOSEPHINE MNDEBELE	**2ND APPLICANT**
ELUKWATINI THREE TAXI ASSOCIATION SECONDARY CO-OPERATIVE LIMITED	**3RD APPLICANT**

And

NATIONAL EMPOWERMENT FUND	**1ST RESPONDENT**
STANDARD BANK SA LIMITED	**2ND RESPONDENT**

JUDGMENT

LEGODI J,

[1] An interdict granted *ex parte* on 30 October 2017 against the fourth respondent (Elukwatini Three Taxi Associations Secondary Co-operative Limited) with the return date of the rule *nisi being 29 January 2018* became the subject of a dispute before this court after the fourth respondent anticipated the return date and enrolled the matter for re-consideration on 28 November 2017.

[2] The interim interdict so granted is framed as follows:

> "2. *A rule nisi is hereby issued calling upon the respondents to show cause, if any, on 29 January 2018 at 10h00 or so soon thereafter as counsel may be heard, why pending the outcome of the action referred to in paragraph 3 hereunder, the following orders should not be granted:*
>
> 2.1 *Interdicting and restraining the first to fourth respondents and its nominated and authorised representatives from in any way dealing with or transacting on or withdrawing funds from the following bank accounts that are registered and operated under the name of ELUKWATINI THREE TAXI ASSOCIATION SECONDARY CO-OPERATIVE LIMITED with account number 030248876 held with the fifth respondent.*
>
> 3. *The applicant is to institute an action against the first to fourth respondents for recovery of monies unlawfully withdrawn by the*

respondents from the bank accounts that are registered and operated under the name of ELKUKWATINI THREE TAXI ASSOCIATION SECONDARY CO-OPERATIVE LIMITED with account number 030248876 held with the fifth respondent

4. *That paragraph 2 above operates as an interim interdict pending the finalisation of the action the applicant is ordered to bring in terms of paragraph 3."*

[3] The nature of the order so granted is interlocutory although in very material respects, has the effect of final order as it does not provide for the status *quo* to take place, neither was counsel on behalf of the applicant prepared to have the parties restore the status *quo*. I deal later with the principle in this regard.

[4] The background to the dispute can be summed up as follows: During November 2015 the applicant and fourth respondent entered into a loan agreement in terms of which the applicant loaned an amount of over R4 million to the fourth respondent with the following material conditions relevant to the present proceedings:

"3.1.9 The Borrower shall have provided the lender with written confirmation that it has opened a joint bank account over which both the Borrower and a representative of the Lender shall be signatories, to the satisfaction of the Lender;

12.2.5 refrain from using any of the proceeds received from the Lender under this agreement to settle any amount/s owed to a business broker or agent of the Borrower and neither shall the Borrower use any of the business's own funds in this regard without the express consent of the Lender's Post Investment Unit;

12.2.6 use proceeds of the Facility exclusively in connection with the Business and in accordance with the provisions of this Agreement.

[5] The fourth respondent was granted the loan aforesaid in order to enable it to meet the terms and conditions of transport agreement it secured from a mining company called Aveng Moolman Limited.

[6] The loan and the nature of the agreement aforesaid was meant to advance economic black employment. Instead of sticking to the agreement, in particular, in accordance with clause 3.9.1 quoted above, at one stage the applicant increased the number of signatories contrary to clause 3.9.1. In so doing making it possible to transact on the fourth respondent's banking account without a representative of the fourth respondent. When this came to knowledge of the fourth respondent, it approached the bank and caused the signing authority of the applicant's representatives removed from the banking account of the fourth respondent. Similarly, without sticking to the agreement the fourth respondent decided to transact on the baking account through its officials to the exclusion of the applicant. Then on 30 October 2017 the applicant instituted an *ex parte* application and obtained an order as indicated in paragraph [2] of this judgment.

[7] Before I deal with the requirements for an interlocutory application, I find it necessary to deal first with the circumstances under which the *ex parte* order of 30 October 2017 was obtained. The respondents in their affidavit deposed to on 21 November 2017 alluded to the following averments: The initial co-signatory to the banking account of the fourth respondent on behalf of the applicant was one Bongani Qokose. On 26 May 2017 and at the behest of Elukwatini Three Taxi Association Secondary Co-operative Ltd (fourth respondent in the present proceedings), Dudu Joanah Bembe, (second respondent) and Sdudla Josephine Mndebele (third respondent), the banking account aforesaid was frozen by the order of the Magistrate court's Elukwatini. The first respondent, the applicant, and the fifth respondent in these proceedings were cited as the respondents in the Magistrate's court.

[8] On 15 June 2017 the order freezing the account aforesaid was discharged and I want to believe at the behest of the first respondent as a shareholder of the fourth respondent (Elukwatini Three Taxi Association Secondary Co-operative limited) and or at the behest of the applicant as the lender of over R4 000 000.00 loan to the fourth

respondent. To this, the respondents in these proceedings contend as follows: *"The abovementioned order has not been challenged by way of an appeal by any of the affected parties and therefore it is still binding and enforceable."* The facts upon which the order in the Magistrate's court was obtained are not alluded to or sufficiently in the present proceedings. One would have expected the applicant, who was a party in the Magistrate's court aforesaid to disclose this in some details when the *ex parte* application was launched in this court on 30 October 2017.

[9] Subsequent to the unfreezing of the court order aforesaid, the fourth respondent discovered that contrary to the provisions of clause 3.9.1 of the agreement as quoted in paragraph [4] above, the applicant had caused two authorised persons to be co-signatories to the fourth respondent's banking account and thus made it possible for the applicant to transact without the fourth respondent being a signatory or being involved. This too the applicant failed to bring to the attention of the court or in some details when the urgent *ex parte* application was launched on 30 October 2017.

[10] As I said, in a somewhat tit for tat reaction, the respondents caused the bank to remove the applicant's appointed persons as signatories and contrary to clause 3.9.1 appointed two co-signatories and thus making it possible for the respondents to transact on the baking account aforesaid to the exclusion of the applicant. The proper background to all of this was not disclosed when the *ex parte* application was launched.

[11] I mention all of this just to bring to the fore that when an *ex parte* application is resorted to and the order thereof has the effect of adversely affecting the other party, it becomes incumbent on such an applicant to give a full disclosure. In the present case, neither of the parties was entitled to transact on the banking account aforesaid contrary to clause 3.9.1 quoted earlier in this judgment. This then brings me to the question whether the rule *nisi* or interim order obtained *ex parte* should be made final pending the finalisation of an action intended to be instituted by the applicant apparently based on breach of the terms of the loan agreement. But before I do so, I want to deal first with two aspects. Firstly, the suggestion that the re-consideration of

the *ex parte* application is flawed. Two, the essence of the application and the interim order so granted.

Re-consideration

[12] In as much as the applicant might have wanted to suggest that the hearing of the application launched by the applicant *ex parte* would not be heard other than on the return date of the rule *nisi*, being 29 January 2018, this argument has no merits whatsoever. A party who is affected by an order obtained *ex parte*, is entitled to bring forward the return date of the *rule nisi* as contemplated in paragraph (c) of Rule 6(12) which provides that '*a person against whom an order was granted in his absence on urgent may by notice set down the matter for reconsideration of the matter*'. This does not constitute a different application from the one against which an order was granted in the absence of the affected party. Paragraph 5.8 of the practice directive issued on 1 September 2017 by the Chief Justice as contemplated in section 8 (3) of the Superior Courts Act No 13 of 2o13 provides that '*any person affected by the order obtained ex parte, may approach court on 72 hours' notice to adjudicate on the matter*'.

[13] Acting in terms of paragraph (c) of Rule 6 (12) the affidavit which is annexed to the notice for reconsideration in the present proceedings is effectively an opposing affidavit and response thereto "replying affidavit" and not "answering affidavit" as the applicant termed it to be. When this application was laid before me in the urgent application on Tuesday 28 November 2017, it was dealt as a reconsideration of the initial application in terms of which an order was granted in the absence of the respondents with. Effectively meaning, the hearing of the rule *nisi* is brought forward.

[14] So, what is referred to by the applicant as point in *limine* under the heading "no request for condonation of the prescribed time periods", in my view, is misplaced. You cannot obtain an order *ex parte* on an urgent basis and expect the affected party not to anticipate or bring forward the hearing of the matter. Similarly, the heading "Defective Notice of Motion" insofar as it is raised as a point in *limine*, it too has no merits. Paragraph (c) of Rule 6(12) should not be seen as replacing notice of motion upon which an ex parte order by the applicant supported by a founding affidavit in the

usual sense was granted in the absence of the affected party. Paragraph (c) requires "the matter" brought on *ex parte* to be "set down" in a "notice for re-consideration". The applicant is therefore wrong in thinking that the provisions of Rule 6(12) (a) and Form 2(a) is applicable in a notice for set down of the matter initially brought on *ex parte*.

[15] The so-called "non-joinder" raised as a point in *limine*, in the same vein, has to fail for reasons already articulated in the preceding paragraphs. The parties cited by the applicant in the ex parte application, did not have to be specifically cited in the set down for reconsideration because they are already cited and are already parties to the proceedings. In any event insofar as the bank is concerned, it has no material interest in the dispute of the parties and that is why it is not a player in these proceedings. So, all "points in *limine*" raised are destined to be dismissed. I now turn to the other issue mentioned in paragraph [11] of this judgment.

Essence of interlocutory application

[16] An interlocutory interdict is one which is granted *pendent lite*[1]. It is a provisional order designed to protect the rights of the complainant party pending an action or application to be brought by him or her to establish the respective rights of the parties[2]. It does not involve a final determination of the rights of the parties and does not affect such determination[3]. Its effect is to 'preserve' the position until the court decides where the right lies[4], at which point it ceases to operate[5]. It is aimed at ensuring, as far as it is reasonably possible, that the party who is ultimately successful will receive adequate and effective relief[6]. Therefore its main purpose is to restore the status *quo*.

Rights of the parties

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[1] Pikoki v President of Republic of South Africa 2010 (1) SA 400 (GNP) at 403H
[2] Airoade Express (Pty) Ltd v Chairman, Local Road Transportation Board, Durban 1986 SA 663 (A) at 681 D-F
[3] See Pikoli *supra* at 403 I
[4] Jordaan v Penmill Investments cc 1991(2) SA 430 (E) at 438F
[5] See Jordaan *supra* at 436F
[6] See Pikoli at 404A

[17] The fighting in these proceedings is actually between the applicant and fourth respondent. Having concluded agreement with rights or obligations spelt out *inter alia*, in clauses 3.9.1, 12.2.5 and 12.2.6 quoted in paragraph [4] of this judgment and having failed to adhere to those rights as contemplated in clause 3.9.1 and allegations of non-compliance as contemplated in clauses 12.2.5 and 12.2.6 alluded to earlier in this judgment, the parties find themselves before this court.

[18] The complaint against the conduct of the respondents complained of, is articulated by the applicant in its founding affidavit as follows:

"22. *Notwithstanding the terms of the agreement, the applicant learnt on 26 October 2017 that the fourth respondent has been in breach of the terms of the agreement and has been utilising the loan facility for purposes other than the business projects as identified. The applicant's Bongani Qokose was informed by the fifth respondent's Kaugelo Sibuyi that the fourth respondent had removed him as a co-signatory on the bank account held with the fourth respondent. Mr Qokose was further advised that the fourth respondent was withdrawing money from the account which money was not related to the fourth respondent's business. Due to the limited time constraints the applicant has not been able to obtain confirmatory affidavits, but will endeavour to have the confirmatory affidavits filed by the time the matter is heard on the return date.*

23. *It is prudent to state at this point that the applicant has not afforded the fourth respondent the rights to withdraw money from the account.*

24. *The applicant has further decided to launch these proceedings on an urgent basis ex parte as the applicant is under the impression that the fourth respondent seeks to dissipate the funds in the account."*

[19] The applicant's case therefore falls or rests on these averments. It has approached this court on the basis of the alleged breach of the terms of the agreement and in particular for the purpose of approaching the court on *ex parte*, relying on clauses 3.9.1 12.2.5 and 12.2.6. That is, "*the fourth respondent had removed him* (referring to Mr Bongani Qokose of the applicant) *as a co-signatory on the bank*

account held..." and that the '*fourth respondent was withdrawing money from the account which money was not related to the fourth respondent's business.*'

[20] These averments should be seen in the context of the interim order granted and its effect on the fourth respondent. Paragraph 2.1 of the order quoted in paragraph (2) of this judgment effectively restrains the fourth respondent from operating transportation business with Aveng Moolmans. This clearly impedes on its right to trade as envisaged in section 26 of the Constitution. More particularly, from making a living and from complying with its obligations towards the applicant. There is no evidence that the fourth respondent has any other form of income or business to sustain itself or business entity other than the contract of transportation it has with Aveng Moolmans, which contract apparently comes to an end in 2018.

[21] Seeking to hold back the fourth respondent by tiding its hands down with a freezing order to its banking account, is tantamount to wiping out the fourth respondent in any business market wherein its biggest creditor is the very same entity seeking to destroy it.

[22] I express myself in the manner I do to show the irreparable harm likely to fall down upon the fourth respondent as initiated by the applicant. The test is objective one. That is, on the basis of the facts presented to it, the court must decide whether there is any basis for the entertainment of a reasonable apprehension of irreparable harm for the applicant[7]. On the other hand, if the applicant can establish a clear right, his apprehension of irreparable harm need not be established.[8]

[23] I pause to deal with what is stated above. The applicant need not establish a clear right of apprehension or irreparable harm justifying an interdict in paragraph 2.1 of the order of 30 October 2017. It has to establish a *prima facie* right, which in my view, it had no problem in establishing. However, the question is whether that right as contemplated in clauses 3.9.1, 12.2.5 and 12.2.6, entitles the applicant to the interim

[7] Minister of Law and Order v Nordien 1987 (2) SA 894 (A) at 896H, National Council Society of Prevention of Cruelty to Animal v Openshan 2008 (5) SA 339 (SCA) at 347D-E.
[8] Setlogelo v Setlogelo 1914 AD 221 at 227.

order granted in paragraph 2.1 thereof. It is not, for reasons already mentioned in the preceding paragraphs. What it is entitled to, is the status quo. That is, implementation of the agreement in accordance with clauses 3.9.1, 12.2.5 and 12.2.6 pending finalisation of the contemplated action referred to in paragraph 3 of the interim order.

Rectification

[24] In the cause of oral argument, the court having held the view that the matter was capable of being settled after counsel for the respondent had indicated that his clients are willing to stick to the imperatives in clause 3.9.1, 12.2.5 and 12.2.6 aforesaid, in particular, that the respondents since the institution of the ex parte application had been willing to revert to two signatories as envisaged in clause 3.9.1, counsel for the applicant was requested to take instructions. On his return, the court was informed that no settlement was forthcoming. Without disclosing the real reasons for not having the matter settled, he sought to argue that there is a bigger picture to be considered. For example, he mentioned shareholders of the fourth respondent, in particular, certain rectification of the agreement by the Magistrate's court, Elukwatini.

[25] The background is given as follows: That in April 2015, Aveng Moolmans Propriety Limited having undertaken to enter into a transportation service agreement with three taxi associations, namely; African Ziyabhetha Taxi Association, Embhuleni Taxi Association and Lamagadlela Taxi Association to provide Aveng Moolmans Pty Ltd with transportation services for a period of 3 years for its mine employees from Greater Badplass area to Nkomati mine on a daily basis where the three taxi associations were to become a shareholder, the first respondent was formed as such.

[26] The three taxi association having established the first respondent, the applicant was then approached for funding, who then advised members of the first respondent to form and register another entity (the fourth respondent) as a secondary co-operative), the shareholder of which would then be the first respondent. It is said when the fourth respondent was registered the shareholding of the three taxi association was not properly reflected referred to in the founding papers of the applicant as "*an error in the registration*". Despite the error in November 2015, the Senior Loan Facility

Agreement and Suspensive Sale Agreement were concluded between the applicant and the fourth respondent. It is alleged that a further error occurred when the loan facility agreement was concluded in that the taxi associations were excluded from the shareholding in the fourth respondent. The nature and extent of the shareholding is not necessary for the purpose of these proceedings. The Magistrate's court was then approached for rectification and it was granted. The respondents noted an appeal challenging in part the jurisdiction of the Magistrate's Court to have dealt with the matter, *inter alia*, seen in the light of the amount of R4 200 000.00 loan to the fourth respondent by the applicant.

[27] How the applicant find this background relevant to the relief sought by it pending finalisation of the action proceedings in my view, boggles one's mind, more so seen in the light of its pleaded cause action as quoted in paragraph [18] of this judgment. As I said, its case for the present proceedings whether to confirm the rule *nisi* or discharge it, is founded in the averments quoted in paragraph [18] above. So, the issue of rectification is irrelevant in these proceedings. This matter should have been settled when the issue was raised.

What order to make?

[28] As pointed out earlier in this judgment, the essence of interlocutory application is to restore the status *quo* pending determination on where the respective rights of each party lies. The status *quo* in the instant is working relationship between the applicant and fourth respondent premised on the loan agreement with reference to clauses 3.9.1, 12.2.5 and 12.2.6. Whatever claims the applicant might have against the fourth respondent is an issue to be determined during the contemplated action proceedings. That being the case the rule *nisi* ought to be discharged and parties must revert to the status *quo*.

[29] Consequently I hereby made an order as follows:

29.1 The rule *nisi* granted on 30 October 2017 is hereby discharged with costs.

29.2 The status *quo* as envisaged in clauses 3.9.1, 12.2.5 and 12.2.6 quoted in paragraph [4] of this judgment is hereby ordered.

29.3 The arrangement as envisaged in 29.2 must be finalised within 24hours from date of this judgment and the banking account aforesaid must be unfrozen immediately thereafter.

M F LEGODI
JUDGE OF THE HIGH COURT

DATE OF HEARING:	28 NOVEMBER 2017
DATE OF JUDGMENT:	20 DECEMBER 2017
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