



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 63226/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 23/05/2023

SIGNATURE _____

In the matter between:

Tau Rollermeulle (Pty) Ltd

Appellant

And

Murcus M Farming CC

Respondent

JUDGMENT

Maumela J.

1. This is an application for leave to appeal which is opposed. In the main matter, the applicant was Tau Rollermeulle (Pty) Ltd, a company incorporated in terms of the Companies Act of the Republic of South Africa with registration number 2015/357344/44; with its registered address situated at 2 Geerge Street, Leeudoringstad, North West Province. The respondent was Murcus M Farming CC, registration number 2008/091707/23. It is a close corporation, duly registered in accordance with the Close Corporation Act 1994: (Act No 69 of 1994). It enjoys continued existence by virtue of the provisions of the Companies Act. It is situated at number 603, Wingerhof, 169 Bourke Street, Pretoria, Gauteng Province.
2. The judgment against which this application for leave to appeal is brought provided for the following order:
 - 2.1. That the First Respondent is ordered to *“remove”* and *“retract”* a media statement issued by the First Respondent on March 10th, 2022;
 - 2.2. That the First Respondent is ordered to notify *“the suppliers and service providers”* that it has retracted the statement; and

- 2.3. That the Second Respondent is ordered to take all necessary steps to ensure that the order is complied with.

BACKGROUND.

3. On the 15th of August 2016, the parties entered into a written agreement which was made an order of the court before the Honourable Molefe J. When the order was made, the Respondent admitted indebtedness to the Applicant in the amount indicated under paragraph 2 above, together with interests calculated at the rate of 12% per annum from the 23rd of September 2016. A “pending application” was only served on the 20th of August 2019. This was two years and nine months after the granting of the court order by Molefe J.
4. The Respondent made six payments in substantial amounts from July 2017, until March 2018. That was subsequent to the court order. Respondent’s sole director and its attorneys admitted the debt on various occasions subsequent to the court order.
5. The Applicants were the Respondents in an urgent application that was brought before this court. The Applicants had published the following statement:

“ALERT: Sunshine Hospital is NOT a Road Accident Fund Hospital, Partner or

Official Service Provider.

The Road Accident Fund would like to clarify to the South African public, Health Care Providers and RAF claimants on the misinformation being peddled which suggest that Sunshine Hospital is owned by RAF or is a RAF partner or RAF official service provider.

There exists NO such relations between RAF and Sunshine Hospital. Put differently: RAF HAS NO RELATIONSHIP WITH SUNSHINE HOSPITAL.

RAF has also become aware of the UNLAWFUL practice of transferring

patients from public hospitals, especially from Limpopo Hospitals, to Sunshine Hospital which is based in East Rand, Gauteng.

RAF distances itself from such practice and will therefore not pay any costs incurred resulting from these UNLAWFUL and UNSCRUPULOUS practices.

Stakeholders are also informed of the ongoing forensic investigation currently being undertaken by the Forensic Investigation Division of the RAF regarding the above mentioned practices allegedly perpetrated by Sunshine Hospital and its agents.”

6. The Applicants provided the following grounds for the application for leave to appeal:

6.1. That in the event where leave to appeal is granted, it shall have reasonable prospects of success and

6.2. That compelling reasons and exceptional circumstances exist on the basis of which this appeal has to be heard.

7. It was also contended that there are compelling reasons why leave to appeal should be granted. On that basis, the Applicants move for an order that the Respondents be granted leave to appeal to the Full Court, Gauteng Division, alternatively the Supreme Court of Appeal.

8. The basis upon which this application for leave to appeal is based is as follows:

8.1. That the Court erred in not dismissing the application with costs.

8.2. That the Court erred in granting the order that the First Respondent be directed and ordered to retract certain portions of the media statement published by on 9 March 2022 within 48 hours from date of service of the order;

- 8.3. That the Court erred by finding that the statements reflected below constitute defamation and should therefore be retracted:
- “RAF has also become aware of the unlawful practice of transferring patients from public hospitals, especially from Limpopo Hospitals to Sunshine Hospital which is based in East Rand, Gauteng. Stakeholders are also informed of the ongoing forensic investigation currently being undertaken by the forensic investigation division of the RAF regarding the above mentioned practice allegedly perpetrated by Sunshine Hospital and its agents. RAF will welcome any information and encourages the public to cooperate and come forward with any such information. This information will be treated with the utmost of confidentiality to protect these whistle-blowers.”*
- 8.4. That the Court erred by ordering the Second Respondent to take all necessary and reasonable steps to ensure that the First Respondent complies with the Court’s order and that the First Respondent be directed to pay the costs of the application inclusive of two counsel;
- 8.5. That the Court erred in not finding that the application cannot be granted as there is a material dispute of fact, alternatively the Applicant had not proven the absence of an alternative remedy for the relief sought urgently;
- 8.6. That the Court erred in not finding that the Respondents have defences to the defamation claim;
- 8.7. That the Court erred in not finding that the statement was published in the public interest, as fair comment and the truth, in the protection and furtherance of the First Respondent’s right to dignity and integrity;
- 8.8. That the Court erred in not finding that by the time the application was heard the information had been in the public domain for more than two weeks and therefore no irreparable harm was apparent and the Applicant has a clear alternative remedy of a damages claim against the RAF;

- 8.9. That the Court erred in finding that the statement was defamatory;
- 8.10. That the Court erred in not finding that the Applicant conceded that some of the statement was *“factually correct”*;
- 8.11. That the Court erred in not finding that the relief sought, and granted by the Court, would serve no other purpose than to predetermine a defamation action finally and to disallow the Respondents an opportunity to fully ventilate any defences at trial especially as there is a material dispute of fact;
- 8.12. That the Court erred in not finding that any alleged credibility issues regarding the statements cannot possibly be conclusively determined on the papers especially before the Applicant has attested to any evidence at trial and being cross-examined thereon.
- 8.13. That the Court erred in not finding that the Applicant cannot exclude any justifications negating unlawfulness on application on the facts before Court.
- 8.14. That the Court erred in not finding that the Applicant stated in the founding affidavit that it satisfied the requirements for an *“interim interdict”*, although it approached the Court for final relief.
- 8.15. That the Court erred in ordering that the statements reflected below be retracted, specifically as it was not referred to in the Applicant’s founding affidavit:
“RAF will welcome any information and encourages the public to cooperate and come forward with any such information. This information will be treated with the utmost of confidentiality to protect these whistle-blowers.”
- 8.16. That the Court erred in not finding that the Applicant’s application was not competent in either fact or in law.
- 8.17. That the Court erred by not ordering:
8.17.1. *That “The Applicant’s application is dismissed.*

8.17.2. *That the Applicant is ordered to pay the First and Second Respondent's costs, including the costs of two counsel, one of whom is a senior counsel."*

8.18. *That the Applicant is ordered to pay the First and Second Respondent's costs, including the costs of two counsel, one of whom is a senior counsel."*

9. The parties shall be referred to as they were in the main matter. Before this court, the Applicant instituted action against the Respondent under case number 84019/2016, for payment of an amount of R 5 395 962-30 in respect of chicken feed sold and delivered by the Applicant to the Respondent.

APPLICABILITY OF SECTION 129 OF "THE ACT".

10. Section 129 of the National Credit Act¹ (NCA), provides around the aspect of applicability or otherwise of the NCA. In that regard, it is provided that section 129 does not apply:
- (a). where the consumer is a juristic person whose asset value or annual turnover exceeds R1 million;
 - (b). where the principal debt is R250 000 or more – even when the juristic person has an asset value or turnover of less than R1 million².
 - (c). where the agreement in question is large, (over R250 000).
11. The Respondent submitted that its immovable property alone is worth R12 million. He states that this property was bought in December 2010. (See Land Bank's bond for R6,414858.00; Annexure "FA8", p.55).

¹ Supra.

² . Section 4(1)(a) of the Act read with GN 713 in GG 28893 of 1 June 2006. See also Guide to National Credit Act, Volume 1, p.4-7 – 4-9.

RESCISSION OF COURT ORDER OF 15 NOVEMBER 2016³.

12. The Respondent raised the issue that the preceding application was not served on it, alternatively that the application was served by hand. The parties agreed that their settlement be made an order of court.⁴ The Respondent made various payments and in doing so, it admitted liability on various occasions subsequent to the settlement. Based on that, the Applicant argues that the Respondent therefore acquiesced in the judgment. Applicant states that a Rule 42(1) application has to be brought within a reasonable time. In this case, the Rule 42(1) application was not brought in time. It is trite that inordinate delay in itself is a good reason for refusing the relief.⁵
13. The court has to determine whether to grant or to dismiss this application for leave to appeal. The Respondent advanced points *in limine* arguing that the application ought to be dismissed, alternatively that it be suspended pending the finalization of the Application between the Respondent and the Applicant in terms of which the Respondent sought an order setting aside the Judgment and the Settlement Agreement upon which the liquidation application is premised. It submitted that based on the points *in limine* alone, the Court has to dismiss the Application without considering the merits of the case.
14. The respondent submitted that the findings of the court are not supported by a major part of the judgment that was handed down, the common cause facts, the papers filed and the applicable authorities. It pointed out that where the court found that the defense based on “reckless credit” is bad in law and that the National Credit Act 2005: (Act No 34 of 2005), (as amended), the NCA), does not apply to the underlying transactions in view of *inter alia* the asset value of the Respondent. It contends that the “defence” based on non-compliance with Section 129 of the NCA is without merit.

³. Respondent's Heads, par 13 - 22.

⁴. Clause 2.2 and 3.7 of the settlement: Annexure “FA3”, p.26.

⁵. Erasmus Superior Court Practice, Volume 2 at D1 – 576; *Roopnarain v Kamalpathy*, 1971 (3) SA 3 (D).

15. Respondent's pending application was premised on Rule 42(1) of the Uniform Rules; that the order confirming the settlement agreement had been erroneously sought and granted. The applicant makes the point that the court confirmed that inordinate delay in launching a Rule 42 application is good reason for refusing it. It argues that the court ought to have found that there was an inordinate delay and should have refused the relief.⁶

16. The first point *in limine* revolves around the fact that there is a pending application for a declarator and for rescission of judgment. The Respondent launched an application under case number 84019/16, applying for an order providing *inter alia*, that: -
 - 16.1. A declaratory order be granted to the effect that the underlying Agreements to the Judgment (upon which the Liquidation Application is premised):-
 - (i). Constitute a Credit Agreement to which the provisions of the NCA apply;
 - (ii). Imply that the Agreements should be declared reckless in terms of Sections 80 (1)(a) or 80(1) (b) (i) or 80 (1) (b) of the NCA; and
 - (iii). Have the effect of setting aside all or part of the Respondent's rights and obligations under the Agreements.

17. The Agreements referred to are the following: -
 - 17.1. A Credit Application dated 17th October 2013⁷ concluded between the Respondent and the Second Applicant;
 - 17.2. A Suretyship signed by the First Applicant in favour of the Respondent dated the 10th of March 2016; and
 - 17.3. A Settlement Agreement⁸ dated the 27th of September 2016.

⁶ . See Erasmus Superior Court Practice, Volume 2 at D1 – 576; *Roopnarain v Kamalapathy*, 1971 (3) SA 3 (D).

⁷ Annexure "LM14" of the Supplementary Affidavit, p 195.

⁸ Annexure "FA3", p 25.

18. The Applicant submits that it is not a requirement that service be effected upon employees at the commencement of the application. According to the applicant, the application must only be served on the employees, a reasonable time before the hearing. It submits that the test is merely whether persons who are entitled to be furnished with papers had adequate opportunity to consider the application and to decide to intervene. However, it contends that the application was served timeously on the employees, in February 2019. This is reflected in the service Affidavit which is attached as Annexure "SA4" as indicated on page 238 and Annexure "SA6", page 240.
19. The Applicant submits that an appeal against the order reflected above shall have a reasonable prospect of success on appeal. It contends that the credibility issues regarding the statements cannot be conclusively determined on the papers before the Applicant has attested to any evidence at trial and has been cross-examined thereon. It was also emphasized that the credibility of those who deposed towards the order made ought to be tested.
20. The point was further made that whereas the Respondent applied for a final interdict, it only satisfied requirements for an "interim interdict". It was submitted therefore that the Court erred in not finding that the Applicant stated in the founding affidavit that the it satisfied the requirements for an "*interim interdict*", although it approached the Court for final relief.
21. The Applicant pointed out that some of the aspects in issue cannot be conclusively dealt with on paper and therefore, evidence has to be led. The court finds that the Respondents succeeded in showing that another court may find that its image is being negatively impacted by the adverts that were being made. The likelihood of another court arriving at a different conclusion cannot be ruled out.
22. The Applicants submit that there are compelling reasons and exceptional circumstances why this appeal be heard. The court finds that another court

may arrive at a different conclusion as compared to the one in place.

23. In the result, the application for leave to appeal stands to be granted. The following order is made:

ORDER.

23.1. The application for leave to appeal to a full bench of this Division is granted.

23.2. Costs shall be costs in the appeal.

T. A. Maumela.

Judge of that High Court of South Africa.

Date of the hearing: 13 August 2020

Date of the judgment: 23 May 2023