



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 46358/2021

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

In the matter between:

Lesiba Jeremiah Mailula

First Applicant

Lesiba Mailula Attorneys Inc

Second Applicant

and

Matsi Law Chambers Inc

Respondent

(Old name: Matsi Mailula Inc Attorneys)

In Re

Matsi Law Chambers Inc

Applicant

(Old name: Matsi Mailula Inc Attorneys)

Lesiba Jeremiah Mailula
Lesiba Mailula Attorneys Inc

First Respondent
Second Respondent

JUDGMENT

SARDIWALLA J:

Introduction

[1] This is an application for leave to appeal in terms of section 17(1)(a) read with section 17(2) of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”) against the whole order handed down on 8 September 2022 by me.

[2] On 14 March 2022, an application was before me brought by the applicants against the respondent, seeking leave to appeal to the full bench of this court against the order of 17 March 2022 dismissing the application with costs finding that since there was no direct appeal against the order of Baqwa J that was made on 18 December 2020 between the parties, that the order remains effective and executable, and that there is no need for this Court to grant any leave for its execution.

Grounds of appeal

[3] The applicant disputes the findings and the grounds of appeal in essence are: -

1. The learned Judge erred in pronouncing that Baqwa J’s order remains effective and executable despite the fact that the Respondent’s Second Section 18

Application was postponed *sine die* on 14 March 2022 and has never been re-enrolled by either of the parties to the proceedings, and as such the learned Judge erroneously or inadvertently determined the Second Section 18 Application prior to making a ruling on the preliminary issues and point *in limine* that were raised upfront at the commencement of the hearing.

2. The learned Judge, ought to have decided or ruled on the preliminary issues and/or alternatively on the point *in limine* that were raised by both the applicants and the respondent at the commencement of the hearing prior to disposing off the Second Section 18 Application.
3. It is submitted that, the learned Judge ought to have taken into account the fact that, during the hearing of Second Section 18 Application on 14 March 2022, the applicants raised preliminary issues and point *in limine* which were dispositive of the whole Second Section 18 Application, after Mr Matsi addressed that the parties could not reach settlement during the adjournment wherein the learned Judge requested the parties to utilize adjournment to try and explore possible settlement

Applicant's case

[4] It is the applicants submission that at the hearing on 14 March 2022 in relation to the preliminary issues and/or point *in limine*, the Applicants challenged the validity of the respondent's Founding Affidavit and the Replying Affidavit, and sought a ruling that they ought not to be accepted by this honourable court in their current form. There were a variety of submissions that were made by the applicants on whether or not the respondent's Founding Affidavit and Replying Affidavit deserved serious legal

scrutiny by this honourable court or whether they should be rejected. the applicants submitted during the hearing for preliminary issues that, the respondent's Founding Affidavit and Replying Affidavits were both irregular and fatally defective because they did not comply with the provisions of the Justice Peace Commissioner of Oaths Act, 16 of 1963 ("the Act") and Regulation 4 in terms of section 10 of the Act.

[5] In support of the applicants' preliminary issues and point *in limine*, the Applicants argued that the Respondent's Founding Affidavit and the Replying Affidavit were not properly before Court because they were not commissioned in accordance with the Act and that they should not be accepted in their current form.

[6] During the hearing for preliminary issues, the applicants through their Counsel ("Adv Ngoako Moropene") argued and raised objections that the respondent's Founding Affidavit and the Replying Affidavit were fatally defective because only the deponent and the Commissioner of Oath parts were signed in the entire Founding Affidavit and the Regulations.

[7] It was submitted that, based on the Regulations, the respondent's Founding Affidavit and Replying Affidavit were fatally defective, irregular and ought not to be accepted by this honourable court, the implications thereof, would have been the dismissal of the entire Second Section 18 Application because none of the respondent's affidavits were properly before this honourable court.

[8] It is submitted that, the learned judge ought to have considered the respondent's submissions during the hearing on 14 March 2022 wherein Mr Matsi for the

respondent realizing that the respondent's affidavits were fatally defective and irregular addressed the Court that, the parties can waive the irregular affidavits in order to proceed with the matter, as the preliminary issues pertaining to the contention that the affidavits were bad, irregular and fatally defective was a waste of time.

[9] It is submitted that, the learned judge ought to have taken into account the fact that, the applicants' Counsel in turn objected to the respondent's proposal for the waiver of the affidavits and argued that the parties have no right and/or are not legally enjoined with the powers in terms of the Act to waive irregular affidavit(s) neither do this honourable court have the power or jurisdiction to condone the defective and irregular affidavit.

[10] It is also submitted that the learned judge erred and or misdirected myself in handing down a ruling disposing of the section 18 application, which was postponed *sine die* on 14 March 2022, and ought to have handed down a ruling on this preliminary issue. Further that there was procedural irregularities in handing down an order that was not sought in the Notice of Motion and that the court had become *functus officio* after handing down the order on 17 March 2022 and therefore erred in inviting the parties to reargue the case.

Respondent's case

[11] The respondent submitted that the parties are aware of the *Louw*¹ decision, where it was decided that in motion court a party's cases rises and falls on the

¹ *Louw and others vs Nel* [2011] 2 All SA 495 (SCA).

papers. The entire points *in limine* raised by the applicants, is based on foreign law that is not applicable in South Africa therefore the court had no obligation to even comment thereon but rather to look at the case that was before the court.

[12] The respondent submitted that the only issue that the applicants have raised are that their *in limine* points were not considered. They submitted that the court knows the law, reads the papers before the hearing, and that the *in limine* points were raised based on foreign law that is not applicable in South Africa. That the applicants have failed to establish the elements necessary for a leave to appeal to succeed. The application should be dismissed and costs order on an attorney and client scale with the counsel paying 20% of that cost for bringing a baseless application.

Leave to appeal

[13] With that background it is appropriate now to consider Section 17(1) of the Superior Courts Act 10 of 2013, which provides the test for an appeal as follows:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)

- (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard...”

[14] In considering the provisions of s 17(1)(a)(ii) of the Superior Courts Act which provide that leave to appeal may be granted, notwithstanding the Court's view of the prospects of success, where there are nonetheless compelling reasons why an appeal should be heard. There is established jurisprudence in this Court that where

an appeal has become moot the Court has a discretion to hear and dispose of it on its merits.

[15] The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed previously before the Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an appropriate earlier stage.² But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.³

Legal Principles and analysis

[16] The first issue which this court will determine is whether the ruling of the court *quo* order of 17 March 2022 is appealable. In *Crockery Gladstone Farm v Rainbow*

² *Van Rensburg v Van Rensburg & andere 1963 (1) SA 505 (A) at 510 A-C*. The approach has been endorsed by the Constitutional Court. *CUSA v Tao Ying Metal Industries & others (CCT 40/07) [2008] ZACC 15; 2009 (2) SA 204 (CC) para 68*.

³ *Fischer & another v Ramahlele & others (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14*.

*Farms (Pty) Ltd*⁴ the court in relation to the appealability of an order held that on the test articulated in *Zweni v The Minister of Law and Order*⁵, the order is not appealable if it has the following attributes (a) not final in effect and is not open to alteration by the court ; (b) not definitive of the rights of the parties; and (c) does not have the effect of disposing of a substantial portion of the relief claimed. The order is not final or definitive of the rights of the applicant's in that there is no reason why the applicants cannot or did not directly appeal the decision of Baqwa J on 18 December 2020. The order handed down essentially dismissed the respondent's application for leave to have that order of Baqwa J is still valid and executable, the effect of which it did not need to bring the section 18 application at all as the applicants in this matter did not appeal that decision and therefore such decision remained valid. Therefore, the applicant's still have the right to directly appeal that decision and the order of 17 March 2022 does not affect its right and therefore is not final nor is it definitive in respect of the applicant's rights and it is for this reason that the order is not appealable.

[17] In motion proceedings affidavits constitute evidence. By holding that there is no proper application before court which is as a result of an alleged defective founding affidavit, imply that there is no evidence to substantiate the orders which the appellant was praying for in its notice of motion. The affidavits at issue is the founding affidavit and replying affidavit upon which the respondent's case was made.

[18] The issues whether the Regulations Governing the Administering of an Oath or Affirmation are peremptory or directory, and whether there was compliance with the Regulations by the respondent in commissioning its founding affidavit and

⁴ [2019] ZASCA 61 (20 May 2019) at para 4

⁵ 1993 (1) SA 523 (A)

replying affidavit will be dealt with at the same time. Regulation 4(2) of the Regulations Governing the Administering of an Oath or Affirmation provides that:

“(2)The commissioner of oaths shall-

(a)sign the declaration and print his full name and business address below his signature; and

(b)state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment *ex officio*.”

[19] Turning to the question whether the Regulations Governing The Administering of Oath or Affirmation are peremptory or directory, it was held in *S v Msibi*⁶ that the requirements as contained in the Regulations are not peremptory but merely directory. The court in *Msibi* further held that where the requirements of the Regulations have not been complied with, the court may refuse to accept the affidavit concerned as such or give effect to it, but the question should in each case be whether there has been a substantial compliance with the requirements. In my view, *Msibi*'s case has been correctly decided in relation to whether the Regulations are peremptory or directly, and I therefore align myself with that decision.

[20] The commissioner of oath had duly signed the respondent's founding affidavit and replying affidavit but that each of the pages and annexures were not initialed. In terms of the Regulations, the details of the commissioner of oaths must appear strictly below the signature of the commissioner of oaths. In view, whether the full names and business address has been printed or affixed below the

⁶ 1974 (4) 821 (T)

signature or next to signature and the fact that each page was not initialed is immaterial. In relation to the point *in limine* the only issue that the applicants have pursued is that the annexures and each page to the respondents affidavits had not been initialed or signed by either the deponent or commissioner of oaths. In terms of Regulation 3(1) what is required of the deponent is to sign a declaration in the presence of the commissioner of oaths. Regulation 3(2) provides that if the deponent cannot write, he shall affix his mark at the foot of the declaration. Regulation 4(1) provides that the commissioner of oaths shall certify below deponents' signature or mark. There is nowhere in the Regulations where it makes provision for signing or initialing of the annexures to the affidavit by the deponent and commissioner of oaths. Although it is desirable and advisable for the deponent and commissioner of oaths to sign or initial the annexures to show that they form part of the affidavit, it is not a requirement in terms of the Regulations.

[21] What must be looked at is whether the full names, designation and business address of the commissioner of oaths appears on the certificate. Even if there are certain deficiencies like in the case at hand, the court must look at the information as a whole and determine whether the deficiencies are that material to render the whole affidavit defective, what prejudice will that cause to the affected party and the interest of justice. If the deficiencies are not that material, in my view, there is substantial compliance. In the case at hand failure to initial each page was not that material under the circumstances, and there was substantial compliance. If there is doubt as to whether the details that appears on that certificate is not that of the commissioner of oaths, it is for the party who had the doubt to challenge and substantiate that. In this case that was not the question at all and therefore the point *in limine* had to fail.

[22] The question whether the court *a quo* did not go beyond what the respondents were seeking in *Fischer Supra* Theron JA and Wallis JA said:

“[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for ‘(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded’. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may be instances where the court may *mero motu* raise a question of law that emerges from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however, interesting or important they may seem to it, and to insist that the parties deal with them. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues identified to be determined because they are relevant to future

matters and relationship between the parties. That is for them to decide and not for the court. If they wish to stand by the issues they have formulated, the court may not raise new ones and compel them to deal with matters other than those they have formulated in the pleadings or affidavits.”⁷

[23] Following the dicta in *Vanrensburg and Fischer Supra* I was of the view that although the issue regarding the fact that there was no direct appeal against Bawqa J’s order, that to not consider the point of law due to the parties failure to raise the issue being that there was no direct appeal, would lead to determining the matter on a legal error. I was of the view that there was no prejudice which is why the parties were reinvited to argue the matter before me. The applicants did not object to the proceedings and accordingly the matter was dealt with.

Conclusion

[24] For the reasons set outs above I am of the view that there are no prospects of success on appeal and that a another court would not come to a different conclusion.

[25] In the result the order we make is the following:

1. The application for leave to appeal is dismissed with costs.

⁷ 2014 (4) SA 614 (SCA) at para 13 and 14

SARDIWALLA J
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:
Instructed by:

Adv M L MATSI
Matsi Law Chambers Inc

For the Respondent:
Instructed by:

Adv. N MOROPENE
Lesiba Mailula Attorneys Inc