CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 53/13
[2013] ZACC 31

In the matter between:

SIZWE LINDELO SNAIL KA MTUZE	Applicant
and	
BYTES TECHNOLOGY GROUP SOUTH AFRICA (PTY) LTD	First Respondent
DEIDRE VANESSA LE HANIE	Second Respondent
IZAK STEPHANUS FOURIE VAN DER MERWE	Third Respondent
MICHAEL YARDAN MICHAEL	Fourth Respondent
COUZYN HERTZOG & HORAK	Fifth Respondent

Decided on : 12 September 2013

CORAM: Cameron J, Froneman J, Jafta J, Mhlantla AJ, Nkabinde J, Skweyiya J, Van der Westhuizen J and Zondo J.

JUDGMENT

THE COURT:

Introduction

[1] On 28 May 2013 this Court dismissed with costs an application for leave to appeal against an order of costs that the North Gauteng High Court, Pretoria (High Court), through Potterill J, had granted against the applicant *de bonis propriis* (from his own pocket). In the order of this Court it was indicated that the dismissal of the application was for lack of prospects of success. After our order of 28 May 2013 the applicant filed an application which was styled "an application . . . for reconsideration of [this Court's] earlier order." This judgment relates to this "reconsideration" application.

Background

[2] The applicant is an attorney who practises for his own account under the name and style "Snail Attorneys @ Law". Before he opened a law firm of his own, he was employed as a professional assistant by a law firm called Couzyn Hertzog & Horak (CHH), the fifth respondent in this matter. The first three respondents were the applicants in the proceedings in the High Court in which this matter has its origin. The fourth respondent (Mr Michael) was the first respondent in those proceedings and was the applicant's client.

High Court

[3] While he was in the employ of CHH, the applicant accepted instructions to represent Mr Michael in the High Court in a matter involving the first three

respondents in this matter. It appears that at some stage he also appeared in that Court in person and not as Mr Michael's attorney. It is not necessary to go into details about how this came about. It suffices to say that at some stage he appeared before Prinsloo J, and on other occasions before Potterill J. The manner in which the applicant conducted himself in representing Mr Michael in the High Court, in his communications with the attorneys for the first three respondents and when he appeared in person before Potterill J was such that the latter granted a punitive order of costs against him.

[4] In the matter in which Potterill J made the costs order, the applicants were the present first three respondents and the respondents were the present fourth and fifth respondents and the present applicant. She made the following order:

> "12.1. The costs of the urgent application are to be paid on an attorney and own client scale by the respondent, *de bonis propriis* by the respondent's attorney (Couzyn, Hertzog and Horak) and *de bonis propriis* by Sizwe Snail, jointly and severally, the one paying the others to be absolved.
>
> 12.2. Direct that the Registrar transcribe the proceedings of 31 October 2011. The Registrar is ordered to send the record of the proceedings, a copy of all the documents in the file and my judgment to the Law Society of the Northern Provinces.
>
> 12.3. The conduct of Mr Snail of Snail Attorneys at Law . . . is to be investigated. Mr Snail's conduct acting as attorney for Mr Michael as well as his conduct in court on 31 October 2011 need to be addressed."

[5] Not only did Potterill J grant a punitive costs order against the applicant but she also directed the Registrar to send the judgment and the papers in the matter to the relevant Law Society because she believed that the applicant had conducted himself in a manner that warranted possible disciplinary action by the Law Society.

[6] The applicant brought an application before Potterill J for leave to appeal against the costs order. The application was dismissed with costs. In her judgment, Potterill J mentioned that "the conduct of Mr Snail once again today in court is absolutely reprehensible". She said that she would also refer his conduct on that day to the Law Society.

Supreme Court of Appeal

[7] The applicant says that on 4 January 2013 he applied to the Supreme Court of Appeal for leave to appeal against Potterill J's order of costs against him but that application, too, was dismissed with costs.

Judicial Service Commission

[8] The applicant subsequently lodged two complaints with the Judicial Service Commission (JSC) against Potterill J. He says one was dismissed and the other was either not considered or was also dismissed. He says that he subsequently launched an application in the High Court to have the decision(s) of the JSC reviewed and set aside.

In this Court

[9] The applicant thereafter lodged the application for leave to appeal to this Court against the costs order of Potterill J. In that application the applicant included a request that any Judge of this Court or of the Supreme Court of Appeal acting in this Court at the time who had dealt with his complaint to the JSC against Potterill J should recuse himself or herself. Among the Justices of this Court who dealt with the applicant's application, there was no Justice who had sat in the JSC in connection with the applicant's complaints against Potterill J. For this reason the applicant's application for recusal did not arise. This Court dismissed his application for leave to appeal with costs on 28 May 2013. The Chief Justice and the Deputy Chief Justice were not party to the order of 28 May 2013. The Justices who took part in the decision were Bosielo AJ, Froneman J, Jafta J, Khampepe J, Mhlantla AJ, Nkabinde J, Skweyiya J and Zondo J.

Application for the reconsideration of the order of 28 May 2013

[10] After the first three respondents' delivery of their answering affidavit in the applicant's application for leave to appeal but before this Court made its decision, the applicant addressed a letter to the Registrar and asked whether it was permissible for him to file a "supplementary affidavit" dealing with "new allegations" in the answering affidavit. That letter is dated 10 May 2013. It would appear that he did not receive any reply to that letter. That letter does not appear to have come to the attention of the Justices of this Court before they made the order of 28 May 2013.

[11] On 29 May 2013 – that is the day after this Court had made its order – the office of the Registrar circulated an email to the Justices of this Court and three emails from the applicant. One of them – which is undated – was addressed to the Registrar asking for a reply to his letter or email of 10 May 2013. Another one was dated 28 May 2013. It states that the applicant had received the order of this Court on the day of writing the letter. In that email he complained that he did not get a response to his correspondence. He, inter alia, said that "[t]he important issues raised in our application for leave to appeal have not been considered at all and the dismissal ruling is unacceptable in the circumstances." He also said that he had had "a legitimate expectation" to receive a response to his correspondence but none had been received. He said: "I have not been deflated by this minor set-back and will continue to fight this matter as well as the JSC and Judge Potterill with all the energy that I have. I may be down but not out."

[12] The applicant also asked that he be provided with reasons "for your judgment as we do not accept your 2 (two) line judgment either – our rights are fully reserved to take further steps against the Registrar and/or the Judges of the Constitutional Court." He addressed the third email to the Chief Justice via the Registrar. In it he said that he had decided "to proceed with what we call an extraordinary application for the re-consideration or variation of this matter to the Constitutional Court and will file our Notice of Motion and supplementary affidavit today." He wrote that that application would not be in terms of "Rule 6 of the Supreme Court Act but in terms of the common law."

[13] On 30 May 2013 the applicant launched his application in this Court "for reconsideration" of its order of 28 May 2013. The first three respondents opposed the application and filed their opposing affidavit in support thereof. In his application the applicant included a request for the recusal of Bosielo AJ and Mhlantla AJ on the basis that, although they were Acting Justices in this Court at the time, they remained permanent members of the Supreme Court of Appeal which had dismissed his original application for leave to appeal. Bosielo AJ and Mhlantla AJ had not taken part in the decision of the Supreme Court of Appeal dismissing his application. He accepted this but still considered that they could not be seen to reverse a decision of their colleagues in the Supreme Court of Appeal. He also sought the recusal of any Justice of this Court who may have been party to the decision of the JSC dismissing his complaint against Potterill J. Since Bosielo AJ and Mhlantla AJ did not participate in the decision of the Supreme Court of Appeal dismissing the applicant's application for leave to appeal to the Court and since no Justice of this Court participating in this matter was party to the decision of the JSC dismissing the applicant's complaint against Potterill J, his application for recusal does not arise.

[14] The reason why the applicant has brought the present application is that he feels aggrieved that this Court decided his application for leave to appeal before he could file his "supplementary affidavit" in which, he had said, he wanted to deal with "new allegations" made in the first three respondents' opposing affidavit. He was also aggrieved that he did not get a response to his correspondence. He accepts that the

letter he had addressed to the Chief Justice seems not to have been received by the Chief Justice. The applicant's objective was that this Court should have had regard to his "supplementary affidavit" before it could decide his application for leave to appeal.

[15] Applications for leave to appeal to this Court against orders of any court including the High Court and the Supreme Court of Appeal are governed by Rule 19 of the Rules of this Court. That Rule makes provision for a person who seeks leave to appeal to this Court to lodge an application for leave to appeal with the Registrar of this Court and for the respondent(s) to respond to the application. The Rule does not make provision for the applicant to file a reply. The rationale for this is that, if it is in the interests of justice that this Court should entertain a litigant's appeal, the Court should be able to decide that from the applicant's application for leave to appeal and the respondent's response without the applicant having to file a reply. In this regard it must be remembered that, even though Rule 19 does not contemplate a reply by the applicant, the documents that the Court is required to have before it when it considers an application for leave to appeal include the judgment of the court against which the applicant seeks leave to appeal. This means that Rule 19 contemplates that the Court will have one set of papers from each party to the dispute and the judgment from the court against which an appeal is sought. The Rule does not contemplate that any one party will file more than one set of papers.

[16] In bringing his application for "reconsideration" the applicant elected not to cast it as an application for rescission. However, he did also say he wanted to have the order of 28 May 2013 varied even though he did not say what variation he sought. The applicant is a practising attorney. He knows about rescission applications. His election not to bring an application for rescission must have been deliberate. We, therefore, do not propose to treat his application as a rescission application. However, if he had brought it as a rescission application, the closest his case could have come within the ambit of Rule 29 of the Rules of this Court read with Rule 42 of the Uniform Rules of Court would have been Rule 42(1)(a).[1] That is that the order of 28 May 2013 was erroneously granted. However, he would not have succeeded because the information the applicant wanted to place before the Court by way of a supplementary affidavit was largely irrelevant or did not seek to show that there were reasonable prospects of success or that it was in the interests of justice that his matter be entertained by this Court.[2]

[17] A reading of the applicant's response to the "new allegations" reveals that he does not identify the allegations in that affidavit that he says are new. Instead in one section he deals with his application for the recusal of Bosielo AJ and Mhlantla AJ

[1] Rule 42 provides in relevant part:

> "(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
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> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
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> (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> (c) an order or judgment granted as the result of a mistake common to the parties."

[2] See *Daniel v President of the Republic of South Africa and Another* [2013] ZACC 24 at para 6.

and talks about the fact that they did not recuse themselves and spends considerable energy discussing his complaint to the JSC against Potterill J.

[18] The applicant made a bald statement in his affidavit that he was bringing his application under common law but did not substantiate it in any way. In *Baphalane*[3] this Court recorded that the question whether it has power as a court of final instance to vary its past orders under the common law or under its inherent power to protect and regulate its own process or under its power to develop the common law, taking into account the interests of justice, had been left open in the past.[4] However, subject to what has been said, this Court has reiterated the well-known general principle that, once a court has made a final decision in a matter, it becomes *functus officio* and has no power thereafter to reconsider its decision other than under provisions such as those relating to rescission or variation of judgments.[5] The rationale behind this principle is, in part, that there should be both certainty and finality on matters that have been decided by a court. This is because it would be untenable if a court were free to reconsider and change its decisions as it pleases and if parties to disputes do not have the finality necessary for them to arrange their affairs appropriately.

[19] If the position were to be that this Court does have power outside of Rule 29 read with Rule 42 to reconsider and, in an appropriate case, change a final decision that it had already made, one can only think that that would be in a case where it

[3] *Baphalane ba Ramokoka Community v Mphela Family and Others, In re: Mphela Family and Others v Haakdoornbult Boerdery CC and Others* [2011] ZACC 15; 2011 (9) BCLR 891 (CC) (*Baphalane*).

[4] Id at para 27.

[5] *Daniel* above n 2 at para 5.

would be in accordance with the interests of justice to re-open a matter in that way. The interests of justice would require that that be done in very exceptional circumstances. However, even if this Court had power to entertain the application if the interests of justice so required, the applicant would have failed because a reading of his affidavit reveals no exceptional circumstances. Accordingly, the application comes nowhere near showing that it would be in the interests of justice for this Court to reconsider its order of 28 May 2013.

[20] There can be no doubt that, even if the information that the applicant wanted to place before the Court had been before it when it made its order of 28 May 2013, this Court would still have dismissed his application for leave to appeal with costs.

[21] In the circumstances this application is dismissed with costs.