THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 006/2015

In the matter between:

THE MINISTER OF SAFETY AND SECURITY	**FIRST APPELLANT**
THE DIRECTOR OF PUBLIC PROSECUTIONS GAUTENG LOCAL DIVISION	**SECOND APPELLANT**
and	
TEMBOP RECOVERY CC	**FIRST RESPONDENT**
STAR DIAMOND CUTTING WORKS CC	**SECOND RESPONDENT**
GIANDOMENICO (MARIO) MUGNAIONI	**THIRD RESPONDENT**
MARCELLINO MUGNAIONI	**FOURTH RESPONDENT**
GIANDOMENICO FLORIDO SALVATORE MUGNAIONI JNR	**FIFTH RESPONDENT**
MARIA ROSARIA MUGNAIONI	**SIXTH RESPONDENT**
GOFFREDO MUGNAIONI	**SEVENTH RESPONDENT**

Neutral citation: *Minister of Safety and Security v Tembop Recovery* (006/15) [2016] ZASCA 52 (1 April 2016)

Coram: Leach, Saldulker, Dambuza, Mathopo JJA and Baartman AJA

Heard: 18 March 2016

Delivered: 1 April 2016

Summary: Civil Procedure – Uniform rules of court – application to strike out the defence in application for return of items seized in terms of warrant of search and seizure – where such application is made, and criminal proceedings are pending or have been reinstituted, court must consider the interests of justice, policy and public considerations in the exercise of its discretion

to grant order — court should be loath to issue civil declaratory orders in matters which are the subject of criminal proceedings.

ORDER

On appeal from: The South Gauteng Local Division of the High Court, Johannesburg (Vorster AJ sitting as court of first instance):

1 The application for leave to appeal is granted.

2 The appeal is upheld.

3 Paragraphs 1, 2 and 3 of the order of the high court of 29 August 2014, dismissing the appellants' application for condonation and, striking out the appellants' defence to the main application are set aside and substituted with the following:

'1.1 The respondents are ordered to comply with the applicants' notice in terms of rule 35(12) read with rule (13) of the Uniform rules within ten (10) days of this order.

1.2 In the event of the respondents failing to comply with paragraph 1.1 of the order, the applicants may apply on the same papers duly amplified to strike out the respondents' defence to the main application.

2 Late filing of the respondents' rule 6(5)(d)(iii) notice is condoned.

3 The respondents are to pay the costs of this application as well as the costs of their application for condonation.'

JUDGMENT

Mathopo JA (Leach, Saldulker, Dambuza JJA and Baartman AJA concurring):

[1] This is an application for leave to appeal against a judgment of the South Gauteng Local Division of the High Court, Johannesburg, (Vorster AJ) in which the appellants' application for leave to appeal and condonation was dismissed. The high court held that in the absence of compliance with a notice issued by the respondents' in terms of rule 35(12) read together with rule 35(13) of the Uniform rules, the respondents were entitled to an order for the striking out of the appellants defence to the main application. The high court also ordered that the appellants pay the respondents' costs

on a scale as between attorney and own client. The high court refused leave to appeal. On petition, this court granted leave to appeal against that finding and ordered that the parties be prepared if called upon to do so, to argue the merits in terms of s 17(2)*(b)* and *(d)* of the Superior Courts Act 10 of 2013 (the Act).

Background

[2] A brief background to the matter is as follows. During 2009, the South African Police Services (SAPS) commissioned a special investigation project named Project Nemesis, established after a formal investigation was authorised in December 2007 relating to an alleged platinum syndicate. During these investigations, SAPS opened some 50 dockets in various jurisdictions in the country relating to the syndicate.

[3] As part of the investigations, the third and fourth respondents were implicated in, and it was alleged that they were involved in an organised fashion over a period of time, possessed and dealt with metals or precious groups of metals, in particular platinum, which was either stolen or illegally obtained. During 2011, the police secured warrants for the search and seizure of these alleged illegal precious group metals and other items associated with the crime committed and obtained warrants to arrest implicated persons, who included the third and fourth respondents. The evidence gathered during the investigations indicated that they were linked to organised smuggling and illegal export of unwrought precious metals from the Republic of South Africa to refineries abroad.

[4] The third and fourth respondents, as well as other accused persons were arrested and charged in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (POCA) in the Krugersdorp Regional Court on 29 September 2011. The crimes for which they were charged were allegedly committed in districts within the North West, North Gauteng and South Gauteng Provinces. The case was postponed several times for a variety of reasons, chief amongst which was the fact that the State was not ready to proceed because it was in the process of centralising the matter, and intended to indict the third and fourth respondents, and other accused persons for

contravention of the certain provisions of the POCA. On 23 August 2013, the defence successfully objected to a further postponement and the State provisionally withdrew the charges against them.

Issues

[5] The preliminary issues in this appeal are the high court's refusal of the appellants' (a) application for leave to appeal and (b) application for condonation for the late filing of their rule 6(5)*(d)*(iii) notice. The main issue of substance is whether the high court correctly exercised its discretion when it struck out the appellants' defence to the main application whilst criminal proceedings were pending. These issues are considered below.

The application for leave to appeal

[6] The high court correctly found that on a plain reading of rules 35(12) and 35(13), the respondents are entitled to documents which were relied upon in the appellants answering affidavit. Because the appellants had not filed any opposing affidavit to the notice in terms of rules 35(12) and (13), it dismissed the application for leave to appeal on the basis that there were no reasonable prospect of success on appeal. The attention of the high court was drawn to a number of judgments of this court which held that courts should be loath to issue civil declarators in matters which are the subject of criminal proceedings. The appellants thus have an arguable case and therefore have some prospects of success on appeal. There are compelling reasons why the appeal should be heard. It is also in the interest of justice that leave to appeal be granted. I turn to consider the application for condonation.

Condonation

[7] It is trite that an application for condonation will be granted on good cause shown. There are several factors that a court would generally take into account when considering whether or not to exercise discretion, such as the reasons for lateness, the importance of the case, the prejudice to be suffered by the opposing party, and whether there are any prospects of success.

[8] The appellants sought condonation for the late filing of the notice in terms of rule 6(5)*(d)(*iii) which they filed on 18 July 2014. The explanation for the delay was described by the appellants in the high court as 'the respondents rule 6(5)*(d)*(iii) was unfortunately only filed on 15 July 2014 as a result of counsel's unavailability before that time.' Because no condonation application had been filed by 24 July 2014, being the date allocated for the hearing of the interlocutory application, the matter was postponed to 27 August 2014. The appellants submit that the respondents suffered no prejudice as a result of the delay and contend that the interlocutory application was overtaken by events once the criminal charges were reinstated, which they were on 11 July 2014. (Those proceedings are still pending, apparently awaiting the finalisation of this appeal.)

[9] Although the explanation of the appellants' is far from satisfactory. There were indeed reasonable prospects of success in the case. The high court should have exercised its discretion and granted condonation instead of dismissing the application. However, the opposition to the condonation application was not unreasonable and the appellants who sought the indulgence should bear the cost of obtaining it. I turn to deal with the merits of the interlocutory application.

Interlocutory application

[10] Spurred on, no doubt by the provisional withdrawal of the charges and the failure of the State to recharge them as it had threatened to do, the respondents launched motion proceedings (the main application) on 12 February 2014, for the return of all seized items under the search and seizure warrant. At that stage the State had not yet served any indictment on them in terms of POCA and the authorisation for centralisation of the cases because the crimes were allegedly committed in various jurisdictions, namely North West, Northern Gauteng and South Gauteng, had not been obtained. In addition the forensic reports were still outstanding. The centralisation authorisation was necessary because it was the State's intention that all the pending cases be consolidated and be tried in one court, in this regard the South Gauteng Local Division of the High Court, Johannesburg.

[11] The appellants opposed the main application and filed an opposing affidavit in which reference was made to several documents supported by annexures (in which the seized items were listed). They contended that the relief sought by the respondents was incompetent in law because the respondents were not entitled to possess some of the seized items, either as they were to be used as evidence in pending criminal proceedings or as their possession in the hands of the respondents would be unlawful. In the opposing affidavit reference was made to the fact that the Mugnaioni family (who are related to the respondents) operated a recovery works plant with an expired refinery licence and further that they were not allowed or entitled to possess Precious Group Metals (PGM) and uncut diamonds at their premises.

[12] After the appellants had filed their opposing affidavit, the respondents did not file a replying affidavit. Instead they filed a notice in terms of 35(12) read with rule 35(13) on 14 April 2014, requesting the appellant to produce and make available some of the documentation referred to in the State's opposing affidavit of warrant officer Meyer, an investigating officer in the criminal proceedings. The appellants did not oppose the rule 35(12) and (13) notice. Instead, their attorney wrote to the respondents attorneys on 13 May 2014 and indicated to the respondents that they were not entitled to the documents requested. The appellants placed reliance for this proposition on the judgment in *Stevens & others v Magistrate Swart & others* 2014 (2) SA 150 (GSJ) where it was held that the provisions of rule 35(12) read with rule 35(13) were not applicable to motion proceedings until the stage where the court has issued an order directing it to do so.

[13] Rule 35(12) and (13) and rule 30A provide as follows:

'(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.

(13) The provisions of this rule relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications.'

Rule 30A provides:

'(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice or request be complied with or that the claim or defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as it seems meet.'

Clearly the appellants were misguided, because there is no obligation on a party seeking to exercise the provisions of rule 35(12) to first secure a directive from the court to do so. The mere reference of a document in the affidavit entitles the other party to seek or request that the documents be produced. See *Machingawuta & others v Mogale Alloys (Pty) Ltd & others* 2012 (4) SA 113 (GSJ).[1] In so far as Stevens held to the contrary, it was wrongly decided.

[14] As a result of the appellants' failure to oppose the interlocutory application, the respondents filed a notice in terms of rule 30A of the Uniform rules to strike out the appellants defence to the main application (the interlocutory application). The appellant did not oppose this application. Relying on the *Stevens* judgment, and being of the view that the step taken by the respondent was premature and irregular, they took no steps to set aside the rule 30A notice as an irregular proceeding in terms of rule 30. The respondents, as they were entitled to do, enrolled the matter for hearing on the unopposed roll for 24 July 2014. In the meantime, the second appellant decided to officially institute the criminal prosecution against the third, fourth and other accused persons. On 11 July 2014, the criminal case was transferred to the high court and postponed, pending the outcome of these motion proceedings.

[15] On 18 July 2014, without seeking condonation, the appellants served and filed a notice in terms of rule 6(5)*(d)*(iii) of the Uniform rules in which they raised three points of

[1]See further *Moulded Components & Rotomoulding South Africa (Pty) Ltd v Coucourakis & another* 1979 (2) SA 457 (W) at 460H-461E.

law, namely, privilege, reinstitution of the criminal proceedings, and repeated their assertion that the respondents were not entitled to the documents. They also made various factual assertions and explained why they had ignored both the rule 35(12) notice and that under rule 30A. The belated stance of the appellants resulted in the matter being postponed to 26 August 2014. On 28 July 2014, the appellants delivered an application for condonation for the late filing of the rule 6 notice. As stated earlier, the high court thereafter dismissed the condonation application and struck out the appellants defence to the main application in terms of rule 30(A).

[16] The gravamen of the respondents' submission in relation to the interlocutory application was that the appellants should have delivered an answering affidavit and not a notice in terms of rule 6(5)*(d)*(iii). The appellants concede that they were misguided about the correct legal procedure applicable to rule 35(12) applications but contend that the high court exercised its discretion wrongly when it struck out the appellants' defence to the main application.

[17] In this court, the cornerstone of the appellants' argument was that once criminal charges were reinstated, the interests of justice, policy and public considerations outweighed the interests of the respondents. In essence the case advanced for the appellants is that the respondents did not suffer any prejudice as a result of the late introduction of the rule 6(5)*(d)*(iii) notice, because it was foreshadowed in the appellants letter dated 13 May 2014.

[18] Properly understood, the argument of the appellants was the following. The effect of the order of the striking out the defence of the appellants was that the items which were lawfully seized pursuant to a valid search and seizure warrant would be returned to the respondents and other accused persons even though some of the accused may not lawfully possess them, as there were no exceptional circumstances warranting the return of the items at this stage. We were urged to accept that the high court misdirected itself when it held that the merits of the main applications were irrelevant and the point of law relating to civil declarators affecting criminal proceedings was

unsustainable. In support of its argument reliance was placed on *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A) at 118H-119I where the court dealing with a civil declaratory order said the following:

'The present case has no special features and cannot rightly be brought within the ambit of the Johnstone & Co decision, supra. Apart from the fact that the petition neither referred to, nor sought any relief by way of, a declaration of rights, it is clear that the present would not be a suitable case for the granting of the very special relief entailed in the Court's exercising its discretion under s 102 of Act 46 of 1935 to make a declaratory order in relation to a criminal case. The appellants are alleged to have committed a crime. The normal method of determining the correctness, or otherwise, of that allegation is by way of the full investigation of a criminal trial. There is a total absence of any of the types of consideration which induced this Court to make a declaratory order in the Johnstone case supra. Nor, indeed does the case even contain any law point which, if resolved in appellant's favour, would dispose of the criminal charge, or a substantial portion of it.'

[19] This view was endorsed in *NDPP v King*[2] *where* this court also expressed itself as follows:

'Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment, but also requires fairness to the public as represented by the State. This does not mean that the accused's right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation ─ a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges ─ and especially minimum sentences ─ have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay'. One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution.'[3]

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[2] *National Director of Public Prosecutions v King* [2010] ZASCA 9; 2010 (2) SACR 116 (SCA) para 5.
[3] See also *Mngomezulu & another v National Director of Public Prosecutions & another* [2007] ZASCA 129; 2008 (1) SACR 105 (SCA) paras 12-14.

In *Van der Merwe v National Director for Public Prosecutions* [2010] ZASCA 129; 2011 (1) SACR 94 (SCA) para 32, this court held that litigation of this kind falls squarely into the category of preliminary litigation that ought to be avoided or discouraged.

[20] The respondents' counter argument was the following. Quite correctly, they submitted that the appellants were not entitled to resort to rule 6(5)*(d)*(iii) to place evidence before the court of the facts which should have been placed by way of an opposing affidavit. The argument advanced is that the appellants' sought to introduce evidential material that would have been placed before the court by way of an opposing affidavit, thus denying the respondents the opportunity to deal with these facts. It was contended that the reinstitution of criminal proceedings was a stratagem aimed at persuading the court that the State was ready to proceed with the trial when it was not. It was further submitted that the appellants' were not entitled to seize and retain the items simply because of a pending criminal trial. The submission made in this regard was that the institution of criminal prosecution does not constitute a bar against the relief sought. Correctly understood, the respondents pin their hopes on the legal assertion that in the main application, the State cannot prove the criminal activity as alleged in respect of the items which the respondents seek to be returned to them. I do not agree. Amongst the items sought to be returned are exhibits which are intended to be used at the pending criminal trial. Returning them to the respondents will defeat the purpose for which they were secured.

[21] What emerges clearly from the above-cases is that although there is no absolute bar from adjudicating such issues during the interlocutory applications, applications amounting to preliminary litigation pending the outcome of criminal proceedings should not be encouraged as it is the duty of the criminal trial to deal with all issues relating to the aspects that will affect the criminal trial. The duty to examine or adjudicate the lawfulness or otherwise of the search and seizure resides with the trial court. A decision by a civil court to interfere with the trial court's decision should be exercised sparingly, in exceptional circumstances. (See *Wahlhaus*). In my view where a court is approached for a relief, as in the present case, it must in the exercise of its discretion have recourse

inter alia to the following, (a) the main issues between the parties, (b) return of items seized in connection with a criminal trial; (c) the reason why the documents cannot be furnished at that stage, (d) the likely impact the release of the documents would have on the pending trial and (e) finally, the prejudice that may be suffered by either party if the order is refused or granted.

[22] The exhibits which have been seized are required by the State to attempt to prove its case against the third and fourth respondents, as well as other accused persons, and form an integral part of the State's case in the pending criminal trial. Returning the items seized to the respondents would seriously undermine and impact negatively on the State's case. There is no reason to believe that the respondents' rights are under threat and neither will their rights to a fair trial be infringed. In my view no grave injustice would result if the issues raised by the respondents in the main application are determined by the trial court. The respondents will have an opportunity to challenge each and every aspect of the warrants and evidence obtained against them at the trial. It will be for the trial court to decide whether the warrants and evidence were unconstitutionally obtained, and the trial court will decide whether such evidence should be admitted or not.

[23] It was thus necessary that the high court strike a balance between the policy considerations, public interest, interests of justice and the rights of the respondents. In my view, the court a quo failed to do so. It adopted the most draconian option of striking out the defence to the main application without affording the appellants the opportunity to remedy their default. In terms of rule 30A(2) it should have exercised its discretion and ordered the appellants' to comply with the request for discovery in terms of rule 35(12) and (13). Had there then been non-compliance with that order, the court could on further application have considered striking out the defence. Such an approach would have been far more in accordance with justice. As the high court did not seek compliance with the rule but ordered the striking out of the appellants defence, it misdirected itself, entitling this court to interfere with its order. For these reasons, the appeal must succeed.

Costs

[24] The high court ordered the appellants to pay the respondents costs on a scale of attorney and own client. It was driven to this conclusion by the appellants' misguided interpretation to the rules and reliance on the *Stevens* case. I accept that the conduct of the appellants was less than satisfactory and dilatory but that does not mean that it should be mulcted with a punitive costs order. In the circumstances an appropriate costs order would be one on a party and party scale.

[25] However, counsel for the appellants correctly conceded that in the light of the woefully inept conduct of the appellants' case, including the necessity to seek condonation in this court, despite their success the appellants ought not to be awarded their appeal costs. The effect of this is that each party would pay their costs of appeal.

[26] The following order is made:

1 The application for leave to appeal is granted.

2 The appeal is upheld.

3 Paragraphs 1, 2 and 3 of the order of the high court of 29 August 2014, dismissing the appellants' application for condonation and, striking out the appellants' defence to the main application are set aside and substituted with the following:

'1.1 The respondents are ordered to comply with the applicants' notice in terms of rule 35(12) read with rule 35(13) of the Uniform rules within ten (10) days of this order.

1.2 In the event of the respondents failing to comply with paragraph 1.1 of the order, the applicants may apply on the same papers duly amplified to strike out the respondents' defence to the main application.

2 Late filing of the respondents' rule 6(5)(d)(iii) notice is condoned.

3 The respondents are to pay the costs of this application as well as the costs of their application for condonation.'

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R S Mathopo
Judge of Appeal

Appearances

For Appellants:	D J Joubert SC (with him M Kgomongwe) Instructed by: The State Attorney, Johannesburg The State Attorney, Bloemfontein
For Respondents:	D Dörfling SC Instructed by: Xenophontos Attorneys, Johannesburg Martins Attorneys, Bloemfontein