IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case number :
16715/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 18 September 2020 SIGNATURE:.....

IN THE MATTER BETWEEN:

MOLEFE RUFARO MTHULISI DLODLO	Applicant
and	
SUKOLUHLE THANDO NKALA	First Respondent
HERBERT NKALA	Second Respondent

JUDGMENT

BHOOLA AJ:

Introduction

[1] The applicant seeks leave to appeal the whole order of this court granted on 12 August 2020. Reasons for the order were provided on 28 August 2020. The notice of application for leave to appeal was filed on 18 August 2020 and was accompanied by the founding affidavit of the applicant. The order reads as follows:

1. The application is enrolled as an urgent application, the non-compliance with the Rules is condoned and the forms, service and ordinary time periods provided for in the Uniform Rules of Court are dispensed with.
2. The variation application under the above case number (presently provisionally set down for 17 August 2020) is stayed pending the outcome of the:
2.1. stay application launched by the Applicants on 25 May 2020 under the above case number (attached to the founding affidavit as annexure "A");
2.2. rule 47(3) application launched by the Applicants on 21 July 2020 under the above case number (attached to the founding affidavit as annexure "B"); and
2.3. the application to compel heads of argument and practice note launched by the Respondent on 20 May 2020 under the above case number (attached to the founding affidavit as annexure "D").
3. The Respondent is to pay the costs of this application.

[2] The respondents (who are the applicants in the Stay of the variation application and the Rule 47(3) application) brought an application to strike out the founding affidavit attached to the notice of application for leave to appeal. They submit that the founding affidavit is an irregular proceeding and seeks to place evidence before this court in relation to the main application ("the variation application") and to which the respondents have not had an opportunity to answer. The respondents sought attorney and client costs. The applicant persisted with his submission that his founding affidavit was relevant. After hearing both Ms. Blumenthal, appearing for the respondents, and the applicant, I granted an order striking out the founding affidavit with costs payable on the attorney and client scale. I proceeded to hear and determine the appeal based on the grounds of appeal set out in the notice of application for leave to appeal.

Grounds of appeal

[3] It is trite that section 17(1)(a) of the Superior Courts Act 10 of 2013 sets out the test for granting leave to appeal as being whether the appeal would have reasonable prospects of success, or whether there is some other compelling reason why the appeal should be heard.

[4] The applicant raises various procedural issues related to the late filing of his answering affidavit (filed on the morning of the urgent application and after the order had already been granted) and technical problems experienced as a result of which he was not present in the videoconference when the urgent application was heard. The substantive grounds for the appeal are in essence that:

4.1 The court erred dealing with the matter as an unopposed matter when he had filed a notice of intention to oppose (notwithstanding the absence of an answering affidavit);

4.2 The court erred in staying the (main) variation application when he has brought a variation application pursuant to the *actio communi dividundo* judgment/order of 22 January 2020 that allows for the order's variation.

4.3 The court erred in staying the (main) variation application pending the outcome of both the Stay of Proceedings Application and the Rule 47(3) Application brought by the Respondents.

4.4 The court erred in burdening him with the costs of the urgent application.

[5] The applicant submitted that the appeal has reasonable prospects of success on various grounds including that the court should *inter alia* have *mero motu* :

"3.1 Enquired as to what/which order was the subject of the (main) variation application lest an undesirable situation – prejudicial curtailment of standing court ordered rights/process - was being birthed,

3.2 Appraised herself of all three (3) applications that have been launched by the applicant lest her order would, result in prejudice to the applicant, as well as different outcomes."

[6] Prior to raising these grounds of appeal the applicant had also sought to appeal the court's finding that application by the respondents was urgent, but following the submissions on legal authorities by Ms. Blumenthal, subsequently conceded that such an order was not appealable.

[7] Ms Blumenthal raised an *in limine* point that the order is not appealable because it is not definitive of the rights of the parties and not dispositive of at least a substantial portion of the relief claimed in the main proceedings. In this regard reliance was placed on what was said by the Supreme Court of Appeal in, *inter alia, Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 536 B-C. This approach was confirmed by the Supreme Court of Appeal in *Andrew Lionel Phillips v South African Reserve Bank & Others* (221/11) [2012] ZASCA 38 (29 March 2012). The court held as follows :

"[26] The question of appealability in a case such as this, where a party seeks to attack on appeal an order made in judicial proceedings which have not yet terminated, was discussed by Nugent JA in a judgment with which the other members of the court concurred in NDPP v King 2010 (2) SACR (SCA) at 166e–167c (paras 50–51), where he said the following:

'There will be few orders that significantly affect the rights of the parties concerned that will not be susceptible to correction by a court of appeal. In Liberty Life Association of Africa Ltd v Niselow (in another court), which was cited with approval by this court in Beinash v Wixley [1997] ZASCA 32 ; 1997 (3) SA 721 (SCA), I observed that when the question arises whether an order is appealable what is most often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. I said that two competing principles come into play when that question is asked. On the one hand justice would seem to require that every decision of a lower court should be capable not only of being corrected but of being corrected forthwith and before it has any consequences, while on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice."

[8] Accordingly, Ms Blumental submitted that the order does not dispose of the dispute between the parties and it is clear from the authorities that the court should not grant such an order in isolation where there are still issues to be determined. The order is of an interlocutory nature and it is not determinative of any of the rights of the parties.

[9] The applicant submitted that the effect of the order is to make a determination that the variation application is stopped and this is in fact final and effective. It moreover removes his variation application from the process and leaves it as a stand-alone application, leaving him to oppose two applications which should be dealt with together with the variation application, and this has caused prejudice to him.

[10] I am of the view that the submissions made by counsel on the authorities should prevail. The applicant's rights in respect of the variation application are not prejudiced by the granting of the urgent relief sought. In these circumstances I do not consider it necessary to deal with the merits of the application.

[11] The applicant was invited to make submissions as to why attorney and client costs should not be awarded in this application. The applicant's submissions were to the effect that he cannot afford to litigate and has expended all his resources conducting litigation in this longstanding dispute.

Order

[12] In the result, I make the following order:

12.1 The founding affidavit to the notice of application for leave to appeal is struck out.

12.2 The applicant is to pay the costs of the application to strike out on the attorney and client scale.

12.3 The application for leave to appeal is dismissed.

12.4 The applicant is to pay the costs of this application on the attorney and

client scale.

_____

U. BHOOLA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Date of hearing: 16 September. Heard by videoconference as per the Consolidated Directive of the Judge President of 11 May as extended to 15 October 2020.

Date of judgment: 18 September 2020. This judgment was handed down electronically by circulation to the parties' legal representatives by email, by being uploaded onto the CaseLines digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 18 September 2020.

Appearance:

Applicant: Self represented.

Respondents: Adv R Blumenthal
Instructed by: Ramsay Webber Inc.