

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A5067/2019

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED

10 May 2022.

In the matter between:

CHESS SOUTH AFRICA

First Appellant

HENDRIK DU TOIT

Second Appellant

OMAR ESAU

Third Appellant

JUDY-MARIE STEENKAMP

Fourth Appellant

SHANKS NAIDOO

Fifth Appellant

YOLANDA PRINSLOO

Sixth Appellant

ANNE HUISAMEN

Seventh Appellant

DIVESH SOOKDEO

Eighth Appellant

and

CHESS SOUTH AFRICA

First Respondent

MAHLODI JOHANNES MAHOMOLE

Second Respondent

ERICK TAKAWIRA

Third Respondent

KEOBAKA MATHLODI DIPALE

Fourth Respondent

GERALDINE ENGELMAN

Fifth Respondent

LIEZEL AHJUM

Sixth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 16 February 2022.

JUDGMENT

MALINDI J:

Introduction

[1] This is an appeal against the judgment and order by the Court below (per Yacoob J) on 25 March 2019 (“the Yacoob J judgment”). In that judgment, Yacoob J rescinded and set aside the orders of this Court under case number 44851/2018 and 45319/2018 (per Siwendu J) (“the Siwendu J judgments”) granted on 6 December 2018.

[2] In case number 44851/2018, Gauteng Chess had approached the Court on an urgent basis, against Chess South Africa (Chess SA) and all other Chess SA Provincial Affiliates, and obtained an order on 6 December 2018 to the effect that it is an affiliate in good standing in terms of Chess SA’s constitution and disqualifying Chess SA’s other members as follows:

“5.4 The members of the First Respondent who according to the Report of the First Respondent dated 8 November 2018 are not in good standing, save for the members of the First Respondent who are in good standing as declared by the court, shall not be entitled to participate in the election of the office bearers of the Exbo.”

[3] Siwendu J further ordered that Chess SA’s elective Annual General Meeting (“AGM”) be convened and conducted on 8 December 2018.

[4] The effect of the Siwendu J order was that Gauteng Chess would be the only constituent member in good standing, to the exclusion of members who were not in good standing by 8 November 2018, in terms of Chess SA’s report of the same date.

[5] It is not necessary to set out the ancillary orders by Siwendu J.

[6] On 8 December 2018, the AGM proceeded in terms of the Siwendu J order and the appellants were elected without the participation of the respondents, who

had been disqualified by the Chess SA report on 8 November 2018 read with this order.

[7] On 1 February 2019, the appellants approached the Court below on an urgent basis, seeking an order that they are the legitimate Executive Board (“Exbo”) of Chess SA as elected at the AGM of 8 December 2018. The respondents counter-applied for an order rescinding the Siwendu J order of 6 December 2018, which ordered the continuation of the AGM.

[8] The Yacoob J order rescinded and set aside the Siwendu J orders, thereby declaring the Chess SAAGM invalid and rendering all resolutions, elections and decisions taken thereat invalid and set aside. It is unnecessary to deal with the further orders directing the further conduct of Chess SA business and affairs. These relate essentially to the counter-application of the respondents herein, together with orders granted *mero moto* by the Court below in order to bring a practical resolution to the future conduct of Chess SA’s affairs.

Relief sought

[9] The appellants seek an order declaring that they are still the Exbo of Chess SA, as elected at the AGM of 8 December 2018, and that the Yacoob J order of 25 March 2019 be reversed. In other words, that the Siwendu J order be reinstated.

[10] The respondents seek the opposite, that is, that the appellants be interdicted from holding themselves out as the Exbo of Chess SA, and that they continue to be the Interim Exbo until a new Exbo is elected in compliance with the Yacoob J order.

Background Facts

[11] In the Court below, the appellants and the respondents purported to be acting on behalf of Chess SA. In this appeal, both sides have dropped Chess SA as the appellant or respondent.

[12] Gauteng Chess first brought an application in the Western Cape High Court in August 2018. On 17 August 2018, it obtained an order ordering that a Special

General Meeting (“SGM”) be held to elect an Interim Committee which would govern Chess SA until elections could be held for a new Exbo, among others.

[13] The respondents herein were elected to the interim committee. For reasons, whose validity need not be evaluated at this stage, the AGM planned for 8 December 2018 was cancelled or postponed without setting a new date. The two applications referred to in paragraph 1 above were brought in order to compel the holding of the AGM as scheduled on 8 December 2018. This resulted in the Siwendu J order. The second application is not important for now as it was brought by a special member, Players’ Commission of Chess South Africa and sought essentially the same relief.

[14] The AGM proceeded with only delegates from the Western Cape, Gauteng and the Players’ Commission in attendance as a non-voting delegation.

[15] The members of the Interim Committee did not attend the AGM as ordered by Siwendu J, on the basis of their view that the holding of the AGM was invalid on the basis that since the constituent members remained not in good standing per the Chess SA report of 8 November 2018, the Chess SA had no power to convene it and that elections could not be held as a result.

Issues for Determination

[16] The Court below correctly identified the only issue as being who is entitled to run and represent Chess SA.¹

[17] The respondents contend further that the orders taken on 6 December 2018 were taken in their absence and without notice, in particular the order excluding members who were not in good standing as of 8 November 2018 in terms of paragraph 5.4 of the Siwendu J order. They contend that had they known that such an order would be sought they would have opposed the application.

Analysis

¹ Judgment: 002-9 at [25].

[18] The respondents contend that the Siwendu J order precluded the Interim Committee from regularising the standing of other members for the purposes of the cancelled/postponed AGM. Linked to this is the assertion that the AGM of 8 December 2018 lacked a 50% plus one quorum to constitute a valid AGM.

[19] The respondents also contend in their heads of argument that the amendment to the Notice of Motion and the Supplementary Founding Affidavit should have been preceded by a Rule 28 Notice of Intention to Amend. This contention can be disposed of quickly because a Notice of Motion can be amended at any stage without following Rule 28. Whilst it is true that further affidavits can only be filed with the leave of the Court, such leave was sought by the appellants in paragraphs 20 and 22 of the Supplementary Founding Affidavit.

[20] In my consideration, once Siwendu J held that the AGM should proceed on 8 December 2018, it had to proceed in terms of the previously agreed to terms. This included that constituent members of Chess SA who were not in good standing as of 8 November 2018 will have no standing at the AGM, unless their standing had been regularised by 48 hours before the AGM on 8 December 2018. Paragraph 5.4 of the order merely confirmed this term. Therefore, when the respondents received notice of the order on 6 December 2018 compelling the holding of the AGM on 8 December 2018, they knew or ought to have known that their exclusion from attending the AGM would flow therefrom. This is more so that the amended Notice of Motion and Supplementary Founding Affidavit which set out further relief to be sought were served on 4 December 2018.

[21] Secondly, the respondents do not allege that they did not receive notice that this order will be sought. They cite logistical difficulties that prevented them from opposing the application before Siwendu J. It is in the nature of urgent proceedings that sometimes extremely short notice is given to the respondents. If they cannot meaningfully respond in terms of the Rules, appearance on the day of hearing to

seek further indulgences is permitted.² The respondents did not do this. Their absence despite notice will be considered accordingly.

[22] The Court below held that the contentious order of the Siwendu J order were not foreshadowed in the Notice of Motion or Founding Affidavit³ of the Gauteng Chess and Players' Commission, nor in the Supplementary Founding Affidavit and the Notice of Motion (as amended).⁴

[23] An amended Notice of Motion and Supplementary Affidavit were served on the respondents on 4 December 2018. The application of 6 December 2018 sought an order that Gauteng Chess be declared in good standing notwithstanding the Chess SA report of 8 November 2018 declaring none of the members as in good standing. If Gauteng Chess succeeded in being declared in good standing and the AGM proceeded on 8 December 2018, it stood to reason that the other members would not be in good standing at the AGM unless they obtained similar declarations or succeeded in opposing the continuation of the AGM.

[24] This matter then turns on whether the Court below was correct in its finding. I hold the view that it erred for the following reasons.

[25] The appellants sought further relief in their Supplementary Affidavit which made it eminently clear that elections will take place on 8 December 2018 and that members who were found not to be in good standing in the report of 18 November 2018 would not qualify to vote thereat unless so declared by the Court, or they had satisfied the Chess SA to be declared in good standing by the set deadline for such declaration by or before the AGM on 8 December 2018.

[26] The amended Notice of Motion was then couched in the terms according with the order granted by Siwendu J. No doubt was left to the effect that Chess SA will conduct elections on 8 December 2018 and that only members in good standing will be entitled to vote for candidates that had been nominated in terms of the

² *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE) at 7.

³ Judgment: 002-11 at [36]; 002-12 at [39].

⁴ Judgment: 002-11 at [36]; 002-12 at [39].

proceedings of the Chess SA constitution and as ordered by the Interim Committee in preparation of the AGM.

[27] Whereas the appellants sought to be declared a member in good standing and to be allowed to vote at the AGM in the original Notice of Motion and Founding Affidavit, in the amended Notice of Motion and the relevant paragraphs 20 and 22 of the Supplementary Founding Affidavit they sought:

27.1. An elective AGM. There should have been no doubt in the minds of the respondents that if this order were granted it would have the consequences that they now complain about.

27.2. In the alternative, and in the event that the AGM has to stand adjourned on 8 December 2018, to hold an adjourned AGM in terms of the Chess SA constitution within 15 days of 8 December 2018 but not earlier than 5 days from 8 December 2018, read with paragraphs 23 to 25 of the Supplementary Founding Affidavit.

[28] As stated below, the respondents decided deliberately not to oppose the application.

[29] The reasons for their absence before Siwendu J by the respondents are that:

“69. I need to state that the inability of the Applicants to resist and file papers in opposing to the Supplementary Founding Affidavit is due, amongst others, to:

69.1 The unreasonable short and inordinate period of 48 hours required to respond;

69.2 The fact that all but one of the Interim Executive Board are within the jurisdiction of this honourable Court;

69.3 *The members of the Interim Executive Board are in full-time employment elsewhere and not employed by or devoted on full-time basis to the work of Chess SA;*

69.4 *The Interim Executive Board lack financial means to hire legal representative to defend the applications before the Court on 6 December 2018. In this regard, it is worthwhile to indicate that Chess SA incurred over two hundred thousand Rand (R200 000.00) in legal costs to defend an application brought by Gauteng Chess against it in August 2018. Chess SA is unable to afford the costs of legal proceedings as a means to resolve each and every dispute it may have with its members.”*

[30] The respondents rely on Uniform Rule 6(12)(c) of the Uniform Rules of Court which provides that:

“A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.”

[31] The appellants have referred to *Freedom Stationery (Pty) Ltd & Others v Hassam & Others*⁵ where it was held that a party who is aware of proceedings in which an order may be taken against them and do not enter the fray may not come at a later stage and seek rescission of the order on the basis that it was taken in their absence even if it is not expressly stated as low as it “can be anticipated in the light of the nature of the proceedings, the relevant disputed issues and the facts of the matter”. In this case the amended Notice of Motion and Supplementary Affidavit were explicit. Even if I am wrong in this regard, the part of the Siwendu J order that the respondents object to could be anticipated. Although the *Freedom Stationary* case was considered under Section 252 of the Companies Act and gives a wide discretion to the Court in determining the relief to be granted thereunder, the pivotal aspects are that an absent party cannot come at a later stage when they were aware of the proceedings but refrained from entering opposition where the relief sought is explicit or can be anticipated in the context of the matter.

⁵ 2019 (4) SA 459 (SCA) at [25] and [32].

[32] In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State & Others*⁶ the Constitutional Court said:

“[61] The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities. Mr Zuma was given notice of the contempt of court proceedings launched by the Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well within the bounds of what this Court was competent to grant if the crime of contempt of court was established. Mr Zuma, having the requisite notice and knowledge, elected not to participate. Frankly, that he took issue with the Commission and its profile is of no moment to a rescission application. Recourse along other legal routes were available to him in respect of those issues, as he himself acknowledges in his papers in this application. Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted. I need say no more than this: Mr Zuma’s litigious tactics cannot render him “absent” in the sense envisaged by rule 42(1)(a).”

...

[63] It is simply not the case that the absence of submissions from Mr Zuma, which may have been relevant at the time this Court was seized with the contempt proceedings, can render erroneous the order granted on the basis that it was granted in the absence of those submissions. As was said in Lodhi 2:

⁶ (CCT52/21) [2021] ZACC28; 2021 (11) CLR 1263 (CC) (17 September 2021) at [61] and [63].

‘A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one.’”

[33] The discretion exercised by Yacoob J was based on the erroneous application of the jurisdictional fact that requires a party to have been absent when an order was granted against them. As was stated in the *Zuma* case “*where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a).*”⁷ “Absence” in the context of Rule 6(12)(c) has to be construed as defined in the context of Rule 42(1)(a).

[34] In addition to failing on the submission of being absent, the respondents will fail also on the peripheral submission that the holding of the AGM was invalid on account of the alleged fact that it would have or was not quorate. This case is not concerned with the defence of the unlawfulness or illegality of the AGM. The appellants were entitled to take the order of 6 December 2018 which the respondents had acquiesced to. In any event, the Chess SA constitution dictates the process of dealing with subsequent adjourned AGMs in the event that an AGM cannot proceed when there is not a quorum.

Conclusion

[35] For the reasons stated above I find that the Court below erred in reconsidering and rescinding the Siwendu J order. The respondents were not absent from those proceedings as envisaged in Rule 6(12)(c) and the disqualification of the constituent

⁷ At [61].

members of the Chess SA to attend and/or vote at the AGM was not as a consequence of the order. It was as a consequence of the Chess SA report of 18 November 2018 and the respondents' failure to regularise their standing 48 hours before the holding of the AGM on 8 December 2018 as required in para 3.2 of the Chess SA report.

[36] Since the Siwendu J order has been implemented in that the AGM was convened and elections conducted, the appropriate relief is the one prayed for by the appellants, save to delete the repetitive paragraph 4 in the main application.

[37] The following order is made:

1. The appeal is upheld with costs, to be paid jointly and severally, the one paying the others to be absolved.
2. The counter-application is dismissed with costs, to be paid jointly and severally, the one paying the others to be absolved.
3. The order of the Court below is set aside and replaced with the following order:

3.1. Declaring that the Executive Board of Chess SA (the Exbo) is comprised of the persons elected on 8 December 2018, in accordance with the orders of the above Honourable Court dated 6 December 2018, under case number 2018/44851 and case number 2018/45319, being the second to seventh applicants.

3.2. Interdicting the respondents from acting or purporting to act as, or holding themselves to represent, in any manner or form, Chess SA or the Interim Executive Board/Management Committee of Chess SA.

3.3. Interdicting and restraining the respondents from accessing, transacting or in any way dealing with the bank accounts of Chess

SA, account number [...], [...], [...], [...], [...] and [...] held at FNB, Parow, Cape Town branch of the sixth respondent.

3.4. Interdicting and restraining FNB from permitting the respondents to access, transact or any way deal with the bank accounts of Chess SA, account number [...], [...], [...], [...], [...] and [...] held at FNB, Parow, Cape Town branch of the sixth respondent.

3.5. Interdicting and restraining the respondents from accessing, transacting or any way dealing with the bank accounts of Chess SA, account number [...] held at ABSA, Verdi Centre branch of the seventh respondent.

3.6. Interdicting and restraining ABSA from permitting the respondents to access, transact or any way deal with the bank accounts of Chess SA, account number [...] held at ABSA, Verdi Centre branch of the seventh respondent.

3.7. The second to sixth respondents are to pay the costs of this application on the attorney and client scale, jointly and severally, the one paying the others to be absolved.

G MALINDI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

I agree.

M VICTOR J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

I agree.

**R MATTHYS AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

FOR THE PLAINTIFF:

C T Vetter

INSTRUCTED BY:

Rosseau Inc

COUNSEL FOR FIRST TO SIXTH RESPONDENTS:

F Makhanya

INSTRUCTED BY:

Floyd Makhanya Inc

DATE OF THE HEARING:

17 January 2022

DATE OF JUDGMENT:

16 February 2022

DATE OF REVISED JUDGMENT:

10 May 2022