



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: 2013/73273

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|-------------------|-------------------------------------|
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |
| <u>18/03/2016</u> | |
| DATE | SIGNATURE |

18/3/2016

In the matter between:

ENGELBRECHT: PETRUS HENDRIK STEPHANUS

Applicant

And

KHUMALO, NOMSA VICTORIA

Respondent

In re

TARLOY PROPERTIES (PTY) LTD

Applicant

And

PETRUS HENDRIK STEPHANUS ENGELBRECHT

Respondent

JUDGMENT

MLAMBO JP

[1] The applicant (Engelbrecht) seeks my consent to issue a notice in terms of Rule 13(1)(a)¹ of the Uniform Rules of Court against the respondent, a Judge of this Division. The consent is sought in terms of Section 47 (1) of the Superior Courts Act². The Section provides –

"Notwithstanding any other law, no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be."

[2] The language of the section is clear that no civil legal process can be issued against a Judge unless this has been permitted by the Head of the Court in which the Judge serves. Section 47(1) applies to civil proceedings by way of summons or notice of motion intended to be instituted against a Judge in the Judge's personal

¹ Rule 13 (1) (a) reads:

(1) Where a party in any action claims —

(a) as against any other person not a party to the action (in this rule called a 'third party') that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or

(b) ...,

such party may issue a notice, hereinafter referred to as a third party notice, as near as may be in accordance with Form 7 of the First Schedule, which notice shall be served by the sheriff.

² Act 10 of 2013.

and/or judicial capacities.³ As the Head of Court in question it is incumbent on me to consider the application and make the appropriate ruling.

[3] Section 47(1) is the mechanism through which the institution of legal proceedings against Judges is regulated and plays what I regard as a gate keeping role. In essence the section seeks to insulate Judges from unwarranted and ill-conceived legal proceedings aimed at them. The need to protect Judges from unwanted litigation is not difficult to fathom. The core function of Judges is the adjudication of disputes involving competing interests daily. The judgements they hand down as well as the statements they make in court and in their judgements invariably displease some litigants and sometimes their legal representatives.

[4] It is integral to the adjudication function of Judges that they should be free from any fear of repercussions for doing their work. It is necessary therefore that Judges be protected from the ever present threat of legal proceedings directed at them arising from the execution of their official responsibilities. This is necessary to ensure that they adjudicate disputes unhindered and that they do so "without fear, favour or prejudice"⁴. This was aptly stated by Ngoepe JP in *Soller v President of the Republic of South Africa*⁵ as follows –

"The oath which Judges take upon assumption of office requires of them to adjudicate matters fearlessly. This they can only do if protected against non-meritorious actions. Judges should not, in the execution of their judicial functions, be inhibited by fear of being dragged to Court unnecessarily over their judgments. Such a threat could have a chilling effect on the execution of their duties. Furthermore, Judges should rather spend time hearing matters than defending themselves against endless unfounded civil claims. The very nature of the duty of a Judge is such that it

³ S47 (1) has replaced s25 (1) of the Supreme Court Act 59 of 1959 as well as s5 of the Constitutional Court Complementary Act 13 of 1995 which were repealed by the Superior Courts Act in which s47 (1) is found.

⁴ S165 (2) of the Constitution of the Republic of South Africa, 1996.

⁵ 2005 (3) SA 567 (T).

would open them to such litigation: a Judge's task is to resolve disputes, inevitably leaving one person or the other dissatisfied; moreover they are, in the process, required to make findings on the credibility, honesty and integrity of witnesses and litigants and to justify those findings⁶.

[5] I should further point out that section 47 (1) is not only concerned with legal proceedings targeting what Judges do in their judicial capacities. The provision has been interpreted expansively to also cover actions arising from their personal interactions. Also covered is litigation arising from incidents that occurred before their elevation to judicial office. See *N v Lukoto*⁷ in this regard, where Ngoepe JP discussed the procedure to be followed when a request for consent was lodged. In essence the person seeking consent writes to the Head of the court concerned. On receipt of the request the Head of Court discusses the matter with the Judge concerned and may thereafter either grant the consent requested or direct that a formal process be followed involving the filing and service of an application accompanied by the necessary affidavits. The Head of Court will then hear argument and thereafter dispose of the matter as he deems fit.⁸

[6] I followed a similar approach in this matter. I considered the correspondence from Engelbrecht and from the Judge and advised Engelbrecht's attorneys that I was disinclined to grant consent based on the correspondence at my disposal. I advised that should Engelbrecht be so inclined he was at liberty to pursue the matter formally through a court process where both parties would be afforded the opportunity to file affidavits and advance submissions. I indicated that I would thereafter consider the matter and dispose of it as I saw fit. Engelbrecht served and filed the necessary

⁶ At para [14].

⁷ 2007 (3) SA 569 (T). In that case, the applicant sought leave in terms of s25 (1) to sue the respondent, a judge of the Venda High Court, for the maintenance of a 14 year-old boy, whose paternity the Judge was disputing. The dispute had arisen prior to the appointment of the Judge to the bench.

⁸ In para [4].

application accompanied by an affidavit but the Judge elected not to file opposing papers. She was however represented at the hearing by an attorney who advanced oral submissions in addition to the written argument filed.

[7] I stated earlier that section 47(1) plays a gate keeping function and as such does not provide a complete bar against the institution of legal proceedings against Judges, hence the requirement of consent. The approach of the courts is to determine whether good cause has been shown in the application or request to institute the intended legal proceedings against the Judge concerned. The cases I have considered dealing with good cause are clear that the good cause test is not all-embracing but is case specific⁹. This entails a balanced and common sense appraisal of the individual facts and circumstances of the matter¹⁰.

[8] In *Torwood Properties (Pty) Ltd vs SA Reserve Bank*¹¹ it was stated: "*The overriding consideration is that the matter rests in the judicial discretion of the court, which discretion is to be exercised having regard to all the circumstances of the case.*" In *Soller (supra)* at para 9 Ngoepe JP noted that the existence of good cause depended on the facts and circumstances of each case. See also *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd and Others*¹² where the SCA stated: "*Ultimately, what will constitute good cause in any particular case will depend upon the facts of that case.*"¹³ The test is no different regarding matters where consent is sought, as is the case in this matter, to institute legal proceedings against a Judge. In this context a court would consider whether on the facts before it an arguable case calling for an answer, by the Judge, is made out and whether it is

⁹ In *Loubser v Loubser* [1958] 4 All SA 355 (C) the court noted the undesirability and difficulty of formulating an all-embracing judicial definition of good cause [pg 358].

¹⁰ *Soller (supra)* at para [9].

¹¹ 1996 (1) SA 215 (W) at 228B,

¹² [2012] 1 All SA 135 SCA.

¹³ At 139 para [4].

fair¹⁴, just and equitable¹⁵ between the parties to grant or refuse consent. Simply put the issue is whether the proceedings, for which consent to litigate against a Judge is sought, contains a justiciable issue.

[9] I now turn to the facts of the case before me. I indicated earlier that Engelbrecht seeks consent to issue a third party notice in terms of Rule 13 (1) (a) against the Judge. The third party notice relates to certain proceedings (the Main Application) in which he is sued by Tarloy Properties (Pty) Ltd, for an amount of R9, 673, 758, 91. The claim arises from a lease agreement concluded in 2008 by Engelbrecht, the Judge (before her elevation to judicial office) and one other being co-directors of a company as lessees, on the one hand and Tarloy Properties, as the lessor, on the other. Some two years i.e. in 2010, Engelbrecht concluded a sale of shares agreement with the Judge and the other director in terms of which he resigned as director of the company and sold his entire shareholding in the company. The Judge bought a major portion of these shares. All ties Engelbrecht had with the company were severed upon the signing of this sale of shares agreement and he thereafter had no further interest nor any dealings with the company. At that time the company was in occupation of the leased premises and was complying with the terms of the lease agreement in terms of rentals and other necessary charges.

[10] The following year, i.e. after Engelbrecht's departure from the company and specifically from 1 February to 30 November 2011 Tarloy alleges that no rental payments were made by the company in terms of the lease agreement. It also appears common cause that around July 2011 the company vacated the leased premises. Thereafter Tarloy instituted proceedings against Engelbrecht for payment of the amount mentioned in para 9 above. This claim is for the unpaid rentals as well

¹⁴ *Torwood (supra)* at 228.

¹⁵ In *Dumah v Klerksdorp Town Council* [1951] 4 All SA 365 (T) the court was requested to decide what constituted "*good cause*" for a stay of execution. In the Judge's opinion, good cause was any fact or circumstance that would make it just or equitable as between the parties that execution should be stayed at 368.

as for other charges in terms of the lease. For its claim, Tarloy relies on a suretyship agreement concluded pursuant to and contained in the lease agreement, signed by Engelbrecht. In the suretyship agreement Engelbrecht bound himself jointly and severally *in solidum*, as surety and co-principal debtor, for the due and punctual payment and performance by the company of all debts and other obligations due and owing to Tarloy Properties arising from the lease agreement.

[11] Engelbrecht does not deny signing the suretyship but asserts that he was indemnified by the Judge and the other director as the remaining directors of the company, in the sale of shares agreement against such claims. In this regard it is common cause that the sale of shares agreement contains an indemnity clause to the effect that: "*The purchasers [the Judge and other director] indemnify the seller [Engelbrecht] against any claims arising from whatsoever cause in respect of any obligations of the company incurred after the effective date and arising from contracts concluded or actions taken by the remaining directors of the company after the effective date.*" The effective date is 31 August 2010.

[12] Engelbrecht submits that it is only fair and just that the Judge should also be part of the litigation he is facing. He submits that the default in fulfilling the obligations of the company arising from the lease agreement took place subsequent to his resignation as a director and after divesting himself of his entire shareholding in the company. He further submits that on the basis of the indemnity clause signed by the remaining directors of the company, he should not be facing the litigation alone. In fact he makes the forthright submission that when he concluded the sale of shares agreement and specifically the indemnity clause, he intended thereby to be indemnified against all claims brought against the company and which arose subsequent to his departure from the company.

[13] The factual matrix I have recounted above is sufficient in my view to come to a decision regarding the application *in casu*. I don't find it necessary to traverse all the

facts in greater detail than I have done. It appears to me that the equities cry out for a proper ventilation of all the facts surrounding the suretyship agreement, the alleged breach of the lease agreement as well as the impact of the indemnity contained in the sale of shares agreement. That is not my task. Mine is to determine if Engelbrecht has established that there is a justiciable issue calling for an answer from the Judge in the intended joinder proceedings. In other words has he demonstrated the requisite good cause necessary for me to issue the consent he seeks?

[14] The argument advanced on behalf of the Judge, opposing the granting of consent, is that Engelbrecht has jumped the gun by seeking to join the Judge at this stage. The argument is that as surety he should exercise his options in defending the current suit and can then consider involving the Judge if he either pays or loses in court. It was argued that there is, at this stage, simply no *lis* between Engelbrecht and the Judge. I don't agree.

[14] It appears to me that it would be fair, just and equitable that consent be granted. Clearly Engelbrecht has made out an arguable case requiring an answer from the Judge about her own liability in the main application. The application is not vexatious as it is based on facts on which a justiciable claim is set out. Good cause has in my view been demonstrated justifying the granting of consent.

[14] I'm fortified in my view by the remarks made in *Beinash and Another v Ernst and Young and Others*¹⁶, where Justice Mokgoro writing for a unanimous court, emphasised that the right of access to courts is of importance in ensuring the adjudication of justiciable disputes. She further made the point that access to courts was to be protected for *bona fide* litigants. In my view, Engelbrecht has raised a justiciable issue and a court will have to apply its mind seriously to the issue whether the Judge should be joined in the main application.

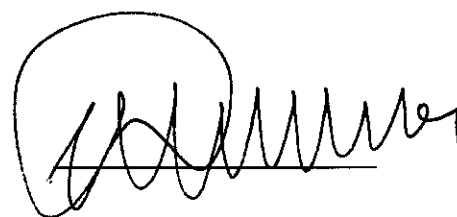
¹⁶ 1999 (2) SA 116 CC

[15] By granting consent, as I'm inclined to do, does not mean that the Judge is joined in the main application. The application before me is a precursor to the proceedings to be instituted in accordance with the provisions of Rule 13(1) (a). The Judge will have the opportunity to oppose the joinder application and make appropriate submissions in that regard. It is the court hearing the joinder application that will traverse all the facts and the law in greater detail and come with a ruling whether Engelbrecht should face the claim on his own and/or with the Judge.

Order

1. In the circumstances the following order is issued:

1. The applicant is hereby granted leave in terms of section 47(1) of the Superior Courts Act 10 of 2013 to issue legal process against the respondent relating to the main application in this matter under case number 2013/73273.
2. There is no order as to costs

A handwritten signature in black ink, consisting of a large circular loop followed by several vertical strokes and a horizontal line at the end.

D MLAMBO

JUDGE PRESIDENT

GAUTENG DIVISION OF THE HIGH COURT

OF SOUTH AFRICA

Attorney for Applicant : Ben McDonald Attorneys

Attorney for Respondent : Norman Berger Attorneys

Attorney for Applicant in the Main Application: Schindlers Attorneys

Date of application : 2 DECEMBER 2015

Date of judgment : 18 MARCH 2016
