IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO.: 81101/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

14/10/2019
DATE

H. Boonstantinides
SIGNATURE

In the matter between:

TSHAMUNWE HERRY MASINDI	First Applicant
MANKHWE GROUP (PTY) LTD	Second Applicant

and

JACOBUS HUGO LE GRANGE T/A PRUDENT ACCOUNTANTS AND FINANCIAL SERVICES	First Respondent
NATIONAL COMMISSIONER, SOUTH AFRICAN POLICE SERVICE	Second Respondent
STATION COMMANDER, SOUTH AFRICAN POLICE SERVICE POLOKWANE	Third Respondent
POLOKWANE LOCAL MUNICIPALITY	Fourth Respondent

In re:

JACOBUS HUGO LE GRANGE T/A PRUDENT ACCOUNTANTS AND FINANCIAL SERVICES	Applicant
and	
TSHAMUNWE HERRY MASINDI	First Respondent
MANKHWE GROUP (PTY) LTD	Second Respondent
NATIONAL COMMISSIONER, SOUTH AFRICAN POLICE SERVICE	Third Respondent
STATION COMMANDER, SOUTH AFRICAN POLICE SERVICE POLOKWANE	Fourth Respondent
POLOKWANE LOCAL MUNICIPALITY	Fifth Respondent

JUDGEMENT - APPLICATION FOR LEAVE TO APPEAL

DATE OF HEARING: 04 OCTOBER 2019

1. This is an application launched by the 1st and 2nd applicants ("the Applicants") for leave to appeal to the Full Bench of this Court against the entire Judgment and Order handed down by myself on the 11th October 2018. The Applicants' grounds upon which this application is based are as follows:

    1.1. The Honourable Court erred in dismissing the application for rescission of the judgment granted in favour of the First Respondent on 05 December 2017 (the Rescission Application) on

the basis that the Applicants were late in bringing the Rescission Application, despite the fact that the Honourable Court had already granted condonation for the late bringing of the Rescission Application;

1.2. The Honourable Court erred in dismissing the Rescission Application on the basis that the Applicants had failed to establish or show good cause in respect of the Rescission Application;

1.3. The Honourable Court erred in finding that the First Applicant's physical presence in Court when judgment was granted on 05 December 2017 means that the judgment was not granted in both Applicants' absence;

1.4. The Honourable Court erred in overemphasising the First Applicant's work experience as a trade unionist for its finding that the Applicants were in wilful default, whilst paying no attention to the transcribed activities in the Court on 05 December 2017, including the ruling by Brand AJ that the matter would be heard on an unopposed basis;

1.5. The Honourable Court erred in finding that the Applicants acquiesced in the judgment granted on 05 December 2017;

1.6. The Honourable Court erred in conflating the requirement for wilful default and the principle of acquiescence when dismissing the Rescission Application;

1.7. The Honourable Court erred in taking into consideration the events of history of the matter beyond 05 December 2017 when dismissing the Rescission Application after it has already granted condonation for the late bringing of the Rescission Application;

1.8. The Honourable Court erred in failing to consider the merits or prospects of success in the Rescission Application whilst determining the aspect of good cause;

1.9. The Honourable Court erred by holding that the Applicants ought to have launched the appeal against the Judgment of 05 December 2017 instead of the Rescission Application;

1.10. The Honourable Court erred by granting a punitive costs order on attorney and client scale, when there was no established justification for such an order.

Background

2. The nature of this application pertains to an application wherein the First and Second Applicants ("the Applicants") applied to this Honourable Court for an order in the following terms:

> *"1. That the Default Judgment granted by the Honourable Court (per Brand AJ) against the First and Second Applicants in favour of the First and Second Respondents on or about 5 December 2017 be rescinded or set aside;*

2 *That costs of suit be paid by any party unsuccessfully opposing this application on an attorney and client scale; and*

3 *Further/alternative relief."*

3. The First Applicant is a labour consultant and business person and the Second Applicant is the Mankhwe Group (Pty) Ltd ("Mankhwe"), which conducts business assisting employees in respect of recovery of emoluments such as pensions and other benefits as well as resolutions of labour disputes through alternative dispute resolution mechanisms. The First Applicant is a co-director and co-shareholder of Mankhwe.

4. The Applicants launched this application in terms of Uniform Rule 31(2)(b) alternatively the Common Law.

5. On the 28th November 2017 the Respondent Jacobus Hugo Le Grange ("Le Grange"), an Accountant launched an urgent application for an interdict against the Applicants. The urgent application sought the following relief:

"2. *That the First and Second Respondents are prohibited and interdicted from:*

2.1 *organising, participating or from holding a march from SABC Park, Polokwane or any other venue in Polokwane to the business and residential premises of the Applicant situated at 29 Vharaharanai Street, Bendor, Polokwane, whether it be on 6 December 2017 or on any other date;*

2.2 *picketing at the business address and residential premises of the Applicant situated at 29 Vharaharanai Street, Bendor, Polokwane, whether it be on 6 December 2017 or on any other date, and whether it be in terms of the provisions of the Regulations of Gatherings Act, Act 205 of 1995 or not.*

3. ...

4. *That the Fourth Respondent, in the event that the First and Second Respondents refuse and/or fail to comply with the provisions of this Honourable Courts [sic] Order, be directed to take all such steps as may be necessary to prohibit First and/or Second Respondents and/or all other participants who may want to participate in any march and/or picketing as arranged by the First and Second Respondents.*

5. *That First and Second Respondents be ordered to jointly and severally pay Applicant's costs on the punitive scale of Attorney and Client, the one to pay, the other to be absolved."*

6. The Urgent Application was heard in the Urgent Court on the 5th December 2017 and the Honourable Brand AJ granted an Order on an unopposed basis.

7. The Applicant stated the reasons for the default and the late application to set aside the Interdict granted by my predecessor Brand AJ was as follows:

7.1. The First Applicant was present in Court when the Court Order was granted. He confirmed that he did not file any papers or have any legal representation to oppose the granting of the Court Order and he stated this was due to the fact that he was not afforded a reasonable time to file papers.

7.2. Furthermore he stated that he did not *"readily have funds to enlist the services of legal representatives".*[1]

7.3. The Applicant therefore stated that his Application would *"technically qualify to be brought in terms of Rule 31(2)(b) of the Uniform Rules ..."*[2]

7.4. In the alternative, the Applicants argue that another basis upon which to apply for rescission of a Court Order is in terms of the Common Law if it is brought within a reasonable time.

7.5. Amongst the reasons given by the Applicants was the fact that the First Applicant allegedly did not fully comprehend the contents of the Court Order of Brand AJ regarding the granting of an adverse costs order against himself and Mankhwe.

7.6. The Applicants confirm that on the 8th February 2018 when he received the Notice of Intention to tax the Bill of Costs arising from the Court Order of Brand AJ, he realised *"the full effect of the Court*

[1] Para 10.2, paginated page 53 of the Application for Rescission
[2] Para 10.3 of the Application for Rescission.

Order."[3]

8. The Applicants abandoned their argument that the Application for Rescission of Judgment in terms of Rule 31(2)(b) and pursued the application on the basis of the Common Law.

9. At the outset I utilized my judicial discretion and allowed the Applicants leave to argue the matter "*subject to making comments during my final finding in this regard*". Therefore, the Applicants are not been candid when they state that the Court *"erred in dismissing the application for rescission of judgment granted in favour of the First Respondent on the 5th December (the rescission application) on the basis that Applicants were late in bringing the rescission application, despite the fact that the Court had already granted condonation for the late bringing of the rescission application."*

10. The entire thread throughout the argument of the Attorney for the Applicants was:

    10.1. that the Order was granted on an unopposed basis by my predecessor Brand AJ and he also argued based on good cause and sufficient cause was practically synonymous and interchangeable.

    10.2. he argued that the application for rescission or to show a reasonable and acceptable explanation for the default, show that

[3] Para 10.5.4, paginated page 55 of the Application for Rescission.

the application is *bona fide* and not merely aimed at delaying execution of the Judgment; and

10.3. establish existence of a *bona fide* defence on the merits of the matter which *bona fide* defence *prima facie* carry some prospect or probability of success.[4]

11. The reasonable explanation that was tendered by the Applicants was the fact that the Applicants *"had financial challenges in securing legal representation".*[5]

12. In the Applicants Heads of Argument there was a concession that there was clearly non-compliance with the Rules and Practice of the Court and it was submitted that this was not due to wilful or deliberate conduct on the part of the First and Second Applicants.

13. The submissions made by the Applicants was that they did have a substantial defence or *bona fide* defence against the Respondents' claim based on the following:

That Le Grange sought and was:

"5.4.1 ... granted a Court Order to prohibit the march or picket whether such was in compliance with the provisions of the Gatherings Act or not..... This, rendered the Court Order extremely wide in breach and, ultimately,

[4] Para 3.5 of the Applicants Heads of Argument.
[5] Para 4.2 of the Applicants Heads of Argument.

unsustainable as it cannot prohibit what is permissible in terms of the law and for a future undetermined event.

5.4.2 *The Court Order did not consider that the Applicants never contemplated marching without compliance with the provisions of the Gatherings Act or any other applicable law."*

14. It was argued by the Le Grange (the Respondent in the rescission application) that the Applicants acquiesced to the Order granted on the 5th December 2017 and they failed to make out a proper case for condonation for the belated launching of the rescission application. Furthermore, it was argued that the recourse lies in the form of an appeal, as the relief that was sought by the Respondents in the Urgent Application was in effect and finally disposed of the matter.[6]

15. What is relevant throughout these proceedings is the fact that the First Applicant had appeared in the Urgent Court in person on the 5th December 2017 and was addressed by the Judge and was allowed to address the Judge as to whether he intended to oppose the Urgent Application.

16. The First Applicant initially stated that:

16.1. he did not intend opposing the application and then eventually said that he did want to oppose the application but that he did not possess the necessary funds to instruct an Attorney to oppose the

[6] Paras 4.1 and 4.2, pages 4 and 5 of the Respondents' Heads of Argument.

Urgent Applicant; and

16.2. despite the fact that the Applicants have given notice of their intended march in terms of Regulation of Gatherings Act 205 of 1993 ("the Gatherings Act")

they have not received permission from the Local Authority to proceed with the march.

17. The Honourable Mr Justice Brand AJ decided to hear the Urgent Application on an unopposed basis and granted an Order in accordance with the Draft Order.

18. The planned march and demonstration that was to take place on the 6th December 2017 did not go ahead in view of the Court Order. In February 2018 the Respondent gave notice to the Applicants of the taxation of the Respondents' costs relating to the Costs Order made by Brand AJ on the 5th December.

19. The Applicants then launched an application for rescission of the Order of Brand AJ which was served on the Respondents' Attorney on the 14th March 2018 which was 99 days after the Order of Brand AJ was granted on the 5th December 2017.

CONDONATION

20. It is trite that the Court has a wide discretion to grant condonation for the hearing of the application for a rescission of judgment.

21. Based on the responses given by the First Applicant to my predecessor Brand AJ it was evident that:

21.1. the First Applicant was resigned to the fact that he did not have permission to march, and the First Applicant stated he did not have the necessary funds to instruct an Attorney to oppose the Urgent Application; and

21.2. that he had not received permission from the Local Authority to proceed with the march and demonstration.

22. The Applicants had received the papers in the Urgent Application. The 1st Applicant has set out in his affidavit his:

22.1. vast qualifications and experience in the labour and the arbitration field;

22.2. he is Trade Unionist; Labour Consultant and business person;

22.3. he attended Court in person on the 5th December 2018;

22.4. he spoke to both the Legal Representatives of the Le Grange and the Presiding Judge on the 5th December 2018.

23. Furthermore what was relevant to this matter is the fact that the Applicants did nothing further after obtaining the Order granted by Brandt AJ until they received a Notice of Taxation of the Costs Order of Brand AJ. Therefore, their conduct indicated that they had acquiesced in the Order that was granted against them. The Notice to tax a Bill was received on the 8th

February 2018. The aforesaid did not take the Court into his confidence as to how he was at that date able to finance the costs of an Attorney to assist him in this matter.

24. What is damning in this matter is the fact that the Applicants alleged that they act on behalf of certain pensioners. This appears in paragraphs 5.1 to 5.14:[7]

24.1. they failed to identify or furnish the Court with any proof of their mandate to act on behalf of the pensioners and the Order granted by Mr Justice Brand AJ on the 5th December relates to the First and Second Applicants and not to the pensioners; and

24.2. that in paragraph 4 of Brand JA's Order prevents third parties from participating in a march and picketing organised by the Applicants of the application for rescission.

25. The application for leave to appeal once again implies that the Order granted by Brand AJ was made in the absence of the Applicants.

26. The fact that the Applicant asked for leave to appeal relating to the emphasis of the First Applicant's works experience as a Trade Unionist and that this Court "... *whilst paying no attention to the transcribed* activities *in the Court on 5 December 2017, including the ruling by Brand AJ that the matter would be heard on an unopposed basis".*[8] once again underlines the fact that the Applicants for rescission of Judgment were requesting this

[7] Pages 15 to 20 of the Founding Affidavit.
[8] Para 4 of Notice of Application for Leave to Appeal.

Court to scrutinize the Ruling by Brand AJ and as repeatedly stated, this Court was not a Court of Appeal.

27. The Applicants only sprang into action upon receiving the Notice of Taxation of my predecessor Brand's Order for Costs, Relating to the Costs Order.

28. As stated above, the fact that Mr Masindi was physically in Court and with his academic background and practical experience, and bar his excuse that he was financially constrained and had no legal representation, he nevertheless refrained from categorically informing Brandt AJ that he intended to oppose the Application he provided a vague response to the honourable Judge. Furthermore, he subsequently did nothing further once the Order was granted until he realised the financial consequences of this order.

29. This Court noted the assertions of the applicants with caution that my predecessor Brand AJ had allegedly disregarded a member of the public and a lay person and just proceeded to grant the Court Order. The honourable judge engaged directly with Masindi before granting the order. Furthermore, the fact that Masindi stated under oath that he did not have funds readily available to oppose the Urgent Application was also noted with caution as he appears to actually be a man of reasonable means based on the Respondents' Answering Affidavit opposing the application for rescission.

30. After having read the papers and heard lengthy arguments by the Attorney

and Counsel for the parties and based on weighing all the facts presented to me I utilised of my judicial discretion and to granted a punitive costs order against the Applicants in the application for rescission as it became evident that this application was a clear abuse of the process of Court which warranted a punitive costs order.

ARGUMENTS FOR LEAVE TO APPEAL

31. The Respondent's Counsel submitted that the consideration relating to the merits of the proposed march of the 06th December 2017 have come and gone. The march can no longer take place. It was argued that the matter on the merits is now moot. It was argued that this application is a frantic effort to escape the financial repercussions of the costs order.

32. The Applicants Counsel presented the court with a constitutional court decision on appeal from and in an application for the which confirmation of the order of the High Court of South Africa, Western Cape Division, Cape Town, relating to the declaration by the High Court that section12(1)(a) of the Regulation of Gatherings Act 205 of 1993 is constitutionally invalid is confirmed to the extent that it makes the failure to give notice or the giving of inadequate notice by any person who convened a gathering a criminal offence.[9] In the aforesaid case the following order was made:

1. The appeal of the State respondents is dismissed.
2. The declaration by the High Court that section 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 is constitutionally invalid is confirmed to the extent that it makes the failure to give notice or the

[9] Mlungwana and Others v The State and Another [2018] ZACC 45

giving of inadequate notice by any person who convened a gathering a criminal offence.

3. The declaration of invalidity **shall not apply with retroactive** effect and shall not affect finalised criminal trials or those trials in relation to which review or appeal proceedings have been concluded. (emphasis added).

It was made clear in the judgement that the operation of the order will be limited to cases that have not been finalised or in relation to which review or appeal avenues are still open in terms of the applicable rules.[at 110]

33. Judgement in the present matter been handed down on the 10th of November 2018, which was before the constitutional court had granted judgement on 19 November 2018.

34. The Superior Courts Act 10 of 2013 has raised the bar for granting leave to appeal in the case of ***The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others,*** *Bertelsmann J held as follows:*

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see **Van Heerden v Cronwright & Others** 1985 (2) SA 342 (T) at 343 H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

35. Based on the aforesaid, I am not persuaded that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard. The decision sought on appeal

does not fall within the ambit of Section 16(2)(a) and the decision sought to be appealed does not dispose of all the issues in the case or that the appeal would lead to a just and prompt resolution of the real issues between the parties as the merits in this matter are now moot.

The following order is made:

1. The First and Second Applicants' application for leave to appeal is dismissed.

2. The First and Second Applicants are to pay the costs of this application.

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H CONSTANTINIDES
Acting Judge of High Court
Gauteng Division
Pretoria

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Counsel for the First and Second Applicants:	Advocate Granova
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