

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 12339/2022

In the matter between:

Goringhaicona Khoi Khoi

First Applicant

Regent Edmen Michael Hansen

Second Applicant

Chief Shiraatz Mohammed

Third Applicant

Peter Ludolph

Fourth Applicant

And

Tauriq Jenkins

First Respondent

Delroque Dextry Arendse

Second Respondent

Observatory Civic Association

Third Respondent

**The Trustees for the time being of the
Liesbeek Leisure Properties Trust**

Fourth Respondent

Heritage Western Cape

Fifth Respondent

City of Cape Town

Sixth Respondent

**The Director: Development Management
(Region 1), Local Government,
Environmental Affairs & Development
Planning, Western Cape Provincial Government**

Seventh Respondent

**The Minister for Local Government,

Environmental Affairs & Development
Planning, Western Cape Provincial Government**

Eighth Respondent

**Chairperson of the Municipal Planning

Tribunal of the City of Cape Town**

Nineth Respondent

Executive Mayor, City of Cape Town

Tenth Respondent

Western Cape First Nations Collective

Eleventh Respondent

In re:

Case Number: 12994/2021

The matter between:

Observatory Civic Association and Another

First Applicant

And

**The Trustees for the time being of the
Liesbeeck Leisure Properties Trust
and Seven Others**

First Respondent

JUDGMENT ELECTRONICALLY DELIVERED

19 JUNE 2023

Baartman, J (Slingsers and Lekhuleni JJ concurring)

[1] On 8 November 2022, this court rescinded the judgment of Goliath DJP, dated 18 March 2022 under case number 12994/2021; simultaneously, we upheld an appeal against that judgment. The first respondent (**Mr Jenkins**) applies for leave to appeal the rescission order.

[2] The rescission was granted on an unopposed basis after the court had refused permission for the late filing of Mr Jenkins' answering affidavit. The application for leave to appeal is directed against that refusal. It is necessary to deal in some detail with the reasons for the refusal.

[3] On 18 March 2022, Goliath DJP granted the following order:

'145.1 First Respondent is interdicted from undertaking any further construction, earthworks, or other works on erf 151832, Observatory, Western Cape to implement the River Club development as authorised by the environmental authorisation issued in terms of the National Environmental Management Act, 107 of 1998 on 22 February 2021 and various development permissions issued in terms of the City of Cape Town's Municipal Planning By-Law, 2015 pending:

Conclusion of meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of HWC

.

The final determination of the review proceedings in Part B.

145.2 The three applications to strike are dismissed.

145.3 There shall be no order as to costs in the striking-out applications.

[4] The above interdict halted the construction of the River Club development. The 18 March 2022 judgment and the 8 November 2022 judgment dealt extensively with the development; I do not repeat it. The appeal was directed at lifting the ban on the construction pending the review envisaged in Part B of those proceedings. The Goringhaicona Khoi Khoi, the first applicant in the rescission application, was the first applicant in the interdict application and at the time, Mr Jenkins was the driving force behind the first applicant.

[5] In the rescission application, the Goringhaicona Khoi Khoi distanced itself from those opposed to the development and denied that it had resolved to bring the interdict application. It further alleged that Mr Jenkins had fraudulently represented the Goringhaicona Khoi Khoi's position in the interdict application.

[6] I deal summarily with the history of the matter as it is fully set out in our main judgment. On 27 July 2022, the rescission application was set down for hearing on an urgent basis. Fortuin J struck the matter off the roll for lack of urgency. At that stage, Mr Jenkins indicated his intention to oppose the rescission application and obtained an opportunity to file an answering affidavit. He filed his Notice of Intention to Oppose 8 weeks after the urgent application was struck from the roll.

[7] On 11 August 2022, Hlophe JP directed that the rescission application should be heard together with the appeal referred to above. Mr Jenkins was

present at that directions hearing. The Judge President further directed that the parties had to 'ensure that there were 3 sets of the record and that the file... in order, all... be done timeously as the Judges will need ample time to read... (as indicated before, parties are to self-regulate in this regard)'.

[8] Thereafter, the Goringhaicona Khoi Khoi's attorney of record, in correspondence, enquired from Mr Jenkins, on 5 and 19 August 2022, when he would file his answering affidavit. He did not respond. Therefore, the applicants in the rescission application filed their replying affidavit on 20 September 2022 without the answering affidavit having been filed. On 22 September 2022, the matters were allocated to us and all the parties were informed. On 4 October 2022, my registrar enquired from Mr Jenkins as follows: 'Kindly advise...when you will be filing your outstanding answering affidavit and your heads of argument.' I quote his response in full:

'Email of 5 October 2022

'I am currently busy working on my outstanding answering affidavit, and will try to get it to you as soon as possible. I will endeavour to file it by end of business day tomorrow.

I had raised the issue with the Judge President that I would not be available for the court hearing and wished for a postponement because of a trip to a conference where I was to deliver a paper and a keynote address. In chambers, I objected to this being urgent, as it was previously struck off the roll by Judge Fortuin. However, I have self-regulated, as was the wishes of the Judge President, and have cancelled the trip and will be attending court.

With regards to heads of argument, I will be attending to them once the

answering affidavit is finalised, but will be giving oral argument.

I would like to point out that I do not have a lawyer, and am struggling to cope.

I am a lay litigant without representation, and I did not receive the order from the Judge President Hlophe when the case was put back on the roll with the notices and schedule for replies.

The submission I am answering to is over 500 pages. It is an extensive and voluminous document which concerns numerous parties and individuals who are stretched across the country. A document of this scale, by the looks of it to me, would have required a professional legal team to compile with considerable resources and time. I am doing my best to respond to it albeit without such resources.

I would like to alert the court that I intend to file for notice to appeal Judge Dolamo's order.

I am most grateful for your patience with me.'

[9] On the strength of that undertaking, the court set the matter down for a directions hearing on Monday 10 October 2022 at 08h30 in Court 18. The parties were informed that they should be able to indicate whether they needed time to respond to the answering affidavit Mr Jenkins had undertaken to file or whether the matter could proceed as set down. Mr Jenkins neither attended the hearing nor filed his answering affidavit as undertaken. After the usher had ascertained that Mr Jenkins was not outside the courtroom, we directed that both matters would be heard the following day.

[10] However, Mr Jenkins left a voice note for my registrar, *after the hearing*, professing not to have known where the direction hearing was being held. At the hearing, Mr Jamiee SC who appeared with Ms Adhikari, counsel for the seventh respondent, informed the court as follows:

'M'Lady may I just place on record,... After the adjournment yesterday Mr Jenkins spoke to me outside of the court. He was, according to him, physically in Court but did not know where to go, and he said that he asked various people where he should go and no one could assist him. I informed him expressly in our conversation that the matter would be proceeding at 10...this morning,... both the appeal and the rescission... That was within 10 minutes after we adjourned yesterday.'

[11] Thereafter, Mr Jenkins arrived and from the bar, sought permission for the late filing of his 1 500-page affidavit. The application was refused and the rescission application and appeal were unopposed. However, the Goringhaicona Khoi Khoi and the Observatory Civic Association, the third applicant, opposed the costs order sought against them. There was agreement that if the Goringhaicona Khoi Khoi succeeded in the rescission application, no costs would be sought against it in the appeal.

[12] In our view, the rescission application had to be heard before or together with the appeal against the order sought to be rescinded on the basis that it had been fraudulently obtained. It was therefore not surprising that the Judge President directed that the matters be heard together. The appeal was with leave of the Supreme Court of Appeal (SCA) which directed that the appeal be dealt with on an urgent basis.

[13] In the circumstances, it is disingenuous to suggest that Mr Jenkins did not know when to file his answering affidavit. He had considered his challenges

when he told the court that he would file his answering affidavit on 6 October 2022. He was granted that opportunity and a further opportunity to seek a postponement at the directions hearing. Mr Jenkins knew in August 2022 that the Goringhaicona Khoi Khoi was alleging that he had committed fraud. He must have appreciated the implications thereof for his person.

[14] This court faced with the application for the late admission of the answering affidavit had various legitimate options. An important consideration was the rights of all the parties to the proceedings. Ms Nyman SC, who appeared with Ms Mashava for Mr Jenkins, submitted that Mr Jenkins' right of access to court had been violated. In the circumstances of this matter, that submission is unwarranted. Mr Jenkins cannot be allowed to exercise his right of access to the court in deliberate violation of the same right of 14 parties involved in the matter. I say that mindful of the fact that Mr Jenkins was unrepresented at the time.

[15] In these circumstances, the interest of justice required the court to balance the rights of the parties to the proceedings and consider the prejudice each would suffer. It is correct that Mr Jenkins and the large group that supported him in court have the right to practise their culture. However, even that right cannot be exercised in violation of everybody else's right to do the same. It is noteworthy that the order directing: 'Conclusion of meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of HWC' was appealed unopposed. Evidently, the parties to the litigation were satisfied with the engagement and consultation that had already taken place. Even as an unrepresented litigant, Mr Jenkins knew what was at stake and made his choices.

[16] A court has a duty to protect the integrity of the process. There comes a point at which the court must act, however unfortunate for a litigant, in the interest

of all the parties. It is not in the interest of justice to allow any party to flagrantly abuse the process and be shielded from the consequences because he/she is unrepresented.

Discussion

[17] The applicant's answering affidavit was not admitted. Therefore, it is common cause that Mr Jenkins must first seek the setting aside of the condonation ruling on appeal. Once that ruling has been overturned and the answering affidavit admitted, the applicants must then be afforded an opportunity to respond, if they so wish. This was envisaged in the correspondence in which the court called for the directions hearing.

[18] In refusing condonation for the late filing of the answering affidavit, we effectively refused the application for a postponement. Therefore, this application is directed at that refusal. In order to succeed on appeal, Mr Jenkins will have to show that this court acted capriciously or on a wrong principle when it refused condonation and the postponement. The Constitutional Court¹ held as follows:

'[10] Both these applications have, as their ultimate objective, the nullification of the High Court order and a re-hearing of the issue on the basis of the respondents' answering affidavit. The first application is wholly misconceived. Short of setting aside on appeal an order made by another court and substituting a different order, this Court has no jurisdiction to make an order on behalf of another court properly seized of a matter or to condone, on behalf of such court, non-compliance with the rules of procedure to which such court is subject. The second application and the ground of appeal which it seeks to introduce, are without merit, for the reasons which follow.

¹ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 CC.

[11] A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere **only** when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. On its face, the complaint embodied in the ground of appeal sought to be introduced by the amendment does not meet this test because it alleges only an error in the exercise of its discretion by the High Court. Even assuming, however, that such ground correctly formulates the test which would permit interference by this Court, the respondents have got nowhere near to establishing such a ground on the facts before the High Court. No such vitiating error on the part of the High Court was contended for by the respondents in their written or oral argument before this court and none can, on the papers, be found. In fact, I am of the view that the High Court correctly dismissed the application for good and substantial reasons and that both the applications in this Court relating to such a dismissal ought to be refused. The question of the appropriate costs order will be dealt with at the conclusion of this judgment.'

[19] I am persuaded that there is no merit in the submission that this court failed to exercise its discretion judicially. We appreciated that the allegations of fraud against Mr Jenkins are serious and that since 27 July 2022, when Fortuin J struck the urgent application for lack of urgency, he had intended to oppose the rescission application. Therefore, his dilatory behaviour was inexplicable.

[20] Counsel for Mr Jenkins referred us to *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) where that respondent sought a postponement a day prior to the scheduled hearing. The court 'criticised counsel for "doing a disservice to his client, to his honourable profession and to the principles his client seeks to vindicate" [nevertheless the court held that] the issues at stake are too important not to factor them into the equation.'

[21] It is relevant to bear in mind that Mr Jenkins was one of 15 parties and that this was not just a dispute among the members of the Goringhaicona Khoi Khoi about its governance. However, that latter dispute had to be determined to deal with the appeal to which Mr Jenkins was not a party in his personal capacity. I appreciate that Mr Jenkins wants an opportunity to deal with the findings of fraud against him that formed the basis for the rescission application. Those findings will not change on appeal. In any event, Mr Jenkins was aware of the allegations and the need to deal with them since at least July 2022.

[22] We considered the rights of all the parties to the proceedings and that the appeal needed to be dealt with on an urgent basis. There is no merit in the submission that this court was influenced by wrong principles or misdirected itself on the facts. In the circumstances of this matter, Mr Jenkins has failed to show that the court had reached a decision that was unreasonable for a court directing itself to all the relevant facts.

[23] It is common cause that the rescission application is not appealable². Therefore, counsel for Mr Jenkins relied on the declaratory orders for the submission that it would be in the interest of justice to grant leave to appeal. The following declaratory orders formed part of the rescission order:

² *Crockery Gladstone v Rainbow Farms (Pty) Ltd (592118)* [2019] ZASCA 61 (20 May 2019).

'30 (a) It is declared that the 2018 Constitution document, as opposed to the document dated 31 March 2021, of the [Goringhaicona Khoi Khoi] is the valid constitution of the [Goringhaicona Khoi Khoi].

(b) It is declared that the Goringhaicona Khoi Khoi did not authorise the litigation under case number 12994/2021.

(c) It is declared that the first and second respondents are not the duly authorised representatives of [the Goringhaicona Khoi Khoi]...'

[24] On 11 August 2022, the Judge President set the matter down for hearing in the presence of Mr Jenkins who understood that the declarators would be sought. The declarators, if successfully appealed, would not alter the appeal outcome. The interim interdict was set aside on appeal and the construction of the development continued unabated for months. Mr Jenkins alleged that he was in command of the majority of the Goringhaicona Khoi Khoi and so could address the issue in a meeting of the tribe. Mr Katz SC, who appeared with Mr Prinsloo for the applicants in the rescission application, submitted that Mr Jenkins 'is not motivated by a genuine desire to address the interdict or the governance of the Goringhaicona, but it is a personal endeavour...to save his name. That is an abuse of the process.' I agree.

Conclusion

[25] In refusing condonation for the late filing of the answering affidavit and the application for postponement, this court exercised a true discretion. As indicated above, a court of appeal would only be entitled to interfere with the exercise of that discretion if it was done 'capriciously or upon a wrong principle, if [this court] has not brought an unbiased judgment to bear on the question or has not acted

for substantial reasons.' I am persuaded, for the reasons stated above and in the main judgment that this court exercised its discretion judicially.

[26] I am further persuaded that the interest of justice required the court to have regard to the interest of all the parties to the litigation. Mr Jenkins' right of access to the court was not restricted in any way. He had ample time to place his version before court. He must have realised the implications for him personally when the rescission application was served. His right to cultural practice was a consideration but it had to be balanced against the other competing rights. Notably, there was no opposition to the appeal against the order that directed: 'Conclusion of meaningful engagement and consultation with all affected First Nations Peoples as envisaged in the interim and final comments of HWC.' Heritage Western Cape and Western Cape First Nations Collective were parties in the appeal proceedings.

[27] The allegations of fraud were unopposed in circumstances where Mr Jenkins had ample opportunity to deal with it. The last opportunity was the directions hearing on 10 October 2022 when this court afforded Mr Jenkins another opportunity to request a postponement. There comes a time when a litigant cannot hide behind being unrepresented. Counsel for Mr Jenkins submitted that delays are a common occurrence where litigants are legally represented. That is an unfortunate situation; the courts have therefore repeatedly held that there comes a time when a litigant cannot hide behind the dilatory conduct of a legal representative. Mr Jenkins sought an indulgence with no explanation of what he had done to finalise his answering affidavit since July 2022 when he had indicated that he intended to oppose the rescission application. His explanation, tendered in the correspondence referred to above, does not deal with the full period he had to file his answering affidavit. The court has not been told what he did about the affidavit since the urgent application was struck from the roll. His 8-week delay in filing his Notice of Intention to Oppose has

also not been explained.

[28] On 11 August 2022, the Judge President emphasised that the parties should file papers timeously. Mr Jenkins does not explain why he did not tell his opponents when he would file when they asked him. Neither does he say what he did about the affidavit during that time. Instead, he disingenuously submits that he did not know when to file his affidavit. In the circumstances of this matter, tolerance of such behaviour would bring the administration of justice into disrepute.

[29] Setting aside the declarators would have no practical effect on the interim interdict that had been set aside. Mr Jenkins is not precluded from exercising his cultural practices. In the circumstances, his attempt at vindicating his reputation is an abuse of this process. The appeal is moot and it is also not in the interest of justice to grant leave to appeal. The dispute within the Goringhaicona Khoi Khoin is not a reason to grant leave to appeal.

Costs

[30] The applicants in the rescission application did not seek costs. However, they now seek costs on a punitive scale based on the view that Mr Jenkins is abusing this process for personal gain. Although, I consider the application an abuse, I am not persuaded that a punitive costs order is warranted in these circumstances as I intend to grant the costs of two counsel.

Order

[31] I, for the reasons stated above, make the following order:

- (a) The application is dismissed with costs, including the costs of two

counsel.

Baartman J

I concur.

Slingers J

I concur.

Lekhuleni J