IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 1414/2016

Date Heard: 13 October 2016

Date Delivered: 20 October 2016

In the matter between:

SIPHO GCORA	First Applicant
KHUSELWA GOBO-GCORA	Second Applicant
GOBO GCORA CONSTRUCTION AND PROJECT MANAGEMENT CC	Third Applicant

and

NELSON MANDELA MUNICIPALITY	First Respondent
PUBLIC PROTECTOR OF SOUTH AFRICA	Second Respondent

JUDGMENT

EKSTEEN J:

[1] The applicants seek a declaratory order that a judgment delivered by Plasket J on 30 August 2016 be declared null and void and of no force or effect.

[2] The first respondent filed answering papers together with a notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court. In the notice the first respondent stated its intention to raise a question of law. The question of law raised is simply whether I, sitting as a single Judge, have the power in law to declare the judgment of

Plasket J to be null and void and of no force or effect. In his answering papers the first respondent further challenged the applicants' standing in these proceedings.

Background

[3] The first and second applicants were the members of the third applicant, a close corporation. Various disputes arose between the applicants and the first respondent. The applicants referred these issues to the Public Protector for investigation and in due course the Public Protector found in favour of the third applicant in a report entitled "Cost of Deviation". She ordered the first respondent to take certain remedial action in favour of the third applicant.

[4] It is common cause that the estates of the first and second applicants were, in the interim, finally sequestrated on 3 December 2013. Much was made in the papers in the present matter of the sequestration order and the applicants raised numerous arguments in respect of the question whether the order should have been granted at all. As a fact, however, the order remains in place. It has not been set aside and trustees have been duly appointed to the estates of the first and second applicants. It appears to be common cause that no application has ever been made to appeal against the sequestration order. The effect thereof is that the personal estates of the first and second applicants vest in the hands of their trustee and their members interests in the third applicant, being part of their estates, similarly vests in the hands of their trustee (section 20(1)(a) of the Insolvency Act, 24 of 1936).

[5] The third applicant too was placed under provisional liquidation, however, that order was later discharged.

[6] Upon publication of the report of the Public Protector, to which I have referred earlier, the first respondent did not immediately give effect to the findings of the Public Protector and accordingly the applicants launched an application to enforce compliance on the part of the first respondent with the order of the Public Protector. The first respondent, on the other hand, resolved to seek a judicial review of the report of the Public Protector.

[7] The applicants' application was due to be heard by Smith J on 12 April 2016, however, at the hearing the parties reached agreement in respect of the further conduct of the matter. Smith J accordingly made the following order by agreement:

> "1. That the application brought by Applicants under case number 992/2016 is postponed *sine die*.
>
> 2. That the aforesaid application is to be heard simultaneously with the application for review to be brought by the Nelson Mandela Bay Municipality (the Respondent in this application).
>
> 3. That the Nelson Mandela Bay Municipality is directed to institute its proposed application to review and set aside the Remedial Action contained in the report of the Public Protector dated 29th January 2016 by no later than the end of April 2016.
>
> 4. That the Nelson Mandela Bay Municipality is directed to serve such application upon the Applicants in this application, the liquidators of the First Applicant and the Public Protector.
>
> 5. That the Nelson Mandela Bay Municipality is directed to comply with its obligations to promote co-operative governance and inter-governmental relations as enshrined in Section 41 of the Constitution, in pursuing the review application referred to more fully above.

6. That the costs occasioned in this application thus far be reserved."

[8] The first respondent duly launched its review application on 29 April 2016. It cited as respondents the Public Protector, the liquidators of Gobo Gcora Construction and Project Management CC, it being under provisional winding-up at the time, and the trustees of both of the first and second applicants in the present application. The first and second applicants in the present application were not personally cited as parties in the review application.

[9] The launching of the review application prompted the first and second applicants herein to bring an application in terms of the provisions of Rule 30/30A of the Uniform Rules of Court. The Rule 30/30A application sought the following relief:

'1. The review application under case number 1414/2016 be set aside;

2. Alternatively the review application be struck out;

3. Declaring that the Applicant under case number 1414/2016 is in contempt of the order dated 12 April 2016 under case number 992/2016.

4. That the Applicant under case number 1414/2016 is acting in violation of s 41 of the Constitution by approaching the above Honourable Court without raising the issues its wants the above Honourable Court to hear, with the Public Protector first;

5. That the Nelson Mandela Bay Municipality be ordered to comply with the Remedial Action of the Public Protector in "cost of deviation" as it opted to waste all the time it had to engage the Public Protector;

6. That the Nelson Mandela Bay Municipality is [in] contempt of the Public Protector.'

[10] Plasket J was called upon to adjudicate on the Rule 30/30A application. He delivered a reasoned judgment and dismissed the application. It is the dismissal of the Rule 30/30A application which prompts the present application.

Question of law raised

[11] On behalf of the respondent Mr **Rorke SC** argues that the applicants have misconstrued their remedy. He suggests that in the event that the applicants are unhappy with the judgment delivered by Plasket J their relief lies in an appeal against the judgment. This prompted extensive argument in respect of the appealability of the order.

[12] Mr **Gcora**, who appeared in person, submitted extensive heads of argument setting out a considerable volume of material. Mr **Gcora** argues that the judgment of Plasket J is not appealable because it was not final and definitive of the rights of the parties and accordingly it does not constitute a judgment or order. He has referred to an extensive volume of authority commencing with ***Zweni v Minister of Law and Order*** 1993 (1) SA 523 (A) where Harms AJA (as he then was), carefully analysed the provisions of section 20 of the Supreme Court Act and distinguished between judgments and orders, on the one hand, and other decisions of the court. Mr **Gcora's** extensive research correctly sets out the position explained in the ***Zweni*** judgment and numerous judgments which followed upon it.

[13] **Zweni**, however, deals with the provisions of section 20 of the Supreme Court Act of 1959.

[14] The judgment in **Zweni** was not unanimously accepted as inflexible. In **Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service** 1996 (3) SA 1 (SCA) Hefer JA considered the appealability of a refusal by a presiding judge to recuse himself during proceedings. At 10E-F he concluded:

> "On the other hand, because it is not definitive of the rights about which the parties are contending in the main proceedings and does not dispose of any of the relief claimed in respect thereof, it does not conform to the norms in the cited passage from the judgment in *Zweni's* case and thus seems to lack the requirements for a 'judgment or order'. However, the passage in question does not purport to be exhaustive or to cast the relevant principles in stone. It does not deal with a situation where the decision, without actually defining the parties' rights or disposing of any of the relief claimed in respect thereof, yet has a very definite bearing on these matters."

[15] At approximately the same time Nugent J in ***Liberty Life Association of Africa Ltd v Niselow*** (1996) 17 ILJ 673 (LAC) at 676H considered that the question was not whether a decision was appealable but rather when it was, that is whether a particular decision was appealable immediately and in isolation before the proceedings had run their full course.

[16] This reasoning of Nugent J was cited with approval in the Supreme Court of Appeal in ***Beinash v Wixley*** 1997 (3) SA 721 (SCA). In ***Beinash*** Mohamed CJ went on at p. 730B-E to state:

> "This problem often arises when one or other party seeks to appeal against some preliminary or interlocutory decision which is made by a court before it has arrived at a final conclusion on the merits of the dispute between the parties. The approach of the Court in such circumstances is a flexible approach. In the words

of Harms AJA in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531J--532A:

'The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution.'

What the Court does is to have regard to all the relevant factors impacting on this issue. It asks whether the decision sought to be corrected would, if decided in a particular way, be decisive of the case as a whole or a substantial portion of the relief claimed, or whether such decision anticipates an issue to be determined in the main proceedings. The objective is to ascertain what course would best 'bring about the just and expeditious decision of the major substantive dispute between the parties'."

[17] Later, in ***National Director of Public Prosecutions v King*** 2010 (2) SACR 146 (SCA) Nugent JA, in a separate judgment which does not conflict with the main judgment, and with reference to his earlier judgment in ***Liberty Life Association*** *supra* at 676H stated at 166f-167a:

"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 also 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.

…I pointed out in *Liberty Life* that while the classification of the order might at one time have been considered to be determinative of whether it was susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction, between orders that are appealable and those that are not, to one of principle."

[18] Against this background the Superior Courts Act, 10 of 2013 came into effect on 23 August 2013. Section 16(1)(a), in contrast to the Supreme Court Act of 1959 now provides:

"(1) Subject to section 15 (1), the Constitution and any other law-

(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted-

(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17 (6); or

(ii) if the court consisted of more than one judge, to the Supreme Court of Appeal;"

[19] It is apparent from the aforegoing that the scope for appeal under the Superior Courts Act is considerably wider than it was under the Supreme Court Act. Under the Superior Courts Act any decision of a court of first instance is appealable, with leave. What is clearly apparent from the relief sought in the Rule 30/30A application is that a successful appeal against the judgment of Plasket J would bring an expeditious conclusion to the litigation relating to the review application. In these circumstances I consider that the judgment is appealable, provided leave is obtained. The result is, I think, that there is merit in Mr **Rorke's** submission that the applicants have misconstrued their remedy. If the applicants are of the view that Plasket J erred in the conclusion to which he came they ought to seek leave to appeal.

[20] Reverting to the question raised in the Rule 6(5)(d)(ii), I have not encountered any decision where a single judge has declared the judgment of another judge of equal standing to be null and void and neither party were able to refer me to any authority where it has occurred before. There is no precedent for such relief in our common law.

[21] It is not in dispute that the High Court has inherent jurisdiction to regulate its own process and to develop the common law (see section 172 of the Constitution). A court will however be slow to exercise its inherent jurisdiction in order to follow procedures which are not provided for in the ordinary law of procedure (compare ***Krygkor Pensioenfonds v Smith*** 1993 (3) SA 459 (A) at 469G-J). Moreover I do not consider that it would serve the interests of justice to permit a practice to arise where one judge, sitting alone, sets aside the judgment of another purely on the basis that it is considered to be wrong. Such a practise would plunge the litigation process into chaos and no finality would then even be reached. For this reason alone I think the application should be dismissed.

[22] Mr **Gcora**, however, argues that the order made by Plasket J, is purely interlocutory (compare ***Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd*** 1948 (1) SA 839 (A)) and therefore at common law it is susceptible to reconsideration at any time (compare ***Zondi v MEC, Traditional and Local Government Affairs and Others*** 2006 (3) SA 1 (CC) at p. 13 para [30] to p. 14 para [34]. In the circumstances he argues that I am at liberty to set aside the judgment of Plasket J.

[23] In ***Zondi*** the Constitutional Court concluded at p. 14 para [34] as follows:

> "What emerges from our pre-constitutional era jurisprudence is that the general rule that an order once made is unalterable was departed from when it was in the interests of justice to do so and where there was a need to adapt the common law to changing circumstances and to meet modern exigencies."

[24] Whilst the court undoubtedly has the competence to alter a purely interlocutory order in appropriate circumstances it will not do so lightly. (See ***Bell v Bell*** 1908 TS 887 at 894; and ***Sandell and Others v Jacobs and Another*** 1970 (4) SA 630 (SWA) at 634D-E.)

[25] Courts have done so where there have been changed circumstances (compare ***Meyer v Meyer*** 1948 (1) SA 484 (T) and ***Sandell and Others*** *supra*). They have also done so in regulating their own process where the orders relate purely to procedural matters or to execution of judgment (compare ***South Cape Corporation (Pty) Ltd v Engineering Management Service (Pty) Ltd*** 1977 (3) SA 534 (A) at 550H and ***Duncan NO v Minister of Law and Order*** 1985 (4) SA 1 (T) at 3A) or where the court had inadvertently omitted to issue an order which had been fully dealt with in the judgment and sought by the parties (compare ***West Rand Estates Limited v New Zealand Insurance Company Limited*** 1926 AD 173).

[26] The present matter is not such a case. It is apparent from the papers that the applicants seek not only a reconsideration of the order but seek also to strike down the reasoning of Plasket J. Various specific paragraphs in the judgment are attacked for being wrong, or not in accordance with law. Simply put the applicants ask that the judgment be declared null and void because they consider that it was incorrectly

decided. I do not consider that there is any precedent in the common law for such a procedure nor, as stated earlier, would it be in the interests of justice to extend such a remedy. In any event, I consider that the matter was correctly decided on the merits. The application must therefore fail on the merits.

Locus standi

[27] As recorded earlier the Public Protector issued an order that the first respondent give effect to certain specified remedial action. It is apparent from the history of the litigation set out earlier that the first and second applicants litigate herein in their personal capacities and on behalf of the third applicant. As set out earlier the members' interest in the third applicant vests in their respective trustees.

[28] Following upon the final order of sequestration issued in December 2013 the applicants embroiled themselves in a number of civil actions. This prompted an application by the trustees of Penny Pinchers Port Alfred Building Materials Trust to launch an application against the present applicants to prevent them from litigating on behalf of third applicant whilst they are unrehabilitated insolvents. The matter came before Chetty J who made the following order:

> "1. The Second and Third Respondents are hereby interdicted and restrained from:
>
> 1.1 Authorising the initiation, pursuit or defence of any legal proceedings of any nature by the first respondent;
>
> 1.2 Directly and/or indirectly participating in the management of the business of the first respondent in contravention of section 47(1)(b)(i) of the Closed Corporation Act 69 of 1984;
>
> 2. …"

(The first respondent in the application before Chetty J was the third applicant in the present application and the second and third respondents were the first and second applicants in the present application.) The first and second applicants therefore do not have *locus standi* to litigate on behalf of or in the interest of the third respondent.

[29] Plasket J considered their *locus standi* in view of the provisions of the Insolvency Act. He concluded:

> "[18] The result is that Mr Gcora and Ms Gobo-Gcora have been divested of their member's interests and have no standing to represent the close corporation. As they are not vested with the capacity to sue in their own names in terms of any of the subsections of s 23, they have no standing in their personal capacities."

(The reference to section 23 is reference to section 23 of the Insolvency Act, 24 of 1936.)

[30] He found the first and second applicants to be in breach of para 1.1 of the order made by Chetty J and accordingly referred the matter to the Director Public Prosecutions for consideration.

[31] A similar order was made by Roberson J in the matters of ***Gobo-Gcora Construction and Project Management CC, Sipho Gcora and Khuselwa Gobo-Gcora v Cape Building and Truss Supplies and The Sheriff of the High Court*** (case number 2699/2011) on 8 September 2016.

[32] Before me Mr **Gcora** argues that the order made by Chetty J was an interim order only. He is clearly wrong. The order made by Chetty J is, in my view, clear

and unambiguous and is not made pending the occurrence of any future event. It persists for as long as the first and second respondents are unrehabilitated insolvents. Assuming that it was intended to be interim Mr **Gcora** was unable to suggest when it had lapsed.

[33] Mr **Gcora** has further referred me to the judgment in the Supreme Court of Appeal in ***Esorfranki Pipelines v Mopani District Municipality*** (40/13 [2014] ZASCA 21 (28 March 2014)). He contends that on the strength of this decision he and second applicant do have the necessary standing irrespective of section 23 of the Insolvency Act.

[34] ***Esorfranki*** *supra* concerned a review of tender proceedings under the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). An objection was taken to the *locus standi* of the second appellant, ***Cycad Pipelines (Pty) Ltd***. The foundation for the objection was that the bid specifications required a tenderer to have a contractor grading designation of 8CEPE which ***Cycad*** did not have. It was accordingly argued that ***Cycad*** could not have submitted a tender capable of acceptance and could therefore not proceed to contest the award in litigation.

[35] The Supreme Court of Appeal held that ***Cycad*** does have *locus standi* as it sought to vindicate a constitutional right of just administrative action given expression to in PAJA. It was held that its standing is therefore to be determined in terms of section 38 of the Constitution which provision is read into PAJA. (See ***Esorfranki*** *supra* para [16].) The present application is not brought in terms of the provisions of PAJA. Although the applicants raise a number of underlying

constitutional issues the present application is not directed at enforcing rights under the Bill of Rights in the Constitution. Section 38 of the Constitution finds no application in this matter. I do not consider that the judgment in ***Esorfranki*** advances the applicants' position.

[36] In all the circumstances I consider that Plasket J was correct in concluding that the applicants had no standing to bring the application before him and, by parity of reasoning, they have no standing to bring the present application. The present application too is in breach of paragraph 1.1 of the order made by Chetty J.

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

1. The application is dismissed with costs.
2. It is declared that the second applicant is in breach of paragraph 1.1 of the order of Chetty J dated 27 June 2014 in case number 1970/2014.
3. The Registrar is directed to forward a copy of this order to the Director of Public Prosecutions, Eastern Cape.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Mr Gcora, in person

For Respondents: Adv S Rorke, SC instructed by Gray Moodliar Attorneys, Port Elizabeth