

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: **2427/2021**

Reportable:Yes/No

Of Interest to other Judges:Yes/No

Circulate to Magistrates:Yes/No

In the matter between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

IQBAL MEER SHARMA

First Defendant

NULANE INVESTMENTS 204 (PTY) LTD

Second Defendant

ISLANDSITE INVESTMENTS 180 (PTY) LTD

Third Defendant

KURT ROBERT KNOOP N.O.

Fourth Defendant

JOHAN LOUIS KLOPPER N.O.

Fifth Defendant

ISSAR GLOBAL LIMITED

First Respondent

ISSAR CAPITAL (PTY) LTD

Second

Respondent

TARINA PATEL-SHARMA

Third Respondent

JUDGMENT BY:

N. SNELLENBURG, AJ

HEARD:

12 MAY 2022

REASONS DELIVERED ON:

16 MAY 2022

[1] On the extended return date of the rule *nisi* issued by this Court per Naidoo J on 2 June 2021 in terms of section 26 of the Prevention of Organised Crime Act 121 of 1998 [POCA]¹, a substantive application was made for the extension of the rule *nisi* pending ‘prosecution’ of an appeal against the order of CJ Musi JP, delivered on 11 August 2021, which provides as follows:

- “1. BDK Attorneys do not have authority to act on behalf of the third defendant in these proceedings.
2. The directors and or shareholders of the third defendant have no standing to oppose these proceedings without the approval of the Business Rescue Practitioners.”

[2] Ms Ronica Ragavan [Ms Ragavan], in her capacity as director of the third defendant, deposed to the founding affidavit in support of the relief by virtue of a resolution by the Board of Directors of the third defendant.²

[3] On 13 May 2022 I dismissed the application by the Board of Directors [referred to below as the extension application] and reserved the costs.

[4] These are the reasons for the order.

SALIENT BACKGROUND

[5] At commencement of the proceedings, it was established that the third defendant was represented by two separate sets of legal representatives.

¹ Extended return date of the Provisional Restraint Order.

² Annexure RR2 to the founding affidavit.

5.1 The first set of representatives appeared on instructions of the business rescue practitioners [the BRPs] in their capacity as representatives of the company in business rescue, Islandsite Investments 180 (Pty) Ltd.³

5.2 The second set of representatives appeared on instructions of the directors of the third defendant.⁴

[6] The representatives acting on instructions of the Board of Directors made a substantive application for the extension of the return date of the provisional restraint order, whilst the applicant in the restraint application [NDPP] and the set of representatives acting on behalf of the BRPs opposed the extension application.

[7] It is important to understand the purpose of the extension application and the consequences should the extension as sought be granted. The application is not simply an application for extension of the rule *nisi* to a later date for argument of the provisional restraint order (thus a postponement to a fixed date in future when the provisional restraint order would be argued and finalised). The purpose of the application is to seek leave to extend the rule *nisi* pending finalisation of an application for leave to appeal the judgment of Musi JP to the SCA and, if that application is unsuccessful or is successful but the appeal is not upheld by the SCA, then an application for leave to appeal to the Constitutional Court as well as the appeal in that Court if leave is granted. Because a rule *nisi* cannot be extended *sine die*, it would, from a practical point of view, be necessary to extend it from time to time whilst the aforesaid appeal process is pursued. For this reason, the relief sought in the extension application is framed in the manner it is, namely that the rule *nisi* be extended to a date determined by the Court.

³ The BRPs are also joined as fourth and fifth defendants. They appointed Smit Sewgoolam Incorporated (attorneys) to represent them and the third defendant in the restraint proceedings. The aforesaid attorneys in turn instructed senior counsel, Mr Bham assisted by Mr T Scott to appear on behalf of the third, fourth and fifth defendants.

⁴ The board of directors of the third defendant appointed Krause Attorneys Incorporated (who substituted BDK Attorneys who were previously appointed by the board of directors). The first mentioned attorneys instructed senior counsel, Mr Hellens, to appear 'on behalf of' the third defendant.

[8] If the application is successful, the effect of the order would be that finalisation of the provisional restraint order will be postponed for an indefinite period.

[9] The essence of this application revolves around the question of whether the order of Musi JP (referred to in paragraph 1 above) still has efficacy or not, which in turn depends on the question of whether a right to appeal the order of Musi JP exists. If no right to appeal exists, then the further issue arises of whether it is in the interests of justice to grant the extension, nonetheless.

[10] Where an application for leave to appeal is not made within the prescribed time-period, the right to apply for leave to appeal does not exist. In other words, until a court grants condonation there is no right. **Panayiotou v Shoprite Checkers (Pty) Ltd AND Others 2016 (3) SA 110 (GJ)**. An application for condonation does not suspend the efficacy of the court order sought to be appealed. **Myeni v Organisation Undoing Tax Abuse and Another**⁵.

[11] During December 2021 the 'third defendant' filed an application for leave to appeal dated 15 December 2021 accompanied by a condonation application for the late filing of the application for leave to appeal. Ms Ragavan deposed to the affidavit in support of the condonation application.

11.1 Both applications were opposed by the NDPP whilst the fourth and fifth defendants filed a notice to abide the decision of the Court.

11.2 Following allegations by Ms Ragavan in the replying affidavit in the condonation proceedings, the fourth and fifth defendants filed an affidavit to respond thereto.

11.3 The BRPs recorded that they abide the decision of the Court because they do not believe that the application for leave to appeal has any

⁵ (15996/2017) [2021] ZAGPPHC 56 (15 February 2021) paras 23-26.

prospects of success and in a desire to avoid incurring any unnecessary costs in the rescue process.

11.4 The BRPs pertinently denied having authorised the ‘third defendant’ to apply for leave to appeal and thus also denied Ms Ragavan’s allegations to that extent in her replying affidavit.

11.5 The BRPs recorded that they agreed to the directors of the company (third defendant) delivering an affidavit and presenting arguments on the company’s behalf to deal with allegations falling outside their knowledge and allegations accusing the company of criminal wrongdoing. The precise manner in which this would be done was still to be decided. The BRPs however state that they did not authorise Ms Ragavan to represent the third defendant in the proceedings.

[12] On 28 April 2022 Mbhele AJP handed down judgment in the application for leave to appeal, accompanied by an application for condonation and made the following order:

“The application for leave to appeal is dismissed with costs.”

[13] A dispute exists regarding the intention of this court order.

13.1 On the one hand, Mr Hellens argued that although Mbhele AJP did not specifically make an order granting condonation for the late filing of the application for leave to appeal, the Court dismissed the application for leave to appeal on its substantive merits. In doing so condonation was granted by implication. If the Court intended to dismiss the condonation application, the order would have said so. Where an application for leave to appeal is dismissed, the aggrieved party is entitled as of right in terms of the provisions of the Superior Courts Act⁶ to apply for leave to appeal to the SCA⁷ and the

⁶ Superior Courts Act 10 of 2013.

efficacy of Musi JP's order will in such event be suspended⁸ pending the finalisation of the application for leave, and if granted, the appeal itself.

13.2 In opposition, the NDPP contends that considering the judgment the court intended to dismiss the condonation application, in which case the order of Musi JP has efficacy and is not suspended.

[14] The first order of business is to interpret the order of Mbhele AJP. To this end Mr Hellens invited my attention to **Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others**⁹ where Meyer AJA on behalf of the Court, with reference to the dictum in **HLB International (South Africa) v MWRK Accountants and Consultants [2022] ZASCA 52 paras 26-27**, explained the test applicable to the interpretation of court orders as follows:

“[T]he now well established test on the interpretation of court orders is that the starting point is to determine the manifest purpose of the order, and that in interpreting the order the court's intention is to be ascertained primarily from the language of the order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. The manifest purpose of the order is to be determined by also having regard to the relevant background facts which culminated in it being made.”¹⁰

⁷ Section 17(2)(b) provides: 'If leave to appeal in terms of paragraph (a) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.'

⁸ Act 10 of 2013 above, section 18(1).

⁹ (1088/2020 and 1135/2020) [2022] ZASCA 66 (10 May 2022).

¹⁰ Para 42. In *HLB International (South Africa) v MWRK Accountants and Consultants* supra at para 26, Meyer AJA referred to the test enunciated in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) para 13 which was endorsed by the Constitutional Court in *Eke v Parsons* 2016 (3) SA 37 (CC) para 29.

[15] The reasons for Mbhele AJP's order as dealt with in her judgment leave no doubt that she intended to dismiss the condonation application. It is quite clear that the Judge considered the application for condonation and intended to dismiss the same.

“[14] Prospects of success on merits cannot be the only determining factor when considering an application for condonation. The applicant in a condonation application must still explain to the court why there was flagrant disregard of the rules of court. The third defendant failed to give reasons why the rules of court could not be adhered to.”

[16] The Judge dealt with the prospects of success as but one of the factors relevant to the exercise of the Court's discretion when considering an application for condonation. The Judge, on that score, concluded that no prospects of success with an intended appeal would in any event exist.

[17] It is inconceivable, considering the Judge's conclusion that there was no explanation for the flagrant disregard of the rules of court, coupled with the finding that the intended appeal would have no reasonable prospects of success, that she intended to grant condonation.

[18] It follows that Musi JP's order has efficacy.

[19] The result is of course that the directors don't have any authority to act on behalf of the third defendant.

[20] Unless the order of Musi JP is set aside, it must be complied with and may not be ignored.

“For so long as that order stood, it could not be disregarded. The fact that it was a consent order is neither here nor there. Such an order has exactly the same standing and qualities as any other court order. It is *res judicata* as between the

parties in regard to the matters covered thereby. The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165(5) of the Constitution, which provides that an order issued by a court binds all people to whom it applies. The necessary starting point in this case was therefore whether the grounds advanced by the applicants justified the rescission of the consent judgment. If they did not, then it had to stand and questions of the enforceability of the settlement agreement became academic.”¹¹

[21] What remains to be considered, is whether it is in the interests of justice to grant the extension as sought.

[22] Mr Hellens submitted that the interests of justice demand that the extension be granted. For this submission reliance is placed, in summary, on the following considerations:

22.1 The application to the SCA has already been issued. That application not only seeks leave to appeal the order of Musi JP on the basis that a right to appeal exists, but also caters for the eventuality of a court ruling that the condonation application was in fact dismissed by Mbhele AJP.

22.2 The intended appeal has strong prospects of success regardless of the findings by Mbhele AJP.

22.3 In addition to the fact that the application to the SCA has already been issued, that application also contains a request that the SCA hear the appeal (if leave is granted) simultaneously with the appeal in the matter of **Ronica Ragavan and 2 others V Optimum Coal Terminal (Pty) Ltd and Others**.¹² Mr Hellens submitted that although the latter judgment could be

¹¹ *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) para 10.

¹² (52832/2021) [2022] ZAGPJHC 14 (18 January 2022).

said to confirm Musi JP's conclusions, Victor J granted leave to appeal to the SCA in that matter. Victor J held that the Companies Act does not clearly distinguish between the powers of directors sitting on the Board of Directors of a company under business rescue supervision, and the powers of appointed business rescue practitioners. This enhances the prospects that leave will be granted by the SCA.

22.4 The extension sought will not prejudice the relevant parties to the restraint application because the assets will remain subject to the provisional restraint order.

22.5 The refusal of the extension application on the other hand may result in prejudice to not only the directors of the third defendant, but also the other parties to the restraint application.

22.5.1 Concerning prejudice to the directors, it contended that should the application be dismissed, and the appeal eventually succeed, the directors would have been deprived of the right to defend the company against the NDPP's allegations. It would in essence amount to closing the doors of justice for the directors. Reference was made in this regard to the NDPP's argument in the restraint application that the answering affidavit deposed to by Ms Ragavan, and which was filed by the attorneys who were appointed by the Board of Directors, should not be taken into consideration as it constituted an affidavit 'filed by a party who is not a party to the proceedings'¹³. Should that happen, no evidence on behalf of the third defendant regarding the alleged criminal conduct would exist, which would be highly prejudicial to the company as the provisional restraint order will then in all probability be confirmed. If the appeal eventually succeeds, it follows that the affidavit in question would

¹³ To borrow from the NDPP's heads of argument.

have been filed by a party that ought to be a party to the proceedings.

22.5.2 Concerning the prejudice to all the relevant parties to the restrain application, it is contended that should the extension application be dismissed and the provisional restraint order confirmed, but the appeal is eventually successful, these proceedings will constitute a nullity.

[23] On behalf of the NDPP Mr Budlender, assisted by Ms Eastwood, contended that an extension as sought would be inimical to interests of justice and should be dismissed. In summary, the following considerations are relevant:

23.1 The contemplated appeal is without merits. Musi JP's order is not assailable. The application for leave to appeal does not have any reasonable prospects to succeed. The simple fact is that the directors do not have the authority to act on behalf of the company. They are simply seeking to delay finalisation of the application.

23.2 The extension sought will result in the postponement of the provisional restraint order for an indefinite period. In the unlikely event that the SCA does grant leave, the prosecution of the appeal in that forum will take time, so much the more if an appeal will thereafter be pursued in the Constitutional Court (should the SCA dismiss the appeal).

23.3 The NDPP is entitled to finality in these proceedings.

23.4 There is no merit in the complaint that the directors will be denied access to justice. The directors have several options available to them to protect their interests and that of the company, none of which they elected to exercise. These include, amongst others:

23.4.1 The directors have a residual interest and could request leave to intervene in the proceedings in personal capacity. In such event the directors will be able to address any allegations of criminality pertaining to the company.

23.4.2 The BRPs could present the evidence of Ms Ragavan.

23.4.3 The directors could challenge the BRPs' authority directly in the circumstances. They have not done so.

23.4.4 The directors could apply for an order compelling the BRPs to authorise them to defend these proceedings.

Instead of pursuing these avenues, the directors insist that they are authorised to represent the company.

[24] Mr Bham, assisted by Mr Scott, submitted on behalf of the third, fourth and fifth defendant (the company and BRPs) that the extension would be highly prejudicial to the BRPs and the company. In summary, the following considerations are relevant:

24.1 The extension as sought will have 'no end in sight'.

24.2 The third defendant is under business rescue. The longer this situation continues, the more prejudice the company and creditors stand to suffer.

24.3 The BRPs are not able to properly perform their functions whilst the provisional restraint order is in place.

24.4 Due to the provisional restraint order, the BRPs are constrained to defend the restraint application on a restricted fee basis, since they need to apply for the release of funds.

24.5 The interests of the third defendant's creditors who approved a business rescue plan are prejudiced whilst the provisional restraint order remains in place as the plan cannot be implemented.

24.6 It is imperative that the Court adjudicate the issues of procedure and practicality that they have raised in the answering affidavit and heads on behalf of the third, fourth and fifth defendants.

24.7 The matters raised by the directors are matters that the Court can deal with in the restraint application. To this end, Mr Bham submitted that if the request for extension found favour with the Court, the Court should instead of granting the extension, rather consider granting permission that the two sets of representatives may 'argue' the matter on behalf of the third defendant on such conditions as the Court may impose, for example that Mr Hellens be allowed to argue the matter on the basis of the answering affidavit deposed to by Ms Ragavan.

[25] Mr Skhosana on behalf of the first defendant and first to third respondents did not oppose or support the extension application. He submitted that in the event of an extension being granted, the issues between his clients and the third, fourth and fifth defendants should not be separated as suggested by Mr. Budlender.

[26] In my view, when considering the competing interests, the extension would be inimical to the interests of justice.

[27] The fact that the assets will remain subject to the provisional restraint order for an indefinite period can hardly be argued not to be prejudicial to the NDPP, third

defendant or the BRPs. The directors do not dispute that the BRPs are responsible, amongst other matters, to implement the business rescue plan and to manage the company. It cannot be contentious that their ability to perform these functions are affected by the provisional restraint order. Whether that is a valid consideration in relation to a restraint order in terms of POCA is an alive issue on the papers in the restraint order between the NDPP and BRPs, who act on behalf of the company, that needs to be resolved in the interest of all concerned, including the third defendant. This issue does not only affect the rights of the NDPP and thus public interest, the BRPs and the company. The interests of the creditors of the third defendant are also directly implicated. The parties are entitled to have the dispute ventilated so that they can obtain clarity, regardless of the outcome. The parties have a right to finality in this litigation.

[28] The applicant for the extension did not adequately address the prejudice that the NDPP or BRPs take issue with. In addition, the issue of prejudice to other interested parties, as dealt with above, have not been addressed by applicant for the extension.

[29] Dismissal of the extension application is not akin to depriving the directors of the right to defend the company against the NDPP's allegations. The directors have remedies available to them. The most obvious is the fact that the directors have always been entitled to apply for leave to intervene in the restraint proceedings as result of their residual interests to address any allegations of wrongdoing or criminal conduct attributed to the company.

[30] As far as the reliance is placed on possible findings in the restraint application regarding admissibility of the answering affidavit deposed to by Ms Ragavan, that is an issue that needs to be dealt with by the Court hearing the restraint application. I am not called upon, nor is it desirable to express any opinion on the matter. As stated above, the directors have remedies to ensure that the worst-case scenario, which is proposed as possible prejudice if the extension is not granted, does not eventuate.

[31] The order of Musi JP is extant and final in its effect. At best for the applicant in the extension application, the court order may or may not be the subject of an appeal in future. Even then the outcome on appeal, should there be one, is at best uncertain.

[32] One issue remains to be considered.

[33] The extension application was issued by Krause Attorneys Incorporated through their Bloemfontein correspondent on behalf of 'the applicant'. The notice of motion is silent on who the applicant in the extension application would be. The founding affidavit in support of the relief sought in the extension application is deposed to by Ms Ragavan who states that she is instructed to 'bring' the extension application by resolution of the Board of Directors of the third defendant on the third defendant's behalf. Ms Ragavan appends the resolution to defend the restraint application passed on 4 August 2021 to the founding affidavit as annexure RR1, as well as a resolution passed on 10 May 2022, authorising Krause Attorneys Incorporated to act on behalf of the third defendant as annexure RR2.

[34] The BRPs did not make the extension application, nor did they authorise Krause Attorneys Incorporated (or for that matter the correspondent attorney appointed by Krause Attorneys Incorporated) to make the extension application on behalf of the third defendant.

[35] From the arguments for the extension I had no doubt that it was indeed the directors who sought the extension to challenge the findings of Musi JP. It is after all the directors who take issue with the finding that neither they nor the shareholders of the third defendant have any authority to act on the third defendant's behalf in the restraint proceedings without the approval of the Business Rescue Practitioners.

[36] My difficulty arises from the loose use of the term 'on behalf of the third defendant'. The authority application revolved around the question of who has the authority to act on behalf of the company (third defendant) in the restraint application. In

other words, the question of whether the directors retained authority to defend the restraint application regardless of the fact that the third defendant was placed under business rescue supervision or do the BRPs have exclusive authority to represent the third defendant and appoint attorneys to oppose the restraint application or authorise the directors to defend the aforesaid application.

[37] The directors require the extension of the rule *nisi* to enable them to pursue the appeal against the order of Musi JP. As matters stand, they do not have any authority to act on behalf of the third defendant in the restraint proceedings without approval of the BRPs. They also lack authority to act on behalf of the third defendant in these proceedings.

[38] When the parties addressed me on the issue of costs of the extension application, after I dismissed the application, Mr Hellens however submitted that the directors were not a party to *these* proceedings.

[39] Insofar as the directors do not have the authority to act on behalf of the third defendant, it could only be them who made the extension application.

[40] Insofar as the directors purported to act on behalf the third defendant when making the extension application, they would not have any standing to do so considering my findings above. On that basis the application also stands to be dismissed.

[41] In the premises the following **order** was made:

1. The application by the Board of Directors of the third defendant for extension of the return date of the Provisional Restraint Order is dismissed.
2. The costs of the application are reserved.

APPEARANCES

On behalf of the Applicant in the extension application:

Adv. M.R. Hellens SC

Instructed by:

Krause Attorneys Incorporated (Honey Attorneys, Bloemfontein)

On behalf of the Applicant in the restraint application:

Adv. G.M. Budlender SC, with Ms. J. Eastwood

Instructed by:

The State Attorney, Bloemfontein

On behalf of the 3rd, 4th and 5th Defendants in the restraint application:

Adv. A.E. Bham SC, with Adv. T. Scott

Instructed by:

Smit Sewgoolam Incorporated (McIntyre Van der Post, Bloemfontein)

On behalf of the 1st Defendant and 1st to 3rd Respondents in the restraint application:

Adv. M.G. Skhosana

Instructed by:

Forbay Attorneys Incorporated (Gcasamba Incorporated, Bloemfontein)