



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case number: 60617/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED: YES

In the matter between:

K MALAO INC

Applicant

(Applicant in the application for leave to appeal)

and

INVESTEC BANK LIMITED

First Respondent

(Respondent in the application for leave to appeal)

THE ROAD ACCIDENT FUND

Second Respondent

(Respondent in the application for leave to appeal)

THE SHERIFF FOR SANDTON SOUTH

Third Respondent

CITY OF JOHANNESBURG

Fourth Respondent

(Respondent in the application for leave to appeal)

APPLICATION FOR LEAVE TO APPEAL

BASSON J

Introduction

[1] This is an application for leave to appeal against the order and judgment of this court made on 26 November 2020:

“1. In respect of the 1st and 2nd respondents:

The matter is held to be not urgent and is therefore struck from the roll with costs (in respect of each of the two respondents) *de bonis propriis* on the scale as between attorney and client against Mr Kabelo Malao of Messrs K Malao Inc. Such costs to include the costs consequent upon the employment of two counsel.

2. In respect of the 4th respondent the following order is made:

2.1 The application is dismissed with costs *de bonis propriis* on the scale as between attorney and client against Mr Kabelo Malao of Messrs K Malao Inc.

2.2 The attachment of the fourth respondent's bank account, held at Investec Bank is irregular and is hereby set aside.

2.3 The Sheriff of the High Court, Sandton South, is ordered to immediately and without any delay repay all amounts attached and paid into its Trust Account held at Standard Bank, with account number 012[...] with branch code number 012345, under case number 359[...], to the 4th respondent's Investec bank account.”

[2] Although the applicant does not take issue with the order in respect of urgency, it does take issue with the remainder of the order and

judgment. All in all, the applicants listed more than 30 grounds of appeal.

- [3] It is, in my view, not necessary to deal with each and every ground of appeal in detail as I am of the view that the entire application for leave to appeal is ill-founded and not supported in either fact or law and moreover, not supported by the papers.
- [4] It is suffice to deal with the following four issues in broad terms. Firstly, the order (“order 1”) relating to urgency and the striking off of the matter with costs *de bonis propriis* on a scale as between attorney and client against Mr Malao which costs include the costs consequent to the employment of two counsel in respect of Investec and the Road Accident Fund (“the RAF”) respectively. Secondly, the contention that this Court erred in admitting the answering papers filed on behalf of the respondents. Thirdly, the order granted in favour of the fourth respondent (“the City of Johannesburg” – “order 2”). Fourth, the costs order.

Order 1

[5] Order 1 provides in respect of Investec and the RAF that the matter is not urgent. The matter was struck with costs *de bonis propriis* on a scale as between attorney and client against Mr Malao which costs include the costs consequent to the employment of two counsel in respect of Investec and the Road Accident Fund (“the RAF”) respectively.

[6] The applicant is not appealing the order in respect of urgency but is appealing the costs order.

[7] Order 1 is not appealable: Firstly, this order is not appealable as it is interlocutory in nature and effect. The merits of the claim against Investec and

the RAF remain alive and will be dealt with in the normal course.¹ Secondly, the order as to punitive costs was made in the discretion of the Court.

The answering affidavits filed on behalf of Investec, the RAF and the City of Johannesburg

[8] The applicant takes issue with the fact that the Court admitted the answering papers filed by these three respondents.

[9] This application was launched on 17 November 2020. In the notice of motion, the respondents were granted an opportunity to give notice of their intention to oppose no later than 18 November 2020 at 14H00 and to file their answering affidavits by no later than 10H00 on 19 November 2020. The urgent application was set down for 24 November 2020 but was only heard by direction of the Court on 26 November 2020.

[10] Despite the fact that the papers filed on behalf of the applicant comprise approximately 595 pages (with the annexures alone comprising almost 570 pages), the respondents were placed under severe time pressure to file their answering affidavits. Investec took issue with the severe truncated time periods and also took issue with the fact that the state of the annexures to the founding affidavit left much to be desired. Some annexures referred to in the founding affidavit are either missing or have not properly been marked in accordance to what has been set out in the founding affidavit. Some pages are also missing in the annexures. Regarding the severely truncated timeframes within which it had to file its answering papers, Investec submitted that it was severely prejudiced thereby because it did not have sufficient time to answer to the application. Although Investec duly gave notice of its intention to oppose on 18 November 2020, it only managed to serve and file its answering affidavit on 20 November 2020. The Road Accident Fund (“the RAF”) and the City of Johannesburg only managed to file their answering affidavits a few days later.

¹ See *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE) at 243A – 244A and *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A) at 531I.

[11] The respondents have clearly been afforded very little time to file their answering affidavits. Although it is accepted that severe truncated time limits may be necessary where the facts of a particular matter so require, no cogent reasons are advanced in the papers in this matter for the necessity of such extreme truncated time periods.

[12] This matter is not urgent (subject to what has been found in respect of the City of Johannesburg). In light of the fact that the matter is not urgent and in light of what Investec states in its answering affidavit about the state of the applicant's papers, Investec cannot, in my view, be blamed for not having been able to adhere to the strict time periods set by the applicant for the filing of answering affidavits.

[13] The setting of time periods in urgent applications for the filing of papers is dictated by the facts. The Court in *Luna Meubel Vervaardigers (Edms) Bpk v Makin And Another (t/a Makin's Furniture Manufacturers)*² made it clear that practitioners should take cognisance of the facts of a particular matter and of the considerations of urgency in setting down a matter in the urgent court. The notice of motion should thus be tailored with due consideration to the degree of urgency required in bringing the application.

[14] This was clearly not done in this matter. There existed no reason for the extreme urgency within which this application was brought and for affording the respondents such a short time within which to file their answering affidavits. The Rules are "*not an end in themselves*" as was pointed out by the court in *Federated Trust Ltd v Botha*.³ Parties cannot tweak the Rules to suit their own agenda. The court in *Federated Trust*⁴ pointed out that where a party "*has failed to comply with requirements of the Rules or an order made in terms thereof and prejudice has thereby been caused to his opponent, it should be the court's endeavour to remedy such prejudice in a manner appropriate to the circumstances, always bearing in mind the objects for which the Rules were designed*". Therefore, just as it is

² 1977 (4) SA 135 (W).

³ 1978 (3) SA 645 (A).

⁴ *Ibid* at 654E-F.

for a Court to decide whether a matter is really urgent⁵ and whether the circumstances warrant a departure from the Rules, it is also, in my view, for a Court to decide whether or not to allow a party to file an answering affidavit which does not comply with the truncated time periods stipulated by an applicant in its notice of motion. In exercising a discretion, a court must always be mindful of the fact that litigants are entitled to the right to a fair hearing. Where a litigant will suffer prejudice as a result of truncated time periods set by a litigant in urgent proceedings and which may result in a party being deprived of the right to a fair hearing, a court will be entitled to come to the assistance of such party.

[15] It is a well-established principle that the High Court has the inherent jurisdiction to prevent the abuse of its processes. As far back as 1927 the Court in *Hudson v Hudson*⁶ pointed out that –

“Every court has the inherent power to prevent an abuse of the machinery provided for the purpose of expediting the business of the Court.”

The inherent jurisdiction of the Superior Courts to protect their own processes is now recognised in section 173 of the Constitution:⁷

⁵ *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE) at 243G – 244A: “In any event, the decision as to whether a case should be heard as a matter of urgency amounts to the exercise of a judicial discretion. That is clear from the wording of Rule 6(12)(a), which reads as follows:

‘In urgent applications a Court or a Judge *may* dispense with the forms and service provided for in these Rules and *may* dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practical be in terms of these Rules) *as to it seems meet*.’

(My italics.)

It is trite law that an appellate tribunal will not readily interfere with the exercise of judicial discretion unless it is shown that it was exercised capriciously or without grounds.

In my judgment at the time I dealt with the question of urgency. On this issue Harms in his work *Civil Procedure in the Supreme Court* at 180 para G4 said the following:

‘There are degrees of urgency. Some matters may be so urgent as to necessitate the hearing at once, albeit at night or during the weekend and may even be so urgent that no time is available to prepare any documents, in which case *viva voce* evidence may be heard. Others again, whilst they may be such that the time limits imposed by the Rules may be ignored, may not be so urgent as to require a hearing out of normal Court hours.’

In the exercise of my discretion I decided to hear the application as a matter of urgency. I took into account the fact that the papers were served on Lubambo and that Lubambo had the opportunity to oppose the application and to file opposing affidavits. There was even enough time for the church to file replying affidavits.”

⁶ 1927 AD 259 at 267.

“The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process.”

[16] For these reasons, this Court exercised its discretion and allowed Investec to place its answering affidavit before the Court.

[17] In terms of the answering affidavits filed by the RAF and the City of Johannesburg, the same considerations as set out in respect of Investec’s answering affidavit, apply. As far as the RAF is concerned, there is the additional claim made by the RAF that it had to obtain a copy of the application from Investec’s attorneys. Mr Malao, according to the RAF, also refused to provide the RAF’s attorney access to CaseLines until the Saturday afternoon before hearing of the application.

[18] Taking into account all of these factors, there is, therefore no reason why this Court ought not to have exercised its discretion to also allow the RAF and the City of Johannesburg to place their affidavits before this Court.

[19] The applicant also advances as one of its grounds of appeal that this Court should have granted the applicant an opportunity to file a reply. This is not correct. The applicant made no request for a postponement and made no request to file a replying affidavit. The applicant chose the time frames within which this matter should be brought before the court. Moreover, the applicant chose to persist with its application on the date of the hearing.

The City of Johannesburg: Order 2

[20] The applicant takes issue with the order granted in favour of the City of Johannesburg, particularly the fact that the Court granted the order in the absence of a formal counter-application on behalf of the City of Johannesburg.

⁷ Act 109 of 1996.

[21] There is no merit in any of these grounds for leave to appeal. The facts placed before the Court by the City of Johannesburg regarding the three Investec accounts, stand uncontested. The applicant's contention that this Court erred in ordering the release of the funds belonging to the City of Johannesburg without satisfying itself as to whether the amounts belonged to the RAF or the City of Johannesburg is therefore incorrect. Also, the contention that the Court erred in accepting the explanation that the Investec accounts were opened to compensate motorists whose vehicles were damaged on the city's roads similarly is incorrect. To restate, the applicant did not file a replying affidavit. The City of Johannesburg's contentions regarding the three Investec accounts therefore stand uncontested.

[22] Further, I am in agreement with the contention advanced on behalf of the City of Johannesburg that the applicant, in any event, did not disclose a cause of action in its founding affidavit against the City of Johannesburg. The cause of action as set out in the applicant's founding affidavit is premised on an agreement purportedly concluded between the applicant and Investec. The City of Johannesburg was not party to this agreement. Therefore, the applicant's papers do not disclose a cause of action between the applicant and the City of Johannesburg. Also, the RAF is the debtor to the applicant's alleged clients, not the City of Johannesburg. The City of Johannesburg is not a debtor to the applicant nor to the applicant's clients. This, as argued by the City of Johannesburg, means that the attachment of the City of Johannesburg's bank accounts in these circumstances is impermissible in law as no debtor/creditor relationship exists between the applicant and the City of Johannesburg.

[23] Regarding the submission that the Court erred in granting the order in the absence of a counter application, I am also of the view that this ground has no merit.

[24] Having regard to the facts, the applicant had no right in law to attach the bank account of the City of Johannesburg. The City of Johannesburg explains in its papers that the funds held in these accounts were derived

through various revenue generating mechanisms of the City of Johannesburg, and that these funds are public funds which exist for the purposes of ensuring that the City of Johannesburg meets its legislative and constitutional mandates of service delivery. The uncontested facts are that these funds were erroneously paid out from the City of Johannesburg's accounts to the Sheriff (the third respondent).

[25] The fact that the City of Johannesburg did not launch a formal counter-application seeking an order that the funds be returned to it, does not, in my view, prevent this Court from granting an order that the funds be returned to the City of Johannesburg. The issue of the impermissible attachment of the three Investec accounts held by the City of Johannesburg is pertinently raised on the papers. Moreover, the City of Johannesburg expressly states in its papers that the funds urgently needed to be returned to it.

[26] I am therefore not persuaded that it was impermissible for the Court to have granted the order in light of what is contained in the answering affidavit of the City of Johannesburg and the express request that the funds urgently be returned to it. What the applicant did in this matter (to borrow words from the Supreme Court of Appeal in the recent judgment of *Gobela Consulting CC v Makhado Municipality*⁸) amounted to “*impermissible self-help*”. There exists, in my view, no reason, not to have ordered that the applicant return public funds it was not entitled to in the first place.

[27] The conduct of the applicant *vis à vis* the City of Johannesburg and the relief sought against it, is clearly an abuse of process. Where a litigant (such as in this matter) abuses this Court's processes, a Court is entitled to protect and regulate its own process and make an appropriate order to prevent or minimise the injustice inflicted upon a party. I am however, mindful that this is a discretion that should be exercised with caution. This instance, however, warrants interference by this Court. As pointed out by the Court in *Stanford v Haley*:⁹

⁸ [2020] ZASCA 180 at para [22].

⁹ 2004 (3) SA 296 (C) at para [8].

“[8] In terms of s 173 of the Constitution the High Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interest of justice. It has an inherent jurisdiction to control its own proceedings and as such has power to dismiss a summons or an action on account of the delay or want of prosecution. (Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th ed at 547; *Hunt v Engers* 1921 CPD 754; *Western Assurance Co v Caldwell's Trustee* (*supra* at 272).) The Court will exercise such power sparingly and only in exceptional circumstances because the dismissal of an action seriously impacts on the constitutional and common-law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial. The Court will exercise such power in circumstances where there has been a clear abuse of the process of Court. (*Kuiper and Others v Benson* 1984 (1) SA 474 (W) at 477A; *Molala v Minister of Law and Order and Another* 1993 (1) SA 673 (W); *Western Assurance Co v Caldwell's Trustee* (*supra* at 271).)

[28] In *Riordan v First National Bank Limited and others*¹⁰ the Court similarly set aside the attachment of a bank account that was done invalidly. The Court in that matter set aside the attachment and similarly ordered that the amounts attached be repaid:

“[1] This application, brought on urgent basis, concerns the validity of the attachment of the applicant's movable incorporeal property in terms of Rule 45(8)(c) of the Uniform Rules. The movable property is in the form of funds in a Platinum Cheque Account held by the applicant at the First Respondent.

.....

[6] Based on the above common cause facts, the only pertinent issue for determination in this application is the question whether the attachment was served on the applicant and/or whether it is valid and regular. For present purposes, all the other issues raised in the papers and in argument, such as why the applicant did not first approach the court for the variation of the Settlement Agreement before ceasing to pay the maintenance, and whether the applicant was in arrears when the writs of execution were issued etc, do not have to be determined in these urgent proceedings.

¹⁰ [2014] ZAGPJHC 195 (1 September 2014).

[7] The obvious starting-point is the provisions of Rule 45(8)(c) of the Uniform Rules of Court. However, prior to dealing with the latter Rule in full, mention should be made of one general practice. This is that if incorporeal property, whether movable or immovable is to be attached, it may be so attached without the necessity of a prior application to Court 1. (See in this regard *Ormerod v Deputy Sheriff, Durban* and LAWSA 3 .

[9] The provisions of Rule 45(8)(c) make it perfectly clear and peremptory that the attachment of incorporeal property, such as in the instant matter, (funds in a bank account), shall only be complete when notice of the attachment has been given in writing by the Sheriff to all interested parties. (See *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A) at 683C-D, where the peremptory nature of a Court Rule was discussed.) There is no doubt that in the instant matter, the applicant is an "*interested party*". See for example, *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd*, in the context of the Mineral and Petroleum Resources Development Act 28 of 2002. *In my view, conduct which is clearly mala fide and not in compliance with this rule for whatever flimsy reasons and an abuse of court process, ought not to be countenanced by the Courts. The applicant is clearly an interested party since it is his account and funds which have been attached*¹¹.

.....

CONCLUSION

[11] In applying the above principles, and on a proper interpretation of the provisions of Rule 45(8)(c), and based on the largely common cause facts of this matter, I conclude that the attachment was irregular and invalid. There was no notification of the attachment given to the applicant in writing. The contentions of the second respondent to the contrary are without any merit. On her own version, on 26 and 27 June 2014, the Sheriff attended at the applicant's place of residence, and was advised allegedly by the security guards at the gate that the applicant was not there. At the applicant's place of employment, the Sheriff was allegedly informed that the applicant was abroad. There is no evidence of this before me. To compound matters, the Sheriff's returns of service in executing the writ on the bank on 24 July 2014 and on 18 August 2014 both read that:

¹¹ My emphasis.

"The attachment is not yet completed as satisfaction of the writ was not demanded from the defendant (please favour me with the defendant's/plaintiff's address particulars)."

The reference by the Sheriff to *"the plaintiff's address particulars"*, in the return of service was clearly incorrect. It was only on 22 August 2014 that the Sheriff served the writ and notice of attachment on the applicant personally at his place of employment. The founding affidavit was commissioned on 20 August 2014, and the notice of motion was issued by the Registrar of this Court the following day, i.e. 21 August 2014. On these facts, the application must succeed."

Costs

[29] The applicant, as pointed out in the judgment, is a firm of attorneys. It is clear from the papers that Mr. Malao is the driving force behind the launch of this urgent application. Notwithstanding the fact that Mr. Malao was informed on 16 November 2020 by Investec what the status of the various accounts were, Mr. Malao nonetheless decided to forge ahead with a voluminous application that is not urgent in the first place. Mr Malao's threatening conduct towards the deponent of Investec's answering affidavit, is further unacceptable. He, as an officer of this Court, ought to have known that bringing this application constituted an abuse of process. He further must have known that his conduct would cause substantial costs to all the respondents.

[30] Costs falls within the discretion of a court, provided that such discretion must be exercised judicially.¹² In *Kruger Bros & Wasserman v Ruskin* the Court held that –

"the rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission."¹³

¹² See *Ferreira v Levin and Others; Vryenhoek & Others v Powell NO & Others* 1996 (2) SA 621 (CC).

¹³ 1918 AD 63 at [69].

[31] A Court, exercising a discretion, can also grant a punitive costs order in cases of unreasonable litigation. Where the driving force behind such unreasonable litigation is an officer of this court, this court is furthermore entitled to show its displeasure by granting a costs order *de bonis propriis*.

[32] In *Hotz and Others v University of Cape Town*¹⁴ the Constitutional Court, in considering the discretion of the High Court on the issue of costs, stated that:

“A cautious approach is, therefore, required. A court of appeal may have a different view on whether the costs award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court’s exercise of discretion.”

[33] Having regard to the above, I am not persuaded that another court will find that this Court erred in ruling on costs as it did.

Conclusion

[34] Having considered all the grounds for application for leave to appeal, I am of the view that the application has no merit. Section 17(1)(a)(i) of the Superior Courts Act¹⁵ has raised the threshold for granting leave to appeal. Bertelsmann J in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*¹⁶ explains how the Superior Courts Act has raised the bar for granting leave to appeal:

“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 343H. The use of the word

¹⁴ 2018 (1) SA 369 (CC) at para 28.

¹⁵ Act 10 of 2013.

¹⁶ 2014 JDR 2325 (LCC) at para 6.

"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] The Supreme Court of Appeal in *Smith v S*¹⁷ also had occasion to consider what constituted reasonable prospects of success in section 17(1)(a)(i):

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[36] There must therefore exist more than just a mere possibility that another court will find differently on both the facts and the law.

[37] In conclusion, I am not persuaded that there are reasonable prospects that another court will come to a different conclusion. The application for leave to appeal is therefore dismissed with costs.

Order

[38] The application for leave to appeal therefore is dismissed with costs, such costs to include the costs consequent to the employment of two counsel where so employed.

¹⁷ 2012 (1) SACR 567 (SCA) at para 7.

AC BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 January 2021.

Case number : 60617/2020

Appearances

For the Applicant : Adv CN Mosala

(In the application for leave to appeal)

Instructed by : K Malao Incorporated

For the 1st Respondent : Adv GB Rome (SC)

Adv SL Mohapi

Instructed by : Werksmans Attorneys

For the 2nd Respondent : Adv R Schoeman

Instructed by : Malatji & Co Attorneys

For the 4th Respondent : Adv C Gibson

Instructed by : Moodie and Robertson Attorneys

Date of Judgment : 6 January 2021