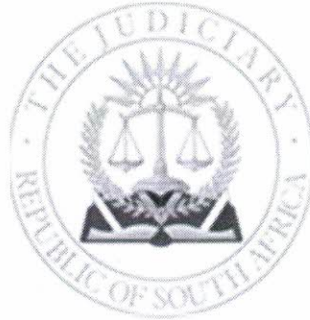


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA



CASE NO.: A369/19 & A372/19

|                                                                                    |                                                  |
|------------------------------------------------------------------------------------|--------------------------------------------------|
| (1)                                                                                | REPORTABLE: <del>YES</del> / NO                  |
| (2)                                                                                | OF INTEREST TO OTHER JUDGES: <del>YES</del> / NO |
| (3)                                                                                | REVISED.                                         |
| <u>31.05.2021</u>                                                                  |                                                  |
|  |                                                  |

In the matter between:

POLOKWANE 28 JOINT VENTURE

First appellant

MATOME MAPONYA INVESTMENTS

Second appellant

THE TRUSTEES FOR THE TIME BEING OF THE  
RASADRI BELEGGINGSTRUST

Third appellant

and

DEVELOPMENT BANK OF SOUTHERN AFRICA  
LIMITED

Respondent

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JUDGMENT

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van der Westhuizen, J (Hughes, J. and Manamela, AJ., concurring)

- [1] This is an appeal to the Full Court of this Division in respect of a judgment by a single judge, sitting as a court of first instance in an opposed application, leave to appeal having been granted by the court *a quo*.
- [2] Central to the appeal are the orders granted by the court *a quo* in what could best be described as a comedy of errors in the adjudicating upon the application by the court *a quo* and to which the parties were not blameless themselves. Furthermore, in the appeal itself, the parties were adamant to perpetuate the comedy in seeking the respective particular relief they sought, whilst not addressing the true issue that gave rise to the appeal in the first instance.
- [3] From a clear and purposive reading of the appeal record, it is gleaned that the procedure followed by the court *a quo*, when hearing the application before it, was non-procedural and inappropriate for what follows.
- [4] The respondent (the applicant in the court *a quo*) launched an application for re-payment of an amount that was lent and advanced to the first appellant, the Joint Venture (the first respondent in the court *a quo*). The second and third appellants (first and second respondents in the court *a quo*) were the partners of the first appellant.
- [5] In response to the said application, the first and second appellants filed a notice in terms of the provisions of Rule 6(5)(d)(iii) of the Uniform Rules of Court. That sub-rule provides:

*“Any person opposing the grant of an order sought in the notice of motion must-*

*(i) ...;*

*(ii) ...;*

(iii) *If he or she intends to raise any question of law only he or she must deliver notice of his or her intention to do so, within the stated in the preceding paragraph, setting forth such question."*

- [6] No answering affidavits were filed in the prescribed time period by any of the appellants in response to the founding affidavit. The first and second appellants merely filed the Rule 6(5)(d)(iii) notice. Following on the receipt of the notice in respect of the point of law taken, the respondent filed a supplementary affidavit in response to the said point of law taken.
- [7] Shortly before the hearing of the matter in the court *a quo*, the third appellant filed an answering affidavit in response to the founding affidavit. This was several months after the launch of the said application for re-payment of the monies lent and advanced. The third appellant's answering affidavit was accompanied by a conditional application for the condoning of the late filing of the said answering affidavit, as well as an application for the postponement of the hearing of the application for re-payment of the amount lent and advanced.
- [8] When the matter was called in the court *a quo*, and during the opening address on behalf of the respondent, the applicant in the court *a quo*, made the submission that the main application was ripe for hearing, but that there were two applications by the third respondent that required consideration. The court *a quo* indicated that it was not aware of the belated application for postponement by the third respondent. It was further brought to the court *a quo*'s attention that the first and second appellants wished to address the court on certain issues. Counsel for the first and second appellants raised the issue that the status of the so-called supplementary affidavit by the respondent required consideration and a ruling to be pronounced on the status thereof, before the first and second appellants were to respond thereto. On behalf of the third

appellant the court was referred to the application for postponement and to the conditional application for the condoning of the late filing of the answering affidavit by the third appellant.

- [9] The court *a quo* clearly indicated that it wished to consider the application for postponement. The court *a quo* further accepted from the bar, heads of argument prepared by the respondent in respect of the third appellant's application for postponement and adjourned to consider those papers. When the court resumed, it proceeded to pronounce upon its ruling on the application for postponement without hearing any argument on behalf of the third appellant, or any of the other parties, on the application for postponement. In its ruling it merely referred to the respondent's heads of argument on that issue. The court *a quo* then proceeded to dismiss the application for a postponement summarily.
- [10] When counsel for the respondent enquired as to whether the ruling in respect of the third appellant's application for leave to file an answering affidavit was included in the ruling, the court *a quo* summarily, and without providing any reasons therefor, dismissed that application as well. The court *a quo* then addressed counsel for the respondent in respect of its supplementary affidavit and indicated its view on whether the respondent needed that affidavit, as it was of the view that it did not take what was contained in the founding affidavit any further. Furthermore, the first and second appellants were not granted an opportunity to argue the points of law in respect of the main application, nor the application for leave to file an answering affidavit in respect of the supplementary affidavit by the respondent.
- [11] Counsel for the respondent commenced to address the court *a quo* on the merits of the main application when counsel for the third appellant interjected and drew the court's attention to the fact that the third

appellant was not granted the opportunity of addressing that court on the merits of the application for a postponement, nor of the issue for leave to file an answering affidavit to the founding affidavit. The approach by the court *a quo* to that point of order is startling. The court *a quo*'s retort was merely "[t]hen consider what I have said up to now is a prima facie view. If you want to argue it, please do". The content and context of that passage is the crux of this appeal.

[12] The court *a quo* did not recall its earlier ruling. It merely granted the third appellant an opportunity to argue the postponement application, if it so wished. The court *a quo*'s indication of its *prima facie* view is of no consequence. From the content and context of the afore quoted passage the following flows: it has already pronounced upon the application; it would entertain argument thereon, if so insisted upon; it gave no indication that it would reconsider the already pronounced finding. At best the court *a quo* gratuitously afforded the third appellant the opportunity to address that court on the issue of the postponement, if it so wished. That approach does not translate into a recalling of the order already granted, neither that a reconsideration of the granted order would follow. The "*prima facie* view" was clearly a final view on the part of the court *a quo*, clearly cast in stone, hence no recalling of the order granted.

[13] When the court *a quo* pronounced upon the application for postponement immediately when the hearing resumed, and only considered the heads of argument by the applicant in the court *a quo* on that issue, and without hearing argument by the third appellant, the court *a quo* was *functus officio*.<sup>1</sup> None of the acknowledged exceptions to the general rule of a final pronouncement apply in the present instance. Furthermore, what transpired after the court *a quo* was called to order,

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<sup>1</sup> *Firestone South Africa (Pty) Lt v Gentiruco A.G.* 1977(4) SA 298 (AD) at 306F-H

clearly indicates that that court at no stage considered to recall the granted order, whether in terms of the provisions of Rule 42 of the Uniform Rules of Court, or the common law, or as an extended exception to the general rule of being *functus officio*. The travesty of justice was merely perpetuated when the court *a quo* gratuitously granted the third appellant the opportunity to argue its application for a postponement, if it so wished. The order stood until set aside or rescinded, or for that matter recalled.<sup>2</sup> The receiving of argument on behalf to the first and second appellants after the fact, is further of no consequence.

[14] It follows that the appeal stands to succeed.

[15] As recorded earlier, the comedy of errors was perpetuated in this court in that the appellants sought that once the appeal succeeds, this court should grant the relief sought before the court *a quo*. The fallacy of that approach lies in the trite principle that this court, sitting as a court of appeal, cannot grant orders as a court of first instance, in particular where the merits of the application for a postponement and the application for leave to file an answering affidavit have not been adjudicated upon by a court sitting as a court of first instance. Nor where the merits of the Rule 6(5)(d)(iii) were not considered. The only order that this court of appeal may grant is one of upholding the appeal, setting aside the orders granted by the court *a quo* and remitting the matter back to the court of first instance, preferably to a different constituted court, to hear the matters *de novo*.

[16] There remains the issue of costs. No cogent reasons were advanced why the general rule that costs follow the event should not apply.

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<sup>2</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004(6) SA 222 (SCA)

The following order is granted:

1. The appeal is upheld;
2. The orders of the court *a quo* are set aside;
3. The matter is referred back to the court of first instance, differently constituted, to hear the matter *de novo*;
4. The respondent is to pay the costs of the appeal, such costs to include the costs of two counsel, where applicable.



C J VAN DER WESTHUIZEN  
JUDGE OF THE HIGH COURT

|                                               |                                                 |
|-----------------------------------------------|-------------------------------------------------|
| Date of Hearing:                              | 19 May 2021                                     |
| On behalf of the First and Second Appellants: | R J Groenewald                                  |
| Instructed by:                                | Geyser Attorneys Inc.                           |
| On behalf of the Third Appellant:             | J G Bergentuin SC                               |
| Instructed by:                                | B H Steyn<br>Bernard van der Hoven<br>Attorneys |
| On behalf of Respondent:                      | B M Gilbert                                     |
| Instructed by:                                | I Phalane<br>Strauss Daly Inc.                  |
| Judgment delivered on:                        | 31 May 2021                                     |