

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : MTHATHA**

CASE NO. 1622/09

In the matter between:

**MINENKULU MZIWABAMBO
GABAVANA**

Applicant

and

**THE MAGISTRATE OF NGCOBO :
E. D. SOLWANDLE**

1st Respondent

**THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

2nd Respondent

THE MINISTER OF POLICE

3rd Respondent

**THE STATION COMMISSIONER
NGCOBO POLICE STATION**

4th Respondent

MAGISTRATE MOLEKO

5th Respondent

JUDGMENT

GRIFFITHS, J.:

[1] The applicant in this matter has launched an application as against "The Magistrate of Ngcobo: E D Solwandle", and certain other respondents. The main purpose of this application is to seek an order setting aside a warrant of arrest issued against the applicant and an interdict against Solwandle restraining him from hearing any matter concerning the applicant, together with certain further ancillary relief. A *rule nisi* was granted by this court on an urgent basis together with certain interim relief.

[2] Confirmation of the *rule nisi* was opposed by the first and second respondents and, in due course, an answering affidavit was delivered on their behalf. The third and fourth respondents duly filed a notice to abide the decision of this court. I shall, for the purposes of convenience, in the balance of this judgment refer to the remaining respondents as "the respondents".

[3] The answering affidavit was deposed to by Solwandle himself who, during the course of explaining the manner in which the relevant warrant of arrest came into existence, stated that the relevant file had been placed before another magistrate of Ngcobo, one Moleko, who had duly heard the

matter and had authorized the issue of the warrant. Accordingly, it was not Solwandle who issued or authorized the relevant warrant of arrest, but Moleko.

[4] This triggered a further flurry of activity on the part of the applicant. It resulted in an application for the joinder of magistrate Moleko as fifth respondent in these proceedings together with certain further relief. By way of a subsequent court order, Moleko was duly joined in the proceedings as the fifth respondent and the applicant was granted leave to amend "*his Notice of Motion so as to seek appropriate relief against the 5th respondent.*" In purported pursuit of this order, the applicant in due course filed a notice (presumably in terms of rule 28) indicating his intention to amend his notice of motion by the addition of the following prayer:

"That the decision and the conduct of the 1st Respondent to peruse the Ngcobo Court File No.A 377/04 on the 9th September 2009 and to instruct the criminal Court Clerk to place the matter before the fifth Respondent for hearing on the 10th September 2009 without giving notice to the Applicant be and is hereby declared irregular, unlawful, unconstitutional ultra vires and should be reviewed and set aside."

[5] This prompted a notice of objection in terms of rule 28(3) to such amendment from the respondents and an application for this same amendment was duly launched. This was opposed by the respondents, who did not file an answering affidavit thereto but merely indicated that they

would oppose it on the basis as set out in their earlier notice of objection. It is this application for an amendment with which I am presently seized.

[6] The applicant has argued that in order to obtain the ultimate relief which it seeks, namely the setting aside of the warrant of arrest, it is necessary for the court to set aside the "decision" of Solwandle as reflected in the above-mentioned draft amendment. Mr. Melane, who appeared for the applicant, has further argued that, had it not been for the "disclosure" by Solwandle in his answering affidavit that he had perused this file and instructed that Moleko handle the matter, the applicant would never have known about this fact. On this basis, so he argued, the court should allow the amendment.

[7] Miss da Silva, who appeared for the first, second and fifth respondents, has in turn argued that the amendment should not be granted as it would not introduce a triable issue in that the "decision" referred to in the draft amendment is not reviewable as it does not amount to an administrative decision, is not final in nature, is not prejudicial to the applicant as, in effect, it does not directly affect his rights, and is not established by the evidence "thus foreshadowed in the application papers". She thus submitted that the amendment sought to be introduced is thus not a triable issue, is irrelevant and is not viable.

[8] It is trite that an amendment will not be granted where the amendment sought does not raise a triable issue or raise a viable claim. In *Trans - Drakensberg Bank Ltd. (under Judicial Management) v Combined*

*Engineering (PTY) Ltd. and Another*¹ Caney J dealt with this as follows:

"Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show prima facie that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable."

[9] A similar point was made by Selikowitz JA in *Benjamin v Sobac South African Building and Construction (PTY) Ltd.*² where he stated in a similar context that:

"If the claim is, in the circumstances of this case, not in law a viable claim I would be doing not only the respondent but also the applicant an injustice by granting the amendment."

[10] It is furthermore trite that for a decision of a functionary to be reviewable it must be an administrative action which adversely affects the rights of any person and which has a direct, external, legal effect. In

¹ 1967(3) SA 632 (DCLD)

² 1989(4) SA 940 (C) at 958D

addition, it should be final in nature before it attracts administrative justice rights³.

[11] I am not at all persuaded that the applicant's conclusion that Solwandle in fact was the person who made the decision to place the relevant file before Moleko is correct. The relevant passages of the answering affidavit read as follows;

“8.1 I dispute that I issued or directed a warrant of arrest to be issued against the applicant on 10 September 2009.

8.2 The applicant was convicted with contravening a protection order and sentenced on 6 June 2008, to pay a fine of R5 000.00 or to undergo imprisonment of 12 months should he default in paying the fine. Upon application by the applicant, the fine was deferred for payment on or before 31 August 2008.

8.3 The applicant launched an application for leave to appeal. The application for leave to appeal was set down for hearing on 3 June 2009.

8.4 On 3 June 2009, the applicant applied for

³ Eastern Metropolitan Substructure v Peter Klein Investments 2001 (4) SA 661 (WLD) at paragraphs 14 – 16; New Clicks South Africa (PTY) Ltd. v Tshabalala- Msimang 2005 (2) SA 530 at paragraphs 38 - 41

postponement in order for him to engage the services of counsel. The matter was postponed to 1 July 2009.

8.5 However, the matter did not proceed on 1 July 2009 due to the non-appearance of the applicant. Upon me having inquired from the public prosecutor (Mrs Nzuzo-Songo) in open court about the appearance of the applicant, I was informed that the applicant had communicated with her that 1 July 2009 was not suitable to him. This had not been communicated to me.

8.6 The matter was then postponed to 6 August 2009 and I ordered that the applicant be informed of the new date for the hearing of the application for leave to appeal.

8.7 I am advised that the court manager delivered a letter to the applicant informing him of the date of hearing. The letter is annexure “MMG 2” to the affidavit under reply.

8.8 On 6 August 2009 and in open court, Mrs Nzuzo-Songo furnished me with annexure “MMG 3” being a letter from the applicant

informing the court, once again of his non-availability and requesting a postponement as he and his counsel were engaged “in the same civil matter on 6 August 2009 as opposing parties” and that the matter should be postponed to 14 December 2009 being the “nearest available date on recess”.

- 8.9 The State applied for the application for leave to appeal to be heard in the absence of the applicant.
- 8.10 After having read the letter addressed by the applicant and the address by the State, and applied my mind to the facts, I exercised my discretion and postponed the matter to 31 August 2009 on which date the application would be heard with or without the applicant.
- 8.11 Annexure “MMG 4” shows that the applicant was notified of the date of hearing on 18 August 2009.
- 8.12 On 31 August 2009 the applicant’s name had been called out three times and he did not appear. Mrs Nzuzo-songu addressed me in open court by informing me that the applicant

had been duly informed of the date of hearing and handed up a copy of annexure “MMG 4” but had failed to appear in court.

8.13 Due to the applicant’s non-appearance and regard being had to my previous directing that the matter would be dealt with on 31 August 2009 with or without the applicant, I exercised my judicial discretion by directing the applicant to pay the fine on or before 9 September 2009 failing which he was to serve his term of imprisonment. Implicit in my order was that the application for leave to appeal was dismissed. Although my reasons for the order made on 31 August 2009 have not been requested, I made the order having had regard to. *Inter alia* the following:

(a) the application for leave to appeal had been postponed on various occasions at the instance of the applicant;

(b) the interests of justice dictated the finality of the matter;

(c) the applicant had not proffered any explanation, whatsoever as to why he was not

in court, notwithstanding notification; and

(d) the integrity of the court demanded that there be finality to the matter.

8.14 The order made on 31 August 2009 was communicated to the applicant on 1 September 2009, as is evidenced by annexure “MMG 5” to the affidavit under reply.

8.15 Upon perusal of court file no. A377/04, I see that the applicant did not pay the fine in terms of the court order and as such the matter was placed before Magistrate Moleko for hearing on 10 September 2009 by the criminal court clerk.

8.16 On 10 September 2009, Magistrate Moleko, upon application by the prosecutor Mtengwana therefore, exercised his judicial discretion by issuing a warrant for the arrest of the applicant for failure to comply with an order of court.”

[12] It should be remembered that the above-mentioned extracts from the answering affidavit were made in response to the allegations made by the applicant in his founding affidavit to the effect that the warrant had been unlawfully issued in his absence. It is fairly clear therefore that he was

unaware of all the facts pertaining to the issue of the warrant as he was not present when it was issued. In founding his claim for the amendment mentioned, he has apparently based his factual conclusions entirely on the content of paragraph 8.15 reproduced above. As I read this sub paragraph, it clearly indicates that Solwandle, on being faced with this application, called for the file, perused it and noticed that, for whatever reason, the clerk of the criminal court had placed the file before Magistrate Moleko for hearing on 10 September 2009. The applicant's interpretation that this subparagraph amounts to a "confession" that Solwandle had, on or prior to 10 September 2009, himself called for the file and personally made a decision not to hear the matter himself but to place it before Moleko, does not appear to be correct. On this basis alone it is my view that the applicant has not made out a case for the amendment sought as there is no factual basis at all for his contention that Solwandle made such a decision to place the file before Moleko.

[13] On this misconception of the facts, the applicant has proceeded in his founding affidavit in support of the application for the amendment to state the following at paragraph 18:

"The confession made by the first respondent in his answering affidavit... that "upon perusal of Court file No.A 377/04, I see that the applicant did not pay the fine in terms of the Court Order and as such the matter was placed before Magistrate Moleko for hearing on 10 September 2009 by the criminal Court Clerk" has brought about the desire to prove that the Magistrate

Moleko who has been joined as first respondent behind whom the first respondent Mr. Solwandle seeks to hide, would not have authorized the Warrant of Arrest he granted against me on the 10 September 2009 had it not been for the malicious, unlawful and unconstitutional administrative conduct of the first respondent of perusing a court file which was beyond the scope of his employment."

[14] It seems to me that the applicant has not only misconstrued the factual statement in the affidavit of Solwandle but has concluded that this "decision" by Solwandle to place the file before Moleko was "malicious, unlawful and unconstitutional". This conclusion is absolutely baseless. It is so that the applicant has in his founding affidavit in the main application made allegations against Solwandle relating to certain tensions which may have existed between them. This however, to my mind, is completely insufficient to lay a basis for the supposition that Solwandle had placed the file before Moleko in an unlawful manner, in an unconstitutional manner and, in particular, driven by malicious motives. Likewise, the statements that Solwandle made a "confession" in this regard and "seeks to hide" behind Magistrate Moleko, have no factual foundation.

[15] In any event, even if the applicant could make out a case to the effect that Solwandle had made such a decision, this could have had absolutely no direct effect on the rights of the applicant and such a decision would not have been a final one sufficient to bring it within the purview of a review. The final decision to issue the warrant was clearly made by Moleko and

there is no allegation whatsoever that he was influenced in any way by Solwandle in reaching his decision. Even if Moleko had been influenced by Solwandle and such a case could have been made out, it seems to me that this would be a matter to be taken into account by the court ultimately hearing the main application in deciding whether or not to set aside the warrant of arrest.

[16] I am perturbed by the allegations made in this matter relating, firstly to the question of the applicant's conduct during the course of the criminal case before the Ngcobo Magistrate's court and, secondly, by the unfounded allegations made against a judicial officer by the applicant as set out above and elsewhere in these papers. The applicant is apparently a practicing advocate of this court. In these circumstances, I believe that it would be proper for the Bar Council to have sight of these papers and to consider any possible action they may deem meet against the applicant in this regard.

[17] In these circumstances, I make the following order:

- 1. The applicant's application for an amendment to his notice of motion is dismissed;**
- 2. The applicant is ordered to pay the costs of the application for amendment;**
- 3. The Registrar of this court is directed and requested to ensure that a copy of these papers and this judgment are made available to the Bar**

Council for its consideration with regard to any action it may consider proper as against the applicant.

JUDGE OF THE HIGH COURT

HEARD ON : 14 JUNE 2011

DELIVERED ON : 23 JUNE 2011

COUNSEL FOR APPLICANT : Mr Melane

INSTRUCTED BY : CK Guzana Attorneys

COUNSEL FOR RESPONDENT : Ms Da Silva

INSTRUCTED BY : State Attorney