



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

Case No: 2024-097438

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

21/02/2025

DATE

SIGNATURE

In the matter between:

NOLUNTU NELISSA BAM

Applicant

and

ANDRE THEODORE HOLTZHAUSEN

First Respondent

MONT REYN BODY CORPORATE

Second Respondent

JAN GABRIEL DU TOIT

Third Respondent

LEE JU HEE

Fourth Respondent

CHARLIZE ENGELBRECHT

Fifth Respondent

ARNE BERT ENGELBRECHT

Sixth Respondent

VICKY DE NYSSCHEN

Seventh Respondent

AURENT OOSTHUIZEN (nee' GREEN)

Eighth Respondent

DOROTHEA REGINA DU TOIT

Ninth Respondent

CORNE DU TOIT

Tenth Respondent

DALEEN PIERINI

Eleventh Respondent

JACOBUS CHRISTOFFEL ERASMUS

Twelfth Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be **21 February 2025 at 14h00**.

JUDGMENT

MFENYANA J

Introduction

[1] This is an application in terms of rule 45A of the Rules of this Court. In Part A the applicant seeks a stay of an order granted by the learned magistrate Langa in the Magistrates' Court, Pretoria on 14 August 2024, and suspending its operation pending the determination of Part B. In Part B, the applicant seeks rescission of the same order. The rescission is premised on the applicant's contention that the learned magistrate erred in granting the

order, as there was no compliance with section 47 of the Superior Courts Act (the Act) which requires any person who wishes to institute legal proceedings against a judge, to obtain the consent of the Judge President before instituting such proceedings.

- [2] The application was launched on an urgent basis. The applicant's submission in this regard is that because the twelfth respondent, who is the appointed administrator, has started executing his duties in terms of the impugned order, this constitutes ongoing harm, as the order was motivated by a material error in law, that the first respondent was not required to comply with section 47(1). As such, the applicant contends that she would not be afforded substantial redress in due course as the twelfth respondent would have gone far ahead in his duties in terms of the order, which actions would not be reversible.

Factual matrix

- [3] The relevant background to this application is that on 7 December 2023 the first respondent (as applicant) served an application to place the second respondent under administration. The application was issued out of the Pretoria Magistrates' Court. The applicant (in this application) as well as the first and third to eleventh respondents are owners of properties in a sectional title scheme known as Mont Reyn. They together constitute the second respondent (the Mont Reyn Body Corporate).

[4] It is common cause that the application in the Magistrates' Court was only issued against the Body Corporate and not against any of the owners of properties in Mont Reyn. The applicant together with nine other property owners (the third to eleventh respondents in this application) were granted leave to intervene in the proceedings before the Magistrates' Court. In these proceedings, the applicant has cited ten of the property owners as well as the administrator who was appointed in terms of the court order of 14 August 2024.

[5] The applicant avers that all legal proceedings involving a body corporate must be issued against the trustees, as a body corporate is not a juristic person and cannot sue or be sued in its own name, a fact which is vehemently denied by the first respondent. It is necessary to dispose of this aspect of the application, this early on. A body corporate is a juristic person which can sue and be sued in its own name. This is trite law and there are a number of decisions dealing with the subject. In *Harbour Terrace Body Corporate (SS401/1998) v Minister of Public Works and Others*¹ the court stated that:

¹ [2016] 3 All SA 766 (WCC); see also: *Zikalala v Body Corporate of Selma Court and Another* (AR255/2020) [2021] ZAKZPHC 81; 2022 (2) SA 305 (KNP) (23 September 2021).

The body corporate is a juristic person with perpetual succession capable of suing and of being sued in its corporate name in respect of any matter in connection with the land or building(s) for which the owners therein are jointly liable, any matter arising out of the exercise of any of its powers or the performance of any of its duties under the Act, any contract made by it and any damage to the common property. The body corporate is required to control, manage and administer the common property for the benefit of all owners and to properly maintain the common property in a state of good and serviceable repair.

- [6] The applicant avers that as the owner of one of the units in Mont Reyn, she is directly and substantially affected by the order sought by the first respondent (as applicant in the proceedings before the Magistrates' Court). It is on that basis that she sought leave to intervene in the proceedings.
- [7] On 12 January 2024 the applicant served a notice of her intention to oppose the application. Thereafter, settlement negotiations ensued between the parties which yielded no positive results. Leave to intervene was granted to the applicant as well as nine other members of the Body Corporate, providing timeframes for filing of answering affidavits. The application was then set down for hearing on 20 June 2024.
- [8] On 30 May 2024 the applicant filed a notice in terms of rule 55 (1) (g) (iii) of the Magistrates' Court Rules, raising a point of law to the effect that

section 47 of the Act had not been complied with. At the hearing of the matter on 20 June 2024 the court *a quo* rejected the applicant's point of law. Having also refused a request for postponement by the applicant and the other respondents who had been joined in the matter, the learned magistrate proceeded to deal with the matter on a default basis, rejecting the opposing affidavits filed by the applicant and other members of the body corporate out of time. The court *a quo* nonetheless postponed the matter in order to consider a supplementary affidavit filed by the first respondent. On 14 August 2024 the same court granted judgment by default.

[9] When on 23 August 2024 the twelfth respondent sent an email to all the property owners informing them of his appointment as an administrator of the second respondent, the applicant instructed her attorneys to institute an urgent application to stay the operation of the order. This is that application.

[10] It is common cause that the applicant is a sitting judge of this Division. It is for this reason that the parties approached the Deputy Judge President (DJP) requesting that the matter be presided over by a judge from a Division of the High Court other than this Division. The request was acceded to by the DJP. The import of this narration is that some time elapsed between the time of the issuing of the application and the allocation of a date of hearing. That in my view can be attributed to the obvious administrative

requirements associated with such request, and the fact that an external judge may not have been readily available. The applicant consented to the request. As such the applicant submitted that while it persists with urgency on the basis that the order of the Magistrates' Court poses continuous harm, nothing much turns on it and issues of urgency have become moot. I share this sentiment.

Discussion

[11] The applicant avers that as the owner of one of the units in Mont Reyn, she has a clear right in the application brought before the Magistrates' Court which ought not to have been proceeded with until the first respondent had obtained the consent of the Judge President to act against the applicant. To this, the first respondent contends that the applicant was not cited simply because the body corporate is capable of being cited in its own name. While this is so, it does not negate the fact that the applicant, as well as nine other property owners were granted leave to join the proceedings as respondents. It is at that point that the applicant avers the proceedings ought not to have continued until the first respondent had sought the consent of the Judge President. She further contends that she would suffer an injustice if the order were set into operation.

- [12] In order to fully comprehend the essence of the applicant's argument, it is necessary to consider the provisions of section 47. It provides:

"47. (1) Notwithstanding any other law, no civil proceedings by way of summons or notice of motion may be instituted against any judge of a Superior Court, and no subpoena in respect of civil proceedings may be served on any judge of a Superior Court, except with the consent of the head of that court or, in the case of a head of court or the Chief Justice, with the consent of the Chief Justice or the President of the Supreme Court of Appeal, as the case may be."

- [13] In the answering affidavit the first respondent argues that it is untenable that the permission of the Judge President could be required in circumstances where a juristic person which a judge is a member of, or has a financial interest in, is sued as this would offend against the principle of separate juristic personality, in this case, of the body corporate and the individuals who constitute it. The first respondent further states that he did not seek any relief against the applicant, but against the body corporate as this is standard procedure. He challenges the fact that the applicant advanced no real opposition to the merits of the application before the Magistrates' Court and opted to only raise a point of law as she does in the present application. As such, the factual basis of the application before the

Magistrates' Court stands undisputed, the first respondent further contends.

[14] Equally undisputed is the fact that there are serious problems with the administration of the Mont Reyn Body Corporate, which require the appointment of an administrator, he further contends. Thus, the first respondent denies that such appointment would prejudice the applicant in any way, and that her apprehension that the appointment of an administrator would decrease her prospects of selling her unit is unfounded.

[15] It is necessary to state that while various submissions were made by the parties in relation to the proceedings before the Magistrates' Court, what stands for determination before this Court is whether the applicant has made out a proper case for the suspension of the operation of the order. This largely depends on whether that order was properly granted. Equally relevant is whether the order would have a negative effect on the applicant were it to be executed.

[16] It is so that the applicant assails the very existence of the order based on the circumstances under which it was granted. Section 47(1) presents no ambiguity. It sets out in clear terms that any person who intends to institute civil proceedings against a judge must first obtain authorisation from the Judge President. The main bone of contention between the parties in this

regard is whether in the peculiar circumstances of this case, the first respondent was obliged to comply with this provision, having elected not to institute any proceedings against the applicant, a judge of this Division. The answer, in my view, lies in the provision for the provision itself. I should point out that the finding of the learned magistrate that the requirement as contained in section 47(1) does not exist, is misplaced. This is disputed by the first respondent who avers that no such finding was made by the learned magistrate. Nothing much turns on this. What matters is that ultimately, the application proceeded without compliance with the provisions of section 47(1). It is for this reason that the applicant avers that she enjoys good prospects of success in the rescission application.

- [17] In *Soller v President of the Republic of South Africa*² Ngoepe JP noted, with reference to the predecessor³ to the current Superior Courts Act that the purpose of the provision is to ensure the independence of the judiciary in circumstances where judges find themselves spending more time in court as defendants rather than adjudicators of disputes. The learned Judge President characterized the requirement as a ‘sifting mechanism’ in civil actions brought against judges. In the same vein, Mlambo JP noted in *Engelbrecht v Khumalo*⁴ that section 47(1) “is the mechanism through which the institution of legal proceedings against judges is regulated” and

² 2005 (3) SA 567 T.

³ Supreme Court Act 59 of 1959.

⁴ 2016 (4) SA 564 GJ.

plays a gate-keeping role. It is trite that the provision also applies to counterclaims in actions instituted by judges.

[18] It is worth pointing out that section 47(1) is not merely a procedural requirement. As Tlaetsi JP observed in *Mthenjwa v Steyn and Another*⁵ (*Mthenjwa*) the requirement has both procedural and substantive elements to it. At a procedural level, the inquiry is what procedure should a prospective litigant wishing to institute legal proceedings against a judge follow. The substantive aspect relates to the decision to be taken by the Head of Court once he or she receives a request to give consent for legal proceedings to be instituted against a Judge in his or her Court.⁶ There can be little doubt that the provision is peremptory. In this regard aptly referred to the provision as ‘peremptory and instructive’. The court in *Mthenjwa* found that the application was defective for failure to comply with section 47(1).

[19] What then, where in spite of such gate-keeping apparatus, and by no doing of the applicant or plaintiff in the matter, the judge is joined to the proceedings by an order of court pursuant to an application by the judge? Put crudely, what if the judge invites themselves to the proceedings on account of a vested interest in the outcome of the matter?

⁵ (9028/17) [2017] ZAWCHC 161 (30 November 2017).

⁶ Para [5].

[20] It is common cause that the applicant was joined to the proceedings in the Magistrates' Court following her application to join the proceedings. This is precisely the reason why the first respondent maintains that he had no responsibility to seek the consent of the Head of Court as the proceedings he instituted were not aimed at the judge. Is it still the responsibility of the applicant to seek leave of the Head of Court in order to proceed against the judge?

[21] It should be borne in mind that the judge was joined to the proceedings in the Magistrates' Court by an order of that court following agreement between the parties. It does not, in my view, avail the first respondent to deny that the applicant has a direct and substantial interest in the order granted by the Magistrates' Court. That is a foregone conclusion; a matter to which the first respondent has acquiesced. It is undeniable that property owners have a financial and personal stake in the decisions and actions made by the body corporate and that these decisions directly affect how each unit is used and valued.

[22] It is trite that the provision also applies to counterclaims in actions instituted by judges. I am not concerned about whether if one considers the merits of the matter before the Magistrates' Court, it was open to that court to appoint an administrator. That is not a question this Court is seized with. The question is whether the Magistrates' Court complied with all the

prescripts of the law for the matter it was faced with. Neither do I consider it appropriate to delve into aspects of the applicant's income or her reasons for wanting to sell her property as suggested by the first respondent.

[23] Of importance is that the first respondent avers that this application is flawed in that it is based on the incorrect perception that a body corporate has no separate existence from its members. I have already stated that this submission by the applicant is incorrect as a body corporate is a *persona iuris*, separate from its members. This, in my view, does not detract from the fact that the Magistrates' Court saw it fit to join the applicant to the application. Having done so, and at that point, it was imperative that the authorisation of the Head of Court be obtained.

[24] The first respondent contends that there is no legal obligation to obtain the consent of the Judge President before instituting proceedings against a body corporate which a judge is a member of. This contention is in my view, ill-conceived as it flies in the face of the provisions of section 47(1) and the wealth of authorities herein stated. He further avers that no order was granted against the applicant. He challenges the fact that a juristic person which has a judge as its member or a company which has a judge as a shareholder cannot be sued. Thus he contends that the applicant, having elected to be a party to the proceedings, ought to have, herself, sought consent from the Judge President. I reiterate that the applicant was joined

to the proceedings following her application and agreement between the parties. Notably, the test for joinder or non-joinder is whether a party has a direct and substantial interest in the subject-matter. This therefore puts paid to the question whether the applicant has a direct and substantial interest in the appointment of an administrator for the body corporate in which she has an interest, and owns a property in. It does not matter in my view, whether the said administrator turns the fortunes of the body corporate around as the first respondent seems to suggest.

[25] Mr Shangisa, counsel on behalf of the applicant referred me to the decision of this Division in *Freedom Under Law v Judge Nkola Motata (FUL)*⁷ to drive home the point that section 47(1) is “*a mechanism designed for the protection of judges against non-meritorious lawsuits...*” He argued that a litigant seeking to institute proceedings against a judge must show good cause – “whether the proceedings, for which consent to litigate against a Judge is sought, contains justiciable issue.”⁸

[26] Responding to the contention that the proceedings in the Magistrates’ Court are not against the judge *per se*, Mr Shangisa placed further reliance on *FUL* that the consent of the Head of Court is required even where a judge is an interested party, and whether the matter relates to a Judge’s judicial

⁷ [2021] ZAGPPHC 14 (28 January 2021).

⁸ *Torwood Properties (Pty) Ltd v South African Reserve Bank* 1996(1) SA 215 (W).

functions, activities or private affairs. As in *FUL*, the proceedings in the Magistrates' Court do not depend on the participation of the applicant. However, as Mlambo JP noted in *FUL*, the consent of the Judge President is required to cite the judge in the proceedings. Mr Shangisa argued that the fact that in *FUL*, the review proceedings were against the JSC which is a separate entity is significant in rejecting the first respondent's argument and in rendering the order of the Magistrates' Court fatally defective and that the first respondent is unable to overcome the hurdles as *FUL* is instructive in these circumstances. I agree.

- [27] In contrast, Mr Davies argued on behalf of the first respondent that the applicant's case is chaotic. He referred to what he called an embarrassing contention that a body corporate has no juristic personality. I have already made a finding regarding the legal standing of a body corporate in the sense of it being a person in the eyes of the law, clothed with the power to sue and be sued in its own name. Mr Davies further submitted that it has never been required a legal requirement that a member of a body corporate be cited as having a direct and substantial interest. In my view that ship has long sailed. The first respondent's submission overlooks the fact that the applicant was joined to the proceedings in the Magistrates' Court, with his acquiescence. The applicant is cited as a party to the proceedings. There can be no issue about that.

[28] In his further submission, Mr Davies drew similarities between the present scenario and shareholders of a company. Inasmuch as a body corporate is a legal persona *sui iuris*, it is a mandatory legal entity. Members of a body corporate do not stand in comparison to shareholders of a company. The first respondent's complaint that a party could not be expected to know who the shareholders are, does not find application in the facts of this case. The members of the body corporate are known, and ought to be known to the first respondent.

[29] Interestingly, and short of seeking a declaration that section 47 is unconstitutional, Mr Davies argued that in terms of section 9 of the Constitution everyone is equal before the law. However when an enquiry was made by this Court whether the first respondent intended to have the section declared unconstitutional, Mr Davies's response was in the negative. Indeed, a cursory reading of the provision does not evince a sense that no proceedings may be instituted against a judge. As I have already stated, it is a gatekeeping mechanism aimed at filtering proceedings against judges. I do not understand the provision to even suggest that a judge is absolved from facing the music of litigation, where such is warranted. To the contrary, the requisite section vests the Head of Court with a power to give consent in circumstances where a litigant requires to sue a judge.

- [30] The remainder of the submissions on behalf of the first respondent pertain to the proceedings before the Magistrates' Court. Notably, the first respondent relies on the judgment of the Constitutional Court in *Zuma v The Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (Zuma)*⁹ for the proposition that the applicant was absent from the proceedings in the Magistrates' Court and was excluded therefrom due to her failure to comply.
- [31] In all fairness to the first respondent *Zuma* is only relevant to the rescission application to be instituted by the applicant. It does not find application to the stay of the order in terms of Rule 45A which question this Court is seized with.
- [32] It remains for me to deal with the requisites for an interim interdict¹⁰, and whether the applicant has satisfied the requirements for the relief she seeks in terms of Rule 45A. As owner of a property at Mont Reyn, the applicant has an interest in decisions which affect the ownership of her property, and this establishes her *prima facie* right. It was further contended on behalf of the applicant that the order of the Magistrates' Court constitutes a flagrant disregard of the statutory requirements laid down in section 47.

⁹ (CCT52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021).

¹⁰ *Setlogelo v Setlogelo* 1914 AD 221.

[33] As regards irreparable harm, the applicant avers that the impugned court order is a sword looming over the applicant's head and constitutes on-going harm, and that the balance of convenience favours the applicant. To my mind, there is no downplaying the fact that the order was not properly granted as it was granted in violation of the peremptory provisions of section 47(1).

[34] In view of the foregoing it is my view that the applicant has satisfied the requirements for the stay of the operation of the order of the Magistrates' Court granted on 14 August 2024.

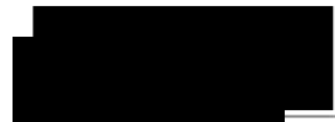
Costs

[35] The applicant sought an order for the costs against the first respondent which costs include costs of two counsel. The general rule relating to the costs is that costs follow the result. Re-imbursing a successful party of his or her out of pocket expenses is a settled principle which brooks no further ventilation. As regards the costs of two counsel, the general rule is such costs may only be awarded by the court if the circumstances of the case so demand. This relates to the complexity of the case and the novelty of issues involved in a particular case. It is no doubt that the issues involved in this case as well as the case itself required proper ventilation. The employment of two counsel therefore cannot be naysaid. It is my view therefore, that the employment of two counsel in this case was merited.

Order

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

- a. The order granted by the Pretoria Magistrates' Court dated 14 August 2024 is stayed pending the application for rescission to be instituted by the applicant within 30 days of this order.
- b. The first respondent shall pay the costs of this application including the costs of two counsel where so employed.



S MFENYANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 29 November 2024

Date of judgment: 21 February 2025

Appearances

For the Applicant : SL Shangisa SC assisted by S Kunene
instructed by Hlapane Attorneys Inc.

For the first respondent : SW Davies instructed by Loock Du Pisane
Attorneys Inc.

For the 2nd to 12th respondents: No appearance