REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 11667/2005

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

6/12/16
DATE

SIGNATURE

In the matter between:

THE SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND First Applicant

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION Second Applicant

SOUTH AFRICAN MUNICIPAL WORKERS UNION

THE POLICE, PRISONS AND CIVIL RIGHTS UNION Fourth Applicant

DIMAKATSO AME MNGOMEZULU Firth Applicant

AARON VULENI VILAKAZI Sixth Applicant

MOKABI JOHANNES MAKGATO Seventh Applicant

And

THE CITY OF JOHANNESBURG	First Respondent
THE EXECUTIVE MAYOR OF THE CITY OF JOHANNESBURG	Second Respondent
JOHANNESBUG WATER (PTY) LTD	Third Respondent
CITY POWER JOHANNESBURG (PTY) LTD	Fourth Respondent
JOHANNESBURG CITY PARKS LIMITED	Fifth Respondent
PIKITUP JOHANNESBURG (PTY) LTD	Sixth Respondent
eJOBURG RETIREMENT FUND	Seventh Respondent
THE REGISTRAR OF PENSION FUNDS	Eighth Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR LOCAL GOVERNMENT IN THE GAUTENG PROVINCE	Ninth Respondent
MINISTER OF SAFETY AND SECURITY	Tenth Respondent
VARIOUS CONTRIBUTING EMPLOYERS AS PER ANNEXURE A	Eleventh to Hundred and Fortieth Respondent

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J U D G M E N T

WEINER, J:

[1] This application concerns the interpretation of an order issued by the Supreme Court of Appeal (the SCA) on the 9th March 2015 (the SCA order).

BACKGROUND

[2] The first, second to sixth and eleventh to the one hundred and fortieth respondents are employers of some of the members of the South African Local Authorities (SALA) Pension Fund.

[3] Up until 1st January 2005, the above respondents (hereinafter referred to as the respondents) paid contributions to the SALA Pension Fund in respect of those employees who were members of the SALA Pension Fund in accordance with the SALA Pension Fund registered rules.

[4] On the 30th June 2004 the first respondent acting on its own behalf and on behalf of the other respondents gave the SALA Pension Fund written notice of its and the other respondents' intention to withdraw as participating employees with effect from the 1st January 2005.

[5] Aggrieved by this decision, the SALA Pension Fund together with several unions representing the members of such fund launched an application on the 31st March 2005 seeking the following orders:

5.1. Declaring the decision of the respondents to withdraw as participating employers of the SALA Pension Fund to be unlawful and invalid.

5.2. Reviewing and setting aside the decisions of the respondents.

5.3. Declaring the decisions of the respondents to constitute an unlawful amalgamation or transfer of business between the SALA Pension Fund and the e-Joburg Retirement Fund.

5.4. Directing that any decisions of the respondents to withdraw as participating employers to have no force and effect.

5.5. Directing the first respondent, prior to withdrawing as a participating employer from the SALA Pension Fund, to comply with the undertakings:

5.5.1. not to unilaterally implement reduced benefits; and

5.5.2. to bargain collectively with the unions representing the employees in a national chamber.

[6] The application was opposed. *In limine,* the respondents raised the issue that the applicants had failed to join the employees of the respondents, as at the 1st January 2005, as they had a direct and substantial interest in the outcome of the relief sought by the applicants.

[7] The court *a quo* dismissed the arguments of the respondents and granted the relief the sought by the applicants. The respondents appealed to the Supreme Court of Appeal.

THE SCA ORDER

[8] On the 9th March 2015 the SCA upheld the respondents' appeal and made the following order:

"*1. The appeal is upheld with costs. ...*

2. The order of the court a quo is set aside and replaced with the following:

(a) The application is stayed for a period of three months pending the joinder of members and former members of the first applicant whose rights may be affected by the order sought.

(b) ...

(c) In the event of the joinder referred to in (a) not taking place, the application is dismissed with costs...

3. The three months period referred to in paragraph 2(a) and (c) shall be calculated from the date of this order."

[9] The applicants launched the joinder application on the 8th June 2015 being within the three month period set out in the SCA order.

THE SUBSEQUENT APPLICATIONS

[10] On the 23rd June 2015, and following receipt of the joinder application, the respondents delivered a notice of opportunity to remove the cause of complaint in terms of Rule 30(2). The respondents alleged that the SCA order had not been complied with, in that, the order joining the additional respondents had to be "*obtained*" by the applicants within the three month period of the SCA order. The applicants chose not to respond to the notice in terms of Rule 30, but rather, on the 14th July 2015, the applicants launched an application in terms of which they sought a declaratory that they had complied with the order issued by the SCA. *Alternatively* they sought condonation and the extension of the period within which the joinder proceedings were to be finalised (the declaratory application).

[11] On the 3rd August 2015, the first to sixth respondents launched an application in terms of Rule 30 of the Uniform Rules of Court alleging that

the applicant's joinder application constituted an irregular step and fell to be set aside (the Rule 30 application).

[12] At the hearing ,the applicants abandoned the relief for condonation and extension of the period within which the joinder proceedings were to be finalised.

[13] The crisp issue in regard to both applications is whether or not the SCA order was complied with. The parties agreed that the two applications would be jointly determined.

[14] The applicants however contend that the Rule 30 application which was launched after the applicants' declaratory application was delivered was, not only, unnecessary but has mulcted the applicants in unnecessary costs. The costs remain an issue that needs to be dealt with.

[15] What is apparent from the SCA order is that, despite upholding the respondents' appeal, the appeal was only successful in relation to the point *in limine* dealing with joinder.

[16] It is common cause that further affidavits were filed in the Rule 30 application which, from a perusal thereof, makes it clear that the same allegations and submissions (as are made in the declaratory application) are made therein. The applicants contend that it would have been undesirable to leave the matter in the hands of the respondents to decide whether or not to proceed with the Rule 30 application, and that it was necessary, in the face of the Rule 30 notice, to obtain declaratory relief

from the court. On the other hand, the respondents contend that, the applicants should allowed for the procedures which follow on the Rule 30 notice i.e they should have waited for the respondents to file their application in terms of Rule 30, and opposed the relief requested therein.

INTERPRETATION OF THE SCA ORDER

[17] It is clear from the SCA order that it did not expressly state that the "*order for joinder*" was to be obtained within three months. The respondents contend that it is implied in the SCA order that the joinder order had to be obtained within three months, as the application was only stayed for three months in terms of prayer 2(a) thereof.

[18] The order is unusual in the sense that, although non-joinder is usually raised as a special plea, and, where successful results in an order requiring the additional respondents to be joined, it is not usual for the plea of non-joinder to result in the dismissal of a claim. In the present case, the dismissal of the claim would, in fact, overturn the judgment of the court *a quo* without reconsidering the merits of the appeal.

[19] The applicants submit that, in the present case, the intention of the SCA was to put the applicants on terms to institute the joinder proceedings but that the intention of the order could only be that the application for joinder should be launched within the three month period.

[20] They contend that the SCA, in framing its order, must have understood that the timing of the order for joinder was not within the applicants' power. What was within their power, was to bring the application within a

particular period of time. Accordingly, they submit that the SCA must have taken this into account.

[21] The applicants argued further that, had there been any opposition, irrespective of the merits of the opposition, it was unlikely that the application for joinder could be disposed of within a three month period.

[22] The respondents submit that they would not have opposed the application for joinder, as it was in terms of the SCA order. Therefore, the order could have been obtained within three months. The applicants, however, argue that the joinder application is one in which the additional respondents were entitled to oppose and file answering affidavits if they wished to do so.

[23] It is evident from the joinder application that the applicants are unaware of the current further particulars and physical addresses of the additional respondents, whom they seek to join to the proceedings. The first applicant knows that they were employed by some of the respondents but some had since left the employ of the respondents and their subsequent particulars remain unknown. The applicant contends that it will be prohibitively expensive and a logistical nightmare to try and locate each and every one of the individuals to serve them directly or effect service at their workplaces.

[24] They accordingly sought substituted service. They seek to join 297 employees whose names appear on Annexure "A" to the joinder application. The applicants sought to effect service by affixing the notice of motion and founding affidavit to the notice boards at the offices or

business premises of the second, third and fourth applicants and the first, second, third to sixth and eleventh to one hundred and fortieth respondents. The applicants also sought an order that the copy of the notice of motion would be accompanied by a notice stating that any party who wishes to oppose the application could do so by delivering a notice in writing to the applicants' attorney of record within one month of the date from when the notice of motion was affixed at the offices as set out above. The notice was further to state that any party wishing to oppose the main application should file an answering affidavit within 15 days of delivering the notice referred to above.

[25] The applicants contend that, before the application for joinder could be granted, they first had to apply for substituted service. They could not anticipate whether or not the court would agree with the manner of substituted service sought by the applicants. This is one of the issues which the applicants contend lends credence to their interpretation of the SCA order that the launch of the application for joinder, as opposed to its granting, was to be done within the three month period.

[26] The applicants contend that this interpretation is consistent with the meaning given in certain cases in which similar issues were determined. They contend that it has been consistently held that "*prosecuting the appeal*" means setting it down for hearing within the prescribed period and not compelling the appellant in question to ensure that the court hands down its ruling within the prescribed period. See *Rex v Whittle*[1].

[1] 1914 CPD 774

[27] The Applicants submit that it would be both impossible and unreasonable to expect a litigant to ensure that an order of court is handed down within a certain period. The judge may, for instance, reserve judgment which would not be in the control of the applicant. If anyone opposed the application, same would have to be set down on the opposed roll, in accordance with the Practice Manual, which could take in excess of three months.

[28] Reference was also made to the judgment in the SCA in *Novartis v Maphil*[2] in which the court held that "*words without context mean nothing*". The applicants contend that, within the context of the present matter, the only step within the applicants' control is to comply with the order by bringing the application within the three month period. It is contended that the SCA could not have intended that the application be dismissed, not because of a failure to do what was within their power, but for the failure to achieve something not within their power.

[29] The respondents argued that the SCA made the order in the terms in which it did because the matter had been pending since 2005. The applicants however submitted that the delays were not only that of the applicant but that of the respondents as well. The respondents submit that the three month stay of proceedings in terms of prayer 2(a) came to an end on the 9th June 2015 and, as the applicants had not obtained the order

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[2] 20229/2014) [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) (3 September 2015)

of joinder by such date, the application must be taken to have been dismissed in terms of the SCA order.

[30] The respondents contend that the SCA made express conditions as to the timing when the joinder was to take place and that the applicants brought the joinder application out of time. The respondents submit that there is prejudice to them in that employers will have to continue to litigate in circumstances where the application should have been dismissed.

[31] The respondents, however, ignore the fact that the applicant, in fact, succeeded in obtaining the order which it did on the merits and that such order has not yet been overturned.

[32] The respondents refer to several authorities in regard to the interpretation of the order and the fact that the basic principles applicable to a construction of documents also applies to the construction of a court's judgment or order. See *Firestone South Africa (Pty) Ltd v Gentiruco AG*[3] where it was held that the court's intention is to be ascertained primarily from the language of the judgment or order.

[33] The SCA in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*[4] which formulated the principles governing the approach to interpretation as follows:

"*...the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of*

[3] 1977 (4) SA 298 (A)
[4] (802/2012) [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) (28 November 2013) at para [12]

all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise..."

[34] The respondents accordingly contend that the circumstances in which the document came into being must take into account the fact that the SCA was restricting the period within which the joinder could be effected in order to ensure that it took place expeditiously. The respondents further submit that in interpreting the SCA order one needs to determine the manifest purpose. See *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others*[5]. The respondents submit that the purpose of the application being stayed for a period of three months, pending the joinder, was that, if the joinder did not take place within that period, the application would be dismissed with costs. The order was stayed only for a period of three months and therefore that is the period within which the order had to be obtained. Had the SCA intended that the joinder application had to be launched within three months it would have said so. It refers to "*the joinder*" not the launch of the application for joinder.

[35] The respondents further argue that the applicants' submissions that the hearing of the matter was not within their control is not borne out by the facts, in that the joinder application was only delivered on the 8th June 2015. If no notice of intention to oppose was received the application was to be heard on the 2nd July 2015 (a three week period). However, this fails

[5] (363/2011) [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (30 March 2012) at paras [13] and [14]

to take into account that there might have been opposition from parties after service and even opposition from the court on the way in which the substituted service was to occur. If the matter was opposed, it would have had to be postponed to the opposed court roll some months later.

[36] It is clear therefore that there are two interpretations which might be applicable and the applicants contend that it is incumbent on the court to favour the interpretation which advances the interests of justice.

[37] In *F v Minister Safety and Security and Another (Institute for Security Studies and Others as Amicus Curiae*[6] the court held:

> "*It is trite that the interests of justice require that all issues pertaining to a matter be ventilated fully and for all parties to be given the opportunity to state their case as comprehensively as possible..*"

[38] The applicants argue that the only prejudice to the respondents is that they would have to continue with the litigation and seek to justify their decision to cease their contributions to SALA. On the other hand, the prejudice to the applicants is that their application will be dismissed in terms of the SCA order, when the merits of the case have been decided in their favour, and have not been overturned by an appeal court.

[39] In my view, the framing of the order, being open to both interpretations, requires the interpretation which gives business efficacy to the wording and which advances the interests of justice. See *Bothma-Batho Transport*

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[6] 2012 JOL 282 (CC) at para [34]

(Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk (Supra)[7] and *F v Minister of Safety and Security, supra.*

[40] To advance the interests of justice as set out in *F v Minister of Safety and Security* (*supra)* the interpretation that the launching of the application, which was within the applicants' power, had to be done within the three month period, and not the actual obtaining of the order, appears to be more persuasive.

[41] The Rule 30 application boils down to an issue of costs. The respondents contend that, because the notice in terms of Rule 30(2) preceded the declaratory application, the Rule 30 application should have been determined prior to the declaratory application and that the issue of the interpretation would then be *lis pendens*. However the *lis* only comes into existence once proceedings have been launched not merely by the issue of a Rule 30(2) notice. See *Van As v Appollus and Others*[8].

[42] The applicants contend that it was unnecessary for the respondents to proceed with the Rule 30 application after receiving service of the declaratory application. On the hand, the applicants could have waited for the Rule 30 application and allowed those proceedings to proceed. If the respondents did not proceed within the requisite time periods, they could have proceeded with their joinder application or, if necessary, launched the declaratory application. Accordingly, I believe it apposite that each party pay their own costs.

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[7] Supra fn 4
[8] 1993 (1) SA 606 (C) at 609

[43] The following order is granted:

1. The application for a declarator is granted.
2. The Rule 30 application is dismissed.
3. Each party is to pay their own costs.

S WEINER
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

For the Applicants: Advocate CDA Loxton SC
: Adv A Milovanovic

Instructed by: Thipa Denega Inc.

For the First to sixth Respondents: Advocate M Brassey SC
:Advocate G Engelbrecht

Instructed by: Bowman Gilfillan Inc.

Date of hearing: 21 November 2016

Date of Argument: 21 November 2016

Date of Judgment: 6 December 2016