

SOUTH AFRICA / JUDGMENT

Diale and Another v Diale and Another In re: Diale v Gallery Momo Johannesburg (Pty) Ltd (2019/23347) [2021] ZAGPJHC 603 (23 March 2021) [2021] ZAGPJHC 603

COURT

South Gauteng High Court, Johannesburg

BEFORE

Yacoob

CASE / FILE NUMBER

2019/23347

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2019/23347

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

NOT

REVISED.

23/03/2021

In

the matter between: DIALE,
MARRIAM
N.O.
First Applicant
MORRIS,
SAFEIYA ROBYN N.O.
Second Applicant
and
DIALE,
MARRIAM
N.O.
First Respondent
GALLERY
MOMO JOHANNESBURG (PTY) LTD
Second Respondent
In

re: DIALE,
MARRIAM
N.O.
Applicant
GALLERY
MOMO JOHANNESBURG (PTY) LTD
Respondent

JUDGMENT

YACOOB J:

1. The applicants are the trustees of the Dumile Feni Family Trust. They seek an order joining them, in their capacity as trustees, as applicants in the main application, which has been brought by the first respondent in her capacity as the executrix of the estate of the late Dumile Mexaji Feni (“Feni”), a renowned South African artist who died in exile in New York in
1991. The first applicant and the first respondent in the joinder application are the same natural person, acting in different legal capacities. The first applicant is the late Feni’s daughter,
2. The second respondent is a Gallery with which either the estate or the Trust has or had an agreement regarding Feni’s artwork.
3. In this judgment I shall refer to the applicants as “the Trust”, the first respondent as “the estate”, and the second respondent as “the Gallery”. Where it is necessary to refer to the first applicant/ first respondent as a natural person, I shall refer to her as “Ms Diale”.

4. The estate brought an application seeking the return of any of Feni's artwork in the Gallery's possession, and seeking an order that a mandate given to the Gallery had been validly terminated; that the Gallery render a complete account to the estate of all relevant transactions; that the Gallery pay to the estate the proceeds of the sales of two specific works, and that the Gallery be interdicted from dealing with Feni's works or holding itself out as authorised to deal with Feni's works.
5. The Gallery in its answering affidavit denies an agreement with the estate and pleads an agreement with the Trust. It claims a rectification of the terms of the agreement with the Trust, and denies that Ms Diale was acting in either her personal capacity or as executrix of the estate when she collected Feni's work and delivered it to the Gallery for sale or "commercialisation".

It contends that Ms Diale must have been authorised by the estate to collect and realise the works through the Trust, and that the agreement with the Trust is still in existence.

6. The Gallery seeks that the dispute be determined on the basis of the agreement it allegedly has with the Trust, and that the application be dismissed.
7. It is for this reason that the Trust seeks to intervene or be joined as an applicant in the main application. The Trust contends that it has a substantial interest in the matter since, if the mandate between the estate and the Gallery is found not to exist, the Trust contends it would then be entitled to the relief sought by the estate in terms of the agreement between the Trust and

the Gallery.

8. The Gallery opposes the joinder of the Trust on the basis that the notice of motion in the main application does not seek the return of works and payment of money to the Trust, but to the estate, and therefore that the Trust does not have a real and substantial interest.
9. It is contended on the Gallery's behalf that if there is no plea of non-joinder, the Gallery's defence of an agreement between it and the Trust does not have any effect on whether the Trust has an interest in the main application. The Gallery's version, it is submitted, is irrelevant.
10. The Trust, on the other hand, contends that it clearly has an interest in the subject matter of the main application, which may be affected by the judgment of the court in the main application and is therefore entitled to be joined. It only has to show some right which will be affected.
11. In my view, it is clear that the only reason the Gallery opposes the joinder of the Trust is because it relies on the agreement it has with the Trust as a defence, and wishes its own version to be the only version before the court dealing with the main application. It is clear that the Trust has an interest in the subject matter of the main application. It is not sufficient for the Gallery to say that the Trust does not seek relief for itself in the main application. The

Trust does not need to in order to have an interest. The Trust certainly does have an interest if someone is relying on the Trust's alleged actions to avoid an obligation to someone else.

12. In addition, if the Trust wishes to seek the alternative relief it refers to in the application for joinder, after the main application is determined, and if the main application is determined in the Gallery's favour, it is open to it to do so. However I do not see why it should. It is in the interests of justice that the issues be fully ventilated and determined at the same time.
13. Since the Gallery's opposition of this application has been in vain I see no reason why it should not bear the costs, nor was any submission made that costs should not follow the result.
14. For these reasons I grant the following order:
 1. Marriam Diale N.O. and Safeiya Robyn Morris N.O. in their capacity as the trustees of the Dumile Feni Family Trust are joined as the second and third respondents in the main application.
 2. The second respondent in the joinder application is to pay the costs of the joinder application.

S. YACOOB

JUDGE OF THE HIGH COURT

Appearances

Counsel for Applicants:

NS Nxumalo

Instructing Attorneys:

Mthembu Inc

Counsel for Second Respondent: M Smit

Instructing Attorneys:

Mohamed Randera & Associates

Date of hearing:

Determined in the absence of oral argument by agreement

Date of judgment:

23 March 2021

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Prepared on 9 October 2026 · Esheria