

SOUTH AFRICA / JUDGMENT

Engelbrecht N.O and Another v Mokitmi and Others (1424/2022) [2023] ZANCHC 56 (28 July 2023) [2023] ZANCHC 56

COURT

Northern Cape High Court, Kimberley

BEFORE

Nxumalo

CASE / FILE NUMBER

1424/2022

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF

SOUTH AFRICA

NORTHERN CAPE

DIVISION, KIMBERLEY

CASE

NO: 1424/2022

DATE

HEARD: 10

MARCH 2023

DATE

OF ORDER: 10 MARCH 2023

THIS

JUDGMENT DELIVERED ON: 28

JULY 2023

In

the matter between:

ENGELBRECHT,
FRANKEL
N.O.
First Applicant
MAKOBO,
MMABATHO
LUCIA
Second Applicant
and
MOKITIMI,
LOUISE
MMAPHUTI
First Respondent
LOUW,
TEBOGO
CLIFFORD
Second Respondent
MATHEBULA,
SHANE
Third Respondent
NKOPANE,
ITUMELENG
Fourth Respondent
ZHANG,
QING
Fifth Respondent
HUANG,
CHAOQIANG
Sixth Respondent
In

re:

MAKOBO,
MMABATHO
LUCIA
Second Applicant
CHARISM
FUNERAL DIRECTORS
CC
Third Applicant
THE
MASTER OF THE HIGH COURT, KIMBERLEY
Second Respondent
FIRST
NATIONAL BANK
TRUST
Third Respondent
LOUW,
TEBOGO
CLIFFORD
Fourth Respondent
MATHEBULA,

SHANE
Fifth Respondent
NKOPANE,
ITUMELENG
Sixth Respondent
ZHANG,
QING
Seventh Respondent
HUANG,
CHAOQIANG
Eighth Respondent

Coram: Nxumalo J

JUDGMENT

Nxumalo J:

BRIEF STATEMENT OF RELEVANT BACKGROUND FACTS:

1. On 13 July 2022, the first applicant, in his capacity as Executor of the Estate Late of one Simangele Agnes Mabotsa; and the second and third applicants lodged an application in this Court inter alia seeking both restraining and mandatory interdicts against the respondents variously; to wit:
 - (a) that the first respondent be prohibited from receiving and/or utilising the rental income due to the Estate Late Simangele Agnes Mabotsa and/or the Estate Late Mabotsa Daniel Alex Mabotsa, as well as the third applicant, as received from the fourth to eighth respondents;
 - (b) that the fourth to eighth respondents be ordered to effect payment of the monthly rental income due to the said estates into the bank account of the Estate Late Mabotsa SA; and that of the third applicant into the trust account of its attorneys, until it has opened a bank account; and that the first respondent and any other opposed to the application pay its costs on an attorney and client scale. The applicant also sought further and/or alternative relief.
2. It is significant to interpose and point out that the first applicant, who is a practising attorney, is the deponent to the founding affidavit against which the main application is predicated. As alluded above, the applicant was appointed as Executor in the Late Estate of SA Mabotsa on 17 February 2022. It is also significant to point out that in paragraph 2 of the said affidavit he avers, inter alia, that the facts contained therein, unless otherwise indicated are within his personal knowledge and are to the best of his knowledge and belief both true and correct.
3. After his appointment as Executor the deponent opened an estate account for the late Simangele Agnes Mabotsa. Thereafter the deponent directed the first respondent in writing to henceforth pay all rental income pertaining to the said properties over into the relevant Late Estate account. She was also advised that she was not entitled to dispose of, or remove

any assets of the Late Estate without the deponent's consent, even though she was a co-heiress. From the information obtained from the first respondent, the third respondent (FNB Trust) has renounced its appointment as Executor in the Estate Late of MDA Mabotsa.

4. The second applicant, for her own part, is a joint heiress with the first respondent in the said estates. The third applicant is a close corporation in which the combined deceased estates hold 50% members' interest under the name of the late Mr MDA Mabotsa. Sans the second respondent, the remainder are several tenants to various commercial properties owned by the third respondent.
5. In paragraph 20 of the said affidavit, the deponent avers that notwithstanding the fact that the relevant lease agreements were concluded by and between the late MDA Mabotsa and the fourth to eighth respondents, respectively; some of the rent is due and payable to the third applicant. In paragraphs 21 to 22 of the said affidavit, the following is averred:

"21.

The First Respondent has been collecting the rental from Fourth to Eighth Respondents and has, in her discretion, decided where and how the money should be allocated and applied. Needless to say, none of the funds are paid to the estate bank account of the late Simangele Agnes Mabotsa and there is no estate bank account for the late Mabotsa Daniel Alex Mabotsa and the Third Applicant.

22.

On the instructions of the Second Applicant, I addressed a letter to the First Respondent on 15 September 2021. Therein, the First Respondent was warned against taking possession of or controlling the property of a deceased estate and could not use any funds in relation thereto for her own purposes. I had requested her to contact my office to arrange for the monthly rental to be paid into my trust account until such time as FNB was appointed in the estate of MDA Mabotsa. I also indicated that the First Respondent would be liable to report on all income received and expenses paid for the period since she took control of the estates' assets. The First Respondent was urged to contact our offices, failing which I would have to bring an Application for an interdict in the High Court and request a Cost Order on an attorney and client scale..."[1]

6. In paragraph 30-31 of the said affidavit, the following is stated:

"30.

I can state that despite various requests and warnings, the First Respondent has failed to pay over the rental income into the estate bank account. She has appropriated the rental income for herself contrary to the ADMINISTRATION OF ESTATES ACT 66 OF 1965. Further, she has arbitrarily and unilaterally decided how and when to allocate these funds to pay certain expenses relating to the property.

31.

I therefore submit that a proper case has been made out for the relief sought. In addition, the relief for a costs order on an attorney and client scale is justified by the First Respondent's behaviour, not only in receiving the rental income but also infringing on the rights of other heirs by locking the gates where they reside and installing cameras. The First Respondent has also repeatedly had her misconduct pointed out to her, to no avail.”[2]

7. Paragraphs 35, 36 and 38, read as follows:

“35.

At present, the Applicants do not have an alternative remedy. Various letters were sent to the First Respondent to no avail. Letters were also sent to the Fourth to Seventh Respondents, attached hereto as Annexure FE22, 23, 24, and 25, respectively. There was no positive feedback from these Respondents.[3]

36.

It is abundantly clear that, the First Respondent's continued receipt of the rental income will be to the detriment and prejudice of the Applicants and possible creditors. I do submit that the balance of convenience therefore favours the Applicants.

37...

38.

I submit that a proper case has been made out for the relief sought in the Notice of Motion and therefore request the Honourable Court for such orders.”[4]

8. The remainder of the relevant facts may be gleaned in the founding papers filed of record. It is not necessary, for the purposes of this judgment to regurgitate same here to avoid prolixity.

THE RELEVANT CHRONOLOGY, IN SUM:

9. On 19 August 2022, the matter was set down on the unopposed roll and subsequently postponed to 09 September 2022, with costs in the application. On the latter date, this Court issued a rule nisi, returnable on 14 October 2022, on an unopposed basis. The first respondent was ordered to pay the costs of the application on an attorney and client scale and any other respondent who opposes the application.
10. On 14 October 2022, this Court having heard the applicants, unopposed and having read the rule nisi in question and the other documents filed of record, ordered that the matter be postponed to 18 November 2022 and the rule nisi be extended accordingly. No order as to costs was granted.

11. On 17 February 2023, having heard the applicant's counsel and the applicant in person and having read the rule nisi in question and other documents filed of record, this Court extended the said rule and postponed the matter to 04 April 2023. The costs resulting from this postponement were reserved.

THE CONTEMPT OF COURT APPLICATION:

12. The foregoing notwithstanding, the matter was subsequently set down for 10 March 2023, ostensibly for postponement to the opposed roll for the necessary papers to be delivered on behalf of the parties, including heads of argument. In this application the applicant forthrightly sought the first to sixth respondents to be found to be in contempt of the Court Order dated 09 September 2022 and that a sentence of imprisonment be imposed on the said respondents for such a period as this Court may deem fit; costs and further and/or alternative relief.
13. Of significance in this regard is what is contained in paragraphs 25 to 29 of the founding affidavit against which this application is predicated; to wit:

“25.

As indicated in the founding affidavit to the interdict application and as appears from what was set out above, the Respondents and especially the First Respondent, blatantly and intentionally ignore the prescripts of the Administration of Estates Act, the rights of the Second and the Third Applicants and a Court Order clearly directing and prohibiting them not to collect and/or to interfere with the collection of the rent and to pay the rent into the aforementioned accounts.[5]

26.

I humbly submit that from what was stated herein as well as in the Founding Affidavit to the interdict application, it is quite clear that the Respondents especially the First Respondent, have no intention in complying to any Court Order and/or

obeying the Administration of Estate's Act. I furthermore submit that it is clear that unless the Respondents are incarcerated, no one of them will adhere to the Court Order.[6]

27.

Furthermore, the conduct of the Respondents, especially the First Respondent, are prejudicial to the winding up of the estate, to the rights of the co-heir and the Second member of the Third Applicant. Furthermore, it is unclear whether these funds collected by the First Respondent, will be recoverable from the First Respondent if the current situation is allowed to continue.

28.

The conduct of the Respondents, especially the First Respondent, are not only mala fide but also intentional. Their conduct is furthermore a complete disregard of laws of South Africa and the powers of the judiciary.

29.

In light of the abovementioned, I therefore humbly submit that the Honourable Court find the Respondent in contempt of Court and orders that the Respondent be incarcerated for contempt of Court for a period of 90 days as per the applicable Statute.”[7]

14. The remainder of the allegations contained in this affidavit may also be gleaned therefrom. Having heard the applicant’s legal representative and having read the rule nisi and other documents filed of record, this Court ex mero motu rescinded the impugned rule with no order as to costs.

BRIEF STATEMENT OF THE LAW:

15. Section 173 of the Constitution expressly grants our Superior Courts inherent powers to protect and regulate their own processes. It is so in terms of rule 42(1)(a), that a Court may, in addition to any other powers it may have, ex mero motu or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. It has been held that the word “may” refers to circumstances under which the Court will consider a rescission or variation of the judgment, namely that it may act ex mero motu or upon application by an affected party.
16. The rule has been construed to mean that once one of the grounds is established, for example, that judgment was erroneously granted in the absence of a party affected thereby, the rescission of the judgment should be granted.[8] It can therefore be deduced from the foregoing that the jurisprudential basis of rule 42 is “to correct expeditiously an obviously wrong judgment or order.” [9]
17. Whilst it is so that a Court always has a wide discretion to refuse an interim interdict even if the requisites have been established.[10] On the other hand, since an interim interdict pending an action is an extraordinary remedy aimed at temporary relief, it is not granted unless all the legal requisites for same are fully met.[11] This means that the Court is entitled to have regard to a number of disparate and incommensurate features in coming to a decision and not that the Court has a free and unfettered discretion.[12]
18. It is also so that one of the seminal requisites for the granting of an interim interdict is the absence of another adequate remedy[13] or whether any other adequate remedy is available. It can be deduced from the foregoing that the final requirement for an interim interdict, like that of a final interdict, is the absence of another adequate remedy to the applicant and the respective requirements in this regard are similar.[14]

19. This requisite is thus a critical factor in the exercise of the Court's general discretion to grant or refuse an interim interdict.[15] The discretion is a juridical one which must be exercised according to law[16] and upon established facts.[17] On the other hand, a Court has no discretion to grant an interim interdict if all the requirements have not been established.[18] The critical question for consideration therefore was whether the applicants had established the absence of another adequate remedy available to them.
20. It is so that Section 13(1) of THE ADMINISTRATION OF ESTATES ACT, 66 of 1965,[19] expressly precludes any person from liquidating or distributing the estate of any deceased person, except under letters of Executorship granted or signed and sealed under the Act, or under an endorsement made under Section 15, or in pursuance of a direction by a Master. It is also so that Section 26(1) of the Act, expressly stipulates that immediately after letters of Executorship have been granted to him an Executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.
21. It is trite that one of the essential requirements for the granting of interdicts, interim or final, is the absence of an alternative adequate remedy.[20] It is also trite that the alternative remedy must be adequate in the circumstances;[21] be ordinary and reasonable;[22] be a legal remedy;[23] and grant similar protection which is equally effective or suitable.[24] An applicant must also, as a general rule, first exhaust other available remedies provided for in the specific statute, regard being had to the relief sought. More, it is also trite that a criminal sanction may in particular circumstances provide an adequate alternative remedy.[25]
22. Section 102(1)(g)(iii) of the Act, for its own part expressly stipulates that any person who contravenes or fails to comply with the provisions of inter alia Section 9(1) or (3), 13, 27(1) of the Act, shall be guilty of an offence and liable on conviction, in the case of an offence referred to in paragraph (f) or (g), to a fine or imprisonment for a period not exceeding twelve months. It is clear from the foregoing that the alternative adequate remedy available to the applicants, at all material times hereto, was to report the alleged crime to the Police. [26]
23. Section 12(1)(b) of the Constitution, for its own part, as far as it is material, expressly guarantees everyone the right to freedom and security of the person, which includes the right not to be detained without trial. Section 205(3) of the Constitution expressly arrogates powers to the police to prevent; combat and investigate crime; to maintain public order; to protect and secure inhabitants of the Republic and their property; and to uphold and enforce the law.

24. The question that arose before this Court *mero motu* was then whether the rule nisi against which the contempt of Court was predicated, in the first place was erroneously sought or granted, regard being had to the

facts of this case and the applicable law. Conterminously, concomitant to the foregoing was whether reporting the first respondent's impugned conduct to the police would not have been an adequate alternative remedy for the applicants in this case. What this Court coevally considered *ex mero motu* was whether the criminal prosecution under Section 102(1)(g)(iii) of the Act was competent in the circumstances and if so, whether it was shown that such a prosecution would not be an adequate alternative remedy.

25. It is so that in certain cases, a criminal prosecution may well be an adequate remedy such as to disentitle a person to whom such remedy is available from obtaining an interdict : cf *Celliers v Lehfeldt* 1921 AD 509, where an order binding over was, in the circumstances of that case, held to be such a remedy, and *Ebrahim v Twala and Others* 1951(2) SA 490 (W) where Dowling J (at 493H - 494A) held that the remedy, *inter alia*, of a criminal prosecution was not adequate in the circumstances of the case before him and stated:

"I make this reservation advisedly, because I am not prepared to say that there may not be cases where these remedies [which included a criminal prosecution] or some of them may be adequate." [27]

26. No attempt is made in the affidavits filed on behalf of the applicants in the motion that resulted in the rule nisi being granted indicating why a criminal prosecution in this case would be an inadequate remedy. Indeed, the deponent does not even state if any endeavours were made to lay a charge or what happened, or did not happen, if such a charge was laid. It has not even been suggested for a moment that the State declined to prosecute nor that there is any realistic reason to believe that a prosecution (whether brought by the State or the applicants as private prosecutors) will fail for some technical reason. By contrast, in the *Ebrahim* case, *supra*, it was stated (at 493 A-B) that the remedy of the institution of a prosecution had been found to be ineffective.[28]

27. As alluded above, all the deponent baldly states, is the following: "At present, the Applicants do not have an alternative remedy..." This clearly is not a correct statement of the law. Whilst it has long been well said that:

"God forbid that it should be imagined that an attorney, or counsel, or even a judge, is bound to know all the law" per Abbot CJ in Montriou v Jeffries.[29]

This Court is however constrained to interpose to point out here that Rule 3 (3.13) of the Code of Conduct for All Legal Practitioners unequivocally stipulates as follows:

"Legal practitioners, candidate legal practitioners and juristic entities, shall remain reasonably abreast of legal developments; applicable laws and regulations; legal theory and the common law; and legal practice in the fields in which they practice."[30]

CONCLUSION:

28. The rescinded rule nisi was clearly erroneously sought and granted in the absence of a party affected by it in circumstance where the Court was in error due to a misrepresentation of the applicant's deponent, who is a qualified lawyer, that the applicant did not have any alternative adequate remedy other than the relief sought.
29. There is clearly a causative link between the impugned averment and the granting of the rescinded rule nisi which was granted as a result of the said mistake. It is so since the mistake obviously relates to and is based on a pertinent prerequisite for the granting of interim interdicts and the procedure adopted.
30. It is for the foregoing reasons that this Court was constrained to grant the following order; to wit:

ORDER:

- (a) THE ABOVEMENTIONED RULE NISI BE AND IS HEREBY RESCINDED.
- (b) THERE IS NO ORDER AS TO COSTS.

JUDGE APS NXUMALO

HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

[26 JULY 2023]

Counsel for the Applicants: MS SNYDERS Instructed by: Engelsman Magabane Inc. Kimberley 1st
Respondent: In Person

- [1] Emphasis supplied
- [2] Emphasis supplied
- [3] Emphasis supplied
- [4] Emphasis supplied
- [5] Emphasis supplied
- [6] Emphasis supplied
- [7] Emphasis supplied
- [8] Mutebwa v Mutebwa 2001 (2) SA 193(Tk) at 199I-J
- [9] Bakoven Ltd v GJ Howes (Pty Ltd) 1992 (2) SA 466 (E) at 471E-F
- [10] Setlogelo v Setlogelo 1914 AD 221
- [11] Plettenberg Bay v Minister of Law and Order 1993 (2) SA 396 (C) 400

[12] Knox D'Arcy v Jamieson

[1996] ZASCA 58; 1996 (4) SA 348 (A) 361 at 680I

[13] Van Niekerk v Van Rensburg 1957 (4) SA 510 (T)

[14] Prest, The Law and Practice of Interdicts, (Juta, Cape Town) at p 77

[15] Beecham Group Ltd v BM Group (Pty) Ltd 1977 (1) SA 50 (T) 57

[16] Gründling v Beyers and Others 1967

(2) SA 131 (W) 155

[17] Benoni Town Council v Meyer and Others 1961(3) SA 316 (W) 326

[18] Plettenberg Bay Entertainment v Minister of Law and Order 1993 (2) SA 369 (C) 400

[19] Hereinafter referred to as the "Act."

[20] Chapmans Peak Hotel v Jab & Analene Restaurants 2001 (4) All SA 415 (C)

[21] Free State Gold Areas v Merriespruit Gold Mining 1961 (2) SA 505 (W) 518 at 524-525

[22] Martin v Kiesbeampte Newcastle Afdeling 1958 (2) SA 649 (N)

[23] Francis v Roberts 1973 (1) SA 507 (RA) at 512

[24] Cape Town Municipality v Abdulla 1974

(4) SA 428 (C) at 440

[25] FAWU v Scandia Delicatessen 2001 (3) SA 613 (SCA), overruling Minister of Health v Drums & Pails Reconditioning 1997

(3) SA 867 (N) 877

[26] FAWU v Scandia Delicatessen, (supra)

[27] Emphasis supplied

[28] FAWU v Scandia Delicatessen (supra) fn 25, paras 35-39

[29] (1825) C & P 113 at 116 (NP)

[30] Emphasis supplied

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANCHC/2023/56.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/engelbrecht-no-and-another-v-mokitmi-unknown-topic-anchc-2023--6a3ea5153b1caa912980cdcc>

Prepared on 11 October 2026 · Esheria