

SOUTH AFRICA / JUDGMENT

H.G.D and Another v Z.Z and Others (534/2016) [2017] ZAECMHC 44 (14 November 2017) [2017] ZAECMHC 44

COURT

Eastern Cape High Court, Mthatha

BEFORE

RWN Brooks

CASE / FILE NUMBER

534/2016

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

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII

Policy

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION:

MTHATHA

CASE NO. 534/2016

H.

G. D.

Applicant

and

N.

P. Z. N.O

In

her capacity as natural
guardian of:

Z.
Z.; and
A.
Z.
1ST Respondent
S.
D.
2ND Respondent
B.
D.
3RD Respondent
L.
D.
4TH Respondent
O.
D.
5TH Respondent
MASTER
OF THE E.CAPE
HIGH
COURT MTHATHA
6TH Respondent

JUDGMENT

BROOKS J

- [1] On 18 February 2016 the applicant launched an application in which she sought the following relief:

“1. That this Honourable Court declares that universal partnership existed between the applicant and D. Z. D. herein referred to as the deceased.

2. That this Honourable Court declares that half the assets of the estate of the deceased belonged to the applicant.
3. That this Honourable Court grants an order of costs only in the event of opposing the application.” (sic)
- [2] The application was originally launched as a counter application. It was the first respondent who was the applicant in the initial application. The relief which the first respondent claimed against inter alia the applicant was granted in due course. The nature thereof is not relevant to the outcome of the present proceedings. Only the first respondent has opposed the application brought by the applicant.
- [3] A full set of affidavits was exchanged by the parties.

- [4] On 22 June 2016 the applicant sought the allocation of this matter to an opposed motion court roll by the registrar. The matter was allocated to the opposed motion court roll for 10 November 2016. On that date the parties legal representatives appeared before this court and the matter stood down by agreement to 16 November 2016 to enable due consideration to be given to the extra curial resolution of the issues between the parties. On 16 November 2016 the matter was removed from the roll. It was indicated by Mr Bodlani, who then appeared on behalf of the applicant, that consideration was being given to the supplementation of the papers.

In the circumstances, the applicant tendered payment of the wasted costs.

- [5] A year later the matter is again before this court. It was set down by the first respondent who, as before, was represented by Mr Botma. On this occasion, the applicant was represented by Mr Ntsaluba. The application papers have not been supplemented and are in the same form as they were a year ago.
- [6] The proper approach to be adopted in a matter of this nature has been re-affirmed in NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS vs ZUMA[1] where the following is stated by Harms DP:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.”

It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, or so clearly untenable that the court is justified in rejecting them merely on the papers.”

- [7] In her answering affidavit the first respondent purports to raise a number of disputes of fact in order to defeat the application.

In my view, when properly analysed, they amount to no more than bald denials inasmuch as the first respondent bases all her denials of the factual averments made by the applicant upon a lack of knowledge thereof and then puts the applicant to the proof of the allegations she has already made. In such circumstances, the allegations made in the founding affidavit are every bit as reliable as undisputed facts and the real question is whether, on those facts, the applicant is entitled to relief.

- [8] In giving consideration to claims that a partnership exists, over the years our courts have accepted the formulation by Pothier[2]. The applicant must prove the existence of three essentials, being that:

- each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money or labour or skill;
- the partnership business should be carried on for the joint benefit of both parties; and
- the object should be to make a profit.

[9] The courts have discounted a fourth element proposed by Pothier, namely that the partnership contract should be legitimate on account of it being common to all contracts.

[10] The applicant's entitlement to relief is to be assessed in the light of the following undisputed facts:

- the applicant and the deceased were married out of community of property on 29 June 1976 in accordance with the marriage laws prevailing in the country at the time;
- although in terms of the applicable marital property regime the applicant and the deceased held separate estates, de facto the position which prevailed between them was different;
- as the marriage matured the deceased acquired an LLB degree and the applicant a B. Com. Degree majoring in accounting and business management;
- the applicant studied towards a related honours degree;
- the applicant and the deceased made a joint decision to embark upon opening some businesses for their mutual benefit;
- the applicant gave up her teaching career and took responsibility for the commercial aspects of the businesses;
- with an established career as an attorney, the deceased contributed by taking responsibility for the legal aspect of the businesses;
- from the inception of the family business enterprise the applicant has fulfilled her agreed function to date, drawing only a modest salary from the businesses;
- the first business to be opened by the applicant and the deceased was a bookshop, opened in 1990 in Ngqeleni, a hardware store;
- the business model adopted was always to plough the profits generated back into the businesses and to use them to make other investments, usually in the form of the purchase of immovable property;
- using this business model, the applicant and the deceased purchased the erf upon which the Ngqeleni businesses were located and subdivided it into two erven;
- over the years the businesses enterprise expanded and additional businesses were acquired;

- the original businesses in Ngqeleni were closed in approximately 1998 but the immovable property was retained and is let currently to Pepkor for a monthly rental;
- in 1994 the applicant and the deceased entered into a franchise agreement with a tiling company. In 1997 they formed a close corporation, each holding a 50% members interest, to operate this business;
- in 2014 the franchise agreement was renewed and the business operates currently, trading as CTM Mthatha;
- the applicant and the deceased registered a close corporation to operate Spar supermarkets in Butterworth;
- in 2001 the applicant and the deceased registered a close corporation as a vehicle through which to operate hardware stores in Mthatha and Mount Frere, but these operations ceased in 2008;
- whilst the applicant was in charge of the operational and financial management of the various businesses the deceased attended to his legal practice;
- the deceased controlled the family bank accounts into which were paid rentals received from the lease of immovable properties and amounts generated by the profits of the family businesses;
- the rentals and profits paid into the family bank accounts were used to purchase additional immovable properties in accordance with the business model pursued since 1990;
- all the properties listed in annexure HDI to the founding affidavit were registered in the name of the deceased but were paid for by the profits and rentals generated by the family business and were regarded by the applicant and the deceased as partnership assets, with the exception of Unit 6, S. S., East London, held under title deed ST 1566/2013, which was paid for by the deceased and was not part of the joint investment;
- not include in the list of properties which forms annexure HDI to the founding affidavit is an immovable property described by the applicant as “the Maderia property” which was a partnership asset and which was sold for R4, 6m in 2013.

[11] It is apposite to record that the allegations in the founding affidavit are confirmed in three confirmatory affidavits filed by the children of the applicant and the deceased.

[12] In her replying affidavit the applicant confirms that she makes no claim to any property which the deceased purchased using the proceeds generated by his legal practice and is only concerned with property that was purchased utilising the proceeds from the business venture conducted in partnership by the applicant and the deceased.

[13] It is clear that with the passage of time the applicant and the deceased formed close corporations as vehicles through which to operate their joint business ventures. Each held a member's interest therein. In due course, certain relatives also acquired a member's interest therein. Mr Botma submitted that this model defeats the applicant's claim for a declarator that she and the deceased operated the family business in partnership. In my view, this approach towards the

facts

alleged by the applicant is deficient. Whilst it is so that the integrity of the various member's interests held in the businesses which are still operated by the applicant is preserved by the separateness of the legal entities of those businesses from their members, the creation of the close corporations in no way undermines the applicant's factual averments to the effect that in accordance with decisions made by her and the deceased jointly the profit and the rentals generated by the businesses were utilised to purchase the immovable properties which were regarded as partnership assets. There is no legal impediment to the applicant and the deceased reaching agreement to utilise the profits generated by their businesses in this manner. Nor is there any legal impediment to their joint decision to apply rentals received from the lease of partnership assets to the purchase of additional partnership assets.

[14] Mr Botma also submitted that the properties targeted by the applicant have been purchased utilising funds belonging to the close corporations which therefore have claims against the estate of the deceased. Of this there is no suggestion in the application papers. The applicant's unchallenged factual averments demonstrate only that profits generated by the lease of partnership assets were utilised to purchase the immovable properties. Any amount standing to the credit of one of the close corporations in a loan account which may be due and payable by the deceased's estate forms the subject of a separate enquiry and in no way excludes the business model described by the applicant in her founding affidavit.

[15] in my view the applicant has made out a case for a declaratory order to the effect that the immovable properties listed in annexure HD1 to the founding affidavit, with the exception of Unit 6, S. S., East London, held under title deed ST1566/2013, are deemed to be assets of a universal partnership formed by the applicant and the deceased for their joint operation of the family businesses. Any additional assets which may be demonstrated as having been purchased as partnership assets utilising the same source of funding would also form part of the universal partnership. Any assets purchased by the deceased directly, utilising the proceeds from his legal practice, are excluded therefrom. So too, by operation of law, are the various member's interests in the close corporation of which the deceased and the applicant, and members of their family, were and are members.

[16] In addressing the issue of costs, Mr Botma indicated that the matter had been opposed because the notice of motion sought a declaratory order that a universal partnership existed and a declaratory order that half of the assets of the estate of the deceased belonged to the applicant. Particularly the latter element of the relief was criticised as being wider than the

relief to which the applicant may be entitled. Accordingly, he submitted that the respondent should not have to pay the costs of the application in the event that she is unsuccessful in her opposition thereto.

[17] Whilst it is so that the terms in which the notice of motion are expressed aim at relief which is broader than that to which the applicant is entitled, the content of the founding affidavit makes it clear that the declarators sought do not relate to the entire estate of the deceased. If there were any uncertainty about this, the replying affidavit clarifies the nature and extent of the relief claimed. Nothing prevented the first respondent from considering the matter on the allegations made out in the affidavits filed by the applicant and confirmed by her children and responding to the application accordingly. The first respondent puts up no factual case in opposition and her answering affidavit records her lack of knowledge of the essential averments made by the applicant and requires her to prove them. To some extent a case in opposition has been attempted which relies upon an assessment of the probabilities by the first respondent of the facts of which she states she has no knowledge. Such an approach is inappropriate in motion proceedings.[3]

[18] Even if the first respondent's manner of handling the matter were to be excused on the basis of the relief claimed in the notice of motion being too widely expressed, which of necessity must ignore a proper reading of the applicant's affidavits, such accommodation of the first respondent's approach cannot survive beyond the occasion when the matter was first enrolled in the opposed motion court. The first respondent's legal team were made fully aware of the prima facie view the court took of the matter in order that a serious attempt might be made at reaching a settlement in the matter. The

application stood down for this specific purpose. The attempt failed and the matter was postponed. Fortunately for the first respondent, this was at the expense of the applicant.

[19] The matter was re-enrolled before this court by the first respondent. Mr Botma informed the court that the purpose of the re-enrolment was to achieve finality. The question which is raised immediately and which goes unanswered is why the additional

costs of re-enrolment were necessary. Nothing prevented the first respondent from reaching agreement with the applicant extra curially. This factor, combined with the fact that on the merits of the application the first respondent had no case to raise in opposition,

means that no reason exists why costs should not follow the result.

[20] The following order will issue:

"1. The applicant, H. G. D., and the deceased, D. Z. D., formed a tacit partnership agreement during 1990 in respect of the conduct of family businesses conducted by them as equal partners

until the death of the deceased;

2. The applicant is entitled to one half of the net assets of the partnership referred in paragraph 1 of this order as at the date of the death of the deceased, alternatively to the payment by the estate of the deceased of an amount equal to one half of the net value of the assets of the partnership referred to in paragraph 1 of this order as at the date of death of the deceased;
3. For the purpose of paragraph 2 of this order, the assets of the partnership referred to in paragraph 1 of this order shall include all assets which maybe demonstrated to the executor of the estate of the deceased by the applicant to have been purchased utilising the profits generated by the said partnership and/or the rental income derived from the lease of assets belonging to the said partnership including, but not limited to, the immovable properties registered by

the deceased in his own name and reflected in annexure HD1 attached to the founding affidavit of the applicant and/or the proceeds

generated by the sale of any such assets;

4. For the purpose of paragraph 2 and paragraph 3 of this order, the following shall be excluded from the assets of the partnership referred to in paragraph 1 of this order:

4.1 the immovable property described as Unit [...], S. S., East London, registered in the name of the deceased under title deed ST1566/2013;

4.2 any assets purchased by the deceased utilising funds derived from his practice as an attorney;

4.3 the member's interests in any close corporation of which the applicant and the deceased were members at the date of the death of the deceased.

5. The respondent is ordered to pay the costs of the application on the scale as between party and party."

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

Applicant:

ADV TM NTSALUBA SC

Instructed by:

Mantyi Attorneys

1st Floor,

Clublink Building

28 Madeira Street

MTHATHA

First respondent:

ADV DC BOTMA

Instructed by:

Smith Tabata Attorneys

34 Stanford Terrace

Date heard:

6 November 2017

Date delivered:

14 November 2017

[1]

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) para [26]

[2] R J POTHIER, A Treatise on the Law of Partnership (Tudor's translation 1.3.8); BESTER v VAN NIEKERK 1960 (2) SA 779 (A) at 783 H – 784A; PEZZUTTO v DREYER [1992] ZASCA 46; 1992 (3) SA 379 (A) at 390 A-C.

[3] Note 1 *ibid.*

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/ZAECMHC/2017/44.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/hgd-and-another-v-zz-unknown-topic-aecmhc-2017>

Prepared on 9 October 2026 · Esheria