

SOUTH AFRICA / JUDGMENT

Masoeu v Masoeu and Others (2039/2022) [2023] ZAFSHC 220 (2 June 2023)

[2023] ZAFSHC 220**COURT**

Free State High Court, Bloemfontein

BEFORE

M E Mahlangu

CASE / FILE NUMBER

2039/2022

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Policy**IN THE HIGH COURT****OF SOUTH AFRICA,****FREE STATE****DIVISION, BLOEMFONTEIN****Case****number: 2039/2022****REPORTABLE: YES/NO****OF****INTEREST TO OTHER JUDGES: YES/NO****CIRCULATE TO****YES/NO****MAGISTRATES:**

In the matter between: PULENG
 MARIA MOKOENA-MASOEU
 Applicant
 and
 MARIA
 MPOTSENG NHLAPHO-MASOEU
 1st
 Respondent
 LYDIA
 MOSIDI MASOEU
 2nd
 Respondent
 MATSHEPO
 SARAH MASOEU-LECHE
 3rd
 Respondent

CORAM: M E MAHLANGU, AJ

JUDGMENT

BY: M E MAHLANGU, AJ

HEARD ON: 25 MAY 2023

DELIVERED ON: 2 JUNE 2023

Introduction

- [1] The applicant was married to out of community of property and without the accrual system being applicable to the late Tlala Doctor Masoeu on 30 July 2020. The deceased is the father of the respondents.
- [2] The applicant alleges that, upon the death of her husband, the respondents dissipated and derived undue benefit from the estate of her late husband.

Background

- [3] On 4 May 2022, the applicant launched an urgent application in which she sought a rule nisi returnable 4 June 2022 wherein she interdicted the respondents from dealing with the estate of the deceased. The rule nisi was extended to 28 July 2022 and the judgement was handed down on 27 March 2023 where the rule nisi was partly amended and confirmed and was also partly dismissed. The following was part of the order granted on 27 March 2023:

“2.

- (a) Paragraph 2.1. The rule nisi is amended to read as follows:

“That the first, second and third respondents together are interdicted and/or restrained from disposing and/or dealing in and/or

transferring and/or dispensing with and/or in any manner alienating the assets forming part of the Estate Late Tlala Doctor Masoeu (ID No: 5[...]) and that includes, but is not limited to, the assets forming part of the Estate Late Tlala Doctor Masoeu as it pertains to the second and third applicants subject to the authority and/or instructions of the Master and/or the executrix.”

[4] On 11 April 2023, the applicant launched an urgent contempt of court order application in which she sought the following order from the court:

“2. That the First, Second and Third Respondents are in contempt of paragraph 2(a) of the order of this Court, granted on 27 March 2023, under case number 2039/2022.”

[5] The urgent application became opposed and was postponed to 14 April

2023. It was further postponed to 28 April 2023 for the filing of opposing and replying affidavits. The following order was made by the court pending the hearing of the urgent application:

“5. The respondents undertake that:

5.1 They will desist from conducting any business of Ramasoeu Funeral home and/or Ramasoeu Funeral Home, and any other matters in relation to the deceased estate of Tlala Doctor Masoeu, pending the outcome of this application.”

[6] The contempt of the court order urgent application was heard on 25 May 2023 in which after having heard the legal representatives of both parties, the following order was granted:

1. Point in limine of the locus standi is dismissed with costs in the cause.
2. Points in limine 2 to 4 are granted with costs in the cause
3. Merits of the matter to proceed.

[7] Upon granting of the order mentioned above, Adv Nhlapo-Merabe, the counsel for the applicant, requested the reasons for the judgment only relation to paragraph 2 of the order. The merits could not be heard and the judgement was reserved.

POINT IN LIMINE

[8] Second and Third points in limine: that the confirmatory affidavits attached to the contempt of court application do not comply with the Regulation 3 and 4 of the Regulations Governing the Administration of the Oath (the Regulations)

8.1 The respondents submitted that commissioning of the confirmatory affidavit of Uyleta Claudine Nel-Marais and Samuel Mokhotho is not in terms of Regulations 3(1) and 4(1) of the Regulations. Regulations 1 and 2 set out the nature of the oath or affirmation to be taken and the form in which it is administered. The Regulations have been promulgated in terms of section 10 of the Justices of Peace and Commissioners of Oath Act, Act 16 of 1963 (Act).

8.2 Section 3(1) and 4(1) of the Act provides that:

“3(1) The deponent shall sign the declaration in the presence of the Commissioner of Oaths.

4(1) Below the deponent’s signature or mark the commissioner of oath shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.”

8.3 Bothe the confirmatory affidavits of Nel-Marais and Mokhotho reads as follows:

“this affidavit has been sworn in to and signed before me at EXCELSIOR the 11 day of APRIL 2023 by the above-mentioned deponent....”

8.4 The Commissioner of Oaths that attended to the commissioning of the confirmatory affidavits is a practicing attorney of Bloemfontein by the name of Munashe E.T Nyangani.

8.5 The respondents submitted that, the confirmatory affidavits do not comply with Regulation 3(1) as the affidavit was signed at Excelsior whereas the Commissioner of Oaths was in Bloemfontein. The respondent further submitted that after the issue was raised in the opposing affidavit the applicant could have made some means to correct the signing of the confirmatory affidavits for them to comply with Regulation.

8.6 The applicant submitted in her heads of arguments that the deponents in both affidavits have affirmed that they know and understand the contents of the affidavits and that the Commissioner of Oaths have attested to both affidavits. She further submitted that, the affidavits were pre-signed and that they were to be attested and commissioned in Excelsior where Mr Mokhoto is based. Mr Mokhoto presented himself in Bloemfontein and the parties simply omitted to change the area in which they were to be signed. I am of a view that, the explanation given by the applicant does not make the affidavits to comply with Regulation 3(1) and 4(1).

8.7 In the matter of *S v Kahn* 1963(4) SA 897 (A) at 900C the court stated that it has the discretion to refuse or receive an affidavit attested otherwise than in accordance with the Regulations depending upon whether substantial compliance with the regulations has been proved or not.

8.8 In the case of *Cape Sheet Metal Works v JJ Calitz Builder* 1981 (1) SA 698 (O) at 699 A-B the court held that the provisions of Regulations 3 are not peremptory. In the case of *R v Sopete* 1950(3)SA769(E) at 774F-G referred to the court by the respondents, the court said the following about the directory nature of the regulations:

“But to say that the provisions are directory does not mean that all the rules are treated as ‘wasted paper’, for they are by decisions already quoted treated as of great value and failure to comply with them gives the court a discretion to treat the affidavit as of no value in proper cases”.

8.9 The respondents also referred the court to the case of *Firststrand Bank Limited v Briedenhann* 2022 (5) SA 215 in which it was held that:

“The language of Regulation 3(1) when read in the context of the Regulations as a whole, suggests that the deponent is required to

append their signature to the declaration in the physical presence of proximity of the commissioner. This accords with the concern for place, in so far as the exercise of the authority to administer an oath is concerned, as appears from the act. Regulations 2, 3 and 4 must be read as a whole since they provide for the manner in which an oath or affirmation is administered. The process follows a logical a sequence which requires the commissioner to satisfy themselves that the deponent understands the nature of the oath; administer it; obtain confirmation of the taking of the oath by signature on the document and thereafter, to append their signature with details of place, area and designation. These latter steps are to occur in the presence of the commissioner. It is apparent that the entire process is envisaged to occur in the presence of the commissioner. The essential purpose of the Regulations is to provide assurance, to a court receiving an affidavit, that the deponent, properly identified as the signatory, has taken an oath. The signature of the declaration in the presence of the commissioner establishes a guarantee that the consequences of oath taken are understood and accepted.

In my view, the plain meaning of the expression ‘in the presence of’ within its context in regulation 3(1), requires that the deponent to an affidavit takes the oath and signs the declaration in physical proximity to the commissioner.” (my emphasis)

8.10 The respondents further submitted in their heads of arguments that, all the averments relating to Mr Mokhoto and Ms Nel-Marais in the applicant’s replying affidavit concerning to commissioning of their affidavits amounts to hearsay. The reason for the respondent’s averment is that no confirmatory affidavit is annexed to the replying affidavit to confirm the averments as far as they relate to them. I agree with the respondents’ submissions.

8.11 I am of the view that the confirmatory affidavits of Mr Mokhoto and Ms Nel-Marais do not comply with regulation 3(1) and 4(1) of the Regulations and therefore does not amount to affidavits.

[9] Fourth point in limine: Leave not granted to file a supplementary affidavit.

9.1 The respondents submitted that, the applicant filed the supplementary affidavit to the contempt of court application without seeking leave to file it in terms of Uniform Rules of Court 6(5)(e).

9.2 The respondents further submitted that, the applicant supplementary affidavit filed without leave of court is pro non scripto and should be disregarded.

9.3 The applicant submitted that, the filing of the supplementary affidavit was necessitated by the respondents’ being in contempt of the court order granted on 13 April 2023. She further submitted that the deviation from the Rules of Court necessitated by the respondent’s contempt of the Court order.

9.4 It is common cause between the parties that the applicant instituted motion proceedings against the respondents. The respondents opposed the application and filed the answering affidavit. The applicant filed the replying affidavit in response to the answering affidavit.

[10] Rule 6(1)(e) of the Uniform Rules of Court reads as follows:

“(1) Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

(2) ...

(3) ...

(4)

(5)

(a) to (c)

(d) Any person opposing the grant of an order sought in the notice of motion must-

(i)

(ii) within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents; and

(iii)

(e) Within 10 days of the service upon him of the affidavit and documents referred to in subparagraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits”

[11] Rule 6(5)(e) clearly states that the Court has a discretion whether to allow further affidavits or not. The court could only exercise its discretion only when an application to file further affidavits had been launched.

[12] In the unreported matter of *Ndlebe v Budget Insurance Limited* (7457/2017) [2019] ZAGPJT 320 (22 February 2019) (Ndlebe) at paragraph 7 it was held that:

“It is trite that there are normally three sets of affidavits in motion proceedings. However, the Court has a wide discretion to allow the filing of further affidavits. It is upon the litigant who seeks to file a further affidavit to provide an explanation to the satisfaction of the Court that it was not malicious in its endeavour, to file the further affidavit and that the other party will not be prejudiced thereby.”

[13] It was held in *Hano Trading v JR 209 Investments* 2013(1) SA 161 that:

“[11] Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion in this regard where there is a good reason for doing so.

[12] This court stated in *James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons* NO 1963(4) SA 656 (A) at 660D-H that:

‘It is in the interest of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted.....’ (my emphasis).

[13] It was then later stated by Dlodlo J in *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) in paras 12-13:

“The applicant is simply not allowed in law to take it upon himself and [to] file an additional affidavit and put same on record without even serving the other party with the said affidavit.....”

Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the

firm view that this affidavit falls to be regarded as *pro non scripto*”

[14] As it has been mentioned in Ndlebe herein above, it is trite that three sets of affidavits are allowed, i.e the supporting affidavit, the answering affidavit and the replying affidavit. It is further trite that the applicant must stand and fall by his founding affidavit. The party who seeks to file further affidavit, must do so by obtaining leave from the court. The Court has a sole discretion whether to allow any further affidavit or not.

[15] I am therefore of a view that the supplementary affidavit filed by the applicant falls to be regarded as *pro non scripto*.

Costs

[16] One of the point in limine have been dismissed and the other 3 points in limine were granted. I am therefore of a view that no order as to costs to any of the parties should be made.

Order

[17] I consequently make the following order was made:

1. Point in limine of the locus standi is dismissed with costs in the cause.
2. Points in limine 2 and 3 are granted with costs in the cause

E. MAHLANGU AJ

Counsel for Applicant: Adv K Nhlapo-Marabe Attorneys for Applicant: UC Nel-Marais Lovius Block Attorneys 31 First Avenue, Westdene Bloemfontein Ref: U Nel-Marais/at/LM0213 Counsel for Respondents: Adv H.J Stander Attorneys for the Respondents: Stander& Associates 29 President Steyn Avenue Westdene Bloemfontein Email: chantelle@stanprok.co.za Ref: HJS/GM0833

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