

SOUTH AFRICA / JUDGMENT

Mbebe and Another v First National Bank Limited (1336/2020)

[2020] ZAECMHC 30 (21 July 2020)

[2020] ZAECMHC 30

COURT

Eastern Cape High Court, Mthatha

BEFORE

Dawood

CASE / FILE NUMBER

1336/2020

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL
DIVISION: MTHATHA)

CASE

NO. 1336/2020

In

the matter between:

BALEKILE FRANCE
MBEBE
1ST APPLICANT
NOMTSHA
MKUTUKA
2ND
APPLICANT
And
FIRST NATIONAL BANK
LIMITED
1ST RESPONDENT
NQABISA
FAVIA LOBETE

‘INTERVENING RESPONDENT’

JUDGMENT

DAWOOD J:

1. The applicants herein brought an application wherein they sought the following relief:

“1. That Rule Nisi do hereby issue calling upon the Respondent to show cause if any, on Tuesday the 2nd day of June 2020 at 10H00 or so soon thereafter as the matter may be heard why an order not be made final in the following terms:

1.1 That the conduct of the Respondent holding, closing and freezing Account Number: 628[...] of the 1st Applicant on 2nd April 2020 and 9 May 2020 be and is hereby declared unlawful, illegal and unconstitutional.

1.2 That the Respondent be and is hereby ordered or directed to reverse and open the 1st Applicant’s accounts held by the Respondent under account No. 628[...] forthwith and allow Applicant to withdraw money from the account.

1.3 That the conduct of the Respondent of holding, closing and freezing accounts of the Applicants be and is hereby declared unlawful, wrongful without any justification.

1.4 That it is hereby declared that the money on the accounts is the money of the Applicants.

1.5 That the conduct of the Respondent of holding, closing and freezing account number of the 2nd Applicant on 30 April 2020, be and is hereby declared unlawful, illegal and unconstitutional.

1.6 That the Respondent be and is hereby ordered or directed to reverse, open the 2nd Applicant’s account held by Respondent under account number 62-----574 forthwith and allow Applicant to withdraw money from the account.

1.7 That the Respondent had no authority to hold, close and freeze accounts of the Applicants.

1.8 That the conduct of the Respondent is declared to be unlawful.

1.9 The Respondent be and is hereby interdicted and restrained from freezing and/or closing the Applicants’ account.

2. That prayer 1.1, 1.2, 1.5, 1.6 and 1.8 are to operate as a mandamus pending the finalisation of the matter.

3. That Applicant be directed to make use of email service when effecting service of this matter.

4. The Respondent is directed to pay the costs of this application on an attorney and client scale.

5. Granting applicant such further and/or alternative relief.”
2. The respondent filed a notice to abide but accompanied it with an affidavit setting out the reasons for freezing the accounts. The respondent inter alia:
 - a) Did not raise the issue of jurisdiction;
 - b) Stated that its registered place of business was in Sandton.
 - c) Stated inter alia the following with regard to the issue of freezing the accounts:

“7.1.2. In terms of FNB’s T’s and C’s the Respondent may, in case of any actual or suspected fraudulent or criminal activity on any account, or if any dispute arises as to the authority of any representative, or if required by law, without notice, restrict access and/or disallow any further transactions, dealings on that account, stop services and may freeze all deposits standing to the credits of such account.

...

7.1.5. The premises of the dispute was that the disputed funds that were originally contained in the Estate Late account of Nozabathini Mbebe was rightfully part of the late Nozabathini Mbebe’s estate and could not be transferred from her account without the permission of the executrix, being Ms Lobete, which was not given.

7.1.6. As a result, the Respondent, in order to prevent the unauthorised dissipation of the disputed funds, placed a hold over all the accounts wherein the disputed funds were transferred to.

7.3.1. On or about 11 May 2020 the Respondent, through its attorneys, addressed a letter to the First Applicant advising that a hold had been placed on the various accounts held by the First Applicant and the account held by the Second Applicant due to the dispute that had arisen between the First Applicant and the executrix of the Estate of the late Nozabathini Mbebe in respect of the disputed funds. A copy of the letter is attached to the founding affidavit as annexure “BF5”.” (my emphasis)

3. Nqabisa Favia Lobete herein sought leave to intervene in the application and filed a conditional counter application. The applicant opposed her application for leave to intervene and made averments in this regard in his replying affidavit.
4. The first point to be determined is whether or not to grant her leave to intervene prior to dealing with the merits of the main application.
 - (1) Leave to intervene
 - a) The applicant herein states that the party seeking leave to intervene does not have the requisite direct and substantial interest in the subject matter of the litigation between himself and the respondent. He claims in his heads that inter alia:

“1.3 Prima facie, the Second Respondent’s application for intervention is premised on the incorrect belief that 50% of the pension monies or the death benefit of the retirement fund member, the late Thembekile Andreas Mbebe in the sum of R1 661 671.01 was due and payable to the Estate Account of the late Nozabathile Mbebe in terms of her marriage in community of property with her deceased husband, the late Thembekile Andreas Mbebe. In essence the second respondent’s application for intervention is premised on monetary value as a daughter, the heir, the beneficiary and as an Executrix of the estate of the Late Nozabathini Mbebe.

1.4

The intervening application is opposed by the Applicants on three simple grounds in terms of Section 37 C of the Pension Funds Act 24, which are that: (i) death benefits are not subject to the law of marriages (which means it does not form part of the joint estate in the case of parties married in community of property), (ii) death benefit does not form part of the deceased estate of the member, but the nominated beneficiary and (iii) the law of intestate succession does not apply to death benefit (where the member died without a valid will).

3.22. Lastly on this aspect and per the Second Applicant own version the only reasons she brought this application is (sic) her belief that her mother’s estate would have been entitled to 50%; which I submit that is a misguided argument not to advise a death benefit is not subject to the joint

estate, does not form part of the deceased estate.”

- b) The party seeking leave to intervene in her heads made the following submissions in this regard:

“7. Nozabathini Mbebe owned a 50% share of the joint estate of the late Thembekile and Nozabathini Mbebe (as surviving spouse) by virtue of their marriage to each other in community of property. The remaining 50% of share of the joint estate of the late Thembekile and Nozabathini Mbebe (as surviving spouse) is to be dealt with in terms of the written Will of Thembekile by virtue of Thembekile’s written Will.

8. Nozabathini Mbebe died intestate during February 2016, and as a result of her death a further estate of the late Nozabathini Mbebe (unmarried widow) came into being. The intestate heirs (legatees) in estate of the late Nozabathini Mbebe in equal shares are the two direct descendants of the late Nozabathini Mbebe, being her biological children, Nqabisa Favia Lobete, and Vincent Mayana.
9. the owned share and inherited share of Nozabathini Mbebe (by virtue of her marriage in community of property and by virtue of the provisions of the written will of Thembekile) from joint estate of the late Thembekile and Nozabathini Mbebe (as surviving spouse), vested in Nozabathini Mbebe on her husband’s death and were transmitted on the death of Nozabathini Mbebe to the estate of the late Nozabathini Mbebe (unmarried widow) and vested initially in the Master and subsequently in the appointed executrix, being the second respondent.”

- c) The pension funds have already been paid over to the deceased estate by the administration of the pension fund, albeit it was paid over to the deceased estate account of Nozabathini Mbebe (hereinafter referred to as the deceased wife) and not that of Thembekile Mbebe (who will hereinafter be referred to as the deceased husband).
- d) It does not appear anywhere in any of the papers that the deceased had nominated a beneficiary to his pension fund to receive his pension benefits, nor does it appear that the matter was ever referred to the pension fund adjudicator to make a

determination

on the issue of death benefits.

- e) It does however appear from the provisions of the deceased husband's will that he has made provision for the distribution of the proceeds of inter alia his pension fund in his will, where he has nominated the first applicant and his surviving spouse, the now deceased wife, to each receive half of the proceeds of his pension fund.
- f) The monies ought to have been paid into the deceased husband's estate account by the pension fund barring any claims by any other qualifying beneficiaries, if one has regard to the terms of the will.
- g) The monies can remain in that account if indeed the first applicant seeks to challenge the payment into the estate and claim that it ought to have been paid out as a death benefit as opposed to forming a part of the deceased estate.
- h) There is no clarity as to why the monies were paid into the account of the deceased wife, if indeed it was, and there is nothing from the pension fund regarding their decision or who they considered the beneficiary and whether or not they intended giving effect to the terms of the deceased will or whether or not there was a nominated beneficiary that is still alive. These are all issues that need to be clarified and the pension fund is the only party that can provide clarity in this regard. The court is left in the dark about the state of affairs and instead is faced with the speculation by the parties.
- i) However going on the only relevant document that is before court, that being the deceased husband's will, the deceased husband clearly intended his now deceased wife and his brother, the first applicant to each acquire 50% of his pension fund interest. This was a bequest and would in the circumstances form part of the deceased estate.
- j) There is nothing on the face of the papers to controvert this and the payment into an estate account, albeit seemingly an incorrect one by the pension fund, seems to support that contention or else it would have been paid directly to the nominated beneficiary by the fund.

- k) In those circumstances and having regard to the terms of the deceased will the deceased wife and accordingly her estate would be entitled to 50% of the proceeds of the pension fund by virtue of the provisions of the deceased husband's will.
 - l) The second respondent being the executor of the deceased wife estate in the circumstances would have an interest in the subject matter of the application and in the relief sought, based on what is presently before this Court.
 - m) The deceased wife's estate would have an interest in protecting the proceeds of the pension fund, as it is on the information before court seemingly an asset of the deceased husband's estate, until such time as the applicants produce evidence to support their contention that in the present circumstances the pension benefit ought not to be considered as an asset of the deceased estate.
 - n) There is evidence before court that the executrix does have an interest in the subject matter of the application to protect the dissipation of assets to which the deceased wife's estate is entitled to irrespective of whether or not the intervening party in her personal capacity would be an heir to that estate.
 - o) The application for leave to intervene is accordingly granted and the executrix of the estate late Nozabathini Mbebe (the deceased wife) will hereinafter be referred to as the intervening respondent.
5. I now turn to the main application.
- a) The intervening party has raised the following points in limine which needs to be determined prior to going into the merits of the application—
 - i) Lack of jurisdiction;
 - ii) Locus standi of the first applicant; and
 - iii) Non-joinder.
 - 2) Lack of Jurisdiction
 - i) The intervening respondent raised the fact that this Court does not have jurisdiction in this matter arguing as follows:

“18. The respondent is a registered company with its head office situated at Simmonds Street, Bank City, Johannesburg (see para 2 of the Founding Affidavit).
 - 19. An application brought against a registered company, such as the respondent in this matter, must be brought in the Court which has jurisdiction over the head office or principal place of business of such company.

20. Accordingly, this Application should have been brought in the High Court in Johannesburg and not in the Mthatha High Court, rendering this application defective. The application should be dismissed on that basis.”

ii) The respondent has not opposed the application and has refrained from stating where its principal place of business is but merely stated where it’s registered office.

iii) The respondent has not raised the issue of jurisdiction in its affidavit filed wherein it sought to abide by the decision of the court.

iv) The respondent did not dispute that the estate account was opened at the Mthatha branch and the transfer of the funds took place at that branch, that it is the branch where both these accounts are held.

v) In the present circumstances I am disposed to accept for present purposes that this Court does have jurisdiction to entertain the application, on the basis that the cause of action arose within the jurisdiction of this Court and accordingly this court does have jurisdiction to entertain the application.

3) Locus standi

i) The intervening respondent further raised the issue of lack of locus standi of the first applicant arguing as follows:

“21. The first applicant has cited himself to bring this application in his representative capacity as the Executor in the Joint Estate of the late Thembekile Andreas Mbebe and surviving spouse, Nozabathini Mbebe, with Estate No: 160/2016 (see founding affidavit para).

22. The First Applicant has not cited himself in his personal capacity and is thus not a party to this application and is thus not before court in his personal capacity.

23. While the first applicant does have the requisite locus standi to seek relief on behalf of the said joint estate; the first applicant certainly does not have the locus standi to seek relief in this application in his personal capacity and to seek relief in relation to his personal bank accounts or monies in those personal bank accounts, such as is done in prayers 1.3, 1.4, 1.5, 1.8 and 1.9 of the applicants; notice of motion, insofar as the relief pertains to the first applicant’s personal bank accounts and monies in those said accounts.

24. On this basis, the application is defective and any relief sought by the first applicant in relation to his personal bank accounts and his monies in those personal bank accounts should not be entertained and any such relief should fail.”

ii) That point is well taken and it seems as if the first applicant concedes this if one has regard to the heads submitted on his behalf by adv Mbiko where in his introduction he states at paragraph 1.1:

“On 19th May 2020, the applicants approached this Honourable Court on urgent basis seeking inter alia orders premised on spoliation and/or an interdict against the First Respondent (the only Respondent at that time) in terms of the Notice of Motion. The orders sought by the Applicants are in essence orders that the first respondent be directed to forthwith reverse, to re-open and to unfreeze the First Respondent’s (sic) Account Number: 628]...] and held by the First Respondent.”

- iii) The first applicant has not stated that he is suing in his representative and personal capacity.
- iv) The first applicant accordingly is not entitled to any relief pertaining to himself in his personal capacity, he may nonetheless pursue these reliefs insofar as they relate to the estate account and the second applicant is entitled to pursue the relief in her personal capacity.

4) Non-joinder

- i) The intervening respondent has stated as follows pertaining to the point in limine with regard to the issue of non-joinder:

“25. Given the declaratory and mandatory relief sought by the applicants, there has been a material non-joinder of interested parties in this application.

26. This non joinder of interested parties, includes:

26.1 The Master of the High Court, Grahamstown, who oversees both estates and has a material interest in the relief sought in prayers 1.2, 1.4, 1.6 and in relation to the far reaching and inaccurate allegations made in respect of both estates;

26.2 The estate of the late Nozabathini Mbebe, represented by Ms Lobete as Executrix;

26.3 Ms Lobete, in her personal capacity, as an intestate heir in the estate of the late Nozabathini Mbebe; and

26.4 Vincent Lundi Mayana, as an intestate heir in the estate of the late Nozabathini Mbebe.

- 27. Clearly the latter three parties have an interest in the far reaching relief sought by the applicants give that it relates to assets (cash) which forms part of the joint estate and in due course the estate of Nozabathini Mbebe and the inheritances of heirs in each estate.

- 28. This failure by the applicants to not join the abovementioned parties as respondents in this application, renders this application defective and as a result it should fail.”

- ii) It is settled law that when a person has an interest of such a nature that he or she is likely to be prejudicially affected by any

judgement given in an action, such a person must be joined either as plaintiff or defendant.[1]

- iii) A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined.[2]

- iv) It is clear in this matter that the Master has an interest as does the estate of the deceased's wife as a substantial portion of the assets in the estate of the deceased husband would constitute assets in her deceased estate and indirectly so would the heirs to her estate.
- v) In light of the dispute raised pertaining to the pension fund, the pension fund is likewise an interested party and needed to be joined in order to put before the court the reasons why it paid into that estate account and whether it considered the estate of the deceased husband as the beneficiary, or a nominated beneficiary, as the correct recipient of the deceased husband's death benefits.
- vi) The estate of the deceased wife similarly has a direct and substantial interest in the outcome of this application since it stands to inherit from the estate of the deceased husband. As it stands monies from the pension fund, without deciding who is entitled to what portion thereof, would constitute an asset of the deceased's wife estate in terms of the provisions of the will. The deceased's wife estate is in light of the intervention now before court.
- vii) There has been a material non-joinders of at least those parties that clearly have a direct and substantial interest in this matter.
- viii) The first applicant was aware of the fact that the estate of the deceased wife had an interest in this matter and was the basis for the bank putting a hold on the account by virtue of the dispute that had been first declared in connection with monies that had been transferred. The settlement agreement makes it clear that she intended remaining the executrix in her mother's estate (the deceased wife).
- ix) There clearly is a dispute at least in the mind of the first applicant with regard to whether or not these monies belong to the first applicant in his personal capacity.
- x) The facts presently before court fail to support his contention that the monies are for his exclusive use. He has failed to state on what basis he has been considered the exclusive beneficiary of the pension fund interest. He has not stated why the monies were not paid directly to him if the pension fund considered him the exclusive beneficiary.
- xi) He had put up the Will of the deceased's husband wherein the deceased has expressly stated his intention that the pension fund is part of his estate and had designated who the recipients of the benefits would be. On that basis the first applicant was not to treat the monies as if it were his own but rather as an asset of the deceased estate that can only devolve upon the heirs after finalization of the deceased estate and not as his own personal assets to do with as he pleases.
- xii) The first applicant was well aware of the intervening respondent's interest in the matter since that was the warning bell that precipitated the investigations and actions of the respondent.
- xiii) The first applicant is also contending that the Master made a mistake in his issuance of the letter of executorship by stating "Executor of Thembekile Andreas Mbebe and surviving spouse Nozabathini Mbebe and it actually was intended to be him being executor of both the deceased estates".

xiv) Clearly the Master would be the only person who could give clarity on that issue aside from the fact that these are monies that were held in an estate account and he has an interest in law regarding all deceased estates that fall within his jurisdiction.

xv) The Master accordingly was a necessary party to this application even on the first applicant's version.

xvi) The first applicant's non-joinder of at least these parties is material and appears to be intentional.

xvii) The first applicant has failed to acknowledge that he was indeed obliged to join these parties despite the fact that the respondent distinctly informed him of the basis upon which the accounts were frozen in its letter to him wherein it was inter alia stated:

"1.9 Further, we implore you to seek legal advice with regard to this dispute and the administration of the joint estate of the Late

Thembekile Andreas Mbebe and his "surviving" spouse Nozabathini Mbebe with Estate No: 160/2016, as you are legally

obligated to liquidate and distribute the assets of the joint estate and so once all the debts of the joint estate have been settled, then you are required to pay 50% of the net joint estate to the estate of the late N Mbebe as her estate is entitled to 50% by virtue of their marriage having been in community of property. Thereafter you will need to give effect to the Will of the Late TA Mbebe and transfer the immovable property to the Estate of the Late N Mbebe and also half of all the "monies from insurances, banks and pensions" that remain after the half share has been paid to the Estate of the Late N Mbebe by virtue of their marriage having been in community of property."

xviii) He was aware of the interest of these parties and he is aware of who the attorney was who represented the deceased's estate of the wife in light of the prior litigation between the parties.

6. The non-joinder in this instance clearly warrants a dismissal of the application on this basis alone.
7. The first applicant also appears to have misconstrued the laws of intestate succession if he believes that he is the heir of the deceased wife's estate.
 - i) The fact that he does not know the "biological" children of the deceased wife does not mean they are not, and in any event he has not stated that she has no siblings or other recognised heirs in terms of the law of intestate succession and accordingly has failed to state on what legal basis he would be construed the only heir to the deceased wife's estate by virtue of the laws of intestacy.
 - ii) Even if that proposition were correct which is highly doubtful, then he would still be obliged to wind up the estate prior to receiving the proceeds thereof.

8. In any event even on the merits it would not be in the interest of the estate of the deceased husband for the accounts to be “unfrozen” and the first applicant or second applicant to freely deal with monies that on the facts presented before court, belong to the deceased husband’s estate and not to either of them in their personal capacity, to do with as they please.
9. The respondent has, in my view, acted prudently in freezing the accounts as on the face of it the first applicant was not entitled to the deal with the funds belonging to the estate as if it were his own monies and their action of safeguarding the proceeds is justifiable in the circumstances and accordingly there was nothing unlawful or illegal in their conduct.

10.

Similarly these monies, on the face of it, do not appear to belong to the estate of the deceased wife and should not be moved and unfrozen as requested by the intervening party in the conditional counter application.

11.

The proceeds clearly will be dissipated, on the first applicants own version pertaining to his reasons for wanting the funds and this would be contrary to the interests of the deceased husband’s estate since he is not the sole beneficiary thereof and the estate has not been wound up.

12.

The first applicant may have gone about it incorrectly but it would appear that the proceeds of the pension fund belonged to the deceased estate of the deceased husband, and not the deceased wife, it is also unclear whether the monies that were in the account over and above the pension monies belonged to the deceased wife or were monies paid into that account from the deceased husband’s bank account.

13.

I am not disposed in the circumstances to cause the first applicant to pay costs in his personal capacity but rather in the circumstances to order that the estate, deceased’s husband, of late Thembekile Mbebe and surviving spouse, Nozabathini Mbebe pay the costs of the intervening party in the main application and the application for leave to intervene. The application was brought by the first applicant in his representative capacity as was aptly demonstrated by the intervening respondent when raising the issue of lack of locus standi of the first applicant in his personal capacity.

14.

The respondent has not sought any costs order and there will accordingly be no order as to costs with regard to the respondent.

15.

The parties will do well to collate documents from the pension fund and ascertain which account the monies were designated for. The monies need to remain frozen until the finalization of the deceased husband's estate and the disputes regarding who is entitled to the funds and the Master's decision with regard to any disputes arising between the parties.

16.

In all the circumstances the following order is made:

- a) The application is dismissed.
- b) The estate late Thembekile Andreas Mbebe and surviving spouse Nozabathini Mbebe to pay the costs of the application for leave to intervene and of the intervening respondent in respect to the opposition to the main relief.
- c) There shall be no order as to costs in respect of the Respondent.

DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD:

02 JULY 2020

DATE DELIVERED:

21 JULY 2020

FOR THE APPLICANT:

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FOR THE RESPONDENT: MR

POWER

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[1] Kethel v Kethel's Estate 1949

(3) SA 598 (A).

[2] See Amalgamated Engineering Union v Minister of Labour 1949

(3) SA 637 (A); Van der Walt and Another v Saffy 1950 (2) SA 578 (O) at 581.

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