

SOUTH AFRICA / JUDGMENT

Medupi N.O. v JNC Vehicle Testing CC (40521/2010) [2015] ZAGPPHC 1045 (19 August 2015) [2015] ZAGPPHC 1045

COURT

North Gauteng High Court, Pretoria

BEFORE

MNS Sithole

CASE / FILE NUMBER

40521/2010

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

Source record

/SG

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

DATE:19/8/1

CASE

NO: 4052112010

In

the matter between:

NTSWAKI

ELIZABETH MEDUPI

N.O.

APPLICANT

And

JNC

VEHICLE TESTING

CC

RESPONDENT

JUDGMENT

SITHOLE, J

1.

INTRODUCTION

1.1 This is an opposed application which was heard by me on 18 March 2013 in the opposed motion Court. At the close of argument I reserved judgment so as to apply my mind and to consider all issues raised as well as the authorities which had been referred to by counsel during their respective arguments.

1.2 There has been an inordinate delay on my part in jotting down my decision since then. This has occurred on account of factors

beyond my control because soon after hearing this matter I have had to preside over the criminal Court of the Eastern Circuit in

Mpumalanga for the rest of the year. Subsequently, I was deployed to the criminal Court at Palm Ridge and at Randburg. Needless to say that Eskom load-shedding exacerbated the delay.

1.3 The delay is deeply regretted by me and I hereby record and express my sorrow to the legal representatives and their clients for this occurrence.

1.4 Both parties were legally represented during the hearing of this matter. The Applicant was represented by Advocate DZ Kela of

Johannesburg duly briefed by Moleke Matsepe Attorneys also of Johannesburg and the Respondent by Advocate AC Janse van Rensburg of Pretoria briefed by Jasper van der Westhuizen and Bodenstein Inc of Pretoria.

2. FACTUAL BACKGROUND

2.1 It is common cause that the Applicant is Ntswaki Elizabeth Medupi NO, an adult female residing at 417 Block B, Mabopane, Pretoria and that the Respondent is JNC Vehicle Testing Station CC, a close corporation

Incorporated in terms of the Close Corporation Act with its registered office address at 31 Leopard Street, Theresa Park, Pretoria. The Applicant's husband, Goli Gilbert Medupi, was a member of the close corporation until his death on 28 January 2008.

2.2 On 13 July 2010 the Applicant in her capacity as an executrix of her late husband's estate, brought an application to this Court for an order in the following terms:

2.2.1 That the Respondent be ordered to provide her with the following:

- (a) Bank statements from 28 January 2008 until to date within thirty days of the granting of the order;
- (b) A list of assets of the Respondent to the Applicant within one month of the granting of the order.

2.2.2 The Respondent to pay costs in the event of opposition.

2.3 Subsequently, the Respondent filed a notice of intention to oppose on 12 November 2010, that is, four months after the application was brought.

2.4 The application by Applicant was apparently set down for hearing on 18 April 2011 at 10:00.

2.5 On 25 February 2013 the Respondent brought an application to this Court for an order that the late filing of the Respondent's opposing affidavit (dated 14 April 2011) be granted on the same day of the hearing of the main application on 18 April 2011 at 10:00. Respondent's opposing affidavit was therefore not filed within (15) fifteen days as required by the relevant rule.

2.6 It has to be mentioned that the above given dates do not tally with those mentioned by Respondent's attorney of record annexed to the Respondent's notice of motion of 25 February 2013. For example, the said attorney alleges that Applicant filed and served her notice of motion upon Mr RM More, a member of the Respondent on or about 2 November 2010. It is not clear why an application filed on 13 July 2010 could only be served on the Respondent's member on or about 2 November 2010, i.e. four months after the application was brought. In any event, a copy of the relevant service return filed of record is dated 2 November 2010. Furthermore, the Applicant's replying affidavit was filed on 11 April 2012 and served on Respondent's attorneys on 14 March 2012, that is, one year and one month after the opposing papers were filed. This has occurred without any explanation or condonation application whatsoever by the Applicant.

2.7 Subsequently on or about 26 July 2012, the Respondent filed a supplementary answering affidavit, which formed part of the answering

affidavit already before Court, for reason of the fact that new facts were raised by the Applicant in her replying affidavit, namely, that "the deceased's estate has to be dealt with in accordance with the provisions of section 35 of the Close Corporations Act, 69 of 1984". See paragraph 5 of Applicant's replying affidavit.)

2.8 I may also point out en passant that this matter was initially set down for hearing on 19 November 2012 and subsequently removed by the Applicant on 16 November

2012. It was then set down for a new date of hearing on 4 February 2013 only to be removed from the roll of that date on 30 January

2013. The Applicant then set it down for hearing on 4 February 2013 only to remove it from the roll of that date on 30 January

2013. The Applicant then set it down for hearing on 25 February 2013 only to remove it from the roll of that date on 20 February

2013. Suffice it to say that the matter was ultimately set down for hearing on 13 March 2013.

2.9 In the light of the checkered history of this matter since 13 July 2010, there have been recriminations between the parties, more particularly in that the Respondent bitterly complained about not having received notices of set down for 4 February 2013 and 18 February 2013 and suddenly being confronted with a notice of removal from the roll. Also that when the matter was set down for hearing in November 2012, the Respondent experienced problems with the Applicant's non-compliance with the rules set down in the practice directive of the former Deputy Judge President VAN DER MERWE. That no papers can be filed by parties after a notice of set down.

2.10 The Applicant, on the other hand, firstly complained about an alleged insurance policy on the life of her late husband, which was not paid by Momentum Insurance Company upon his death because he was allegedly not honest when he applied for it. Consequently, even if the said policy was taken, the Applicant does not have any shareholding to it. Counsel for the Applicant argued that Applicant

simply wants Respondent to provide her with the records of the company so as to see the state of the company because at this

stage she is not claiming any shares.

2.11 The second complaint by the Applicant concerns an alleged buy-and-sell agreement attached to Respondent's papers as annexure

"RMM5" which is devoid of any signatures of those who entered into it. Counsel for the Applicant argued that in the

absence of the necessary signatures, even if it is initiated, the alleged agreement never came into existence for want of signatures.

2.12 The third complaint of the Applicant was about two answering affidavits filed by the Respondent. Counsel for the Applicant

argued that the first answering affidavit was deposed to very late.

As a result it was accompanied by a condonation application which is not opposed by Applicant. After a replying affidavit had been filed the Respondent filed a supplementary affidavit without having obtained the leave of the Court as required by the Rules of Court. Besides, he argued, the issues canvassed in the said supplementary affidavit are already canvassed in the answering affidavit. He argued that there are therefore no new issues raised.

3. THE ISSUES TO BE DECIDED BY THE COURT

3.1 The Court has to decide whether, at law and on the facts of this matter, the Applicant is entitled to the relief she has claimed in her Notice of Motion. Stated otherwise, the Court has to decide whether the Applicant has made out a case for the granting of the relief she claims, regard being had to the points in limine raised by the Respondent.

3.2 The first point in limine is that the Applicant's application and the nature of the relief sought is premature in that the Applicant, as executrix of the deceased's estate, has not stated in her founding affidavit that she (a) established the current existence of a membership interest whatsoever and

(b) the percentage of any membership interest.

3.3 It is contended that the Applicant should first have applied for an order to restore the membership of her husband, the late Goli Gilbert Medupe, moreso that in paragraph 6.3 of her Founding Affidavit, the Applicant states: "I will be bringing a separate application against the individual members of the Respondent to restore the status quo insofar as the deceased members interest is concerned."

3.4 The second point in limine is that on account of an agreement between the members of the Respondent, the claim against the latter has prescribed and is of academic interest only. The said agreement was the outcome of a meeting held by the Board of Directors on 9 November 2004, when it was decided that the members of the close corporation should each take out a life insurance policy in order to protect the Respondent from financial distress and to preserve the business interests of the Respondent. A copy of the written minutes of the said meeting is attached to the Respondent's papers as annexure "RMMB".

3.5 Furthermore, upon the death of the Applicant's husband, his Momentum policy was repudiated by the insurer and the claim against Momentum had already prescribed by the time the Applicant's attorneys of record forwarded a repudiation letter (annexure "RMME") to the Respondent's attorneys. The Respondent further contends that to his knowledge the Applicant has not instituted legal action against Momentum to stop prescriptions besides the Applicant was already appointed as the executrix of her husband's deceased estate on 28 April 2008 and any claims which she allegedly had against the Respondent with regards to the membership interest have now become prescribed.

3.6 The third point in limine, which is raised by the Respondent is an alternative to prescription, *supra*, is that the Applicant did not comply with the prescribed formalities of the provision of section 35 of the Close Corporation Act 69 of 1984. The said provisions have to do with the disposal of the interest of a deceased member of a close corporation. It is contended by the Respondent that the Applicant must first convince the Court that she has complied with her duties as an executrix of her husband's deceased estate in terms of section 35 of the said Act in respect of the alleged membership interest before she can approach the Court for the relief she is seeking in her application.

3.7 The Applicant, on the other hand, is of the view that the Respondent's points in limine are without merit because the purpose of her application is merely to obtain information in respect of the Respondent to enable her as executrix of the deceased's estate to fulfil her duties. She maintains that the deceased's estate still has an interest in the Respondent which has a certain commercial value to form part of the deceased's estate and to be dealt with in accordance with the provisions of section 35 of the Close Corporations Act 69 of 1984. That despite the deceased's death, his interest in the Respondent still exists with herself as executrix as a member of the Respondent *nomine officii*, and that the present financial situation of the Respondent is therefore relevant as the interest continues to exist as to date.

4. THE COURT'S FINDINGS AND

CONCLUSION

4.1 Having carefully read the application papers of this matter and having patiently heard argument by the respective counsel for the parties, the Court, taking into consideration the points in limine raised by the Respondent against the Applicant's application makes the following findings, that:

4.1.1 Since 2008 the Applicant has been in possession of the repudiation letter dated 1 August 2008 which was delivered to her previous attorney of record and is attached to Respondent's papers as annexure "RMME", and did not deem it necessary to use it in her application. By so doing she did not take the Court into her confidence. The significance of this repudiation letter lies in the context of the relief she claims for a "list of assets of the Respondent to her within one month of the granting of the order", as she said.

4.2 The Applicant was appointed by the Master as executrix of her late husband's estate on 23 April 2008 and yet she only lodged her application for the relief claimed on 13 July 2010 without taking any precautionary measures against the possible prescription of her claim. As demonstrated in the Respondent's second point in limine, Applicant's claim against the Respondent has prescribed on account of the agreement referred to therein.

4.3 In her Founding Affidavit the Applicant makes no mention of the fact that as executrix of her late husband estate, she has already established the current existence of a membership interest and what percent such interest is. It is incumbent on her to restore the alleged membership interest first before she can approach the Court for the relief she is claiming. It follows that her application is, if anything, indeed premature.

4.4 The Applicant's non-compliance with the prescribed provisions of section 35 of the Close Corporation Act 69 of 1984, as far as the membership interest is concerned, is another weak link of her application. It is not good enough to allege that such interest has commercial value and it forms part of the deceased's estate. She must state it in her founding affidavit that she has complied with her statutory duties in terms of section 35 of Act 69 of 1984 before she can approach the Court for the relief claimed in her notice of motion.

4.5 In the light of the above findings, Applicant cannot be granted the relief she seeks since her application is trumped by the points in limine raised by the Respondent. It follows that the said points are hereby sustained and Applicant's application falls to be dismissed because Applicant has not made out case to be granted the relief she is asking for.

In the result, I make the following order:

THE APPLICANT'S APPLICATION IS HEREBY DISMISSED WITH COSTS.

Dated at PRETORIA on 26 JUNE 2015

MNS SITHOLE

ACTING JUDGE OF THE,

HIGH COURT, PRETORIA

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/ZAGPPHC/2015/1045.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/medupi-no-v-jnc-unknown-topic-agpphc-2015>

Prepared on 12 October 2026 · Esheria