

SOUTH AFRICA / JUDGMENT

Mokoena and Others v Masoeu and Others (2039/2022) [2023] ZAFSHC 97 (27 March 2023)

[2023] ZAFSHC 97

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

2039/2022

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Application number: 2039/2022

In the matter between:

PULENG MARIA MOKOENA 1st

Applicant

REMASOEU PULENG FUNERAL HOMES (PTY) LTD 2nd Applicant

(Reg. no.: 2020/625672/07)

REMASOEU THATO FUNERAL (PTY) LTD 3rd

Applicant

(Reg. no.: 2020/625369/07)

and

MARIA MPOTSENG NHLAPHO-MASOEU 1st

Respondent

LYDIA MOSIDI MASOEU THAELE 2nd

Respondent

MATSHEPO SARAH MASOEU-LECHE 3rd

Respondent

UYLETA NEL-MARAIS N.O 4th

Respondent

THE MASTER OF THE HIGH COURT 5th

Respondent

THE MOTOR FINANCE CORPORATION (PTY) LTD 6th Respondent

AUCOR BLOEMFONTEIN (PTY) LTD 7th

Respondent

CORAM: VAN ZYL. J

HEARD ON: 28 July 2022

DELIVERED ON: 27 March 2023

[1] This is the extended return date of a rule nisi which was granted on an urgent ex parte basis in the following terms:

"1. Dispensing with the forms and service provided in the Uniform Rules of Court and condoning the non-compliance with the Uniform Rules of Court relating to service and time periods in terms of Rule 6(12).

2. That a rule nisi, with return date 2 June 2022, be issued calling on the respondents to show cause why an order in the following terms should not be made final:

2.1 That the first, second and third respondents together are interdicted and/or restrained from dealing in and/or transferring and/or dispensing with and/or in any manner alienating the estate forming part of the late Tlala Doctor Masoeu (ID No: [...]) and that includes, but is not limited to, the assets forming part of the late Tlala Doctor Masoeu as it pertains to the second and third applicants.

2.2 That the first, second and third respondents together be and are interdicted and/or restrained from dealing in and/or transferring and/or disposing of and/or in any manner alienating the estate whether forming part of the estate of the late Tlala Doctor Masoeu or the business assets of the second and third applicants including the assets of Remasoeu Funeral Home CC with registration number 2005/099101/23.

3. Pending the finalisation of the appointment of the executor appointed by the Master of the High Court in terms of the Administration of Estates Act, 66 of 1965, the first to third respondents are interdicted and/or restrained against the disposal of any asset forming part of the Estate Late Tlala Doctor Masoeu.
4. That the first, second and third respondents be ordered to hand over the administration of the deceased estate to the Master of the High Court, pending the finalization of the appointment of the executor of the Estate Late Tlala Doctor Masoeu in terms of the Administration of Estates Act, 66 of 1965.
5. The sixth respondent is interdicted and restrained from selling and/or alienating the motor vehicle bearing the description: 2014 MERCEDES-BENZ VITO 122, ENGINE NUMBER [...], VIN NUMBER: WDF [...], pending the final appointment of the executor of Estate Late Tlala Doctor Mosoeu; and/or in the event that the sale has taken place, the sixth respondent is interdicted and restrained from transferring the abovementioned vehicle to the buyer.
6. The seventh respondent is interdicted and restrained from giving effect to the sale by public auction of the motor vehicle bearing the description 2014 MERCEDES-BENZ VITO 122, ENGINE NUMBER [...], VIN NUMBER WDF [...] pending the final appointment of the executor of Estate Late Tlala Doctor Mosoeu; and/or in the event that the auction has taken place, the seventh respondent is interdicted and restrained from transferring the abovementioned vehicle to the buyer.
7. The relief as set out in paragraphs 2 to 4 above be granted and operate with immediate effect.
8.
9. Costs of this application to be paid by any of the respondents who opposes this application and/or the relief sought, jointly and severally, one paying the other to be absolved."

Prayer 8 above made provision for service of the order and the application papers.

Background:

- [2] The first applicant, who is the deponent to the founding affidavit, was married out of community of property with the exclusion of the accrual system to Tlala Doctor Mosoeu, the deceased father of the first to third respondents, from 30 July 2020 until his passing on 1 September 2021.

- [3] The first applicant deposed to the affidavit in her personal capacity and also on behalf of the second applicant, the third applicant and Thato Masoeu.
- [4] Mr Masoeu and his first wife, Rachel Motsilisana Masoeu got married to each other on 24 April 1978. Sadly, Mrs Masoeu passed away on 5 July 2019. Thereafter Mr Masoeu married the first applicant on 30 July 2020. Sadly, Mr Masoeu passed away on 1 September 2021. The first applicant is consequently the widow of the late Mr Masoeu.
- [5] The first, second and third respondents were born from the marriage of the late Mr and Mrs Masoeu.
- [6] With regard to the fourth respondent, the following is stated in the founding affidavit:
- "14. The fourth respondent is Uyleta Nel-Marais who is cited herein in her capacity as the prospective Executor of Estate Late Tlala Doctor Masoeu who is most likely to be appointed as the Executor imbued with a responsibility to oversee the affairs of the deceased estate. The appointment of Uyleta Nel-Marais is not yet finalized because the nominations of the guardians in terms of the Will of the late Mr Masoeu is currently outstanding. It will however be gleaned from documentation from the Master of the High Court that the Will and Testament dated 8 June 2021 has been accepted and the fourth respondent's appointment stands to be finalized."
- [7] The Master of the High Court, Bloemfontein was cited as the fifth respondent in his capacity as the official responsible for the administration of deceased estates within his area of jurisdiction.
- [8] Since the passing of the late Mr Masoeu, litigation has ensued between the applicants and the first to third respondents.
- [9] On 21 September 2021 the first to third respondents issued an ex parte urgent application against the first to third applicants under case number 4373/2021 as a result of which a rule nisi was issued, dated 23 September 2021, which, in short, interdicted the present applicants from dealing in any way whatsoever with the assets of the Estate Late Tlala Doctor Masoeu. The rule nisi was to be operative pending the finalization of the dispute in Part B of the Notice of Motion issued in that application, which was to deal with a dispute pertaining to the validity of the Will of the first applicant and the late Mr Masoeu, dated 8 June 2021 as oppose to the Will of the late Mr and Mrs Masoeu, dated 22 January 2019.
- [10] On 27 January 2022 Litheko AJ discharged the aforesaid rule nisi issued on 23 September 2021.

Business entities:

- [11] According to the applicants there are various business entities which are "an integral part of the estate which must be administered by the executor". Reference is then made to the following entities:

11.1 Remasoeu Funeral Home CC, Registration No. 2005/099101/23 in which the late Mr Masoeu had a 45% interest and the late Mrs Masoeu had a 45% interest, whilst the first respondent has a 10% interest in the close corporation.

11.2 The second respondent, with registration number 2020/625672/07. According to the first applicant herself and the late Mr Masoeu were the two directors, each with a 50% shareholding in the company.

11.3 The third respondent, with registration number 2020/625369/07, of which entity the late Mr Masoeu and the applicant were the two directors, each with 50% shareholding in the company.

[12] In the founding affidavit the following allegations are made in relation to the purpose of the application:

"21. This application is interdictory in nature and is instituted by the applicants in response to the fact that the respondents are attempting to or have embarked on disposing of and/or alienating assets that form part of the Estate Late Tlala Doctor Masoeu and/or assets which belong to the second and third applicant-entities which in any event directly or indirectly form part of the Estate Late Tlala Doctor Masoeu.

22. This interdictory relief is further intended to operate so that the Executor of the Estate Late Tlala Doctor Masoeu may carry out her duties as required by the Administration of Estates Act, 66 of 1965 to administer all assets forming part of the estate.

23. This application is launched as a way to safeguard the assets of the Late Tlala Doctor Mosoeu and the efficacy of the first and second applicants. The applicant seeks the relief set out in the accompanying Notice of Motion, aimed generally at safeguarding the interest .of the applicants as well as protecting movable and immovable property."

[13] From the contents of the Will of the late Mr Masoeu and the first applicant, dated 8 June 2021, it is evident that the late Mr Masoeu bequeathed:

"44.1 His furniture held in the communal home which we share, to me.

44.2 The Remasoeu Thate Funeral Home (Pty) Ltd (the third applicant), with branches situated in Ladybrand, Clocolan, Ficksburg, Steynsrus and Senekal to Thate Masoeu.

44.3 His vehicles that he owned and which are registered in his name at the time of his passing to me.

44.4 His shares in the business Remasoeu Funeral Home to me. His shares in this business at the time of his passing were arguably 90%. His shares in the Remasoeu Puleng Funeral Home (Pty) Ltd (second applicant) and all its branches to me."

[14] Following the passing of the late Mr Masoeu, the first, second and third respondents registered their own private company, Rebomasoeu Enterprise Services, Registration No. 2021/419571/07, which company was registered on 22 February 2021, with its principal business address at 11 Malan Street, Senekal. The second and third respondents are active directors and the first respondent resigned as director on 18 January 2022. The following is alleged in paragraph 46 of the founding affidavit:

"... the first, second and third respondents have used the Rebomasoeu Enterprise Services entity to dissipate or derive undue benefit and/or alienate the estate of my late husband including the assets of the other businesses forming part of the entities mentioned above".

[15] The applicants addressed in a number of paragraphs the alleged conduct of the first to third respondents in relation to the Remasoeu Funeral Home CC. For reasons which will become evident later in this judgment, I do not consider it necessary to deal with the details of those allegations.

[16] The first applicant alleges that aside from the business interest of the Estate Late Tlala Doctor Masoeu which must be protected, the first to third respondents chased her out of the communal home which she shared with her late husband, being 28 Busschau Street, Senekal. This happened a few days after the burial of the late Mr Masoeu. She could not even pack her personal belongings and have been without same since September 2021 and has since not been able to return to the communal home.

[17] On 26 April 2022 the first applicant became aware that the first respondent completed and signed a voluntary surrender of vehicle to the sixth respondent. The said vehicle, with description 2014 MERCEDES-BENZ VITO 122, ENGINE NUMBER [...], VIN NUMBER: WDF[...] is registered in the name of the late Mr Masoeu. According to the first applicant the first respondent therefore did not have the requisite authority to sign a consent to sell and/or a voluntary surrender of the said vehicle. As already pointed out earlier, the Will of 8 June 2021 bequeathed all vehicles in the name of the late Mr Masoeu to the first applicant. The seventh respondent appears to be in the process of selling the said vehicle.

[18] The applicants further dealt with the requirements for an interdict in the founding affidavit.

[19] Two aspects which I need to underline is that it is evident from the founding affidavit that the Master of the High Court, the fifth respondent, has accepted the Will dated 8 June 2021. This is evident from annexure "MAS1" attached to the founding affidavit.

[20] It is furthermore evident from the replying affidavit that the fourth respondent has been formally appointed as executrix of the Estate Late Tlala Doctor Masoeu on 18 July 2022, as evident from the Letters of Executorship issued by the Master of the High Court, annexure "2" to the replying affidavit.

The first to third respondents' answering affidavit:

- [21] In the first to third respondents' answering affidavit they dealt in detail with the reasons for the late filing of their answering affidavit. I do not deem it necessary to repeat same herein. I am satisfied with the explanation advanced and condonation for the late filing of their answering affidavit is consequently to be granted.
- [22] In broad the following aspects are referred to and/or relied upon by the first to third respondents in their opposition to the confirmation of the rule nisi:
1. That there is a similar matter pending before the Magistrate's Court and that the applicants are therefore forum shopping.
 2. The applicants' attorneys of record have previously represented the first to third respondents.
 3. The fact that the first applicant signed the second Will has the effect that she stands to be disqualified from inheriting in terms of the Will.
 4. That the first applicant has no authority or standing to represent or act on behalf of the second applicant.
 5. That the applicants have embarked on a commercial rivalry with the first to third respondents and have set out to incapacitate their business endeavours.
 6. That the applicants are usurping the duties and obligations of the fourth and fifth respondents.
 7. That the first to third respondents still have an intention to appeal the decision under case number 4373/2021 in respect of the discharge of the interim order which was granted in their favour and also in respect of the validity of the Will.

Consideration of the merits of the application:

- [23] In my view the issue raised by the first to third respondents regarding the legal representation of the applicants and/or the fact that the executrix, the fourth respondent, is a member of Lovius Block Attorneys, being the applicants' attorneys of record, are not to be dealt with and/or are irrelevant to the merits of the present application. Should the first to third respondents wish to take the issue further, they should do so in the appropriate manner and appropriate forum.
- [24] With regard to the fact that the first applicant has also obtained an interdict in the Magistrate's Court, it is in my view evident that the nature and effect of that interdict are vastly different from the relief which is being sought in the present application. It consequently did not bar the applicants to have approached court by means of the present application for the relief requested.
- [25] In respect of the questioning of the first applicant's authority to act on behalf of the second applicant, this aspect was duly addressed in the replying affidavit.

[26] The first to third respondents' intention of instituting an appeal and/or any other process in opposition to the acceptance of the Will, does not constitute a defence to the present proceedings. Presently the Will has been accepted by the Master and the executrix has been appointed accordingly.

[27] With regard to the first to third Respondents expressed concern that the applications are usurping the powers and roles of the fourth and fifth respondents, being the executrix and the Master, I am in agreement with the principle that same should not be allowed. As the papers currently stand, there is no indication that the fourth respondent, the executrix, has actively commenced with her duties and obligations as executrix. In these circumstances I am in agreement with the applicants that the assets of the Estate Late Tlala Doctor Masoeu should be protected. However, as previously stated, the applicants are not to usurp the powers and roles of the executrix and the Master. I consequently intend to prevent such a situation by amending the relief which I propose to grant, appropriately.

[28] Mr Lekala, who appeared on behalf of the first to third respondents, stated as follows in his heads of argument, which contentions he also repeated during his oral argument:

"8.2 It is a basic principle of our law as expressed in the Supreme Court of Appeal in the matter *Ex Parle Body Corporate* *Caroline Court* 2001

(4) SA 1230 (SCA) that interested parties who may be prejudiced by an order issued by court should be joined in a suit as also expressed in

Rule 6(2) of the Uniform Rules of Court.

8.3 The result, I submit that failure of bringing entities alleged to be using assets of the late estate is fatal and any order to the effect of interrupting its operation without the opportunity of refuting the false allegations would be a fundamental flaw and grossly prejudicial to the core."

[29] The applicants failed to site Remasoeu Funeral Home CC, of which the first respondent holds a 10% members' interest as a party to the present proceedings. This is despite the fact that paragraph 2.2 of the rule nisi seeks an interdict pertaining to the assets of Remasoeu Funeral Home CC.

[30] This relief cannot be granted in the absence of Remasoeu Funeral Home CC having been cited as a party to this application. A close corporation is a separate legal entity and as such, should have been cited as a party to the proceedings in order for the applicants to obtain any relief against it. This is also the reason why I did not deem it necessary to deal with the allegations in the founding affidavit pertaining to Remasoeu Funeral Home CC.

[31] The principle is *mutatis mutandis* applicable to Rebomasoeu Enterprise Services (Pty) Ltd, since it also constitutes a separate legal entity.

- [32] However, in my view this does not prevent me from interdicting the first to third respondents to deal with the assets of the Estate Late Tlala Doctor Masoeu, which also prevents them from doing so by means of Remasoeu Funeral Home CC and/or Rebomasoeu Enterprise Services (Pty) Ltd.
- [33] From a consideration of the totality of the papers, and considering the requirements for the granting of a final interdict, I am satisfied that the applicants have made out a proper case for the relief sought pertaining to the dissipation and/or alienation of the assets of the Estate Late Tlala Doctor Masoeu. However, no relief can be granted with regard to the entities which are not before court.
- [34] I further consider it appropriate and necessary that the interdictory relief be subjected to the authority and the instructions of the executrix and the Master, respectively.
- [35] Furthermore, I am of the view that certain paragraphs of the rule nisi have become redundant in view of the appointment of the executrix.

Costs:

- [24] The applicants sought in their Notice of Motion costs against any of the respondents who oppose the application.
- [25] The first to third respondents are mutatis mutandis seeking costs against the applicants.
- [26] The application was postponed and the rule nisi extended on 2 May 2022 to 28 July 2022, with the wasted costs to stand over. In my view those costs are to be costs in the application.
- [27] The applicants have been substantively successful with the present application. However, this matter basically constitutes a family feud as the result of a Will and different family businesses which are directly or indirectly connected to the Late Estate. In the circumstances and in exercising my discretion, I consider it appropriate that the costs of the application be paid by the Estate Late Tlala Doctor Masoeu, which costs are to include the reserved costs of 2 June 2022.

Order:

- [28] I consequently make the following order:
1. Condonation is granted for the late filing of the first to third respondents' answering affidavit.
 2. With regard to the rule nisi contained in paragraphs 2.1 - 6 of the court order dated 4 May 2022, the following is ordered with reference to the respective paragraphs of the court order:
 - (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: [...]) 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."

So amended, the rule nisi is confirmed.

(b) Paragraph 2.2: The rule nisi is discharged.

(c) Paragraph 3: The rule nisi is discharged. (d) Paragraph 4: The rule nisi is discharged.

(e) Paragraph 5: follows:

The rule nisi is amended to read as

"The sixth respondent is interdicted and restrained from selling and/or alienating the motor vehicle bearing the description: 2014 MERCEDES-BENZ VITO 122, ENGINE NUMBER [...], VIN NUMBER: WDF[...] , and/or in the event that the sale has taken place, the sixth respondent is interdicted and restrained from transferring the abovementioned vehicle to the buyer subject to the authority and/or instructions of the Master and/or the executrix of the Estate Late Tlala Doctor Masoeu."

(f) Paragraph 6: The rule nisi is amended to read as follows:

"The seventh respondent is interdicted and restrained from giving effect to the sale by public auction of the motor vehicle bearing the description 2014 MERCEDES-BENZ VITO 122, ENGINE NUMBER [...], VIN NUMBER: WDF[...] , and/or in the event that the auction has taken place, the seventh respondent is interdicted and restrained from transferring the abovementioned vehicle to the buyer subject to the authority and/or instructions of the Master and/or the executrix of the Estate Late Tlala Doctor Masoeu."

3. The costs of the application, including the reserved costs of 2 June 2022, are to be paid by the Estate Late Tlala Doctor Masoeu.

C. VAN ZYL, L

On behalf of the applicants: Adv

I Macakati

Instructed by: Lovius

Block Attorneys

BLOEMFONTEIN

On behalf of the first to third respondents: Adv R Lekala

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