

SOUTH AFRICA / JUDGMENT

Mothiba N.O and Others v Mothiba (10847/2011) [2020] ZAGPPHC 707 (26 October 2020) [2020] ZAGPPHC 707

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod

CASE / FILE NUMBER

10847/2011

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

26/10/20

10847/2011

In

the matter between:

MALEKWE ATHANIA MOTHIBA NO

First

Applicant

JEROME SETSHEDI MOTHIBA

NO

Second

Applicant

MAKGABO SERVICES STATION NO

Third

Applicant

And

ROSE

REBECCA MOTHIBA

Respondent

Delivered.

This

judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is

deemed to be 10h00 on 26th

October 2020.

JUDGMENT

RANCHOD, J

Introduction

[1] In this opposed application the applicants seek the following relief as set out in the notice of motion:

'1. Prayer 1 of the order granted by this Honourable Court per Justice Claasen on the 18TH May 2011 (sic)[1] is hereby amended by correcting and completing the names of the Second Respondent to read as below-

1.1 That Rose Rebecca Motlatsi Mothiba be removed as a member holding 40% share in the records of the Third Applicant, namely, Makgabo Service Station CC.

2. Further, and or alternative relief.'

[2] The respondent opposes the application and has filed a counterclaim seeking the following relief against the first and second applicants:

'1. The order of Court granted by the Honourable Justice Claasen on 18 May 2012 in the main application under the above-mentioned case number is hereby set aside.'

Costs are also sought as against the first and second applicants.

[3] Where I refer to the first and second applicants jointly I will simply refer to them as 'the respondents' as the third applicant does not actively feature in the application.

Factual

background

[4] A brief background of the facts leading to the present applications is set out below.

4.1 The deponent to the founding affidavit (the first applicant) states that she and the second applicant are co-executors in the estate of the late Lesiba Lucas Mothiba (the deceased) who died on 22 June 2004.

4.2 Prior to their appointment the deceased's widow, Rebone Martha Mothiba was the appointed executrix in his estate but she later died and the first and second applicants were appointed in her place as executors.

4.3 The respondent questions the validity of the first and second applicants' appointment as executors but has not made a formal application to set it aside. Therefore, for present purposes, they are the duly appointed executors.

4.4 Whilst the deceased's widow was the executrix, she launched an application in this court as a result of which Claasen J granted the following order:

- '1. That Rose Rebecca Motlatsi be removed as a member holding 40% membership share in the records of the Second Respondent, namely Makgabo Service Station CC.
2. That Rebone Mary Mothiba be removed as a member holding 60% membership in the records of the Second Respondent, namely Makgabo Service Station CC.
3. That the Estate of the late Lesiba Mothiba be substituted as a member holding 100% membership in the records of the Second Respondent, namely Makgabo Service Station CC.
4. That the First Respondent pay the costs of this application on an Attorney and client scale.
5. Further and/or alternative relief.'

4.5 The applicants now apply to have the names Rose Rebecca Motlatsi, amended by adding the Surname Mothiba to them.

[5] There appear to be a number of issues (and resultant litigation) concerning the estate of the deceased. Several of them have been referred to by the respondent in this matter as grounds for dismissing the application and granting the counter application. But I will deal first with three points in limine raised by the respondent.

The first point in limine

- [6] The respondent alleges that the applicants have no locus standi and have acted without authority. Respondent questions the validity of the appointment of the applicants as executors on 29 September 2016 on the basis that they were appointed as such before the previous executrix (the deceased's widow) died on 1 November 2016.
- [7] The mere fact that applicants were appointed prior to the death of the previous executrix does not in itself mean that the applicants' appointment was irregular or unlawful. The respondent merely makes the allegation without any supporting evidence. In any event, if the respondent is of the view that the appointment was improperly made then it is open to her to apply to the Master of the High Court to set aside the applicants' appointment or apply to court for their removal. Respondent does not say that she has taken any of these steps. The first point in limine must accordingly fail.

The second point in limine

- [8] The respondent contends that the applicants not have locus standi in relation to the third applicant (the CC) unless they also allege (which they have not done) that the deceased is registered as a member of the CC, or that they themselves are registered as its members in the stead of the deceased.
- [9] There is no merit in this submission. It is not necessary for the applicants to make such allegations. What is relevant is that it is common cause that the 100 per cent membership in the CC was an asset in the deceased's estate which, say the applicants, was fraudulently transferred out of it. As executors, the applicants have a duty to find and collect all assets belonging to the deceased estate. They have a right to vindicate all assets from whatever source.[2] They need not be registered as members of the CC to do so.

The third point in limine

- [10] The third point in limine raised is that there is a misjoinder of the deceased estate of the widow (who, as I said, died some time after the deceased). It seems to me what the respondent is saying is that there was a 'non-joinder' as the contention is that there has been a failure to cite the estate of the widow in these proceedings.
- [11] The respondent further contends that in this Rule 42(2) application, the cited parties must be the same as in the application which was before Claassen J. There the applicant was the then widow of the deceased, apparently in her capacity as executrix, who sought the removal of the respondent in this matter 'as a member holding 40% membership share in the records of the Second Respondent, namely Makgabo Service Station CC.'[3] The contention is not understood. The applicant in that matter, in her capacity as executrix, died and the applicants are presently

executors in the deceased's estate. This application is concerned with correcting what is alleged to be an error in the order of

Classen J.

[12] The applicants are vindicating assets allegedly belonging to the deceased, not that of the deceased's widow. The application is not concerned with distribution of assets of the deceased's estate. The issue of whether the widow was in fact a spouse of the deceased is irrelevant to this application. This point in limine similarly falls to be dismissed as it is without merit.

Are there disputes of fact necessitating referral to trial?

[13] The respondent contends that in any event there are disputes of fact and the matter should not be decided on application but, seemingly, referred to trial. Again, the submission is without merit. The only fact in issue is whether the surname 'Mothiba' should be inserted in the order of Claassen J.

[14] The applicants state that the error in the order sought to be varied occurred because the respondent's surname was omitted in the notice of motion and also in the prayers for the relief sought. However, the supporting affidavit had the correct full names of the respondent. [4] The address where the applicant was to be served with the application also mentioned the respondent's full names, including the surname 'Mothiba'. The Sheriff's return of service also mentioned the correct full names and surname. The contention cannot be sustained.

The counter-application

[15] I turn then, to the counter-application.

[16] The respondent delivered her counter-application by way of the long form of the notice of motion instead of the short form. She seeks the following relief:

'1. The order of Court granted by the Honourable Justice Classen on 18 May 2012 in the main application under the above-mentioned case number is hereby set aside.

2. Costs of the counter-application against the First and Second Applicants, jointly and severally, the one to pay the other to be released pro tanto.

3. Further and/or alternative relief.'

[17] She states further:

'TAKE NOTICE FURTHER THAT the opposing affidavit of ROSE REBECCA MOTLATSI MOTHIBA and the annexures thereto in the application brought by the Applicants on 8 November 2017 under the above-mentioned case number will be used in support of this application.'

[18] It is important to note that here she states that her surname is 'Mothiba' even though this was challenged in the application.

[19] The respondent did not file a supporting affidavit in the counter- application. She elected to rely on her answering affidavit in the application. The respondent then takes issue with the fact that the applicants did not deliver an answering affidavit in the counter-application. The applicants say they filed a replying affidavit in the application and therefore, in the circumstances, they did not have to file an answering affidavit, as their replying affidavit served as an answering affidavit. I agree.

[20] As is apparent from the relief sought in the counter-application, the respondent seeks to have the entire order of Claassen J set aside.

[21] According to respondent the reason why she did not oppose the main application which served before Claassen J and which is now sought to be varied by the applicants is that she did not receive the notice of motion. Applicants are not challenging this averment, albeit they maintain that there was proper service. It is therefore common cause that the order now sought to be varied was granted by default. Consequently, respondent in her counter-application is seeking rescission of an order granted by default but does not state which grounds she relies upon.

[22] Application for rescission of a judgment granted by default may be applied for on any of the grounds set out below.

[23] Rule 31(2)(b), which provides as follows:

'(b) A Defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the Plaintiff to set aside such judgment, and the court may upon good cause shown set aside the default judgment on such terms as it deems meet.'

23.1 It is common cause that respondent first had notice of the court order that she now seeks to rescind as far back as December 2016 when applicants issued and served on respondent what respondent refers to as 'the property application.'[5]

23.2 In the circumstances respondent's counter-application is completely out of time insofar as Rule 31(2)(b) is concerned.

23.3 Furthermore, the respondent in her counter-application has also failed to show good cause. Good cause has been authoritatively held to mean inter alia that the applicant must have a bona fide defence. The applicant must set out facts which, if established at the trial, would constitute a good defence.

23.4 Respondent's defence appears to be that she was substituted as 100% member of the third applicant in place of her father, the deceased, in terms of a redistribution agreement.

23.5 It is common cause that the applicants in this application are together with the respondent the intestate heirs of the deceased Lesiba Lucas Mothiba. First and second applicants unequivocally deny all knowledge of the redistribution agreement.

23.6 Furthermore a redistribution agreement must satisfy the following formal requirements:

- (a) It must be in writing.
- (b) It must be signed by all the heirs.
- (c) It must accompany the liquidation and distribution account.
- (d) The Master must approve the redistribution agreement.

23.7 Respondent has failed to produce either the written redistribution agreement or the liquidation and distribution account where such a redistribution agreement appears.

23.8 In the premises respondent does not have a substantiated bona fide defence and as such cannot succeed under this sub-rule.

[24] Respondent's counter application therefore falls to be considered in terms of Rule 42 and the common law.

[25] Rule 42(1)(a) provides that a court may amend or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[26] It is respondent's contention that she never received the notice of motion. Applicants however aver that because it was served at her mother's house she must have had notice of it.

[27] The applicants submit that even if respondent succeeds in persuading this Court that she did not receive the notice of motion, and therefore the judgment was erroneously sought and granted, it has been authoritatively held that 'although Rule 42 differs from Rule 31(2)(b) in that it is not a requirement of this (Rule 42) rule that the applicant for rescission has to show good or sufficient cause. This does not mean however, that if it appears that the Applicant does not have a good defence, once the erroneous granting of the judgment has been shown rescission should follow mechanically because the rule is not peremptory.'^[6]

[28] As I said, respondent alleges transfer of membership from the deceased's estate to her in terms of a re-distribution agreement (which is denied by the applicants) but has failed to produce it. The rescission application in terms of this Rule must fail.

[29] The last option that respondent has in securing the rescission she seeks is under common law.

[30] At common law a judgment may be rescinded on very limited grounds, namely, that the judgment was obtained by fraud, or exceptionally, as a result of a justus error. That is not the case here.

[31] In all the circumstances, I am of the view that the applicants have made out a proper case for the relief sought. The respondent raised much irrelevant and argumentative matter in her opposing affidavit which probably warranted a punitive costs order against her. However, counsel for the applicants submitted that they would be content with a normal costs order.

[32] I make the following order:

1. Paragraph '1' of the order granted by Claassen Jon 18 May 2012 is amended by inserting the surname 'Mothiba' immediately after the names 'Rose Rebecca Motlatsi'.
2. The respondent is to pay the costs of the application.
3. The counter-application is dismissed with costs.

RANCHOD, J

JUDGE OF THE HIGH COURT

Appearances:

For applicants:

Ms L Mbanjwa

L Mbanjwa Inc.

636 Makou Street

Monument Park, Ext 2

Pretoria

For respondent:

Mr WP Steyn

WP Steyn Attorneys

c/o Johan Van De Vyver Prokureurs

II Villagio

5 De Havilland Crescent

South Blok, Sorrento Building

Persequor Park, Pretoria.

- [1] It is common cause or not in dispute that the correct date of the order is 18 May 2012
- [2] Section 26(1) of the Administration of Estates Act 66 of 1965: '26 Executor charged with custody and control of property in estate
- (1) Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.
- [2] Section 26(1) of the Administration of Estates Act 66 of 1965:

'26 Executor charged with custody and control of property in estate

- (1) Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.
- [3] Vide: Order of Claassen J.
- [4] Supporting affidavit para 8.
- [5] Paragraph 12.2 respondent's opposing affidavit.
- [6] Sheriff Pretoria North East v Flink and Another [2005] (3) All SA 492 (T).

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