

SOUTH AFRICA / JUDGMENT

Motlhasi v Standard Bank of South Africa (5460/22) [2022] ZAGPPHC 488 (4 July 2022) [2022] ZAGPPHC 488

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi

CASE / FILE NUMBER

5460/22

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION.

PRETORIA)

CASE

NO: 5460/22

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

04

July 2022

In

the matter between: TSHEGOHATSO BERNADETTE
 MOTLHASI
 APPLICANT
 EXECUTOR
 (In her capacity as Executrix of
 Lester
 Phidian Ntsabo)
 AND
 STANDARD BANK OF SOUTH
 AFRICA
 RESPONDENT

JUDGMENT

- REASONS

TLHAPI J

INTRODUCTION

- [1] I give reasons herein for dismissing with costs the above opposed application.
- [2] The applicant is executrix in the estate of her father, the Late Lester Ntsabo who died on 25 October 2020. The applicant sought the following relief:
- (i) That the application be heard on urgency;
 - (ii) That the respondent be ordered to return certain vehicles in its possession being a Toyota Fortune; a Mercedes Benz C200 and a Jaguar which were administered by the respondent under the following account numbers. [...]; [...]; [...]; [...].
 - (iii) That the applicant be given full details and the whereabouts of the vehicles;
 - (iv) That the respondent be interdicted from disposing of the said vehicles in any public auction;
 - (v) That should the respondents fail to return the vehicles with immediate effect the sheriff be authorised to take possession of the vehicles and hand them over to the applicant;
 - (vi) That the respondent be ordered to open all Lengau Tours bank accounts which fall under the estate of the Late Lester and that the applicant be granted access to these accounts with immediate effect;
 - (vii) That the respondent pay costs of the application on an attorney and client scale;

BACKGROUND

- [3] The deceased was married to one Ms Salamina Ntsabo who was appointed the first executrix in the deceased estate. She took over as director of Lengau Travel and Tours Pty Ltd under registration number 2011/005687/07, where the deceased had been sole director. The applicant launched various applications in the Mahikeng High Court against Ms Ntsabo before she launched this application.
- [4] On 11 March 2021 in case number UM 32/2021 Leeuw JP among other orders granted the following against Ms Ntsabo who was the first respondent:
- “3. THAT: The first respondent be and is hereby interdicted or ordered not to sell, transfer any ownership of deceased estate movable or immovable properties including the deceased shares in Lengau tours Africa and any directorship which the deceased estate may hold in any Juristic Company
4. THAT: The first respondent be and is hereby ordered to temporarily halt the winding up of the estate, of deceased Lester Ntsabo who died on 25th October 2020, pending the paternity test of the first and second applicants and pending the outcome of Part B of this Notice of Motion”
- [5] On 2 November 2021 under the same above case number in the Mahikeng High Court, Snyman J declared the applicant to be the rightful heir of the deceased and removed the first respondent as executor of the deceased estate, also surrendering the estate to the Master of the High Court until such time as an executor was appointed. On 28 January 2022 the applicant was appointed executrix of the deceased estate and was registered as director of Lengau Travel and Tours (Pty) Ltd on 31 January 2022.
- [6] The applicant launched this application seeking the return of the Toyota Fortuner, the Mercedes Benz and Jaguar. Furthermore, the applicant sought “access to all bank accounts held by the respondent among others account [...], business credit card number [...], business vehicle assets finance account number [...], business vehicle and finance asset account number [...] and any other business accounts held by the respondent.
- [7] The applicant averred that she was informed by her attorney who deposed to a confirmatory affidavit that it came to his knowledge on 13 January 2022 that the vehicles were towed away by a certain Mr George from the respondent, without a court order or consent of Ms Ntsabo. The vehicles were repossessed and placed in storage on instructions of Ms Masemola an employee of the respondent. The applicant’s attorney wrote several emails to Ms Masemola seeking information on the vehicles which were unlawfully repossessed, details of outstanding amounts and the whereabouts of the vehicles. Ms Masemola copied the attorney’s correspondence to several employees of the respondent. The requests for information were simply ignored.

- [8] The applicant contended that she was forced to approach the court on urgency due to no response from the respondent. No person had the authority to take possession of the vehicles belonging to Lengau tours without any court order directing the respondent to do so and without the consent of Lengau Tours and the executor in the deceased estate. She contended further that the respondent's action amounted to a spoliation and demanded that the vehicles be immediately returned to the possession and custody of the applicant as executrix of the deceased estate
- [9] The respondent contended in limine that the application lacked urgency in that applicant failed to allege facts which caused the application to be launched on grounds of extreme urgency. The desire to wind up the estate within a reasonable time or the possibility that the vehicles would be disposed of at a possible auction did not constitute grounds for urgency. Further, the applicant has not made out a case for interdictory relief nor for urgent interdictory relief, therefore the application had to be dismissed with costs.
- [10] The respondent contended that the applicant failed to allege averments entitling her to the relief that she sought, for example, her right presently as director to access the bank accounts and credit card of Lengau Tours. The applicant failed to demonstrate that she would not be afforded substantial redress in due course.
- [11] The respondent gave details of only three vehicles according to their records which were financed by it and were the subject to an instalment sale agreement concluded with the deceased being:
- a) 2016 Jaguar under account [...];
 - b) 2016 Mercedes Benz 180 under account [...];
 - c) 2019 Toyota Fortuna 2.4 under account [...]; The respondent had no record of an account under [...].
- [12] The respondent stated that applicant was appointed as executrix on 20 January 2022 and, that the vehicles were voluntarily surrendered to it by Ms Ntsabo as reflected in the respondent's upliftment documents on 4 January 2022. It was contended that the requirements for a spoliation order had not been met. The applicant was not in peaceful and undisturbed possession when the said vehicles were handed over to them and the applicant failed to prove that she was unlawfully deprived of the said vehicles. Her reliance on spoliation was therefore misplaced
- [13] Further, the respondent contended that ownership of the vehicles had not passed to the deceased in terms of the instalment sale agreement and that the said vehicles were owned by the respondent in terms of clause 4 of the instalment sale agreements annexed to the papers. The respondent denied that the instalment sale agreements were entered into with Lengau Tours, rather the instalment sale agreements were entered into directly with the deceased and, as at date of death the outstanding balances owing on the vehicles were the following, R335 152,50 (a/c [...] -Mercedes Benz); R433 937.88 (a/c [...] - Jaguar) and R506

183.13 (a/c [...]-Toyota Fortuna). The respondent denied that the vehicles were up for auction and maintained that they were in safekeeping.

[14] The respondent contended that they had no knowledge that the applicant was involved in litigation with Ms Ntsabo when the vehicles were uplifted on 4 January 2022. It was in possession of the Letters

of Executorship of Ms Ntshabo; it had no knowledge of the orders obtained in the Mahikeng High Court and it was not made aware of the fact that Ms Ntshabo had been removed as executrix. As at date of upliftment of the vehicles the applicant had not been appointed as executrix as yet. The respondent only learnt of Ms Ntsabo's removal on 31 January 2022 when letters of executorship issued in favour of the applicant were forwarded by the applicant's attorney

[15] In reply the applicant contended that Ms Ntshabo lacked capacity to act on behalf of the deceased estate as she was removed as an executrix on 11 November 2021, It was contended that the respondent

had not cancelled the instalment sale agreements. Further, that since the applicant had been appointed executrix, she had a duty to take over the contractual obligations of Lengau Tours by continuing to operate its business and rendering service of transporting school children.

[16] The applicant contended that there was no need to satisfy any requirements for spoliation as she had not prayed for such in the notice of motion. It was denied that Ms Ntsabo voluntarily surrendered the motor vehicles. It was further contended that the bank accounts of Legau Tours were frozen by the court order in matter UM101/21 following upon a successful application by the applicant. At the time the respondent was aware of the nature of the dispute between the applicant and Ms Ntshabo.

THE ISSUES

[17] The relief sought by the applicant was for the respondent to return

the motor vehicles surrendered by Ms Ntsabo and to unfreeze and give access to the applicant to banking accounts held in the name of Lengau Tours and those of the estate. Further, that the respondent be interdicted from selling the motor vehicles at a public auction. The court had to consider whether a proper case had been made out for the relief sought by the applicant.

THE LAW

[18] It was submitted and argued on behalf of the applicant that the

application concerns vindicatory relief which in effect disavows what is stated in the founding affidavit, where the applicant demands return of the motor vehicles and contended that the conduct of the respondent amounted to a spoliation. The respondent contended that reliance on the rei vindication, which was only brought up in the heads of argument was impermissible. Further, it was contended that the founding affidavit and replying affidavit were materially vague on the remedies relied upon and relief sought, thereby prejudicing the respondent in

determining the case it had to answer to. It was also contended that the applicant introduced new material in the replying affidavit and that given the ‘ultra-truncated timeframes in urgent applications, the respondent was prejudiced by being prevented from responding to allegations which were within the knowledge of the applicant and should have been addressed in the founding papers.

[19] The mandament van spolie and rei vindicatio are distinguishable. It is not often that these remedies are mentioned by name in a notice of motion. However, it is from what is pleaded and, from the factual evidence in the affidavits that distinguishes the one from the other. It is my view that in this instance it is of importance to determine which one is applicable to the facts.

The Motor Vehicles

[20] It is trite that the mandament van spolie primarily dissuades individuals from taking the law into their hands; it prevents the unlawful dispossession of property without consent, or a court order or any other legal basis; it is about protecting and restoring peaceful and undisturbed possession ante-omnia, that is, before the merits of the case can be considered. It has nothing to do with title to the property although there may be exceptions. Therefore, there must be actual possession of the property, and actual unlawful dispossession of the property. From the facts the applicant was not in possession of the motor vehicles on 4 January 2022 neither was she unlawfully dispossessed of them, when they were surrendered by Ms Ntsabo to the respondent.

[21] According to the applicant Ms Ntsabo was removed as executor on 21 November 2021 and she had no permission or capacity to surrender the motor vehicles. It seems Ms Ntsabo retained possession of the vehicles after her removal as executrix, and voluntarily surrendered them to the respondent. Under the mandament van spolie the issue of title nor authority to possess was irrelevant, even Ms Ntsabo could have launched this application if she was of the view that she had been unlawfully dispossessed of the vehicles which were at the time in her possession. The applicant therefore cannot succeed on the grounds of spoliation and in any event she disavowed reliance on the spoliation remedy.

[22] It is also trite that the rei vindicatio is based on ownership of the property, it is about restoring ownership of the property, proprietary interest, which is in existence and is identifiable and which is in possession of a third party. These facts must exist when the application is launched.

[23] The respondent annexed the instalment sale agreements to the answering affidavit and it is evident that the deceased entered into an instalment sale agreement in respect of all the vehicles, with the

respondent in his personal capacity. Clause 4 of these agreements read:

“4.1 We will be the owner of the goods for the duration of this agreement;

4.2 Ownership of the Goods will only pass to you once you have paid all the amounts due and complied with your obligations in terms of this Agreement.”

Ownership of the goods (motor vehicles) only passes in an instalment sale agreement when the obligation is extinguished mainly by due performance on the part of the purchaser, the deceased in this regard. The applicant could therefore only avail herself of the remedy as executrix on behalf of the deceased's estate, if there was proof that the debt had been extinguished by the deceased during his lifetime or by the executrix during administration of the deceased's estate.

[24] The submission on behalf of the applicant that the Road Traffic

Management Act and its Regulations confers the applicant in her position as executrix with ownership is misplaced. The purpose for which the Act was promulgated was to provide for road traffic matter and in this instance it was required by law and was in the public interest that vehicles on public roads be registered and be issued with a licence. The instalment sale agreement precedes the registration of the motor vehicles. In the said Act the owner is described as either one who has “right of use of the vehicle in terms of the common law or a contractual agreement with the title holder of such vehicle.” The applicant is described as an ‘owner’ of the vehicle because she has the right of use based on a contractual agreement with the title holder. She is not the title holder, the respondent is. The deceased's estate still remains indebted to the bank in substantial amounts and the respondent in terms of the instalment sale agreement retains ownership till the last payment. The rei vindicatio on this ground alone does not avail the applicant as ownership had not passed to the deceased or his estate. (my emphasis)

[25] The vehicles were handed over by Ms Ntsabo to representatives of the respondent. The applicant and her attorney cannot state that the hand over on the part of Ms Ntsabo was not voluntary, or that it was unlawful or that or give any other interpretation and meaning to the narration on the reason for the surrender in the upliftment documents which was in Ms Ntsabo's handwriting, unless she confirms their version in a confirmatory affidavit. It seems to me that Ms Ntsabo was an integral part on issues around the assets of the deceased's estate, but she was not joined to these proceedings. The respondent had in its possession the letters of executorship in Ms Ntsabo's name and negotiated the safekeeping of the motor vehicles with her. The respondent states that the vehicles are in safekeeping and have not been put up for public auction and no evidence to the contrary has been provided by the applicant,

[26] The respondent states that it was not aware that Ms Ntsabo was no

longer the executrix in the deceased estate and that this was only brought to its attention on 31 January 2022. The applicant states

that the respondent was aware of Ms Ntsabos removal, but that in my view is not good enough. Service of the court order removing Ms Ntsabo as executrix could have been served on the respondent as early as November 2021. In the absence of an executor all assets in the deceased estate vest in the Master until another executor is appointed, which only happened on 20 January 2022. However, what has been established above is that the respondent was the lawful owner of the vehicles.

The Bank Accounts

[27] The applicant seeks that the court grant an order that the respondent

open “all Lengau Tours accounts which fall under the Estate of Lester Phidian Ntsabo and applicant granted access to these accounts with immediate effect.” Here the applicant failed to distinguish between the bank accounts held by the deceased in his personal capacity and those held by the company Lengau Travel and Tours (Pty) Ltd. I shall be cautious and deal with two scenarios.

[28] The personal bank account of a deceased person is normally frozen by the bank on notification of death. The funds are released only by instructions from a duly appointed executor, who is obliged to deposit the funds into an estate bank account in terms of the Administration of Estates Act 66 of 1965 as amended. The proceeds and interest accumulated become assets in the deceased’s estate. The duty of an executor would be to pay the liabilities of the deceased and administration expenses and to avail the balance for distribution to the heirs /shareholders in accordance with the Will where there is one, if not, according to the laws of intestacy and according to the marriage regime where applicable if there is a surviving spouse.

[29] The purpose for the order according to the applicant, is to enable

her to continue to run the business of the deceased of transporting school children. In my view, in the absence of a Will directing how the running of the business should be conducted or otherwise and without the Master’s consent, an executor cannot continue to run a business without first paying all liabilities and to the prejudice of the creditors and heirs. Therefore, a court cannot grant an order for the opening of deceased’s personal bank account for purpose of running the deceased’s business. There are ways in which a business could continue to run without creating more liabilities during the administration of the deceased estate, but I am not called upon to pronounce on that aspect..

[30] It should be common knowledge that a bank account is operated

according to the mandates of the account holder and this is for the protection of the account holder and the bank. It is doubtful whether the deceased who was sole director and shareholder made provision for how Lengau Tours was to continue as a business in the event of his death; alternatively there is no evidence on the papers from which I could determine whether that such provision was made. The only evidence by the applicant was that she was involved in litigation with Ms Ntsabo which culminated in her removal as executor and that she was no longer a

director of Lengau. Access by the newly appointed director in the company, to take control of the bank accounts and a credit card held by Lengau Tours cannot occur without negotiations and compliance with certain requirements.

[31] In fact the respondent states that the application was launched

without the applicant giving it time to consider the position of the applicant's request. Except for the exchange of letters and demand between the applicant's legal representative and officials at the respondent bank regarding issues around the motor vehicles, it does not seem from the papers that any formalities were engaged with the bank for taking over of Lengau bank accounts by the applicant prior to the launch of this application. Again, except for the mention of the credit card, it is not clear what type of bank accounts of the business the applicant seeks access. Seeking an order for a court to direct a bank to open up all company accounts to allow the applicant, just because she is a newly appointed director and executrix is not competent. In passing I would think that as sole director there would be meetings and decisions taken by the applicant which were recorded in writing and, having regard to the Articles of the company that these be presented to the respondent in negotiating a relationship for the company going forward. The respondent alluded to the fact that the applicant failed to engage with it and to give it an opportunity to assess the applicants request.

[32] Furthermore, the applicant has not shown why it could have been competent for the respondent to release the company credit card for use by the applicant. The facility was awarded to the company, there should have been a process engaged by the applicant and the respondent for further use of this facility. The applicant cannot demand the card as if the company had a right of ownership.

Interdicting the Public Auction of the Motor Vehicles

[33] The applicant must satisfy the following requirements before the grant of a final Interdict:

- a) A clear right;
- b) An injury actually committed or reasonable apprehended; and
- c) The absence of similar protection by any other ordinary remedy

In my view, the applicant failed to establish in her capacity as executrix, that she on behalf of the estate had a clear right to the motor vehicles at the time when the vehicles were surrendered and, when the application was launched. In as far as the injury committed it is a fact that the vehicles were in the possession of Ms Ntsabo. The only versions regarding the surrender of the vehicles is that of Mr George, which was communicated to the applicant by her attorney even then this does not amount to an injury and is hearsay. The applicant and her attorney were not present when the vehicles were surrendered, Any allegation by them that Ms Ntsbo was misled by the respondent's employees also amounted to hearsay. There were no credible facts which supported a belief by the applicant that there was a possibility of the vehicles being sold on public auction.

URGENCY

[34] Having regard to the reasons above this application was not urgent

and, should rightfully have been regarded as an abuse of the court process as contended for the respondent. The application should have been struck off the roll for lack of urgency. with costs, However, the applicant had been through two prior applications, the first in which had to assert her right to inherit and the second which had to deal with the removal of Ms Ntsabo as executrix. A striking of the matter would have delayed the administration of the estate further and in the interests of justice the merits had to be dealt with, which in this instance culminated in a dismissal of the application with costs.

THLAPI VV

(JUDGE OF THE HIGH COURT)

APPEARANCES:

For the Applicant: Mr C. Molatoli (instructed by): Chabeli Molatoli Attorneys

For the Respondent: Adv J. Singh (instructed by): Van Hulsteyns Attorneys

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