

SOUTH AFRICA / JUDGMENT

Nelwamondo and Another v Standard Bank of South Africa Limited and Another (768/2015) [2016] ZALMPTHC 9 (15 March 2016)

[2016] ZALMPTHC 9

COURT

Limpopo High Court, Thohoyandou

BEFORE

Kganyago

CASE / FILE NUMBER

768/2015

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

Source record

SAFLII

Note: Certain

personal/private details of parties or witnesses have been
redacted from this document in compliance with the law
and SAFLII

Policy

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

CASE

NO:768/2015

DATE:

15 MARCH 2016

In

the matter between:

MMBENGENI
ALEX
NELWAMONDO.....First
Applicant
GOODTIME
FINANCE
CC.....Second
Applicant
And
STANDARD
BANK OF SOUTH AFRICA
LIMITED.....First
Respondent
ELELWANI
RACHEL
RAMUKOSI.....Second
Respondent

JUDGMENT

KGANYAGO AJ

- [1] The applicants have brought an application against the respondents seeking an order that the first respondent be directed to allow the second applicant, through its member Mmbengeni Alex Nelwamondo, access to its banking account held with the first respondent at its Loius Trichardt branch under account number [3.....] ("the banking account"), and to do all that is necessary to operate and transact on the aforesaid banking account, without limiting to the authorization of payments and transfers of funds out of the aforesaid banking account. The applicants are also seeking a costs order against the respondents on attorney and client scale, only in the event of opposition by anyone of them.
- [2] The second respondent has been cited as an interested party and the applicants are not seeking any order against her. However, it is the second respondent who is opposing the applicants' application whilst the first respondent has filed a notice to abide.
- [3] The first applicant and second respondent are husband and wife. They each hold 50% of members' interest in the second applicant. The first applicant and second respondent are at present in the process of divorcing each other.
- [4] On the 19th November 2012 the second respondent brought an exparte application against the applicants and others under case number 731/2012 on urgent basis. She obtained an interim order with a rule nisi been issued, and the return date was the 6th December 2012. It is not clear what transpired on the 6th December 2012, but the matter was finalized on the 25th February 2013 where by agreement between the parties a draft order was made an order of court.

[5] The consent order which was obtained on the 25th February 2013 read as follows:

"By agreement between the applicant, the first, second, third, ninth and tenth respondents, the following order is made:-

1. The third respondent, Alex Nelwamondo, is interdicted and restrained from preventing the applicant from participating in the management and control of the first respondent.
2. The third respondent, Alex Nelwamondo, is hereby interdicted and restrained from giving any instructions to any of the first respondent's debtors and their employers in relation to the payment of amounts due by them to the first respondent
3. The third respondent, Alex Nelwamondo is interdicted and restrained from diverting any of the monies due to the first respondent to the second respondent, Dembe Associates cc and and/or ninth respondent, Go Home Village Finance (Pty) Limited.
4. The third respondent, Alex Nelwamondo is interdicted and restrained from giving any instructions to the first respondent's Standard Bank account no [3.....] Louis Trichardt Branch, regarding the operation of such account including transfer of any monies from such account.
5. The bank account no [3.....] and [2.....] held with Standard Bank at, inter alia, Louis Trichardt by the second respondent or third respondent, Alex Nweiwamondo, be frozen and that Alex Nwelwamondo or any other person be interdicted and restrained from operating such bank accounts.
6. The bank account number [1.....] as well as [4.....], [1.....], [1.....], [1.....] held at with Capitec Bank ("the Capitec accounts") at inter alia, the Thohoyandou Brach be frozen and that Alex Nelwamondo and any other person who is not a member of the first respondent be interdicted and restrained from operating such bank accounts.
7. The bank account number [5.....] held with First National Bank in the name of the third respondent be frozen.
8. The bank account number [4.....] held with ABSA Bank in the name of the ninth respondent be frozen and that the respondent and the ninth respondents and any other person, be interdicted and restrained from operating such bank account.
9. The banking institutions as defined in the definition section of the Banks Act 94 of 1990 ("the banking institutions") set out in paragraph 4 to 8 above are directed to provide bank statements to the accounting officers referred to below for the period beginning 1st July 20th to 25th February 2013 and thereafter for such other periods as the accounting officer» request
10. The monies due to the first respondent, the second respondent and the ninth respondent of all of their debtors including the employers of their(debtors and the Limpopo Department of Education; the South African Police Services (Salary section), the Limpopo Department of

Health (Salary Section), Musina Municipality, Thulamela Local Municipality, Sasko, the Department of Justice, the Department of Minerals and Energy Resources, the Limpopo Department of Roads and Transport, Limpopo Department of Public Works, the Limpopo Department of Agriculture, the Department of Defence and Military Resources, the South African Social Agency, the Department of Home Affairs, the University of Venda, shall be paid into the first respondent's Standard Bank account number [3.....] held at the Louis Trichardt branch of the fifth respondent.

11. Nupayment Solutions (Pty) Limited is directed to pay all monies due to the first respondent, the second respondent and the ninth respondent into the first respondent's Standard Bank account number [3.....] held at the Louis Trichardt branch of the fifth respondent.
12. Standard Bank of South Africa Limited, Capitec Bank, Absa Bank and First National Bank are directed to transfer the monies held in the bank account held with them in the name of the second, third, ninth and tenth respondents into the first respondent's Standard Bank account number [3.....] held at Louis Trichardt.
13. The third respondent is interdicted and restrained from preventing the applicant from operating the first respondent's Standard Bank account number [3.....] held at the fifth respondent's Louis Trichardt branch.

This order shall serve as the authority required by the applicant to operate such bank account

14. The third respondent and the tenth respondent are interdicted and restrained from directing any banking institution to pay monies due to the first respondent, the second respondent and the ninth respondent into any Banking institution account other than into the first respondent's Standard Bank account number [3.....] held at Standard Bank, Louis Trichardt.
15. Financial Junction Investment (Pty)Ltd ("the accounting officer") with registration number [20.....] is hereby appointed and authorised to conduct an investigation into the financial affairs of the first respondent ,the second respondent, the ninth respondent and Preferred Proficient Finance cc (" Preferred Finance") and to prepare a report thereon which report must specifically show what monies are due to the first respondent, the ninth respondent and Preferred Finance ("in the investigation"),
16. Directing the applicant, the second respondent, the third respondent, the ninth respondent, the tenth respondent and Preferred Finance to pay to the first respondent such money as may be found to be due by them to the first respondent pursuant to the investigation. In the event that the accounting officer's finding as to how much money, if any, is owed to the first respondent is disputed, any party may approach this court for whatever relief may be competent.
17. For purposes of the investigation, the auditor is hereby authorised to uplift all of the contracts entered into by the first respondent, the second respondent and the ninth respondent and Preferred Finance with their customers from whenever they may be

situated or stored, specifically at all of the offices or premises from which such respondents and Preferred Finance conduct business. This order shall serve as whatever authority may be required by the accounting officer to take possession of, copy and keep copies of the aforesaid contracts. The applicant and the third respondent shall be entitled to make and retain copies of such contract documents.

18. The accounting officer is hereby authorised and directed to make payment of provisional taxes due by the first respondent and second respondent from the monies which are to be paid into the first respondent's Standard Bank account number [3.....] held at Louis Trichardt in terms of this order.
19. The accounting officer is further authorised to investigate and approach such banking institutions as may be necessary to establish which monies have been transferred to which entity of the third respondent, the ninth respondent and Preferred Finance insofar as that may be relevant to the investigation. This order shall serve as the authority which the accounting officer may require in order to give effect to this order.
20. The applicant, the third respondent, the ninth respondent and the tenth respondent and Preferred Finance are directed to take all the steps which may be necessary to give effect to this order and in particular, the conduct of the investigation.
21. The accounting officer is hereby authorised to take possession of all contract documents between the first respondent, the second respondent, the ninth respondent and Preferred Finance and their customers from any person who may be found to be in possession thereof to enable the accounting officer to conduct the investigation. This order shall serve as the authority which the accounting officer may require in order to take possession of such contract documents.
22. This order shall not be varied, amended or cancelled unless by an order of this Court pursuant to an application for such variation, amendment or cancellation served upon the attorneys of record of each of the interested parties.
23. The accounting officer is further authorised to pay the salaries of the employees of the first respondent, the second respondent and the ninth respondent currently employed as on the date of this order for the money which shall be paid into the first respondent's Standard Bank account number [3.....] held at Louis Trichardt.
24. The accounting officer shall complete the investigation and submit his report to the applicant and the third respondent by no later than 15 May 2013.
25. With effect from the date of this order, the applicant and the third respondent shall be entitled to start new business entities provided that they shall not divert the first respondent's customers to their new business entities.
26. Without derogating from the above, the applicant and third respondent are interdicted and restrained from poaching the first respondent's customers.

27. The costs of this application shall be paid by the first respondent except the costs of 11 February 2013 which shall be paid by the third respondent.
28. Costs of the accounting officer shall be paid by the first respondent."
- [6] The final order of the 25th February 2013 is almost similar to the interim order obtained on the 19th November 2012 except for paragraph 4 of the final order. Paragraph 4 of the final order is paragraph 4.5 of the interim order. Paragraph

4.5 of the interim order read as follows:

"that the bank account number [3.....] held with Standard Bank at Louis Trichardt by the second respondent be frozen and that Alex Neiwamondo or any other person who is not a member of the second respondent be interdicted and restrained from operating such bank account."

- [7] Under case number 731/2012 the second respondent is Dembe Associates cc ("Dembe") and its account number is [3.....]. Good Time Finance cc which is the second applicant in the present case and is the first respondent under case number 731/2012 (hereinafter referred to as "second applicant") and its account number is [3.....]. The first applicant in the present case is the third respondent under case number 731/2012. Both Dembe and the second applicants held their banking accounts at Standard Bank (hereinafter referred to as "first respondent") Louis Trichardt.
- [8] The final order was presented to the first respondent for implementation during 2013. After the order was implemented by the first respondent, the first applicant wanted to transact the second applicant's account number [3.....]. However, he was prevented from doing so by the first respondent. He was informed that in terms of the final order under case number 731/2012 he was interdicted and restrained from doing so.
- [9] According to the first applicant, the order under case number 731/2012 does interdict him from transacting and operating the second applicant's account number [3.....]. The second respondent argues that paragraph 4 of the final order interdict the first applicant and the only error that was made was in relation to the account number which was erroneously captured. The second respondent further argues that the first applicant wants to vary the order without complying with paragraph 22 of that order. The first applicant on the other hand argues that error on clause 4 of the order was to insert first respondent instead of second respondent.
- [10] What I am called upon to determine, is whether the final order obtained by the second respondent on the 25th February 2013 by consent of both parties interdicted and restrained the first applicant from operating and/or transacting the second applicant's account number [3.....] held at Standard Bank Louis Trichardt. The other issue which I must determine is whether the applicants' application is a variation of the order of the 25th February 2013.

[11] In my view, this application is centred on paragraph 4 of the order of the 25th February 2013. Basically what I am called upon is to inteprete that order whether it interdicted and restrained the first applicant from operating the second applicant's account number [3.....].

[12] In *Engelbrecht No and Another v Senwes*

[2006] SCA 166 (RSA) (30 November 2006) at paragraph 6 the court stated: " The court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement The approach to be followed was summarized in *Coopers & Lybrand and others v Bryant*:

I proceed to ascertain common intention of the parties from the language used in the instrument Various canons of construction are

available to ascertain their common intention at the time of concluding the [contract]. According to the "golden rule"

of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, some repugnancy or inconsistency with the rest of the instrument...

The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself...

The correct approach to the application of the 'golden rule*' of interpretation after having ascertained the literal meaning of the

word or phrase in question is, broadly speaking, to have regard:

1. to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract...
2. to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted...
3. to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions..."

[13] It is common cause that paragraph 4 of the final order in its present format is unenforceable. Either party may interpret it to their own benefit. To get its true meaning, that paragraph cannot be read in isolation with paragraph 4.5 of the interim order that was obtained exparte on the 19th December 2012 wherein a rule nisi was issued calling upon the respondent why the interim order was not made final. On the 25th February 2013 the order that was made final was the interim order of the 19th December 2012. During the period 19th December 2012 to 13 February 2013, paragraph 4.5 of the interim order was the one

which was in operation.

- [14] In terms of paragraph 4.5 of the interim order Dembe is identified as the second respondent which is the company that the first applicant is been interdicted and restrained from operating its bank account. In the interim order, there is no paragraph that specifically interdicted and restrained the first applicant from operating the bank account of the second applicant. What the first applicant is interdicted and restrained is from diverting and/or giving instructions to the debtors of the second applicant not to make payment into the bank account of the second applicant. The first applicant is further interdicted and restrained from preventing the second respondent from participating in the management and control of the first respondent.
- [15] On further reading of paragraph 13 of the final order, it state that the third respondent, who is first applicant in the present case, is interdicted and restrained from preventing the applicant from operating the first respondent's Standard Bank account number [3.....]. In my view, the first applicant could be able to prevent the second respondent from operating the account if he was still a signatory to that account. If he was interdicted, he will not have access to that account and there will be no need for paragraph 13 of the final order. In my view, the insertion of this paragraph was to protect the second respondent since she and the first applicant will still be joint signatories on account number [3.....]
- [16] On reading the final order, it is clear that it is a replica of the interim order except for changing of numbering. It is common cause that on the interim order Dembe and its correct account number has been correctly reflected. The confusion arise on the final order wherein they have now inserted the first applicant with the account number of Dembe and modified it a little bit.
- [17] In my view, an error common to the parties has occurred in relation to the description of the parties on paragraph 4 of the final order and both parties now wants to interpret that paragraph to their own benefit and not what it was originally intended. This was a consent order and one will not have the benefit to have the full judgment where it can be ascertained how the judge arrived at that order. However, in a situation like this, it is necessary to have a look at the evidence of the surrounding circumstances that passed between the parties during the negotiations that preceded the conclusion of the agreement.
- [18] In this case the second respondent was armed with an interim order that was interdicting and restraining the first applicant from operating Dembe. The interim order was not interdicting and restraining first applicant from operating the second applicant. Even if the first applicant did not oppose the second respondent's application, the order that would have been confirmed in relation to clause 4.5 of the interim order was to interdict and restrain the first applicant from operating the bank account of Dembe.

- [19] Both parties are aware that paragraph 4 of the final order has been wrongly drafted and is therefore unenforceable. In my view the only interference to be made is that on paragraph 4 of the final order, there was a typing error. They inserted "first" instead of "second" as that was a confirmation of the interim order of the 19th December 2012. The intention of the parties was to insert second instead of first. That is confirmed by the account number and wording of the paragraph which is almost similar from the one in the interim order.
- [20] The interim order of the 19th December 2012 does not interdict and restrain the first applicant from operating the account of the second applicant. If paragraph 4 of the final order is inserted with the word "second" instead of "first", it follows that the first applicant is not interdicted from operating the bank account of the second applicant, and that in my view will be its true and intended meaning.
- [21] In my view this is not an issue which the parties can argue that it raises a dispute fact. Even if they can, in my view it does not raise any genuine dispute that cannot be resolved on papers. A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously addressed the facts to be disputed, (see *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA)). The second respondent has failed to seriously address the issues that might raise a dispute of fact. It is within the knowledge of the second respondent that paragraph 4 of the final order did not correctly reflect paragraph 4.5 of the interim order. Therefore, in my view, there is no basis for the second respondent to argue that there is a real, genuine and bona fide dispute of fact in relation to how paragraph 4 of the final order was supposed to have been drafted.
- [22] Now I turn to determine whether the applicants' application is a variation of the order of the 25th February 2013. Paragraph 22 of the final order regulates variation, amendment or cancellation of that order. In terms of that paragraph, the final order shall not be varied, unless an application for such variation is served upon the attorneys of record of each of the interested parties. It is common cause that neither party has brought a variation application.
- [23] The second respondent's counsel has conceded that paragraph 4 of the final order in its present format is unenforceable. In fact he even went further to state that it is meaningless. Despite it been unenforceable and meaningless, the respondents are interpreting it to mean that the first applicant has been interdicted and restrained from operating the bank accounts of the second applicant.
- [24] In terms of the rule 42(1) of the Uniform Rules of Court, the court has powers to mero motu vary an error or omission on an order or judgment, but only to the extent of the error or omission. In *Colyn v Tiger Food Industries Ltd t/a Meadow Feeds Mills Cape* [2003] 2 All SA 113 (SCA) at paragraph 4 the court stated:

"...There also, thirdly, exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order. These are the most part conveniently summarised in the headnote of *Firestone SA (Pty) Ltd v Gentiruco A.G.* supra as follows:

1. The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgement debt, that the court overlooked or inadvertently omitted to grant
2. The Court may clarify its judgment or order, if on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance of the judgment or order.
3. The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order, it does not extend to altering its intended sense or substance.
4. Where Counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits) but the court, in granting judgment also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.

[25] I have already pointed out at paragraph 18 supra, that what has occurred in relation to paragraph 4 of the final order was a typing error. That error need to be corrected to give effect to its true intention. In my view, if that error is corrected, it will not alter its intended sense or substance of the order. In fact it will be giving effect its true intention which was obtained when the interim order was granted.

[26] In my view these are the type of errors which the court is empowered to clarify to give effect the proper interpretation and true intention of the final order. If the first applicant did not file opposing papers, on the return date the order which would have been confirmed was prayer 4.5 of the interim order which did not interdict and restrain the first applicant from operating the account number of the second applicant held at the first respondent's branch at Louis Trichardt.

[27] Since paragraph 4 of the final order was not correctly drafted to give its true intention, either party could have brought a variation application. However, neither party did so, nor despite that the respondents are relying on that paragraph 4 of the final order to prevent the first applicant from operating the account of the second applicant. The procedure to rectify these type of errors is either on application by the affected party, which need not be formal, or the court may *meru motu* do so.

- [28] Not every mistake may be corrected in terms of rule 42. It should be a mistake that is common to the parties or an order that is containing a patent error. It is common cause that paragraph 4 of the final order has not been correctly drafted. In my view that is a mistake that is common to the parties and the court is entitled to meru meto rectify it to give effect to its true intention.
- [29] The first applicant and second respondent are joint signatory on the second applicant account. Before the 23rd February 2013 the first applicant was having access on bank account no [3.....] and able to transact on that account. The correction of the final order will not be introducing a right which the first applicant did not have, but will merely be restoring the right that was taken away. Even the wording of paragraph 13 of the final order shows that it was the intention of the parties to remain joint signatories on account number [3.....]
- [30] At present the parties are in the process of divorce. From the papers filed, it is clear that it is an acrimonious divorce. If the order is granted as prayed for in the notice of motion it right present some challenges to the parties. Either party could do as he/she wish in order to deplete the estate. Some form of protection and preservation of the estate is necessary.

[31] In the result I make the following order:-

31.1. The first respondent is directed to allow the second applicant through its member Mmbengeni Alex Nelwamondo, access its banking account held with the first respondent at its Louis Trichardt branch under account no [3.....] ("the banking account") and to do all that is necessary to operate and transact on the aforesaid banking account, without

limiting to authorization of payments and transfers of funds out of the aforesaid banking account.

31.2. The first applicant and second respondent shall be entitled to jointly operate the said account in accordance with their respective mandate.

31.3. None of the joint signatories shall be allowed to transact on the said account without the written consent from the other signatory, and that such written consent shall not be unreasonably withheld.

31.4. The second respondent to pay the costs of this application including the costs of employment of two counsel.

MF KGANYAGO

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 23rd February 2016 Judgment delivered:

For the Applicants: Adv W R Mokhari SC

Instructed by: Lebesa Motshwane Attorneys For the

Second Respondent: Adv K Tsatsawane

Instructed by: Hogan Lovells Attorneys

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/ZALMPTHC/2016/9.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/nelwamondo-and-another-v-standard-unknown-topic-almpthc-2016--6a3ea51e3b1caa912981428e>

Prepared on 13 October 2026 · Esheria