

SOUTH AFRICA / JUDGMENT

Ngubo v Tshepang Contractors And Trading CC and Others (3967/2018)

[2023] ZAFSHC 149 (2 May 2023)

[2023] ZAFSHC 149**COURT**

Free State High Court, Bloemfontein

BEFORE

Daniso

CASE / FILE NUMBER

3967/2018

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 3967/2018****Reportable:**

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between: Dr
NOZIPHO FORTUNATE NGUBO Applicant
And
TSHEPANG
CONTRACTORS AND TRADING CC First
Respondent
[Registration
Number: 20[....]23]
SAMUEL
MATLABE TSHABALALA Second
Respondent
[Identity
Number: 6[....]]
BLOEMFONTEIN
CELTIC FOOTBALL CLUB Third
Respondent
[Registration
Number: 20[....]07]
In

re: TSHEPANG
CONTRACTORS AND TRADING CC Plaintiff
SAMUEL
MATLABE TSHABALALA First
Defendant
Dr
NOZIPHO FORTUNATE NGUBO Second
Defendant
[Registration
Number: 20[....]07]
HEARD

ON: 17 NOVEMBER 2022

JUDGMENT

BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 02 MAY 2023 at 10H00.

[1] In this opposed application, the applicant (Dr Ngubo) seeks an order in terms of rule 15 (4) of the Uniform Rules of Court for the setting aside of the substitution order handed down by this court on 24 February 2022. In terms of the said order, Dr Ngubo was substituted as second defendant in the action instituted by the first respondent Tshepang Contractors and trading CC (Tshepang) against the second respondent as first defendant and third respondent (Bloemfontein Celtics) as second defendant for repayment of a R5. 4 million loan.

- [2] The second respondent was at all material times hereto the owner and sole director of Bloemfontein Celtics.
- [3] On 9 August 2021, approximately three years after Tshepang issued summons against second respondent and Bloemfontein Celtics, the second respondent sold Bloemfontein Celtics to Dr Ngubo as a going concern pursuant to a written sale agreement. According to Tshepang, as Dr Ngubo acquired all rights and obligations pertaining to Bloemfontein Celtics she became liable for the repayment of the R5.4 million loan due by the second respondent and Bloemfontein Celtics and it is in that regard that Tshepang sought the substitution of Dr Ngubo in the place of Bloemfontein Celtics as a second defendant.
- [4] In addition to the determination of the merits of the application, there are preliminary issues which must be addressed namely, both parties seek condonation for the late filing of their respective affidavits.
- [5] The applicant's replying affidavit was due by 30 June 2022[1] and the answering affidavit to the counter-application was due on 24 June 2022.[2] Both the replying and answering affidavits were only filed on 29 September 2022 approximately ninety (90) days late.
- [6] The delay is extreme. Despite the substantial ineptitude, the affidavit deposed to by Dr Ngubo's attorney in support of the condonation application merely states the following:

"6.1. I agree that the late filing of the answering affidavit and the counter-application should be condoned. (sic) Likewise, I ask the Honourable Court to condone the late filing of the answering affidavit to the counterclaim (sic) and the replying affidavit in the main application.

6.2. I had problems in getting instructions from the Applicant and in the process misplaced the file and got the proverbial wake-up call when the First Respondent filed a Notice of Setdown.

6.3. I sincerely apologize for the oversight in this regard, but as deponent on behalf of the First Respondent in the answering affidavit, submits that there can be little prejudice, if any by the late of filing in this regard and that the interest of justice support such condonation."

- [7] A party who seeks an indulgence of the court to condone its ineptitude must show sufficient cause entitling it to the court's

indulgence by giving a full explanation for the non-compliance with the court rules. In this condonation affidavit, there are no specifics in terms of the dates on which the attempt was made to obtain instructions from Dr Ngubo, the dates on which the file was found to be misplaced, recovered including the date on which the affidavits were ultimately attended to. The delay is partly attributed to Dr Ngubo (para 6.2). Inexplicably, her confirmatory affidavit verifying the said allegations is not annexed on the condonation affidavit. Then, except to fleetingly aver that "there can be very little prejudice, if any, by the late filing in this regard" no attempt has been made to explain the basis upon which this conclusion is arrived at, there are also no averments pertaining to the prospects of success on the merits of the application if any, including the importance of the subject matter to Dr Ngubo.

[8] The Constitutional Court in *Grootboom v National Prosecuting Authority and Another* [3] long-established that all these factors are of relevant consideration in condonation applications. This condonation application dismally falls short of the requirements contemplated in *Grootboom* however, having regard to the age of the matter (the summons was issued on 8 August 2018) and that no prejudiced has befallen Tshepang as a result of the late affidavits I hold that it will be in the interest of justice including that of Tshepang that this matter is progressed. Condonation for the late filing of Dr Ngubo's replying affidavit and answering affidavits is granted.

[9] Tshepang's answering affidavit was also filed a day late on 20 May 2022 instead of 19 May

2022. Condonation is sought on the basis that the delay was occasioned by the preparation of the counter-application. I take into account that the delay of one day is quite miniscule, condonation is not opposed and that no prejudice has been indicated by Dr Ngubo accordingly, the late filing of the answering affidavit is also condoned.

[10] I now turn to the application and the counter-application.

[11] Rule 15 provides thus:

"Change of parties

(1) No proceedings shall terminate solely by reason of the death, marriage or other change of status of any party thereto unless the

cause of such proceedings is thereby extinguished.

(2) Whenever by reason of an event referred to in subrule (1) it becomes necessary or proper to introduce a further person as a party

in such proceedings (whether in addition to or in substitution for the party to whom such proceedings relate) any party thereto may forthwith by notice to such further person, to every other party and to the registrar, add or substitute such further person as a party thereto, and subject to any order made under subrule (4) hereof, such proceedings shall thereupon continue in respect of the person thus added or substituted as if he had been a party from the commencement thereof and all steps validly taken before such addition or substitution shall continue of full force and effect: Provided that save with the leave of the court granted on such terms (as to adjournment or otherwise) as to it may seem meet, no such notice shall be given after the commencement of the hearing of any opposed matter; and provided further that the copy of the notice served on any person joined thereby as a party to the proceedings shall (unless such party is represented by an attorney who is already in possession thereof), be accompanied in application proceedings by copies of all notices, affidavits and material documents previously delivered, and in trial matters by copies of all pleadings and like documents already filed of record, such notice, other than a notice to the registrar, shall be served by the sheriff.

- (3) Whenever a party to any proceedings dies or ceases to be capable of acting as such, his executor, curator, trustee or similar legal representative, may by notice to all other parties and to the registrar intimate that he desires in his capacity as such thereby to be substituted for such party, and unless the court otherwise orders, he shall thereafter for all purposes be deemed to have been so substituted.
- (4) The court may upon a notice of application delivered by any party within 20 days of service of notice in terms of subrules (2) and (3), set aside or vary any addition or substitution of a party thus affected or may dismiss such application or confirm such addition or substitution, on such terms, if any, as to the delivery of any affidavits or pleadings, or as to postponement or adjournment, or as to costs or otherwise, as to it may seem meet.”
- [12] The relief sought by Dr Ngubo is premised on the grounds that the substitution order was obtained in her absence and it was granted erroneously in that, there is no nexus between her and Tshepang because the company that was sold to her, K2[....]07 (Pty) Ltd t/a Bloemfontein Celtic Football Club, registration number: 20[....]07 and the party that she was substituted in its place, Bloemfontein Celtic Football Club with registration number: 20[....]07 are two distinct and different entities.
- [13] According to Dr Ngubo, the order was also obtained irregularly as it was granted before the dies expired for Tshepang’s compliance with the Rule 30 and/or Rule 30A application.
- [14] In the answering affidavit Tshepang raises a point in limine that: the application is defective as it refers to rule 15(4) whereas rule 15 does not apply in this matter for the reason that, Dr Ngubo’s substitution was not occasioned by a change in status of the parties but in terms of the common law pursuant to Dr Ngubo’s acquisition of Bloemfontein Celtics. She has assumed Bloemfontein Celtic’s liability towards Tshepang. The application ought to be dismissed solely on this score.
- [15] Having regard to the facts of this matter, the fact that pursuant to her ownership of Bloemfontein Celtics, Dr Ngubo ex lege attained all rights and responsibilities pertaining to Bloemfontein Celtic is not contested.
- [16] Rule 15 (4) applies to variations or the setting aside of the orders where the substitution of a party was occasioned by a change in status of a party namely, as a result of death, marriage or any other change in status.[4]
- [17] In this matter it is indisputable that at the time the substitution application was launched there was no change in status of the parties involved in the action. Dr Ngubo’s substitution in the place of Bloemfontein Celtics was merely intended to replace the erstwhile second defendant with another persona, Dr Ngubo as the new owner of Bloemfontein Celtics. In these circumstances the substitution occurs in terms of the common law.[5] For these reasons, I am in agreement with Tshepang’s contention that Dr Ngubo’s reliance on the provisions of rule 15 is misplaced. Notwithstanding this conclusion, I am not inclined to dismiss the application merely on this score. I am of the view that the merits of the

application must also be determined otherwise the matter could make a turn back to court and unnecessarily clog the court rolls which are already bursting at the seams.

- [18] Tshepang points out that the substitution order was obtained in the absence of Dr Ngubo after she had failed to oppose the application and the second respondent had also failed to file an answering affidavit after having filed a notice to oppose the application.
- [19] Tshepang further states that there is no merit to Dr Ngubo's contention that the substitution order was obtained irregularly. The rule 30A application was merely a complaint against the service of the proceedings by email and at the time the order was sought, the cause of complaint had already been removed in that, the court processes were duly served at the offices of Dr Ngubo's attorneys.
- [20] I am not persuaded that the substitution order was obtained irregularly. It is also important to note that pursuant to receipt of Tshepang's answering affidavit the argument in respect of the alleged irregularity of the order was not pursued.
- [21] In response to the disputed link between Dr Ngubo and the entity Dr Ngubo was substituted in its place, Tshepang attributes the discrepancy in the description of the relevant entity to an error of citation. It is conceded that instead of citing Bloemfontein Celtics as defined in the sale agreement and in the consequent transfer letter issued by the Premier Soccer League (PSL) namely: "K2[....]07 (Pty) Ltd t/a Bloemfontein Celtic Football Club, registration number: 20[....]07," Tshepang erroneously cited Bloemfontein Celtics as: "Bloemfontein Celtic Football Club with registration number: 20[....]07" and it is in that regard that a counter-application has been filed for the variation of the incorrect citation in terms of rule 42 (1).
- [22] Tshepang is adamant despite the erroneous citation, Bloemfontein Celtics cited as second defendant in the action is the same entity that was sold to Dr Ngubo and this fact is confirmed by the second respondent's admission of the identity of the entity in the Plea including the consequential amendments to the declaration. There is no evidence that there is another Bloemfontein Celtics that was also owned by the second respondent and sold to Dr Ngubo. Page 13 to 29 of the bundle of the documents are copies of the sale agreement and the PSL transfer letter. Both documents describe the company sold to Dr Ngubo as: K2[....]07 (Pty) Ltd t/a Bloemfontein Celtic Football Club, registration number: 20[....]07.
- [23] I am satisfied that the citation of Bloemfontein Celtic Football Club with registration number: 20[....]07 as opposed to K2[....]07 (Pty) Ltd t/a Bloemfontein Celtic Football Club, registration number: 20[....]07 is simply a misnomer. The dissimilarities in their respective description do not denote two different entities. This fact is also

borne out by the definitions of the merx in the sale agreement. The relevant part of the sale agreement reads thus:

"SALE AGREEMENT

Entered into by and between:

K2[....]07 (PTY) LTD T/A BLOEMFONTEIN CELTIC FOOTBALL CLUB

(REG: 20[....]07)

Herein represented by S.M. Tshabalala in his capacity as Director and Sole Owner
(the Seller)

NOZIPHO FORTUNATE NGUBO

(Identity Number: 7[....])

("The Purchaser")

[collectively referred to as "the parties"]"

[24] On 13 August 2021 PSL transmitted to Dr Ngubo in terms of which she is informed that the transfer of the football club K2[....]07 (PTY) LTD T/A BLOEMFONTEIN CELTIC FOOTBALL CLUB sold to her by the second respondent as a going concern has been approved.

[25] A misdescription of a party's details can be cured with an amendment in terms of rule 42(1) by amending the order which was erroneously sought in the absence of the party affected thereby.

[26] I have consequently arrived at the conclusion that the application for the setting aside of the substitution order ought to fail. The counter-application prevails. I have found no reason why the costs should not follow the results.

[27] I make the following order:

- (1) The applicant's application in terms of Rule 15(4) is dismissed with costs.
- (2) The first respondent's counter-application is upheld. The applicant shall pay the costs of the counter-application.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of Applicant: Adv.

P. Greyling

Instructed by: Lwandle

Nkontso Inc.

BLOEMFONTEIN

Counsel on behalf of 1st Respondent: Adv. TJ Mkgate

Instructed by: Mavuya

Attorneys Inc.

[1] See rule 6(5)(e).

[2] Rule 6(5)(d)(iii).

[3] 2014

(2) SA 68 (CC) para 50.

[4] Rule 15 (1) and (2). [5] Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another 2011

(1) SA 35 (SCA) paras 12 -14.

[4] Rule 15 (1) and (2).

[5] Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another 2011

(1) SA 35 (SCA) paras 12 -14.

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Prepared on 12 October 2026 · Esheria