

SOUTH AFRICA / JUDGMENT

Ngwenya NO v Ngwenya NO and Another (2019/14999) [2024]

ZAGPJHC 1127 (31 October 2024)

[2024] ZAGPJHC 1127

COURT

South Gauteng High Court, Johannesburg

BEFORE

Raubenheimer

CASE / FILE NUMBER

2019/14999

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2019/14999

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

31 October 2024

In the matter between:-

MHLONIPENI LUCKY NGWENYA NO Applicant And PINKY NGWENYA NO 1st Respondent
MASTER OF THE HIGH COURT, JOHANNESBURG 2nd Respondent

JUDGMENT

Raubenheimer AJ:

Order

[1] In this matter I make the following order:

1. The application is granted with costs on an attorney and client scale
2. The Answering Affidavit filed by the 1st Respondent on 3 October 2023 is struck out.

[2] The reasons for the order follow below.

Introduction

- [3] The application is in terms of Rule 30 and or Rule 30A of the High Court Rules for the answering affidavit of the 1st Respondent to be struck out as an irregular step.
- [4] The application originated in an application on 25 April 2019 for an interdict to prevent the mother of the 1st Respondent to deal with the estate of the 2nd Respondent's father and to remove her as the executor of the said estate. This application is still pending and has not been set down for hearing.
- [5] The 1st Respondent was born from the customary marriage between Elphas Jabulani Ngwenya (Elphas) and Thokozile Agnes Ngwenya.(Agnes)
- [6] The 2nd Respondent was born from an extra marital affair between Elphas and Thokozile Dorah Ngwenya.(Dora)

Factual and procedural chronology

- [7] On the death of Elphas on 18 August 2018 Dora was appointed by the 2nd Respondent as the executrix of his estate.
- [8] On Dora's passing on 25 November 2019 the 1st Respondent was appointed as her executrix on 14 May 2020.
- [9] Dora was also substituted by the 1st Respondent in the main application on 9 September 2023.
- [10] On Agnes's passing on 20 October 2019 the Applicant was appointed as the executor of her estate on 22 January 2020. She was subsequently substituted in the main application by the Applicant on 31 January 2020.
- [11] By the time of Dora's passing she had already filed an answering affidavit in the main action on 9 July 2019 and a replying affidavit was filed on 16 July 2019.
- [12] The Applicant filed Heads of Argument, List of Authorities, Chronology of events and practice note in the main application on 29 August 2019.
- [13] As the 1st Respondent did not file heads the Applicant brought an application to compel the filing of such Heads. This application was granted on 9 September 2020.
- [14] The 1st Respondent filed her Answering Affidavit on 4 October 2023 and her Heads of Argument on 30 October 2023.
- [15] This answering affidavit traversed new issues not dealt with in the previous Answering Affidavit.

Submissions

[16] The 1st Respondent contends that the applicant has no locus standi in the application for the answering affidavit to be struck out as an irregular step.

[17] The basis for the contention is that:

17.1 The Notice of Substitution and copies of the documents filed in the application was not served on all the parties;

17.2 There was no application for him to be substituted and has his substitution consequently not been authorised by the court.

[18] The Applicant contended that he was duly and properly substituted and consequently have locus standi to bring the application.

The legal position in respect of substitution

[19] Substitution is dealt with in Rule 15 and the procedure is dealt with in subrule 2 which reads as follows:

“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 hereby 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 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.

Wherever 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 the 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.”

[20] There is a clear distinction between subrule 2 and 3[1], the latter being applicable in the present case. The former is only applicable where a person who have not been a party to the case is “added” to the case. From there the requirement for the serving of the notices, affidavits and material documents to the person so added to the matter.

- [21] Where a person is substituted in his capacity as an executor there is no need for the delivery of the mentioned documents on the applicant as he is substituted of his own volition.[2]
- [22] The contention by the 1st Respondent in respect of the non-serving of the notices, affidavits and material documents on her consequently stands to be rejected.
- [23] The contention by the 1st Respondent that the Notice of Substitution has to be followed by an application for substitution is based on a misinterpretation of the Rule.[3]
- [24] The clear and unambiguous meaning of subrule 4 is that any party may apply for the setting aside or variation of the substitution in which case the court may either dismiss or confirm the substitution.[4]
- [25] The 1st Respondent did not avail herself of this right and did not bring such application. The Applicant is thus deemed to have been substituted.

The irregular step

- [26] On substitution the 1st Respondent stepped into the shoes of Dora as if she had been a party to the proceedings since the commencement of the proceedings.[5]
- [27] By the time the 1st Respondent substituted Dora the pleadings had closed and was it impermissible for her to file any further affidavit without the permission of the court to file further affidavits[6], which permission she had not applied for.[7]

Conclusion

- [28] For all the reasons as set out above I make the order in paragraph 1.

E RAUBENHEIMER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 31 October 2024

Counsel for the applicant: Adv Mahafha Instructed by: Mulisa Mahafha Attorneys Counsel for the Respondent: Adv Ngqwangele Instructed by: G M Makete Attorneys Date of argument: 29 October 2024 Date of judgment: 31 October 2024

- [1] Tecmed (Pty) Ltd v Nissho Iwai Corporation 2010 3 All SA 36 (SCA)

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- [2] EX-TRTC United Workers Front v Premier, Eastern Cape Province 2010
- (2) SA 114 (ECB), Rees and Others v Harris and Others 2012(1) SA 583 (GSJ)
- [3] Micillo v Fillippo (23724/2014; 11709/2017)[2022] ZAWCHC 16 (22 February 2022)
- [4] Techmed (n 1 above)
- [5] Rule 15(2)
- [6] Rule 6(5)(e) Hano Trading CC v JR 209 Investments (Pty) Ltd 2013 1 All SA 142 (SCA)
- [7] James Brown & Hammer (Pty) Ltd (previously named Gilbert Hammer & Co Ltd) v Simmons 1963 4 All SA 524 (A)
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