

SOUTH AFRICA / JUDGMENT

N.T v M.R and Another (1817/2016) [2016] ZAECMHC 32 (21 June 2016)

[2016] ZAECMHC 32

COURT

Eastern Cape High Court, Mthatha

BEFORE

S M Mbenenge

CASE / FILE NUMBER

1817/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO: 1817/2016

In the matter between:

N. T.

Applicant

and

M. R.

First Respondent

HARMONY GOLD MINING COMPANY LIMITED

Second Respondent

REASONS

FOR ORDER POSTPONING THE APPLICATION ON 17 JUNE 2016

MBENENGE J:

- [1] I was approached in chambers by the parties' legal representatives in this matter in the morning of Tuesday 14 June 2016; having not been certain as to whether he had previously appeared before me, Mr Nombambela, the applicant's erstwhile attorney, in the company of

Mr Hobbs, counsel for the first respondent, attendant upon chambers to introduce himself. Notwithstanding the fact that the first respondent's heads of argument had not been filed of record, the parties' legal representatives indicated that they were nevertheless ready to argue the matter. I urged them to explore ways and means of settling the matter, in view of its sensitive nature, with the potential to create acrimony between blood relatives – a dispute between biological parents for the burial of their deceased son. A pledge was thereupon made that settlement talks would be engaged in on the following morning, and failing such settlement, the matter would be argued. The rule nisi was accordingly extended to Wednesday 15 June 2016, principally to enable the parties to find one another.

- [2] When the matter served before me on the extended return day (15 June 2016), I was advised, from the bar, that settlement talks had been held, but that no settlement had been reached. I entertained some hope that the parties might still find one another, especially that there was a common denominator between them – the mother of some of the deceased's minor children who, despite not being a party to the proceedings, had deposed to an affidavit delivered simultaneously with the first respondent's answering affidavit. I thought that her views had the potential of bringing the contestants together. The parties' legal representatives gave heed to my proposal, after the lady concerned had confirmed being the mother of some of the deceased's minor children and expressed her preferences concerning the burial venue, albeit informally. That course, too, yielded naught.
- [3] The parties' legal representatives thereupon braced themselves up for argument. During such argument and at a point when I was debating issues with Mr Nombambela, he expressed concern that the first respondent had not delivered heads of argument in the matter, which he believed disadvantaged his client. I called upon Mr Hobbs to place on record, for the benefit of Mr Nombambela, the contentions he intended raising in pursuit of the opposition to the application, which he did after stating that he would adopt an approach different from that taken by his instructing attorney in the heads of argument that appear to have been previously served on the applicant's then attorneys. Mr Nombambela thereupon somewhat grudgingly proceeded to present argument.
- [4] Considering myself not being a mere passive umpire,[1] and in light of the trite legal position in matters of this nature,[2] I called upon Mr Nombambela to first deal with the question of whether any instructions had been given by the deceased in relation to where he (the deceased) should be buried. I was of the view that, if that question were to be answered in favour of Mr Nombambela's client it would not be necessary to proceed to the next enquiry and determine who the deceased's heirs, entitled to decide on where and when the burial should take place, are. It is in the course of the debate that ensued when Mr Nombambela was hard put to point to the alleged wishes in the papers that he became visibly agitated and sought a stand down of the matter to enable him to take instructions, which was granted. On resumption of the hearing, Mr Nombambela advised the court that a rift had since developed between him and his client regarding the future conduct of the case, with the result that he no longer held instructions to represent the applicant and was

accordingly withdrawing as attorney of record. This resulted in the matter being postponed to enable the applicant to secure the services of another attorney. The rule nisi was further extended to Friday, 17 June 2016.

[5] On the further extended return day, Friday, 17 June 2016, the applicant appeared in person stating that she had not been successful

in her quest to secure the services of an attorney, and hoped to achieve that today (Monday 20 June 2016), hence she applied for a further postponement of the matter. Mr Hobbs, correctly so in my view, did not oppose the postponement application. He undertook to request his instructing attorney to avail the entire set of application papers for the take- over attorney of record, for the sake of expediency.

[6] Against this background, the rule nisi was further extended and the matter postponed to Thursday, 23 June 2016, for hearing as an opposed application.

S M MBENENGE

JUDGE OF THE HIGH COURT

For the Applicant

: In Person

Counsel for the 1st Respondent : Mr Hobbs

Instructed by

MESSRS TSIPA ATTORNEYS

BUTTERWORTH

C/O CAPS PANGWA & ASSOCIATES

MTHATHA

Date heard

: 17 June 2016

Date order granted

: 17 June 2016

Date reasons for order handed down: 21 June 2016

[1]

In Jones v National Coal Board

[1957] EWCA Civ 3; [1957] 2 All ER 155 (CA) at 158 Lord Denning had the following to say: “...a Judge is not a mere umpire to answer the question ‘How’s that?’”. See also *Leepile v S* 2016 (1) SACR 513 (NWM) at para [18]; *B v B*

[2011] ZAWCHC 71 at para [18] *Smith v S*

[2013] ZASCA 38 (28 March 2013) at paras [15] – [17] and *S v Basson* 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC) at para [33].

[2]

In the absence of instructions, expressed verbally or in writing, as to who should bury the deceased, the deceased’s heirs, in their order of seniority, are the persons entitled to decide on where and when the burial should take place. See *Gonsalves v Gonsalves*, 1985 (3) SA 507 (T); *Mankahla v Matiwane* 1989 (2) SA 920 (Ck); *Khumalo v Khumalo* , 1984 (2) SA 229 (D); *Sekeleni v Sekeleni* , 1986 (2) SA 176 (TkS); *Mabulu v Thys*, 1993 (4) SA 701 (SE) and *Nxumalo v Mavundla* 2000 (4) SA 349 (D).

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