

SOUTH AFRICA / JUDGMENT

Ntefang and Another v Seeletso and Others (M180/2021) [2021] ZANWHC 77 (18 November 2021) [2021] ZANWHC 77

COURT

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

M180/2021

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IN

THE HIGH COURT HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAFIKENG

CASE

NO: M180/2021

Reportable:

NO

Circulate

to Judges: NO

Circulate

to Magistrates: NO

Circulate

to Regional Magistrates: NO

In the matter between:

GAETLODGE EDWARD
NTEFANG
FIRST APPLICANT
KAGELELO CORNELIA
NTEFANG
SECOND APPLICANT
and
TIROYAONE LEONARD
SEELETSO
FIRST RESPONDENT
BOIKANYO
BABEDI
SECOND RESPONDENT
ANY PERSON WHO INTENDS
TO
UNLAWFULLY POSSESS ERF
NO [...]
MMABATHO THROUGH THE
FIRST AND
SECOND RESPONDENTS
(EXCEPT THOSE
PERSONS WHO RESIDE ON
THE PROPERTY
AND ARE PROTECTED BY
ACT 19 OF 1998)

Coram:

Petersen J

Heard:

14 October 2021

Handed

down: 18

November 2021

ORDER

(1)

The first and second respondents' points in limine is dismissed.

(2)

The first and second respondents are ordered to immediately give undisturbed access and possession to the applicants in respect

of the property known as: ERF [...] MMABATHO UNIT
9
REGISTRATION DIVISION J Q
THE PROVINCE OF NORTH
WEST
IN EXTENT 457 (FOUR
HUNDRED AND FIFTY SEVEN) SQUARE METRES
which is situated at
[...] ANDRIES BLOEM CLOSE, UNIT 9, MMABATHO.
(3)
Should the first and second
respondents not comply to order 2 above, the Sheriff is authorized to
take each and every step necessary
to ensure that the applicants are
given access and possession to the property as described in order 2
above.
(4)
The respondents are interdicted in future
from unlawfully interfering with the applicants possession of the
property, described
in order 2 above.
(5)
The first and second respondents are
ordered to pay the costs of this application, jointly and severally,
the one paying the other
to be absolved, on an attorney and client
scale.

JUDGMENT

Petersen J

Introduction

[1] This is an opposed application in which the applicants seek relief in the following terms:

“1. That the First and Second Respondents be ordered to immediately give undisturbed access and possession to Applicants in respect of the property known as:

ERF [...] MMABATHO UNIT 9

REGISTRATION DIVISION J Q

2. That should the First and Second Respondents not comply to prayer 1 above, the Sheriff be authorized to take each and every step necessary to ensure that the Applicants are given access and possession to the property as described in prayer 1 above.
3. That the Respondents are interdicted to in future unlawfully interfere with the Applicants possession of the property, described in prayer 1 above.

4. The First Respondent be ordered to pay costs, jointly and severally, the one paying the other to be absolved on an attorney and client scale.”

[2] The first and second respondents filed answering affidavits in which they raise a single point in limine, without pleading over on the merits of the application. The first and second respondents further filed, what they termed supplementary

answering affidavits, in which a number of further points in limine are raised. The supplementary answering affidavits have been filed without leave of this court, contrary to Rule 6(5)(e) and are

accordingly regarded as pro non scripto. That this is the law, was made clear in *Nwafor v Minister of Home Affairs and Others*[1], where Mbha JA, writing for a unanimous Court stated as follows:

“[19] The matter was then argued before Potterill J, who on 27 June 2019 dismissed the applicant’s application

with costs. In the course of her judgment, she held that as the applicant had not sought and obtained the court’s requisite leave, the applicant’s supplementary affidavit that was filed on 30 June 2017, was pro non scripto. As such, she would not accept or consider the contents thereof.

...

[28] In argument before us, the intended application to adduce further evidence in the supplementary affidavit was not pursued. This decision was, in my view, well taken considering that the court a quo quite rightly disregarded the supplementary affidavit on the basis that no leave to file same was sought and obtained from the court a quo, a fact rightly conceded by the applicant in the papers. Nothing further needs to be said about this issue. Regarding the remaining issues, the applicant’s counsel submitted that these would be pursued as points of law.”

(my emphasis)

The point in limine raised by the respondents

[3] The answering affidavits are brief and the contents is quoted to appreciate the adjudication of the point in limine and other aspects of the content of the affidavits:

The first respondent

“POINT IN LIMINE 1

LACK OF CAPACITY BY THE APPLICANT’S ATTORNEY OF RECORD TO SERVE THE APPLICATION

3. On the 29th March 2021, the applicants issued this application through their attorney of record and the same attorney, Mr Kgosikala Barry Semaushu served this application at my office at 484 DP Kgotleng Str, Montshiwa, Mmabatho without any justification thereof.

4. The conduct in which this application was served is a shock that nullifies these proceedings as this court is precluded to grant the relief sought in terms of the Notice of Motion as there is no lawful application before this court that can be decided in favour of the Applicant.
5. The application is an unprecedented application which will never and it is also impossible to appreciate its standing before this court as a lawful application that can be decided by a presiding judge to make a lawful order.
6. Rule 4(1)(a) provides that:
“service of any process of the court directed to the sheriff and subject to the provisions of paragraph (Aa) any document initiating application proceedings shall be effected by the sheriff”
7. The applicants have failed to allow the service of this documents to be effected by the sheriff as provided for by the law and as the results, this application is unlawful and it cannot be decided in favor of the Applicants. There is no other remedy available rather than dismissal of this application with costs at attorney and client scale.
8. This application must be issued afresh to allow the proceedings mutatis mutandis.
9. It will be a waste of time to deal with other issues relating to this application. The first respondent will therefore limit his submissions to this point in limine.

WHEREFORE the first respondent prays that the application be dismissed with costs at an attorney and client scale.”

The second respondent

4. Having perused and conducted my research, the application is unprecedented and there is no that can grant the relief sought in terms of the Notice of Motion.
5. Rule 4(1)(a) provides that:

Further

Rule 4(1)(d) provides that:

It shall be the duty of the sheriff or other person serving the process or documents to explain the nature and contents thereof to the person upon whom service is being effected and to state in his return or affidavit or on the signed receipt that he has done so”

6. I submit that a word of words with an imperative or affirmative character indicate a peremptory provision (eg the words “shall” or “must”) (messenger of the Magistrate’s Court, *Durban v Pillay*). In *Bezuidenhout v AA Mutual Insurance Association Ltd*, for example, the court found that “shall” is a strong indication that the provision is peremptory.
7. In *S v Takaendesa* this principle was explained as follows:

“where a statute prohibits the doing of something unless something else is done as a precedent to doing the thing prescribed, it is a general rule of interpretation that the provisions of the Act are obligatory and not directory”.

8. The applicants have failed to allow the service of this documents to be effected by the sheriff as provided for by the law and as the results, this application is unlawful and it cannot be decided in favor of the Applicants in the circumstance. There is no other remedy available rather that a dismissal of this application with costs at attorney and client scale.
9. This application must be issued afresh to allow the proceedings mutatis mutandis.
10. It will be a shame and a waste of time for burdening this court by dealing with other issues relating to the application. The second respondent will therefore limit his submissions to this point in limine.
11. I wish to highlight to this honourable court that this application is a reckless litigation and it is about to costs the Applicants R 1. 5 million in legal costs should they persist with the matter. The first step of costs has started herein with this point in limine. The Applicants will be faced with the mighty of a litigation that will impoverish the Applicants.

Discussion on the point in limine raised by the respondents

- [4] The first respondent in his answering affidavit refers Rule 4(1)(a) of the Uniform Rules of Court, with the second respondent further referring to Rule 4(1)(d). It is, however, apposite to have regard to Rule 4(1) with regard to all other relevant provisions of the Rule, for the proper adjudication of the point in limine, which reads as follows:

“4(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners:

- (i) by delivering a copy thereof to the said person personally: Provided that where such person is a minor or a person under legal disability, service shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability;
- (ii) by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age. For the purposes of this paragraph when a building, other than an hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family, ‘residence’ or ‘place of business’ means that portion of the building occupied by the person upon whom service is to be effected;
- (iii) by delivering a copy thereof at the place of employment of the said person, guardian, tutor, curator or the like to some person apparently not less than sixteen years of age and apparently in authority over such person;

....

(aA) Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings.

(d) It shall be the duty of the sheriff or other person serving the process or documents to explain the nature and contents thereof to the person upon whom service is being effected and to state in a return or affidavit or on the signed receipt that the person serving the process or document has done so.

(2) If it is not possible to effect service in any manner aforesaid, the court may, upon the application of the person wishing to cause service to be effected, give directions in regard thereto. Where such directions are sought in regard to service upon a person known or believed to be within the Republic, but whose whereabouts therein cannot be ascertained, the provisions of subrule (2) of rule 5 shall, mutatis mutandis, apply.”

[5] It is common cause that the process initiating the present application proceedings was not served by the sheriff but by Mr Semaushu, the attorney of record of the applicants. Mr Semaushu filed a service affidavit, the relevant part of which reads as follows:

“4. On the 30th March 2021 I undertook to serve the above application personally at the offices of the attorney of record of both the first and second respondent’s due to high volume of service work the sheriff of the high court is currently faced with in its area of jurisdiction.”

[6] Whilst Mr Semaushu alludes to the sheriff’s workload and delays in effecting service as the reason for taking it upon himself to effect service, which constitutes the complaint of the respondents raised as a point in limine, an examination of the papers demonstrates the following. The first respondent, Mr Seeletso, is a practicing attorney, practicing under the name and style of T.L. SEELETSO ATTORNEYS. The notice of motion with annexures was served on the first respondent on 30 March 2021 at 09h09 by Mr Semaushu at the first respondent’s offices. There is no indication that the application was served on the second respondent, whose address is reflected as being care of T.L. SEELETSO ATTORNEYS. At first glance, this would suggest that the second respondent was not served. However, that aspect cannot be considered in isolation from the steps which followed service of the application on the first respondent.

[7] The first respondent, and second respondent, cited for purposes of service at the first respondent’s address, through the law firm of the first respondent, on the same day of service of the application, 30 March 2021, drafted a notice of intention to oppose, which was served on the applicants’ attorneys of record SEMAUSHU ATTORNEYS, on 31 March 2021 at 08h31. The content of the notice of intention to oppose is clear in that notice of opposition was given in respect of the first and second respondents. It reads verbatim as follows:

“KINDLY TAKE NOTICE that the Respondents hereby gives their intention to oppose this application.

FURTHER TAKE NOTICE that the Respondents shall accept service of all notices and documents at the below address.

T.L SEELETSO ATTORNEYS

RESPONDENT'S ATTORNEYS"

- [8] The next step taken by the first and second respondents was to file answering affidavits. On 7 April 2021, the first respondent served his answering affidavit and filed same on 9 April 2021. On 13 April 2021, through his attorneys of record, the second respondent served his answering affidavit and filed same on even date. The filing sheet accompanying the second respondent's answering affidavit makes it plain that TL SEELETSO ATTORNEYS are his attorneys of record.
- [9] The notice of opposition which includes the second respondent clearly suggests that he was represented by TL SELEETSO ATTORNEYS. If the second respondent was not represented by said attorneys, it is inexplicable, why on the same date of service of the application, a notice of opposition was filed in respect of the first and second respondents. The second respondent was on the papers, already represented by TM SELEETSO ATTORNEYS and in terms of Rule 4(1)(aA), the notice of motion with annexures could be served on TM SELEETSO ATTORNEYS. I turn to the content of the answering affidavits.
- [10] The respondents contend that "this application is unlawful..." and "There is no other remedy available rather than a dismissal of this application with costs at attorney and client scale."
- [11] Even if it were to be accepted that there has been non-compliance with Rule 4(1)(a) by the applicants' attorney, no allegation is made by the respondents that they have been prejudiced by non-compliance with the letter of Rule 4(1)(a) relating to service of the application, save for the contention that service in terms of rule 4(1)(a) by the sheriff is peremptory. The question of prejudice is an important consideration in this regard, on which I expound later in this judgment.
- [12] In *Steinberg v Cosmopolitan National Bank of Chicago*[2] the importance of receiving notice of legal proceedings was emphasized as follows:
- 'It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such person'.
- [13] In considering the question of notice of legal proceedings, which has at its core, the notion that such proceedings must be brought to the attention of a person, Rule 4(1) cannot be read restrictively, when regard is had to the fact that it does not deal with issues of substance but rather issues of procedure. In *Viljoen v Federated Trust Ltd*[3] the Court said the following in respect of the role of the Rules:

“This is an interpretation of the relevant Rules of Court which not only facilitates the work of the Courts but also enables litigants to resolve their differences as speedily and inexpensively as possible in applications of this nature. This interpretation is sound in law and I respectfully adopt it as correct.”

(my emphasis)

[14] In *United Reflective Converters (Pty) Ltd v Levine*[4], Roux J made it clear that the Rules provide for procedural steps and do not create substantive law:

“The Rules of the Supreme Court are made in terms of s 43 of Act 59 of

1959. Section 43(2)(a) provides that the Rules are made to regulate the conduct of the proceedings of the Provincial and Local Divisions of the Supreme Court. Clearly a distinction must be drawn between a rule of procedure and a substantive rule of law. Originally s 108 of the South Africa Act 1909 enabled the Chief Justice to make procedural rules. The distinction between procedural rules and substantive rules of law was recognised in this context in *Van Aardt v Natal Law Society* 1930 AD 385 at 392.

In *Ex parte Christodolides* 1953

(2) SA 192 (T) at 195A - D a Rule of Court made in terms of s 108 of the South Africa Act 1909 was held not to be procedural but a substantive rule of law.”

[15] In terms of the substantive law, it is a requirement that a person who is sued or against whom relief is being sought, should receive notice thereof by way of delivery of the relevant processes initiating the action or application. If notice of such proceedings comes to the attention of the said person, this purpose is achieved, even if not strictly in accordance with the Rules.

[16] In *Road Accident Fund v Britz obo Britz*[5], the following was further stated in respect of the role of the rules in the litigation process:

“[11] ...The role of the Rules in the litigation process must therefore be placed in context. The Rules are formulated to govern procedural matters in the litigation process within specified time limits. They are meant to bring matters to a point where an executable order can be given by a competent court in an expeditious manner. The Rules are designed to remove the burden of regulating procedural matters from the Court. The rules are meant for the Court and not the Court for the rules. The common law jurisdiction of the high court further allows a high court to govern its own procedures and with Rule 27, to condone

non-compliance with any of the rules... However, in interpreting the Rules of Court, Schreiner JA in *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) said: “No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision

of cases on their real merits.”

[17] In the present application, the allegation of non-compliance with the Rules does not result in prejudice to the first and second respondents, who on their own versions had notice of the application and its contents.

[18] The first and second respondents contend that the application should be dismissed for lack of compliance with Rule 4(1). I re-iterate that “...technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.” The focus should always be on the real merits of the application to ensure fairness in respect of the Rules rather than less than perfect procedural steps which hold no prejudice. In the final analysis on the question of effective service, the sentiments expressed in *Prism Payment Technologies (Pty) Limited v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions and Others*[6] by Lamont J are apposite:

“On the face of it a summons served in any manner, but which is served effectively, is regularly served. Great injustice may follow if the service is set aside on the basis of irregularity without applying the effectiveness test...”

[19] In the present application the respondents suffer no prejudice. Service of the application whilst not strictly in accordance with Rule 4(1)(a) or without an application to court in terms of Rule 4(2) does not necessarily imply that service of the application was not effective, having due regard to Rule 4(1)(Aa) discussed supra. The notice of motion with the accompanying founding papers clearly came to the attention of the first and second respondents, who first, filed a notice of opposition to the relief sought and second, took a further step in the proceedings with such requisite attention, by filing answering affidavits. Service was clearly effective. In this regard, the first and second respondents’ in their opposing answering affidavits state as follows at paragraph 2 of their respective affidavits:

“2. I have read the Notice of Motion and the Founding Affidavit of the Applicants which is accompanied by its annexures and I wish to respond as follows:

2. I have read the Notice of Motion and the Founding Affidavit of the Applicants which is accompanied by its annexures and I wish to respond thereto to the best of my little abilities as follows:”

[20] The point in limine raised by the first and second respondents accordingly stands to be dismissed.

The reference to case law in the answering affidavits

[21] Insofar as the second respondent refers to case law in his answering affidavit and makes legal submissions on the case law, the law is trite. It is not permissible. Authorities relied on are a matter for argument and not evidence.

The content of paragraph 11 of the second respondent's answering affidavit

- [22] In respect paragraph 11 of the second respondents answering affidavit, statements constituting threats of the nature contained in the said paragraph cannot be countenanced and should be deprecated in the strongest terms. The legal representative in preparing the said affidavit should know better. In any event issues related to costs remain within the discretion of a Court and should not be utilized as a means of threatening an opponent in the context used in paragraph 11 of the second respondent's answering affidavit.

The merits of the application

- [23] The respondents elected to raise only the point in limine and failed to plead over on the merits. The first respondent as indicated above makes the following statement in paragraph 10 of his answering affidavit, with the second respondent echoing similar sentiments in paragraph 10 of his answering affidavit:

"9. It will be a waste of time to deal with other issues relating to this application. The first respondent will therefore limit his submissions to this point in limine.

10. It will be a shame and a waste of time for burdening this court by dealing with other issues relating to the application. The second respondent will therefore limit his submissions to this point in limine.

- [24] In motion proceedings, parties stand and fall on their papers. The first and second respondents in deciding that it would be a waste of time to deal with other issues relating to the application, whilst having effective notice and knowledge of the relief sought, took a calculated risk by raising only a point in limine, without pleading to the merits of the applicant's case. They have to abide by that decision which is flawed in law and with the consequence that the application is accordingly unopposed.

- [25] I turn to the merits of the application and whether or not the applicants' have made a case for the relief sought. The first and second applicants are married in community of property. The applicants contend that they are entitled to possession of the immovable property which is at the center of the dispute, on the basis that they are the registered owners of the immovable property. The first and second respondents are presently in possession of the property.

- [26] The applicants premise their claim on the following. The property was initially registered in the name of Margaret Tikanyetso Malekutu, who passed away on 20 September 2020 ("the deceased"). The deceased's father and the second applicant's father were biological brothers. The deceased and the second applicant were therefore nieces who shared a good relationship. The deceased was married to Phillemon Malekutu who passed away in 1993. At that stage the deceased was the owner of the immovable property. During 2012 the deceased approached the applicants to purchase the property from her. A purchase agreement was consequently concluded and the immovable property was subsequently transferred into the names of the applicants on 4 February 2014, after the purchase price had been paid in full to

the deceased. The transfer was handled by KOIKANYANG ATTORNEYS, who practice as Conveyancers in MAHIKENG.

- [27] The applicants have since transfer, paid all municipal rates and taxes, in respect of the property, due to the Mahikeng Local Municipality. The applicants were further registered as consumers by the Municipality which is evidenced by the municipal account. The applicants gave the deceased right of habitation in respect of the immovable property until her death. The right of habitation was however not registered on the title deed of the property, as it was a personal arrangement between the applicants and the deceased.
- [28] Following the death of the deceased, the first respondent, on the version of the applicants alleged that the deceased had testated to a will, which inter alia, appointed him as the executor. The will purported to bequeath the deceased's entire estate to the second respondent. The applicants point out that the will fails to meet the requirements of section 2(1)(A) of the Wills Act 7 of 1953, as the document does not contain a date, it is not clear that the "will" was signed in the presence of two competent

witnesses, the fingerprints of the deceased is also suspicious and the deceased was literate and could write, it is not indicated where the "will" was testated to. These issues do not, however, merit any specific pronouncement, in my view.

- [29] The aforementioned evidence in respect of ownership of the immovable property, stands uncontested.

Conclusion (Merits)

- [30] I am satisfied that the applicants' have made a case for the relief sought against the first and second respondents.

Costs

- [31] In the exercise of my discretion as to costs, I take note of the fact that the applicants' seek an order as to costs on an attorney and client scale. The respondents have taken a point in limine which was stillborn from inception, exacted threats at the applicants' in such affidavits and took it upon themselves to

decide that the adjudication of the merits of the application would be a waste of this Court's time by not answering to the merits. The conduct of the first and second respondents in the answering affidavits in my view merits a punitive cost order.

Order

- [32] Consequently, I make the following order:

- (1) The first and second respondents' points in limine is dismissed.
- (2) The first and second respondents are ordered to immediately give undisturbed access and possession to the applicants in respect of the property known as:

- (3) Should the first and second respondents not comply to order 2 above, the Sheriff is authorized to take each and every step necessary to ensure that the applicants are given access and possession to the property as described in order 2 above.
- (4) The respondents are interdicted in future from unlawfully interfering with the applicants possession of the property, described in order 2 above.
- (5) The first and second respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, on an attorney and client scale.

A.H. PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

For the Applicant:

Adv H Scholtz

Instructed by:

Semaushu Attorneys

For the Respondent:

Adv Lehabe

Instructed by:

LT. L. Seeletso Attorneys

[1] (1363/2019)

[2021] ZASCA 58 (12 May 2021) at paragraphs [19] and [28]; Case Dismissed in Constitutional Court on 19 October 2021 without hearing oral submissions – CCT 174/21

[2] 1973

(3) SA 885 (RA) at 892B – C

[3] 1971 (1) SA 750 (O) at 756 B - D

[4] 1988 (4) SA 460 (W) at 463 B - C

[5] (76318/2013) [2017] ZAGPPHC 762 (3 November 2017)

[6] 2012

(5) SA 267 (GSJ) at page 272I – J

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