
SOUTH AFRICA / JUDGMENT

Tshitshite and Bros Funeral Undertakers CC v Mudau and Others (290/19) [2020] ZALMPTHC 8 (26 May 2020)

[2020] ZALMPTHC 8

COURT

Limpopo High Court, Thohoyandou

BEFORE

NF Kgomo

CASE / FILE NUMBER

290/19

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REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

Case

No. 290/19

In

the matter between: TSHITSHITE
 AND BROS FUNERAL UNDERTAKERS CC
 Applicant
 and
 MUDAU
 NDITSHENI GIFT
 First Respondent
 MAMPHWE
 TSHILIDZI SOLOMON
 Second
 Respondent
 MALUTA
 MAMPHWE
 Third
 Respondent

JUDGMENT

NF KGOMO ADJP

INTRODUCTION

[1] On the 6th November 2019 the Applicant herein launched this application in which the following orders were sought:

1.1 That the warrant of execution against its property dated 25 October 2019 be set aside.

1.2 That the First Respondent in the case giving rise to the warrant (the Main Case) is a non-existent entity and is a different or separate entity from the Applicant herein (Tshitshite and Bros Funeral Undertakers CC) which is a juristic person capable of suing and being sued in its own name.

1.3 That the properties attached and taken into execution by the Sheriff of the Court must be released from attachment forthwith.

1.4 That the Respondents should pay the costs of this application on a scale as between attorney and own client, which costs shall include the storage costs due to the Sheriff.

[2] The Applicant also asked for further and/or alternative relief.

[3] This application has its origin in or from an Urgent Court Order granted by this Court on the 01 March 2019.

[4] The elephant in the room is Order 4 in the above urgent application which read as follows:

"4. Costs of the application on a scale as between attorneys and client against the 1st Respondent and/or any Respondent who may oppose the application."

BACKGROUND AND FACTUAL MATRIX

[5] As already alluded to above, the three respondents in this application launched an urgent application against Tshitshite Funeral Undertakers (as 1st Respondent) and Livhuwani Mudau (as 3rd Respondent) for orders:

5.1 allowing non-compliance with rules relating to service of processes and compliances with time frames.

5.2 that the 1st Respondent be ordered to release the human remains of Mudau Mukhatshelwa (ID No. [...]) kept at its premises being at Tshitshite Funeral Undertakers palour based or situated at Lwamondo village, to the Applicants therein or their duly appointed representatives with immediate effect after service of this order.

5.3 that the 1st Respondent therein be ordered to prepare and conduct the burial of the deceased, Mudau Mukhatshelwa on the 2nd day of March 2019 at Mulenzhe (Ha-Piet Boo), Thulamela Municipality.

5.4 that the costs of the application on a scale as between attorney and client (be granted) against the 1st Respondent and/or any Respondent who may oppose the application. (my emphasis).

[6] To emphasise the point, the First Respondent in the Main Case was cited as Tshitshite Funeral Undertakers.

[7] After the papers were served the matter served before me (Justice NF Kgomo) the same day and the application was granted in exactly the same or identical terms of the Notice of Motion.

[8] There was no appearances or opposition of the application by any of the respondents thereof.

[9] On the 5 March 2019 the 2nd and 3rd Respondents in that application applied to the Court for a reconsideration of the order granted against them on the 01 March 2019 in the Urgent Court, in terms of Rule 6(12) of the Uniform Rules of Court.

[10] The reconsideration application was argued in court on the 12 March

2019. Judgment thereon was handed down through a full written judgment on the 17 March 2019. The order read as follows:

"54.1 The application for reconsideration of the court order of 01 March 2019 in this matter is struck off the roll with costs on a scale as between party and party"

[11] It so happened, that the Applicants in the main case caused a bill of costs to be taxed based on the court order of 01 March 2019. The amount taxed was R71 681-81.

- [12] On 25 September 2019 the Sheriff of this Court, as mandated or sent by the Respondents in this present application, attended at the premises of the Applicant herein, namely, Tshitshite and Bros Funeral Undertakers CC, and served it with a letter from the Respondents' attorneys of record, Shemeya Vengeza Attorneys claiming payment of the amount of R71 681- 81 appearing on a taxed bill of costs attached to the letter.
- [13] The Applicant sought legal advice and was re-assured that the interpretation of Clause or Prayer 4 of the Court Order of 01 March 2019 could not be that it (Applicant) was liable for the legal costs of that day.
- [14] On 28 October 2019 the Sheriff of the Court attended at the Applicant's business premises in possession of a writ of execution and proceeded to attach and also removed the following movable property of the Applicant:
- 14.1 1 x Mercedes Benz sedan with registration letter and numbers [...]; and
- 14.2 1 xToyota Condor MPV with registration letter and numbers [...].
- [15] The Respondent advertised the sale in execution of the attached goods for 29 November 2019.
- [16] The Applicant launched an Urgent Application on 13 November 2019 for the stay of the sale in execution and the return of the attached goods although they would remain under judicial attachment pending an application to this Court to set aside the attachments.
- [17] On the 26 November 2019 my brother Mr Justice AML Phatudi issued the following Order:
- "17.1 The matter is urgent.
- 172 The sale in execution scheduled for the 29th November 2019 is hereby stayed pending finalization of Case 290/2019.
- 17.3 Costs in the main action in case 290/2019."
- [18] Case 290/2019 is this application.

POINTS IN LIMINE RAISED BY RESPONDENTS

- [19] The respondents filed their answering affidavits in which they raised the following points in limine:
- 19.1 res judicata
- 19.2 improper citation of the parties; and
- 19.3 non-joinder of the Sheriff, Taxing Master and Registrar of the High Court.
- [20] At the hearing of this matter, just before the issues were argued, the respondents abandoned the points in limine. The merits of the application were thus argued.

ISSUED TO BE DECIDED

[21] After listening to full argument from counsel on both sides herein, the issues to be decided are the following:

21.1 Whether Tshitshite and Bros Funeral Undertakers CC as cited in this present application and Tshitshite Funeral Undertakers (as cited in the Main Case) are one and the same parties.

21.2 If the Court finds that they are not, then the matter should end there.

21.3 If the Court finds that they are the same parties, then the Court should embark on an interpretation of order 4 of the Main Case to determine if or whether the Applicant is liable for the costs of that application.

21.4 Who should be mulcted for or with the costs of this application as well as the costs of the urgent application deliberated upon on the 26 November 2019.

THIS APPLICANT vs 1ST RESPONDENT IN MAIN CASE

[22] It is common cause between both sides herein that the Applicant herein is a close corporation whereas the First Respondent in the main case is not. It is what is regarded as an "ordinary proprietorship".

[23] The issues argued by the parties was whether the Applicant herein was the same party as the First Respondent in the main case.

[24] It was argued on behalf of the Respondent that the Applicant's documentation such as receipt books and normal paper work referred to the Applicant here ordinarily generally as "Tshitshite Funeral Undertakers or Tshitshite and Bros Funeral Undertakers". It was further submitted that even the facade of the business premises is branded as such.

[25] Unfortunately counsel for the Respondents could not substantiate the branding claim in any way. However, when challenged to show an example of where and how in the papers works the Applicant was referred to as they alleged, he pointed at Annexure MM7 at folio 57 of the paginated papers herein as typical example thereof. This was an annexure to the Respondents' answering affidavit.

[26] Unfortunately, that example muddled the waters further: Its heading was "Tshitshite & Bros Funeral Society". It made matter worse for the Respondents.

[27] Our Courts have decided this specific issue on several occasions.

[28] In *Muller v Coca-Cola Sabco (SA) (Pty) Ltd* 1998 (2) SA 824 (SECLD) the respondent therein who was the plaintiff in the main matter sued the second defendant in the main case. The second respondent filed an excerpt to the pleadings. The basis of the main case was a deed of suretyship. In the suretyship the principal debtor was described as "Convenient Wholesalers". The first defendant, who the plaintiff alleged in the declaration to the summons as being liable was described as "Convenient Wholesalers CC". The second defendant excerpted to the Plaintiff's declaration in that ex facie the declaration there existed no nexus between the second defendant and the plaintiff as Convenience

Wholesalers CC was not the principal debtor identified in the deed of suretyship.

[29] Mpati J (as he was then) decried the differences between the surety in the deed of suretyship and the instance sued on the basis of the suretyship agreement. The Learned Justice held that there were two distinct personalities involved. In the headnote of the judgment the issues decided are clearly set out as follows:

"... the first defendant was a close corporation, a completely different entity from the principal debtor identified in the deed of suretyship relied upon by the plaintiff. It (1st defendant) was a juristic person whose members were not, merely by reason of their membership, liable for its liabilities or obligations, as in the case of a firm or partnership. The issue was not whether the first defendant traded as Convenient Wholesalers at the time the deed of suretyship was signed, but whether the second defendant had bound himself as surety for and co-principal debtor with the first defendants in the event of Convenient Wholesalers becoming a close corporation or a company."

[30] The exception was granted.

[31] There is no indication and neither was it submitted on behalf of the respondents that the parties herein agreed that a reference to Tshitshite Funeral Undertakers and Tshitshite & Bros Funeral Undertakers CC are one and the same parties or are liable for the debts or liabilities incurred by the other.

[32] Counsel for the Respondents argued that this Court should find that the Applicant herein and the first respondent in the main case are one and the same parties. In the light of *Muller v Coca-cola* case above, that cannot be.

[33] According to counsel for the respondents, the Applicants should or ought to have "shouted out" or responded at the time the Urgent Application was served on it in the main case and said it was not the First Respondent. He consequently argued that the Applicant was now estopped from denying that it is Tshitshite Funeral Undertakers and claiming this present title of Tshitshite and Bros Funeral Undertakers CC. As his authority he relied upon section 32(4) of the Companies Act, 2008.

[34] In his reply on behalf of the Applicants, counsel correctly in my view submitted that the Respondents were misguided to rely upon the Companies Act when the Close Corporations Act was the applicable Act.

[35] Even if the terms of section 32(4) were incorporated somewhere in the Close Corporations Act, that would not have availed the respondents. They could not come up with anything that suggested that the Applicant represented itself in any of its documentation, letters, receipt, and like aspects, like its branding, as Tshitshite Funeral Undertakers. The example alluded to above of a receipt titled Tshitshite & Bros Funeral Society is such example.

[36] The essence of the doctrine of estoppel by representation is that a person is precluded or estopped from denying the truth of a representation previously made by him or her to another and the latter, believing in the truth of such representation, acted there on to his or her detriment.

See SA Broadcasting Corporation v Co-op 2006(2) SA 217 (SCA)

[37] The essential requirements for a successful plea of estoppel are:

37.1 Representation by words or conduct of certain factual position.

(Vide Northern Metropolitan Council v Company Unique Finance (Pty) Ltd and Others 2012 (5) SA 323 (SCA).

37.2 The other party acted on the "correctness" of the facts as represented.

(See Stellenbosch Farmers Winners Ltd v Vlachos t/a The Higher Den 2001(3) SA 597 (SCA).

37.3 The party so acted to his or her detriment.

37.4 The representation was made negligently; and

(See Caldeiva v Ruthenbers 1999(4) SA 37 (SCA)

37.5 The person who made the representation could bind the defendant by means of such representation.

(See Glofinco v Absa Bank Ltd t/a United Bank 2002 (6) SA 470 (SA))

[38] The doctrine of estoppel however, may not be used to make legal what would otherwise be illegal. It equally cannot replace statutory requirements for the validity of contracts.

(see Eastern Cape Provincial Government and Others vs Contraprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA).

[39] The test for a representation by conduct is whether the representor should reasonably have expected that the representee might be misled by the conduct and the represent and/or the representee acted reasonably in the circumstances.

(See Leeu v First National Bank 2010(3) SA 410 (SCA))

[40] In this case, the facts alleged to have raised the estoppel plea are the following:

"... The conduct of the Applicant of receiving all official Court processes and documents and further perusing them under the name Tshitshite Funeral Undertakers without raising any objections amount to conceding to the identity appearing in the documents."

- [41] The above is in my view, far-fetched: Accepting court papers from a Sheriff of the Court is not necessarily an acceptance of liability. When the above is added to the Applicant's protestations after the Sheriff served a letter to which a taxed bill of costs was attached, the Respondents' submissions become more ridiculous. Furthermore, the Respondents have not proved the requirements for estoppel.

CONCLUSION

- [42] From the afore-going, it is the finding of this Court that Tshitshite and Bros Funeral Undertakers CC and Tshitshite Funeral Undertakers as cited as Second Respondent in the Main Case are not one and the same party.
- [43] That in my finding, puts paid to this application. It is not necessarily to go to the next leg of issues to be dealt with, especially the interpretation of the clause in the Court Order dealing with costs.
- [44] The Applicant also seeks an order that Tshitshite Funeral Undertakers is non-existent.
- [45] That this Court cannot do or grant. There are no sufficient facts to arrive at the conclusion.
- [46] In the circumstances, the writ of execution that was used to attach and remove the Applicant's two motor vehicles stands to be set aside. The property attached and removed should be released from attachment and returned to the Applicant. Furthermore, from the facts and circumstances in this matter, there is justification for this Court to issue a declaratory order that Tshitshite and Bros Funeral Undertakers CC is a juristic person capable of suing and being sued in its own name. The Court order in question says the costs should be borne by the 1st Respondent and/or the Respondent who opposes the application. The and/or is vital. It also includes the 1st Respondent after the "or". I leave it there.

COSTS

- [47] The costs order that precipitated the attachment of the Applicant's motor vehicles was on a scale as between attorney and client. The Applicants sought an order of costs on a scale as between, attorney and own client in the event of them being successful.
- [48] They are successful. However, a costs as between attorney and own client is not justified. The costs order accompanying the ruling or orders in this application should be and is that of attorney and client.
- [49] The next aspect to be decided is who between the parties herein should be mulched for the costs accompanying the Urgent Court proceedings to 26 November 2019.
- [50] Counsel for the Applicants submitted that the fee scale for that date should be that of attorney and client. The Respondent submitted or it was submitted on their behalf that the costs order should be that of no order as to costs.

[51] Both sides cannot succeed on the scale of costs for that order of 26 November 2019. The appropriate costs order for that day should be that of party and party.

ORDER

[52] The following order is made:

52.1 The warrant of execution against the Applicant's property dated 25 October 2019 is hereby set aside.

52.2 The properties attached and taken into execution by the sheriff of the Court are hereby released from attachment forthwith.

52.3 The attached motor vehicles should be returned to the Applicant.

52.4 The respondents in this application are ordered to pay the costs of the application jointly and severally, the one paying the other(s) being absolved, on a scales as between attorney and client. The above costs shall include the storage costs due to the Sheriff.

52.5 The respondents are also ordered to pay the costs of the Urgent Application dealt with and finalised on 26 November 2019 on a scale as between party and party, jointly and severally, the one paying the other(s) being absolved.

NF KGOMO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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3. Date of argument : 19 May 2020

4. Date of Judgment : 26 May 2020

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