

SOUTH AFRICA / JUDGMENT

# Zwane v Marenene and Others (2190A/2019) [2020] ZAECMHC 19 (9 June 2020)

[2020] ZAECMHC 19

## COURT

Eastern Cape High Court, Mthatha

## BEFORE

RWN Brooks

## CASE / FILE NUMBER

2190A/2019

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**Source record****IN THE HIGH OF SOUTH AFRICA**

EASTERN CAPE DIVISION: MTHATHA

Case No: 2190A/2019  
MLUNGISI  
ZWANE  
Applicant  
and  
NOMVULA  
MARENENE First  
Respondent  
LUVUYO  
ZWANE  
Second  
Respondent  
BULELWA  
ZWANE Third  
Respondent  
BULELANI  
ZWANE Fourth  
Respondent

## JUDGMENT

## BROOKS J

- [1] This matter came before the court on the extended return day of a rule nisi issued ex parte by Jolwana J on 2 July 2019. In the interim the matter has attracted opposition and a full set of affidavits has been exchanged. Due to the restrictive nature of the national state of emergency regulations promulgated as a result of the current Covid-19 pandemic, the parties elected to have the matter decided on the application papers and the heads of argument which have been filed, without an appearance in court or the use of a videoconference, in accordance with the provisions of section 19 (a) of the Superior Courts Act 10 of 2013.
- [2] The applicant is an adult male person residing at Siphilini Village, Lubhacweni Administrative Area in the Mount Frere district of the Eastern Cape. He has been appointed by the Master of the High Court as the executor in the estate of the late Evelyn Nomangaliso Zwane. He has brought this application in both his personal capacity and in his capacity as executor.
- [3] The applicant is the stepson of the late Evelyn Nomangaliso Zwane (“the deceased”). The four respondents are also related to the deceased. Only the third and fourth respondents have opposed this application.
- [4] On 2 July 2019 the rule nisi was issued in the following terms:
- “1. Applicant is granted leave to bring this application as one of urgency in*
- terms of Rule 6(12) of the Uniform Rules.
2. A rule nisi is issued calling upon the respondents to show cause on 6 August 2019 why an order on the following terms should not be made final:
- 2.1 Respondents be and are hereby interdicted from unlawfully interfering with the Applicant’s occupation of the property at Siphilini Village, Lubhacweni Administrative Area, Mount Frere, alternatively;
- 2.2 The respondents are interdicted from unlawfully evicting the Applicant from the property in prayer 2 above;
- 2.3 The Respondents are interdicted from removing any item belonging to the estate of [the] late Evelyn Nomangaliso Zwane without Applicant’s

consent;

2.4 The Respondents are ordered to return the following terms(sic)

which they unlawfully removed from the room occupied by the Applicant

namely:

2.4.1 The death certificate of the late Evelyn Nomangaliso Zwane;

and;

2.4.2 Applicant's original identity document;

2.4.3 The original Deed of Registration of the property of Evelyn

Nomangaliso Zwane;

2.4.4 Original Deed of Sale

3. Costs of the application be costs in the Estate of [the] late Evelyn Nomangaliso Zwane and only in the event of opposition by any or all of the Respondents shall costs be borne by the opposing Respondent(s)

4. Paragraph 2 above shall operate as [an] interim interdict pending

finalisation of this application".

[5] It is significant to note that the applicant has enjoyed the protection of an interim interdict since the issue of the rule nisi.

[6] Subsequent to the issue of the rule nisi and on 20 August 2019 the fourth respondent approached the court on an urgent basis in case number 2865/2019 and obtained the following

order against the applicant, as first respondent, and the Master of the High Court, as, as second respondent:

*"1. That the matter be and is hereby heard as one of urgency as envisaged in*

Rule 6(12) of the Uniform Rules.

2. That the (sic) rule nisi be issued calling upon the Respondents to show

cause on Tuesday, 17 September 2019 why an order on the following

terms should not be made final:

2.1 That the first Respondent be and is hereby interdicted and restrained

from performing his duties as an executor of the estate late

Evelyn Nomalungisa (sic) Zwane forthwith;

2.2 That the letter(s) of executorship issued by the Master of the High Court on 12 June 2019 be and is hereby suspended pending the return day;

2.3 That the issue of the determination of the validity of the will allegedly made by the deceased be postponed to a date to be arranged with the Registrar;

2.4 That the first Respondent be and is ordered to return to the Applicant her identity document and that of her twin brother, Bulelani Zwane;

2.5 That paragraph 2.1, 2.2 and 2.4 operate as [an] interim interdict pending the finalisation of this application.”

[7] The court file under case number 2865/2019 has been made available to the court. It is apparent therefrom that the application brought by the fourth respondent became opposed by the applicant and the rule nisi was extended and the matter postponed on a number of occasions. During the interim period the applicant, as first respondent therein, brought an application in terms of the Uniform Rules of Court for a reconsideration of the order which had been issued on 20 August

2019. Therein he informed the court of the nature and import of the present proceedings and the rule nisi issued in his favour on 2 July 2019. This prompted the fourth respondent, as applicant, to take a further step in furtherance of her quest for relief under case number 2865/2019 – that of a joinder application in which she sought the joinder of the applicant in his capacity as executor to the estate of the deceased.

[8] On 22 October 2019 the application for a reconsideration of the order issued in case number 2865/2019 was heard. An order was issued in the following terms:

*“1. That the order dated 20 August 2019 is hereby reconsidered.*

2. Paragraph 2.5 of the aforesaid order is hereby deleted in its entirety.

3. Rule [nisi] is extended to 10 December 2019.

4. The Respondent is to pay costs occasioned by the application for reconsideration.”

[9] On 26 November 2019 the following order was issued in case number 2865/2019:

*“1. That the executor of the estate late Evelyn Nomangaliso Zwane be and is hereby joined as the third respondent in the main application.*

2. That there shall be no order as to costs.”

[10] It is plain that the effect of the order issued upon reconsideration of the order issued on 20 August 2019 under case number 2865/2019 has been to do away with the portion thereof which directed that some of the relief set out in the rule nisi shall operate against the applicant, as the first and third respondents therein, as an interim interdict with immediate effect.

Expressed slightly differently, the effect of the order upon reconsideration has been to remove the protection of an interim interdict which previously operated as a protection mechanism in favour of the fourth respondent, as the applicant in those proceedings.

- [11] Both the content of the court file under case number 2865/2019 and the file cover itself are silent as to the fate of the application on the extended return date, 10 December 2019. It may even be that no appearance was made on that date on behalf of the fourth respondent and that the rule nisi, in its amended form, has lapsed. Whatever the position may have been, it is clear from the content of the heads of argument filed on behalf of the fourth respondent in the application now before the court that she is desirous of the matter being postponed in order that she might bring an application for the consolidation of the matter with the application she brought under case number 2865/2019. In this regard, no formal and substantive application for a postponement has been placed before the court. The fourth respondent has merely made a submission to that end in the heads of argument.
- [12] It is evident from the content of the notice filed on behalf of the applicant in accordance with the provisions of rule 15 A of the Joint Rules of Practice of the High Courts of the Eastern Cape Province and from the heads of argument filed on his behalf, that the applicant is desirous of obtaining confirmation of the rule nisi as a final order. For the reasons which appear below, I am of the view that a final order should be issued. I may also state that the same reasons inform my view that even if the fourth respondent had filed a substantive application for postponement, I would not have found merit therein.
- [13] The nature of the relief sought by the applicant is that of a final interdict. It is trite that in order to succeed therein an applicant must demonstrate a clear right, an act of interference therewith or a reasonable apprehension thereof and the absence of any other satisfactory remedy. See for example *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) 540 C.
- [14] It is also trite that where an applicant seeks final relief in motion proceedings such as these and those proceedings became opposed, the Plascon – Evans rule must be applied. A final order can only be granted if the facts averred by the applicant which have been admitted in the opposing affidavits read together with the factual averments in the latter, justify the relief sought. It has been held that it may be different if the opposing affidavits set out a version which consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. See for example *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009
- (2) SA 277 (SCA) at para [26].

- [15] Insofar as the applicant asserts a right to reside in the immovable property referred to in this application he does so in his personal capacity. It is clear from the content of the answering affidavit that the third and fourth respondents acknowledge that the applicant occupied a room there. That they are unhappy about this is both clear from the answering affidavit and irrelevant because no legal basis is set out in justification of their unhappiness.
- [16] Insofar as the applicant asserts a right to reclaim his identity document, this is a personal right which is not displaced by any allegations in the answering affidavit.
- [17] The applicant also asserts a right to protect the assets of the estate of the deceased and to recover three legal documents pertaining thereto. To this end he relies upon his appointment by the Master of the High Court as executor to the estate of the deceased. A copy of the letters of executorship issued on 12 June 2019 is attached to the founding affidavit. In response hereto the third and fourth respondents assert that the appointment of the applicant as executor was done “by mistake” by the Master of the High Court. In support of this view the allegation is made that the will relied upon by the Master of the High Court “is a fake”. Notwithstanding the suspicions expressed by the third and fourth respondents in this manner, the reality is that the appointment of the applicant as executor to the estate of the deceased is a fact which the third and fourth respondents are unable to deny. It is clear that it is upon receipt of letters of executorship that an executor to a deceased estate derives his or her authority and the necessary locus standi and authority to deal with the assets of that estate. See *Klempman N. O. v Law Union and Rock Insurance Co. Ltd* 1957
- (1) SA 506 (WLD) 513 A – D.
- [18] To the extent that the third and fourth respondents attempt to deny the existence of the authority derived by the applicant from his appointment as executor, the third and fourth respondents raise their suspicions and indicate an intention to “seek an order setting aside the applicant’s appointment as the Executor and to stop him from performing his duties as such”. (Para 18.3 of answering affidavit.) This expression of intent does not constitute a fact which displaces the fact that the applicant is clothed presently with the authority to administer the estate of the deceased.
- [19] Sight is not lost of the fact that the fourth respondent indeed launched an urgent application to stop the applicant from performing his duties as executor. She did so by launching the application under case number 2865/2019 to which reference has been made earlier in this judgment. However, even this development (evidence of which lies outside the four corners of the affidavits filed under case number 2190A/2019 in any event) does not create a fact which displaces the authority of the applicant to act as the executor to the estate of the deceased. In the form in which the rule nisi issued under case number 2865/2019 was expressed after it had been reconsidered on 23 October 2019, no interim interdict was granted

prohibiting the applicant from winding up the estate of the deceased. As I have indicated elsewhere, the rule nisi issued under case number 2865/2019 may well have fallen away as a result of a failure on the part of the fourth respondent to appear on the extended return day and to seek either a final order or a further extension of the rule nisi. Either way, no legal finding has been made which is adverse to the applicant asserting his locus standi and authority as executor.

- [20] It follows that I am satisfied that no dispute of fact arises from the allegations made in the answering affidavits to challenge those upon which the applicant relies in claiming his rights and that in the result those rights are established clearly.
- [21] Numerous factual allegations are made in the founding affidavit which establish acts of interference on the part of the respondents with both the applicant's access to the room which he occupied in the house and his custodianship over legal documents pertaining to the estate of the deceased. In the answering affidavit the third and fourth respondents again are vociferous about their challenge to the legality of the applicant's status as executor but effectively confirm that the applicant's room was locked in his absence after legal documents pertaining to the estate of the deceased had been removed therefrom.
- [22] Until the mantle of executorship over the estate of the deceased is removed from the shoulders of the applicant either by a cancellation of his letters of executorship by the Master of the High Court or by an order of this court, the applicant has a legal duty to perform in winding up the estate of the deceased. It is unconscionable that in this he should continue to be hindered by the unlawful activities on the part of the respondents which emerge from a conspectus of all the evidence set out in the affidavits filed of record. It is clear to me that in the circumstances he has no satisfactory alternative remedy but to approach this court for a final interdict. The same considerations apply to the legitimate need on the part of the applicant acting in his personal capacity to protect and enforce his personal right to occupy a room which he has used with consistency previously and to obtain the return of his identity document.
- [23] Accordingly I am satisfied that the applicant is entitled to the final relief which he seeks. That entitlement is unaffected by the rule nisi in its amended form which to be found in case number 2865/2019. Should a final order ever be issued in that matter in terms which affect the applicant's current status as executor to the estate of the deceased, the final order in this matter will simply fall away. Until such time as that may happen, it is in the interests of justice and of the estate of the deceased and her heirs that the applicant should perform his legal duties as executor without hindrance.

- [24] The following order is issued:

*"1. A final order is issued confirming paragraphs 2.1, 2.2, 2.3 and 2.4 of the rule nisi.*

2. The third and fourth respondents are directed to pay the costs of this application jointly and severally, the one paying the other to be absolved."

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

Applicant: Brauns Nyembezi Inc.

Flat No 2, Phyllis Court,

Cnr Leeds and Cumberland Street

Mthatha

First Respondent: Fikile Ntayiya & Associates

67 Wesley Street

Date heard: 28 May 2020

Date delivered: 09 June 2020

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