

SOUTH AFRICA / JUDGMENT

## Zwarts v Thulo (02/2010) [2010] ZANWHC 9 (3 June 2010)

[2010] ZANWHC 9

COURT

North West High Court, Mafikeng

BEFORE

DI Matlapeng, AA Landman

CASE / FILE NUMBER

02/2010

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### Source record

NORTH

WEST HIGH COURT, MAFIKENG

CASE

NUMBER: 02/2010

In the

matter between:

BENADE  
MICHEL ZWARTS APPELLANT  
and  
MOTSHEGWA  
EVODIA THULO RESPONDENT  
LANDMAN  
J & MATLAPENG AJ  
DATE OF  
HEARING 14 MAY 2010  
DATE OF  
JUDGMENT 03 JUNE 2010  
FOR THE  
APPELLANT J.H.F PISTOR SC  
FOR  
THE RESPONDENT NO  
APPEARANCE

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**JUDGMENT**

MATLAPENG AJ

**Introduction**

- [1] Appellant, lodged an appeal in this Court against the decision of a magistrate to rescind an administration order granted in terms of section 74Q
- (1) of the Magistrates' Court Act 32 of 1944, as well as an adverse costs order granted against him. The Respondent did not file any opposition. She filed a notice to abide by this Court's decision.

Factual

**Background**

- [2] For the sake of convenience I will use the appellation that was used in the court a quo. In that court the Appellant was the Respondent and the Respondent was the Applicant. The facts in this matter are straightforward and most of them common cause. [3] Sometime in 2000, the Applicant's estate was placed under administration in terms of section 74 (1) of the Magistrates' Court Act. The Respondent was the administrator of the estate. On 26 August 2009 the Applicant lodged an application for rescission of the order. She was assisted by an attorney.
- [2] For the sake of convenience I will use the appellation that was used in the court a quo. In that court the Appellant was the Respondent and the Respondent was the Applicant. The facts in this matter are straightforward and most of them common cause.
- [3] Sometime in 2000, the Applicant's estate was placed under administration in terms of section 74 (1) of the Magistrates' Court Act. The Respondent was the administrator of the estate. On 26 August 2009 the Applicant lodged an application for rescission of the order. She was assisted by an attorney.
- [4] In the application she claimed that it would be in the interest of the creditors if the administration order was set aside as there was a good cause for doing so. She mentioned the following as constituting good cause for the court to rescind the administration order:
- a) her financial circumstances have changed;
  - b) the creditors were only being paid on trimonthly basis and if the order was rescinded, she would be able to pay them on a month to month basis; and
  - c) not all the money she paid over to the administrator was for the benefit of creditors as the administrator had to deduct administration costs and this decreased the amount that the creditors ultimately received.

- [5] The Applicant, when applying to be placed under administration, had disclosed six creditors to the court. A further two (creditors) were listed and added after the administration order was granted. However, at the time of the application for rescission, the

Applicant cited as a second Respondent "all Creditors" and proof was provided that only two creditors were notified of the application by registered post.

- [6] The Respondent being the administrator opposed the application. He stated that the Applicant did not show that any good cause existed for the rescission of the administration order. He further raised a point in limine in the Magistrate Court which point in limine was pursued in this Court. Several points were also raised in this appeal but because of the view that I take of this matter, I do not think it is necessary to examine them. I will restrict myself to the point in limine. Point in limine

- [7] The point in limine that was raised by the Respondent is that not all persons who have a substantial interest in the application namely the creditors, were informed of the application. In this Court, the argument was further developed and clarified, the submission being that there was a non-joinder in that, the Applicant failed to cite all creditors individually and by name. Further, the Applicant's failed to serve the process in terms of Rule 9(3) of the Magistrate Court Rules. The Applicant relied on writing letters to the creditors informing them of the application and the writing of letters is not an acceptable form of service of court process and cannot be seen as being in terms of the Rules of the Magistrates' Court. Lastly, in case it being found that the Applicant was entitled to rely on such letters, she failed to prove that the letters were sent to all creditors.

- [4] In the application she claimed that it would be in the interest of the creditors if the administration order was set aside as there was a good cause for doing so. She mentioned the following as constituting good cause for the court to rescind the administration order:

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#### Point in limine

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- [8] In terms of rule 9(1) of the Magistrates' Court Rules a party requiring service of any process, notice or other documents to be made by the Sheriff shall deliver such to the Sheriff. Rule 9 (3) (a)-(f) regulates how such services shall be effected. The authors Erasmus & Van Loggerenberg in the book Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa Volume 2 The Rules are of the view that all processes mentioned in rule 9
- (3) refer to court processes. Service of any other document which, is not a court process has to be done in terms of rule 9 (11). Rule 9 (11) makes provision for service of a document which is not a process of the court to be delivered by hand or by registered post.
- [9] By way of background I believe it is apposite to refer to s 74 A (5) of the Magistrates' Court Act which provides: "The debtor shall lodge an application for an administration order and the statement referred to in subsection (1) with the clerk of the court and shall deliver to each of his creditors, at least 3 days before the date appointed for the hearing, personally or by registered post a copy of such application and statement on which shall appear the case number which the original application was filed". (My emphasis.) [10] The process of administration orders was initiated as a means of debt relief to people who are overwhelmed by debt and whose estate is so small in that the costs of sequestration proceedings will swallow it. This is done in order to assist a debtor during financial

difficulties without going through the route of sequestration. See *Fortuin v Various Creditors* 2004 (2) SA 570 (C), *African Bank Ltd v Jacobs* 2006 (3) SA 364 (C), *Bafana Finance Mabopane v Makwakwa and Another*

[2006] ZASCA 46; 2006 (4) SA 581 (SCA).

[11] An application for an administration order is undoubtedly a court process as it is a step by which an action is initiated and or instituted. However, the service thereof is not subject to the prescripts of rule 9 (3). That this is so, is clear from the wording of s 74 A (5) which regulates the manner in which creditors are to be informed of the application for an administration order namely personal delivery of documents or by registered post. The current application by the applicant is the reopening of an existing case in terms of s 74Q(1). This section is silent on the procedure to be followed in as far as it relates to the notification of interested parties. There is nothing to suggest that the same procedure laid down in s 74A(5) should not apply when reopening the proceedings in terms of s 74Q(1). This is further strengthened by the use of the word "notify" (and the manner of notification in the said section) and not "serve" which is a deliberate choice of words to denote that is not a similar process. [12] Because of the underlying reasons for the existence of administration order mechanism, I am of the view that it was not the intention of the legislature that the processes in administration orders should be served in the usual context mentioned in Rule 9 (3) of the Magistrates' Court Rules. To do so would, in my view, defeat the very purpose of the existence of administration orders namely, debt relief. The service of the process through the sheriff would not ameliorate the already precarious financial position of the debtor but would exarcebate it through the addition of further costs. [13] There was no reason why the creditors were cited as second respondents in the Applicant's application for rescission. Although they have an interest in the matter qua creditors, they were never parties to the initial application for administration order and in my view, they only had to be notified in the same manner as when the application was initiated namely by personal delivery or by registered letters as interested parties and not as co-respondents. I venture to say that their being cited as co-respondents can be ascribed to nothing else but ineptitude on the part of a person who was drawing the papers. [14] Having regard to the application, it is clear that the court a quo was not provided with proof that all eight creditors were informed of the reopening of the application. Despite this lacuna in the Applicant's case being pointed to the court, it still came to the conclusion that the creditors were informed about the application and they failed to note their opposition to it and thus the point in limine had no merit. I hold a different view. Nothing in the applicant's application supports the notion that all creditors were informed.

What is clear is that notification was sent to only two of them. Therefore the failure by other creditors to note their opposition

cannot be described to their consent or even apathy to the application but ignorance of its existence. The finding by the learned Magistrate cannot be correct and has to be set aside.

Adverse Court Order

[15] A further aspect that arose in the lower court was the award of costs against the Respondent de bonis propriis. An adverse costs order is one of the hazards of litigation. In the normal cause of events, a losing litigant will be ordered to pay the costs of successful one on a party and party scale. However, it does happen that on some occasions the attorney for the losing

party is ordered to pay the costs of the other party *de bonis propriis*. The award of this costs order is not made normally and it is except as a show of the court's displeasure with the losing party's attorney. [16] This order is not made in *vacuo*. There has to be serious conduct on the part of the attorney that warrants such an adverse order. The courts have over the years taken the following to warrant such an order and, of course, this does not represent a *numerus clausus* namely: dishonesty, willfulness, negligence of a serious degree, a claim or defence that is found to be vexatious, frivolous and totally without substance or hopeless from the onset. See in this instance *Waar v Louw* 1977 (3) SA 297 (O), *Page v Absa Bank Ltd* 2000 (2) SA 661 (ECD), *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC). There was nothing in the Respondent's conduct of the case that could have warranted the court's wrath and displeasure. The Respondent was within his rights to oppose the application. There was a valid point that he raised in his opposition. I am of the view that the adverse court order granted against him should not stand and must be set aside. Order In the circumstances the following order is made:

- 1) The appeal is upheld and judgment of the Magistrate is set aside and replaced with the following: a) Appellant has failed to notify all the creditors of her intention to rescind the administration order.
  - b) The application is postponed *sine die* to enable her to do so.
  - c) Costs to be costs in the administration. In this Court the Respondent did not pursue the issue of costs and therefore I do not make any award relating to costs. DI MATLAPENG ACTING JUDGE OF THE HIGH COURT I agree AA LANDMAN JUDGE OF THE HIGH COURT
- [8] In terms of rule 9(1) of the Magistrates' Court Rules a party requiring service of any process, notice or other documents to be made by the Sheriff shall deliver such to the Sheriff. Rule 9 (3) (a)-(f) regulates how such services shall be effected. The authors Erasmus & Van Loggerenberg in the book *Jones & Buckle The Civil Practice of the Magistrates' Courts in South Africa Volume 2* The Rules are of the view that all processes mentioned in rule 9
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[12] Because of the underlying reasons for the existence of administration order mechanism, I am of the view that it was not the intention of the legislature that the processes in administration orders should be served in the usual context mentioned in Rule 9 (3) of the Magistrates' Court Rules. To do so would, in my view, defeat the very purpose of the existence of administration orders namely, debt relief. The service of the process through the sheriff would not ameliorate the already precarious financial position of the debtor but would exarcebate it through the addition of further costs.

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[14] Having regard to the application, it is clear that the court a quo was not provided with proof that all eight creditors were informed of the reopening of the application. Despite this lacuna in the Applicant's case being pointed to the court, it still came to the conclusion that the creditors were informed about the application and they failed to note their opposition to it and thus the point in limine had no merit. I hold a different view. Nothing in the applicant's application supports the notion that all creditors were informed.

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[16] This order is not made in *vacuo*. There has to be serious conduct on the part of the attorney that warrants such an adverse order. The courts have over the years taken the following to warrant such an order and, of course, this does not represent a *numerus clausus* namely: dishonesty, willfulness, negligence of a serious degree, a claim or defence that is found to be vexatious, frivolous and totally without substance or hopeless from the onset. See in this instance *Waar v Louw* 1977 (3) SA 297 (O), *Page v Absa Bank Ltd* 2000 (2) SA 661 (ECD), *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC).

There was nothing in the Respondent's conduct of the case that could have warranted the court's wrath and displeasure. The Respondent was within his rights to oppose the application. There was a valid point that he raised in his opposition. I am of the view that the adverse court order granted against him should not stand and must be set aside.

#### Order

In the circumstances the following order is made:

- 1) The appeal is upheld and judgment of the Magistrate is set aside and replaced with the following:
  - a) Appellant has failed to notify all the creditors of her intention to rescind the administration order.

- b) The application is postponed sine die to enable her to do so.
- c) Costs to be costs in the administration.

In this Court the Respondent did not pursue the issue of costs and therefore I do not make any award relating to costs.

DI MATLAPENG

ACTING JUDGE OF THE HIGH COURT

I agree

AA LANDMAN

JUDGE OF THE HIGH COURT

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Prepared on 9 October 2026 · Esheria