

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application No.: 1745/2011

In the matter between:

REAHILWE FUNERAL HOMES CC
SECHABA MOEKOA

1st Applicant

2nd Applicant

and

MOSALA ELIAS MOEKOA
NTHABISENG ELIZABETH MOEKOA
PHOLOANA BULA MOEKOA
RETHABILE MOEKOA

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

JUDGMENT: MOLEMELA, J

HEARD ON: 2 JUNE 2011

DELIVERED ON: 7 JUNE 2011

-
- [1] This is a return day of a rule *nisi* granted by this court in terms of which the respondents were interdicted and restrained from entering the business premises of the 1st applicant (in accordance with par 4.1 of the Notice of Motion); from interfering in any manner whatsoever

with the affairs, employees and management of the 1st applicant (in accordance with par 4.2 of Notice of Motion); and staying the protection order issued by the Magistrate's Court, Witsieshoek, under case no 101/2011, against the 2nd applicant (in accordance with par 4.3 of Notice of Motion).

[2] It is common cause that all the parties in this matter are related to one another: the 2nd applicant is the 1st and 2nd respondents' son and is a sibling to the 3rd respondent as well as to the fourth respondent's husband. The applicants' case is that the 2nd applicant is the sole member of a 1st applicant, a close corporation that conducts the business of a mortuary at Boiketlo Village in Witsieshoek. According to the applicants, the property from which the mortuary business is conducted was allocated to the 2nd applicant by the village chief, viz M E Mopeli. I will return later to this point. According to the applicant the 1st, 3rd and 4th respondent *inter alia* changed the locks to the doors of the business premises, the 1st respondent tried to deny the 2nd applicant access into the business premises and 1st, 2nd and 3rd respondents interfered with burial proceedings.

[3] While the respondents admitted that the 2nd applicant was indeed the sole member of the 1st respondent, they denied that the mortuary business was conducted by the 1st applicant exclusively. It is the respondent's case that when the 1st applicant's business ran into financial difficulties, it was agreed amongst the parties that shareholding be granted to the respondents, or at least some of the respondents, after which certain cash and assets were contributed to the business, which was thereafter run as a family business. The applicants, in their replying affidavit did not deny that certain amounts of money and assets like a motor vehicle and equipment were made available to the business but denied that the mortuary was run as a family business. I shall return later to this aspect.

[4] I now turn to deal with the documents attached to the founding affidavit

as proof that the business premises were allocated to the 2nd applicant and thus explaining the 2nd applicant's title to the property concerned. The respondents, in their answering affidavit vehemently denied that the business site in question was allocated to the 2nd Applicant by the chief. They also questioned the authenticity of the aforesaid documents and attached a supporting affidavit deposed to by the very same chief who, according to the 2nd applicant, allegedly allocated the business premises to the 2nd him (2nd applicant). Surprisingly in the chief's affidavit she vehemently denies the applicant's averments and in fact supports the 1st respondent's averment that the property in question was allocated to him. In specific response to the 2nd applicant's averment that he personally visited the chief to apply for the business site in question and that the documents attached as SM1, SM2 were issued by the chief, the chief deposed as follows:

- "3.7 According to the affidavit signed by the second applicant, I had written certain documents which seem to be a permission from me to allocate a site to Sechaba Moekoa. I wish to deny totally that the said documents were written by me. I have no knowledge of the origin of those documents.
- 3.8 The first time I knew the second applicant herein was around March 2011 when he came to me with his wife and asked me to change the documents and write his names as the rightful owner of the said site. I refused blatantly to do such an act and made it clear to him that I would not be part of such a collusion;
- 3.9 Further I wish to state that the stamp that has been used in the documents that I referred to in 3.7 herein above is not mine. I am only allowed to use stamp that is inscribed "Boiketlo Village".
- 3.10 Lastly, as far as I know the site that is in dispute was allocated to Mr Mosala Moekoa."

While it is clear that the chief's averments come down to allegations of fraud against the 2nd applicant, the 2nd applicant did not deal with such averments at all in the replying affidavit.

- [5] Counsel for the applicant (Adv. Greyling) argued that even though there is a dispute of fact pertaining to the ownership of the property

on which the business was being conducted, this did not constitute a material dispute of fact as it only relates to an ancillary issue which has no bearing on the applicants' clear right in respect of its occupation of the business premises. I disagree with this submission because this aspect is integral to par 4.1 of the interim order, relating to a prohibition to the respondents from entering the premises. The 1st applicant's claim to the right to occupy the premises on the basis of ownership has been denied by the very chief who allegedly allocated the land to him.

- [6] In the face of the chief's denial that the land in question was allocated to the 2nd applicant, the documents marked SM2, SM3 and SM4 relied upon by the 2nd applicant have no value for the applicants. It therefore stands to reason that the facts averred in the applicants' affidavits pertaining to ownership of the business premises and admitted by the respondents do not justify the granting of a final order pertaining to paragraph 4.1 of the Notice of Motion. See PLASCON EVANS PAINTS LTD V VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A) at 634 H-I.
- [7] Furthermore, as the applicants' only basis for occupation of the premises was founded on ownership and no other ground, the effect of the chief's disavowal of the authenticity of the documents relied on by the applicants is that the applicants have fallen short not only of showing a clear right to occupy the said premises, but they have also fallen short of showing any justification for the barring of the respondents from entering those premises. This obviously adversely impacts on the proof of the "clear right" requirement of the final interdict in respect of paragraph 4.1 of the Notice of Motion.
- [8] With regards to paragraph 4.2 of the Notice of Motion, it is not in dispute that the 2nd applicant is the sole member of the 1st applicant. The separate existence of the 1st Applicant as an entity has therefore not been denied. In my view, the averment that the mortuary was

being run as a family business as referred to in paragraph 3 above does not detract from the fact that the 1st applicant, being a close corporation, was a separate legal *personam*. This is confirmed by the 1st respondent's averment that certain cash was paid "into *the account of the first applicant* . . . on the understanding that all my children would benefit *from the business of the 1st Applicant*". (My emphasis).

- [9] As the separate existence of the 1st Applicant has been acknowledged by the respondents, there is no reason why the 2nd Applicant should, as the 1st Applicant's sole member, not be allowed to have a sole say in the 1st Applicant's own affairs and management, irrespective of whether the 1st Applicant is operating in association with another business entity or not. As I see it, this finding in no way affects the respondents' rights in respect of the affairs of the jointly-owned part of the business that they can identify.

- [10] With regards to paragraph 4.3 of the Notice of Motion, Mr Fourie, on behalf of the respondents, argued that the High Court has no jurisdiction to set aside an order granted by the Magistrate's Court except by way of appeal and review proceedings. The only exception, so the argument went, is where the particular order made by the Magistrate relates to the interests of minor children, in which event the High Court will have an inherent power to intervene. Mr Fourie argued that insofar as my colleague, Wright J,'s intervention did not relate to minor children, he accordingly erred by granting an *interim* order suspending the protection order granted by the magistrate. Mr Fourie argued that the rule *nisi* ought to be discharged on this basis alone. In view of the fact that the rule *nisi* will automatically be discharged once this court gives final judgment in this matter, which I will be doing *infra*, I do not deem it necessary to make any finding in respect of the legality or otherwise of my colleague's *interim* suspension of the protection order.

- [11] With regards to the issue of costs, the applicants have only been

partially successful in this application. In my view, an appropriate order in the circumstances of this case will be one ordering each party to pay its own costs.

[12] I therefore make the following order:

1. The rule *nisi* in respect of par 4.1 and par 4.3 of the Notice of Motion is discharged.
2. The rule *nisi* in respect of par 4.2 of the Notice of Motion is confirmed.
3. Each party is to pay own costs.

M. B. MOLEMELA, J

On behalf of the applicants:

Adv. J. A. Fourie
Instructed by:
Khalaki Attorneys
BLOEMFONTEIN

On behalf of the respondents:

Adv. D. Greyling
Instructed by:
Motaung Attorneys
BLOEMFONTEIN

/EB