

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case Number.: 1922/2024

In the matter between:

**THE DECEASED ESTATE LATE ZAMOKUHLE MADAKA
(ESTATE NUMBER: 0[...])**

Applicant

and

SUMMER SHUTTLE SERVICES (PTY) LTD

First Respondent

LUXOLO PHATHEKA

Second Respondent

MASTER OF THE HIGH COURT

Third Respondent

CAPITEC BANK (PTY) LTD

Fourth Respondent

JUDGMENT

Beshe J

[1] An urgent applicant was launched on behalf of the applicant seeking an order in the following terms:

‘2. That the *rule nisi* hereby issue calling upon the First and Second Respondent to show cause on 20 June 2024, why an order should not be made in the following terms:

2.1(a) That the First Respondent pays to the Applicant's First National Bank, Account Number 6[...] at the Pretoria Branch with Code 2[...], all the moneys due and payable to the deceased ZAMOKUHLE MADAKA for the utilisation of the taxis [belonging] which bear the following description: (i) a Toyota Quantum with registration number J[...] 7[...] E[...]; (ii) a Toyota Quantum with the registration H[...] 5[...] E[...]; and (iii) a Toyota Quantum with the registration K[...] 0[...] E[...].

ALTERNATIVELY

2.1(b) As an alternative to prayer 2.1(a): That the First Respondent retains all such monies in its bank account pending the determination of this Honourable Court;

2.2 That the account of the Second respondent held at Capitec Bank, Account Number 1[...] and/or any account, be frozen forthwith;

2.3 That the First Respondent be ordered to submit, within 24 hours of the issue of this Court Order, a written notification to this Honourable Court and serve upon the Applicant [of] the details of all bank accounts to which it has deposited any monies due and payable to the deceased from July 2023 to date. The written submission shall contain detail of the date on which the deposits were made; the actual amount and the breakdown thereof and each of the bank accounts to which the monies were deposited;

2.4 That in the event that the written submission of the First Respondent reveals that it paid the monies referred to in 2.2 above to a bank other than that of the Fourth Respondent, such account be frozen immediately after the service of this Court order upon such a bank; and

2.5 That the Second respondent refund all the monies belonging to the Applicant it has been paid by the First Respondent since the dates referred to in paragraph 2.3 above.

3. The provisions of paragraphs 2.1 to 2.5, all inclusive, shall operate as an interim Order pending the return date.

4. That the applicant is hereby granted leave to approach this Honourable Court on the same papers duly amended at a later stage when the need arises.'

[2] Having heard the application Noncembu J issued the following order on the 24 May 2024, which order was returnable on the 20 June 2024:

'IT IS ORDERED THAT:

1. The application is urgent.
2. A *rule nisi* hereby issue calling upon the First and Second Respondent to show cause on **20 June 2024** why an order should not be made in the following terms:

2.1 The First Respondent retains all monies due and payable to the deceased **ZAMOKUHLE MADAKA** for the utilization of the taxis which bear the following description: a Toyota Quantum with registration number J[...] 7[...] E[...]; (ii) a Toyota with registration H[...] 5[...] E[...] and a Toyota with the registration K[...] 0[...] E[...].

2.2 The First Respondent submit within 5 days of the issue of this order, a written notification to this Court and serve upon the Applicant details of all bank accounts to which it has deposited any monies due and payable to the deceased from July 2023 to date. The written submission shall contain all the details of the dates on which the deposits were made to the Second Respondent, the actual amounts and the breakdown thereof and each bank account to which the monies were deposited.

3. The provisions of paragraphs **2.1** and **2.2** shall operate as an interim order pending the return date.

4. The applicant is hereby granted leave to approach this Court on the same papers duly amended at a later stage when the need arises.

5. The First and Second Respondents file their answering affidavits on or before **11 June 2024**. The Applicant file its replying affidavit and heads of argument on or before **15 June 2024**. The First and Second Respondents file their heads of argument on or before **18 June 2024**.'

[3] On the 20 June 2024 (the return date) the following order was issued by Makaula J:

'IT IS ORDERED THAT:

1. The First Respondent pays the amount of R 66 544.00 to the Applicant's First National Bank, Account Number 6[...], held at Pretoria, Code 2[...] within 14 days of the grant of this order;

2. Paragraph 2.1 of the rule nisi granted in 24 May 2024 is discharged;

3. The application is postponed to **15 August 2024** and the rule nisi issued in paragraph 2.2 of the order of 24 May 2024 is extended to 15 August 2024.

4. Costs reserved.'

[4] The matter served before me on the 15 August 2024. Paragraph 2.2 of the *rule nisi* and the only outstanding issue in my view, directed the first and the second respondents to show cause why the first respondent should not be ordered to submit within five days of the issue of the order, a written notification to this court and serve upon the applicant details of all bank accounts to which it has deposited any moneys due and payable to the deceased from July 2023 to date. Which written submission should contain all the details of the dates on which the deposits were made to second defendant, the actual amounts and the breakdown thereof and the bank accounts to which these moneys were deposited. No *rule nisi* was issued in respect of the refund of the sum of R111 124.00 by the second respondent. No *rule nisi* was issued in respect of the restoration or return of applicant's taxi to serve as student

shuttles by first respondent. This prayer was not even part of the notice of motion. No order was issued for first respondent to show cause why it should not be declared to be in contempt of court. Yet, according to applicant's practice note, the court was required to determine these issues. In addition, thereto, the court according to practice note was going to be called upon to order the first respondent to file the information spelled out in paragraph 2.2 of the *rule nisi*. That first respondent's late filing of its answering affidavit should not be condoned, and it should be disregarded.

[5] Briefly stated, what precipitated the application for an order in terms of the notice of motion was the alleged failure by the second respondent to pay over to the deponent to the founding affidavit Mr Landile Philiso, monies due to the estate of the late Zamokuhle Madaka in respect of the use of the latter's three minibus taxis. These monies would have been received from first respondent. In turn, second respondent was required to pay these monies over to Mr Philiso/deceased's estate. In terms of paragraph 2.3 of the notice of motion first respondent was to be ordered to submit details of all bank accounts to which it has deposited any monies due and payable to the deceased, date of deposit as well as amounts deposited.

[6] It is alleged on behalf of the applicant's estate that second respondent replaced deceased's banking details with his as the banking account to which monies due to the deceased should be paid by the first respondent. One such account being second respondent's Capitec Bank account. After Mr Philiso's intervention from September 2023, second respondent deposited the monies to him every month. However, in April 2024 no payment was received from the second respondent by Mr Philiso. Attempts to resolve the matter out of court or without recourse to court failed. Instead, first respondent suspended deceased's taxis from operating.

[7] Second respondent filed an "explanatory affidavit". Therin, he states that he admits that he received payments from first respondent for use of deceased's minibuses. At paragraph 7.2 thereof, he states that he started receiving these payments in August 2023 following deceased's death in July of the same year. However, at paragraph 9 he states that he started receiving these payments in

September. He further states that he diligently transferred the payments received to the bank account of Mr Philiso. To this end, he attached his Capitec Savings account bank statement. He furthermore states that this application was triggered by the fact that he did not pay the money over in April 2024. He explained that he did not do so because Mr Philiso failed to account for the monies to deceased's family. So, instead he transferred the money received from first respondent to deceased's father Mr Nkosinathi Phatheka. This, according to him is also reflected in his bank statement. He denied that he withheld any money received in respect of deceased's minibuses for his personal use. He provides a bank statement comprising of 39 pages spanning from September 2023 to May 2024.

[8] First respondent on the other hand filed its notice of opposition on 24 May 2024. First respondent's answering affidavit is dated the 19th of June 2024. It is not clear when it was filed. At that stage, applicant's replying affidavit had already been filed. It is dated the 14 June 2024. To this end, first respondent states that the answer is triggered by what is contained in the reply. It would also appear that first respondent has an issue with paragraph 2.2 of the order (*Rule nisi*). According to Mr Ngejane who deposed to the answering affidavit, this was not in accordance with what the parties agreed upon. Be that as it may, the order was issued in those terms, and it is extant. Condonation of the late filing of the answering affidavit is sought on the basis *inter alia* that some time was spent in trying to establish how it came about that the interim order was issued in those terms, yet the parties had not agreed to those terms. The delay was also occasioned by the appointment of a new firm of attorneys following a fallout with their erstwhile attorney of record. A process that took some time. It is contended on behalf of first respondents that the intention has always been to abide with the relief sought even though first respondent had an issue with the truncated time periods and felt it was an abuse of the court process by the applicant. The answer was only precipitated by what is contained in applicant's replying affidavit labelling the first respondent as being in contempt of court and seeking an order that the deceased's taxis be restored to being part of the shuttle services.

[9] Applicant's contention that first respondent is in contempt of the court's order of the 24 May 2024 is premised on the alleged failure by first respondent to comply with the said order. It is contended that he failed to pay regard to what applicant has

stated in its founding affidavit namely that it is in the dark as to how much, if any amount, first respondent owes to the applicant and how much it has paid over to the second respondent.

[10] It is apposite to reproduce applicant's averments in this regard. Under the rubric: The Grounds for the Relief Sought. In the founding affidavit, the following averments are made:

'19. The relief I seek in the notice of motion is an interim order, namely that:

19.1. The First Respondent should not pay moneys due to the deceased into any of the accounts of the Second Respondent but to the estate account of the Applicant alternatively keep the money in its coffers until the determination of this matter by this Honourable Court;

19.2. The Second Respondent's Capitec account should be frozen forthwith;

19.3. In the event that that payment has been paid into the bank account of the Second Respondent other than the Capitec account, the First respondent should divulge the details of that account within 24 hours of the service of the interim order upon it. The order is given that such account should also be frozen and the service of the court be made upon that bank for immediate compliance therewith; and

19.4. The Second Respondent be ordered to allow the three taxis of the deceased to continue providing the business of transporting the students forthwith.'

And later at paragraph 27 of the founding affidavit, the following is stated:

'27 I also seek that the First Respondent should release all the information relating to all the monies that it has paid out to the Second Respondent, or any other person, relating to the deceased's mini bus taxis from when he passed away in July 2023 to date. As I have already adverted to, the Second respondent has not been

transparent regarding how much he has been paid by the First Respondent. To date, the Applicant has just been accepting what it is being given.'

[11] I have already adverted to the allegations that the parties had not agreed that an order as it appears on paragraph 2.2 of the *rule nisi* should be issued. But, once again the order is extant and first respondent claims to have complied therewith. This aspect is however brought up by first respondent to explain its lateness in filing an answer. It is not clear to me what the complaint regarding how 2.2 found its way to the *rule nisi* is because, save for the time when the first respondent was to file the requisite written notification which was no longer 24 hours but five days, it mirrors paragraph 2.3 of the draft order. This is the draft order the parties are alleged to have agreed upon. The draft order is annexed by the first respondent as annexure AA1 to the answering affidavit.

[12] Be that as it may, the first respondent filed a written notification in compliance with paragraph 2.2 of the order issued on 24 May 2024, on the 11 June 2024. (Annexure 1 to the replying affidavit.) The said document records that the letter serves to confirm that the late Mr Z Madaka received the following amounts from first respondent for transport services rendered from July 2023 to May 2024. The document proceeds to give a breakdown of the work performed (by the Shuttles) the amount due and the amount paid out from July 2023 to April 2024. In respect of May 2024, the same details are provided save that the amount which is due, R66 544.00 has not yet been paid over.

[13] It is contended on behalf of first respondent that it is not in contempt of court. That in any event an application for contempt of court should be brought on notice to the party concerned and not under the guise of an answering affidavit. I am inclined to agree with the first respondent in this regard.

[14] Regarding the prayer that the first respondent be ordered to allow deceased's taxis to continue to transport students, first respondent points out, rightly so, that this did not form part of the notice of motion. Further, that even though the court allowed the applicant to approach the court at a later stage on the same papers duly amended, the applicant had not supplemented or amended its notice of motion, nor

has it filed a supplementary affidavit in this regard. I have already expressed the view that as far as I am concerned, the only outstanding issue is the confirmation or otherwise of paragraph 2.2 of the *rule nisi*. Applicant concedes that the return of the applicant's minibuses to the provision of shuttle services was not part of the notice of motion – is not part of the notice of motion. The court is however urged to grant this relief on the basis of being further and or alternative relief. This in view, so it is contended, of the fact that this aspect was covered in founding affidavit. The parties aver that the court that issued the *rule nisi* was not amenable to issue an order in this regard on the basis that it did not have sufficient information in this regard. As I understand, it was not clear whether there was a contract that was concluded between the parties regarding shuttle services. In the replying affidavit the court's attention is drawn to second respondent's answering affidavit where he states that after deceased's death he looked after the latter's minibus taxis that were contracted with first respondent for scholar transport. This however is not of much assistance as we are not privy to nature of the contract between the parties, the terms of such contract and the duration thereof. Whilst it is so that there was a prayer for further and/or alternative relief in the notice of motion, the court is still in the same position as the court that issued the *rule nisi*. Nothing has changed. This matter has not been adequately ventilated in the papers. It is trite though that the prayer for further and/or alternative relief can be invoked to entitle a party to an order other than set out in the notice of motion where the relief sought is clearly set out in the founding affidavit, in respect of applications and is established by satisfactory evidence on the papers. In circumstances where the party against whom the relief is sought is given the fullest opportunity to deal with the relief sought. In *casu*, it is clear in what respect/s the respondents were called upon to show cause why the *rule nisi* should not be confirmed. The return of applicant's minibus taxis to being part of the shuttle services clearly not being one of them.

[15] Applicant counters this submission by stating that there was no need to supplement its papers because this is adequately set out in the founding affidavit. But the notice of motion has not been amended. And as I stated earlier, the matter is before court for the determination of paragraph 2.2 of the *rule nisi* of the 24th instant. Whether same should be confirmed or discharged. The terms of this paragraph 2.2 are clear and unambiguous as to what is expected of first respondent. Namely, to

show cause why an order should not be made that first respondent submits written notification to this court of bank accounts to which it deposited any moneys due and payable to the deceased, including dates on which deposits were made to second respondent and the actual amounts. In my view, the first respondent has adequately complied with paragraph 2.2 of *rule nisi*.

[16] I am of the view that first respondent has succeeded in showing cause that the order stipulated in paragraph 2.2 of *rule nisi* should now be discharged. Allied to this is the issue of the condonation of the late filing of his answer. In my view, this delay has been sufficiently explained. Accordingly, the late filing of first respondent's answering affidavit is condoned. I am also of the view that first respondent has complied with the direction issued in terms of paragraph 2.2 of *rule nisi*. Accordingly, paragraph 2.2 of the *rule nisi* issued on 24 May 2024 and later extended to 20 June 2024 is hereby discharged.

Costs.

[17] Applicant was made to approach the court to seek the relief set out in the notice of motion. This was after he had tried to reach out to the respondents to resolve the matter out of court. In my view, he had been predominantly successful against both respondents in that they complied with the *rule nisi*. I however do not think the matter calls for a punitive costs order. Accordingly, the respondents will be ordered to pay applicant's costs, jointly and severally the one paying the other to be absolved.

Order

[18] (a) Paragraph 2.2 of the *rule nisi* issued on 24 May 2024 is hereby discharged.

(b) First and second respondents are ordered to pay applicant's costs, jointly and severally the one paying the other to be absolved.

N G BESHE
JUDGE OF THE HIGH COURT

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Date Heard : 15 August 2024

Date Reserved : 15 August 2024

Date Delivered : 8 October 2024

