

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 43668/2014

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

.....  
**SIGNATURE**

.....  
**DATE**

In the matter between:

**IPROTECT TRUSTEES (PTY) LTD N.O.**

FIRST INTERVENING PARTY

**NDLELA, THABO SIPHO N.O.**

SECOND INTERVENING PARTY

In Re:

**NDLELA, MIRRIAM CLEMENCIA KHOZYA**

APPLICANT

And

**NDLELA, THABO SIPHO**

RESPONDENT

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**JUDGMENT**

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**MODIBA AJ:**

- [1] This is an application to intervene as a party, as well as an application to vary an interim order granted by Victor J on 9 December 2014 in terms of rule 43 of the Uniform Rules of Court.

- [2] The intervening parties, iProtect Trustees (Pty) Ltd N.O. and Ndlela Thabo Sipho (Mr Ndlela) N.O in their capacity as trustees of the Ndlela Trust (the trust) were not party to the rule 43 application. Mr Ndlela was the Respondent in the rule 43 application in his personal capacity as the Applicant's spouse. The Applicant in the R43 application, Mrs Ndlela Miriam Clementia Khoza (Mrs Ndlela) is his wife.
- [3] The intervening parties seek to intervene in the rule 43 application in order to vary certain parts of the order granted in that application that deal with the assets of the trust. They allege that Mr Ndlela consented to the rule 43 application without the requisite authority to bind the trust to that order.

### **COMMON CAUSE FACTS**

- [4] The common cause facts are as follows:
- 4.1 Mr and Mrs Ndlela are party to a subsisting marriage. The trust was formed for their sole benefit and for the benefit of their minor child.
- 4.2 An Audi A4 motor vehicle, as well as the furniture used in the matrimonial home, are trust assets. The Audi A4 was acquired by Mr Ndlela for the sole use of the minor child and Mrs Ndlela. Mr Ndlela donated the Audi A4 to the trust in October 2014. Mrs Ndlela continued using the Audi A4 after it was donated to the trust. Mrs Ndlela suffers from a back condition. She specifically uses the Audi A4 to accommodate her back condition.
- 4.3 On 15 August 2014, Mr Ndlela initiated divorce proceedings against Mrs Ndlela in this court. During the last week of November 2014, Mrs Ndlela instituted a rule 43 application in this court on an urgent basis under a different case number from the divorce action. The trustees of the trust were not party to the rule 43 application despite the fact that an order relating to the trust assets was sought. The order in the rule 43 application was granted by consent of the parties after they had settled the matter amicably.
- 4.4 Prior to granting the order in the rule 43 application, Victor J invited Mr Ndlela to call on the trustees to come to court. Mr Ndlela informed Victor J that it was not necessary for the trustees to come to court because he has the authority to bind the

trust to the settlement agreement entered into with Mrs Ndlela. He also undertook to obtain a written trust resolution rectifying his authority to consent to the aforesaid order on behalf of the trust.

- 4.5 After Victor J granted the order, the trust refused to give the resolution. Instead they issued a resolution dated 11 December 2014 providing *inter alia*:

4.5.1 that the Ndlela Trust is a separate legal entity. Mr Ndlela and the first intervening party are its trustees;

4.5.2 that no trustee shall have the unilateral power to appropriate or dispose of any part of the trust for their benefit;

4.5.3 no trustee shall be party to any decision that affects the distribution of any benefit to them or their estate;

4.5.5 for any decision of the trust to be effective, it must be taken by the unanimous consent of both trustees;

4.5.6 an Audi A4 was donated to the trust on 17 October 2014;

4.5.7 Mr Ndlela did not have the authority to bind the trust to the draft order granted by Victor J on 9 December 2014;

4.5.8 the trust cannot afford continue maintaining the Audi A4. Instead, the trust will sell the Audi A4 and purchase in the name of the trust and for the benefit of the beneficiaries, a smaller motor vehicle with a maintenance plan which will be less expensive to maintain. The trust will then lend the latter motor vehicle to Mrs Ndlela to be used for the benefit of the Ndlela minor child, pending the outcome of the divorce proceedings between Mr and Mrs Ndlela.

- 4.6 The attorneys of record for the trust then addressed a letter to Mrs Ndlela's attorneys attaching the aforesaid trust resolution, requesting Mrs Ndlela to consent to the amendment of paragraph 6 of the order by Victor J to give effect to the trust resolution, failing which they will bring a formal amendment application. She did not acquiesce their request.

- 4.7 Paragraph 6 of the order by Victor J reads as follows:

*“6. The Respondent shall deliver the Audi A4 motor vehicle bearing registration number CW 75 WB GP to the Applicant in compliance with the court order of her ladyship the Honourable Judge Victor, of 28 November 2014 by no later than 18h00 on the 5<sup>th</sup> of December 2014. The Respondent undertakes within 7 (seven) days of the grant of this order to produce a resolution by the Trustees of the Ndlela Trust IT392/05 resolving that it considers itself bound by the terms of this Order and that the Applicant be entitled to full and unfettered use and possession of the Audi A4 motor vehicle pending the outcome of the divorce action instituted under the above case number. The Applicant will not be entitled to take the Audi out of South Africa.”*

- 4.8 On 28 January 2015 Mrs Ndlela addressed a letter to Mr Ndlela's attorneys informing them that she has found accommodation and intends moving out of the matrimonial home and that she requires from the matrimonial home certain listed furniture items in terms of paragraph 7 of the order granted by Victor J. The said paragraph reads as follows:

*“7. Pending the outcome of the divorce action, alternatively a variation of this case by another court, in the ordinary course, the Respondent shall maintain the Applicant and Mbali as follows:*

*(c) The Applicant and the Respondent will share on an equal basis the furniture and effects currently situated in the former matrimonial home so as to enable the Applicant to adequately furnish her residence; and*

*(d) The Respondent shall, in addition, make payment of the reasonable motor vehicle maintenance and insurance and monthly instalments on the Audi motor vehicle set out in 6 above.”*

- 4.9 In their letter written in response to the letter of 28 January 2015, Mr Ndlela's attorneys contended that most of the listed furniture items belong to the trust and that they cannot be released to Mrs Ndlela without a resolution by the trust consenting to their removal. They attached a letter on the letterhead of MaxFin Chartered Accountants and Registered Auditors setting out a schedule of assets for the Ndlela Trust as at 28 February 2014. Various household furniture items to the value of R460,000, a 2014 BMW X1 motor vehicle and investment property situated in Witkopen Ext are itemized in the schedule. Mr Ndlela did not acquiesce to Mrs Ndlela's request.
- 4.10 On 13 February 2015, the intervening parties launched the current application.

## THE ISSUES TO BE DETERMINED

[5] The following issues are to be determined:

- 5.1 whether the intervening parties should be joined to the proceedings;
- 5.2 whether the application to amend the order by Victor J ought to be determined in terms of rule 43(6) or whether it is a normal opposed motion application brought in terms of rule 6 of the uniform rules of court;
- 5.3 whether the intervening parties have shown cause for the variation of the order by Victor J.

## THE APPLICATION TO INTERVENE

[6] Applications to intervene are determined in terms of rule 12 of the Uniform Rules of Court. This rule provides as follows:

*"Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet."*

[7] In terms of rule 6(14), Rule 12 is applicable to applications.<sup>1</sup> A person who has a substantial interest in a matter in which he was joined as a party may apply to intervene in that application in terms of Rule 12. (***United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd***).<sup>2</sup> The court has a wide discretion to grant or refuse the application to intervene.

[8] The intervening parties contend that the order by Victor J affects several trust assets namely, an Audi A4 motor vehicle being used by Mrs Ndlela, maintenance of the said motor vehicle by Mrs Ndlela as well as household furniture which is being used in the matrimonial home.

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<sup>1</sup> *Erasmus Superior Court Practice 2nd Ed Vol 2 (2015) D1-137.*

<sup>2</sup> 1972 (4) SA 409 (C) 416A.

- [9] The Audi A4 and the furniture assets are assets of the trust as defined in section 1 of the Trust Property Control Act 57 of 1998. The trustees have a statutory duty to manage the assets of the trust in the interests of the beneficiaries. See ***PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union***.<sup>3</sup> Given that the use of the trust assets are affected by Victor J's order, I'm satisfied that the trust has a direct and substantial interest in the order granted by Victor J.
- [10] In the premises, the intervening parties have made out a proper case for the trust to intervene in the rule 43 (1) application.

#### VARIATION OF THE RULE 43 ORDER

- [11] Strictly speaking an order granted in terms of rule 43(1) can only be amended in terms of rule 43(6). Rule 46(3) only allows for variation of the order under limited circumstances, where there has been a material change in the circumstances of the parties and minor child.
- [12] Although it seeks to vary an order granted in terms of rule 43(1), the variation application brought by the intervening parties is not an application envisaged by rule 43(6) in that it was not precipitated by a change in the circumstances of the parties or the minor child. The intervening parties brought this application because they were not party to the rule 43 application. Therefore this application falls squarely within the purview of rule 42(1)(a). In terms of this rule, the court may *mero motu* or on application by any of the parties set aside or vary one of its judgements or orders erroneously sought or granted in the absence of any party affected thereby.
- [13] I consider the variation application bearing in mind that the order sought to be varied was granted pursuant to a circumscribed application brought under the strict rubric of rule 43. This rule as already stated only allows for an order granted under it to be varied only in the event of a material change in the circumstances of the parties. The rule does not permit a rehearing of the rule 43 application. I am mindful not to allow the letter of rule 42(1)(a) to encroach on the limitations imposed by rule 43. I

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<sup>3</sup> 2008 (2) SA 351 (W).

therefore limit my consideration of the variation application to circumstances that prevailed when the order in the rule 43 application was granted. I confine the variation application to solely consider the interests of the trust because the intervening parties did not have an opportunity to represent the trust interests when the rule 43 application was heard.

- [14] The purpose of a rule 43 application is primarily to allow the parties to maintain the lifestyle they have enjoyed prior to commencing divorce proceedings unless the breakdown in their marriage justifies a lifestyle change, for example where the parties' living expenses have increased as a result of living apart while their income remained constant. It is for this reason that an order granted pursuant to such an application only operates *pendente lite*.
  
- [15] The Audi A4 was purchased for Mrs Ndlela's use. She continued using it for her benefit and for the benefit of the minor child after it was donated to the trust in October 2014. The intervening parties submit that the trust cannot afford to maintain the Audi A4 or to purchase furniture for Mrs Ndlela. They want to purchase for the use of the minor child and Mrs Ndlela a smaller motor vehicle which is cheaper to maintain. Mrs Ndlela contended that a smaller vehicle will not accommodate her back condition. For this reason she wants to continue using the Audi A4.
  
- [16] To substantiate their contention that the trust cannot afford to maintain the Audi A4, the intervening parties have attached trust financial statements for 2013 and 2014. During this period, the trust incurred a financial surplus in the amount of R19, 788 and R74, 107 respectively. Counsel for the intervening parties contended that although the trust incurred a surplus in 2013 and 2014, it has an accumulated loss which is indicative of its weak financial position.
  
- [17] The trust was formed for the benefit of the Ndlela's and their minor child. By implication, the trust expenses are incurred for their benefit. The trust financial statements reflect a 275% increase in financial surplus between 2013 and 2014. This is indicative of a positive cash flow. The trustees did not disclose trust management accounts from the beginning of the 2014 financial year to December 2014. They have also failed to take the court into their confidence regarding the cost of maintaining the Audi A4. They have not disclosed who was responsible for maintaining the Audi A4 before it was donated to the trust as well as trust expenses

spent towards the Audi A4 since Mr Ndlela donated it to the trust in October 2014. They have failed to show that the trust cannot afford to maintain the Audi A4. In my view, it is appropriate that Mrs Ndlela is allowed to retain the Audi A4 pending divorce.

[18] I also do not agree with the reasons for refusal by the trust to allow Mrs Ndlela to remove some of the trust furniture from the matrimonial home. The furniture was bought for the benefit of the Ndlela family. She has vacated the matrimonial home because of the pending divorce. She is equally entitled with Mr Ndlela and the minor child to enjoy the use of the furniture. I do not see why she must be deprived of using the furniture pending the divorce. It is not the case of the intervening parties that if she moves the furniture it will be destroyed or that she will alienate it. The intervening parties have not made out a case why Mrs Ndlela should be deprived of using the household furniture pending the divorce.

[19] I find it incongruous that the intervening parties claim that the trust cannot afford to maintain the Audi A4, yet it can afford to incur capital acquisitions by purchasing an alternative car and furniture for Mrs Ndlela. If it is indeed true that on the strength of the disclosed financial statements of the trust, the trust is running at a loss, the Trust would not have the means to buy an alternative car and furniture for Mrs Ndlela.

[20] In the premises, the Applicants have failed to make out a case for the variation of the order by Victor J. The variation application stands to be dismissed.

[21] Having allowed the intervening parties to intervene in the rule 43 application and in the light of their failure to show cause for the variation of the order granted in that application, it is appropriate that I declare the order granted by Victor J on 9 December 2014 to be binding on the intervening parties.

## **COSTS**

[22] Although the intervening parties succeeded in bringing the application to intervene, that application only opened the door for them to seek a variation of the order granted by Victor J on 9 December 2014. Having been unsuccessful in the variation



application, the intervening parties are not substantially successful in this litigation. On the trite principle that costs follow the course, the intervening parties are not entitled to any costs.

- [23] The application to intervene would not have been necessary had Mr Ndlela heeded the invitation by Victor J to obtain a trust resolution authorising him bind the trust in the settlement agreement entered into with Mrs Ndlela prior to the settlement agreement being made an order of court. There is no reason why Mrs Ndlela should be out of pocket as a result of the misrepresentation that Mr Ndlela made to Victor J. To express my disapproval of Mr Ndlela's conduct in this regard, it is appropriate that I order Mr Ndlela in his personal capacity to bear the costs of this application on an attorney and client scale.

## **ORDER**

- [24] In the premises, I make the following order:

- 24.1. The application to intervene is granted.
- 24.2. The application to amend paragraph 6 of the order granted by Victor J on 9 December 2014 is dismissed.
- 24.3 The entire order granted by Victor J on 9 December 2014 is declared binding on the intervening parties.
- 26.3. Mr Ndlela shall pay in his personal capacity, the costs of both the application to intervene and the variation application on an attorney and client scale.

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L MODIBA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for Applicant: Adv L Segal

Instructed by: Lowndes Dlamini

Counsel for the First and Second Intervening Parties: Adv Fouche

Instructed by: Savage Hurter Louw & Uys

Date of hearing: 13 October 2015

Date of judgment: 10 December 2015