

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 1758/2020

In the matter between

NHLANGANO TOWN COUNCIL

Applicant

And

M J PRETORIUS

Respondent

Neutral Citation: *NHLANGANO TOWN COUNCIL v M J PRETORIUS*
(1758/2020) [2020] SZHC 250 (16 November 2020)

Coram : MAMBA J.

Heard : 13 NOVEMBER 2020

Delivered : 16 NOVEMBER 2020

[1] *Civil law- Application for attachment to found and confirm jurisdiction. Property attached not owned by the respondent. Insurer of owner of attached property consenting to pay damages and costs claimed by applicant and thus property released from attachment.*

[2] *Civil law and procedure- Application filed against wrong respondent. Real respondent consenting to judgment even though not cited as a party to the proceedings. Applicant praying for an order for costs of suit against person not party to the proceedings. This incompetent and refused.*

JUDGMENT

- [1] The applicant is Nhlangano Town Council, a statutory entity established in terms of the provisions of the Urban Government Act 57 of 1969 (as amended). It has its principal place of business at the municipal management site in the town of Nhlangano in the district of Shiselweni. Currently, its Chief Executive Officer is Appollo Maphalala who has deposed to the papers herein on behalf of the applicant.
- [2] The respondent is Mr. M J Pretorius, whose name has been on numerous occasions herein carelessly spelt as either Pretorias or Pretorious by the applicant. This is despite the fact that the applicant states in its founding affidavit that ‘the name of the respondent is branded or written on the side of the trucks of the respondent.’ Several pictures of the trucks are exhibited as annexures herein and all do not reflect the erroneously spelt names.
- [3] In terms of the founding affidavit, the respondent’s ‘full and further particulars are unknown to the applicant save for that it is in the business as a truck haulage and from time to time makes deliveries around the town of Nhlangano and it is based in Piet Retief, in the

Mpumalanga Province, Republic of South Africa, [and] is a peregrinus of this Court.’

[4] By notice of motion dated 16 September 2020, the applicant successfully sought, *inter alia*, an order

‘3.1 That the Sheriff or his lawful Deputy for the District of Shiselweni be and is hereby authorised and directed to attach, for purposes of founding jurisdiction (*ad fundandam jurisdictionem*) or confirming jurisdiction (*ad confirmandam jurisdictionem*) in an action instituted by the applicant against the above named respondent to attach a motor vehicle being a scania truck with the registration number and letters HPY 197 MP, a semi-truck trailer with the registration numbers and letters FMS 126 MP, a trailer with the registration numbers and letters FMS 128 MP or any other vehicle belonging to the respondent for the purpose of founding jurisdiction within the Kingdom of Eswatini.

3.2 That the applicant be directed to cause summons to be issued against the respondent within seven (7) days of service of this order.

3.3 That the costs of this application be borne by the respondent.’

- [5] The intended action by the applicant was grounded or based on the allegation that on or about the 29th day of August 2020 and at or near Nhlanguano town, the motor vehicle and trailer in question had ‘knocked down a traffic light which resulted in all the surrounding traffic lights to stop functioning.’ The said truck was at the material time being driven by Vusi Zwane, an employee of the respondent. It was alleged by the applicant that the said driver had been negligent in causing the said damage to the traffic lights. The applicant alleged further that as a result of the said negligence by Vusi Zwane, the applicant had suffered damages in the sum of E101,350.00.
- [6] It is common cause that the Court order was served on Vusi Zwane on 24 September 2020 by the Deputy Sheriff, who also attached and seized the motor vehicles in question. This prompted the respondent’s attorneys on 25 September 2020 to file his Notice of intention to oppose the application. This Notice was filed and served by M.J. Hillary Attorneys, who subsequently filed and served the respondent’s opposing affidavit on 09 October 2020.

[7] It is also common cause that another Notice of intention to oppose the application was filed by Dunseith Attorneys, allegedly also acting for or on behalf of the respondent. This notice is dated 01 October 2020 and was filed and served on 02 October 2020. No further papers were filed in these proceedings by the said attorneys. These attorneys did not appear in Court when the matter was heard before me. It is also significant to note that the applicant only directed or served its replying affidavit on M.J. Hillary Attorneys and there was no service of same on Dunseith Attorneys.

[8] In his opposing affidavit, the respondent states, *inter alia*, that:

81. He is an incola of the Kingdom of Eswatini and is a Liswati national with his national Identity Number 530916600017.

8.2 The equipment sought to be attached are owned by the close corporation known as Matthews J. Pretorius Vervoer CC, which is duly registered in terms of the laws of the Republic of South Africa. This is a legal entity and has the capacity of being sued in its own name.

8.3 The motor vehicle in question was hired from its owners by Pretorius Investments (Pty) Ltd trading as Pretorius Transport Services, who has not been joined in these proceedings. Vusi Zwane was, at the material time acting in his capacity as an employee of Pretorius Investments (Pty) Ltd, which company is duly registered in terms of the company laws of Eswatini.

8.4 In my capacity as Director of the Swazi company I, however, admit liability and only dispute quantum claimed on advice of the company insurer and further dispute costs as same should be duly taxed.’

[9] It would appear that as early as the 25th day of September, 2020 – a day after the attachment of the motor vehicle – Attorneys Henry Van Niekerk Legal Services of Helikon Park, Randfontein, RSA- informed the applicant’s attorneys that the motor vehicle in question was not owned by the respondent but by M.J. Pretorius Investments (Pty) Ltd and that the respondent was a mere director thereof. In response, the applicant’s attorneys stated that

‘---we have not been furnished with any link between the company which client seeks to hold liable and the alleged local company.’ (See page 32 of the Book of leadings).

This correspondence shows that the applicant’s attorneys were then aware that the respondent was only a Director of the company and he did not own the relevant motor vehicle and that he was in law, not the proper person to be cited as the respondent. The attorneys specifically stated that they sought to hold a certain company liable and not the respondent. Surprisingly though, despite numerous correspondence thereafter, showing who the owner of the motor vehicle or lessee thereof was, the applicant did not seek or apply to amend its papers in Court, to reflect the proper respondent. No reason for this elementary lapse or infraction of procedure has been forthcoming from the applicant.

[10] By letter dated 28 September 2020 addressed to Henry Van Niekerk Legal Services, applicant’s attorneys explicitly stated that

‘the company which [client] seeks to hold liable is Matthews J Pretorius Vervoer CC. This is a South African company. The details of the company are inscribed on the doors of the truck itself.

---This is the very same truck that damaged client's traffic lights.' (See pages 36 and 37 of the Book of Pleadings). But rather startlingly, in its replying affidavit, the applicant states that the respondent is the Close Corporation and not Mr. Pretorius in his personal capacity.

[11] It is common cause that the matter was subsequently settled by Wayne Venter Attorneys, acting for Caledonian Insurance Brokers, the insurer of the Close Corporation and the applicant's attorneys. Again, Wayne Venter Attorneys noted that the respondent was not the owner of the relevant motor vehicle. The Insurance Brokers agreed to pay the damages sustained and claimed by the applicant together with the applicant's costs of suit. It is this agreement to pay costs that the applicant wants this Court to order as against the respondent. The respondent is, however, Mr. M. J. Pretorius and not the Close Corporation.

[12] In paragraph 18 of its replying affidavit, the applicant persists in its untenable and illogical assertion that '---the attached assets belong to Mathews J. Pretorius [Vervoer] Transport CC and that they have been properly attached to found jurisdiction. I deny therefore that

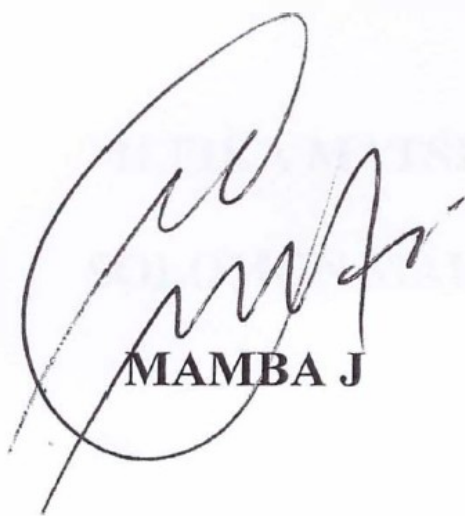
the respondent has been [incorrectly] cited.’ Whilst the first part of this averment is certainly correct, the second part is plainly incorrect inasmuch as the respondent in all the papers herein is stated as Mr. M.J. Pretorius.

[13] From the above analysis of the facts in this application, this Court may not issue an order for the payment of costs against the Close Corporation for the simple reason that such Corporation is not a party in these proceedings and it has not been heard on the matter. The only respondent in this application is Mr. Pretorius. The applicant may, if so minded, pursue its claim for costs against the Close Corporation. For these reasons, the application was,

immediately

after

submissions,



MAMBA J

FOR THE APPLICANT:

MR Z. D. JELE

FOR THE RESPONDENT:

MS. M. J. HILLARY