

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO: EL713/2024

In the matter between:

NOMBONISO MABENTSELA

Applicant

And

SILMA HAMADULAY N.O

1st Respondent

STANDARD BANK OF SOUTH AFRICA

2nd Respondent

THANDEKA BEAUTY BATALA

3rd Respondent

SIPHO MABENTSELA

4th Respondent

KHUTALA MABENTSELA

5th Respondent

MASTER OF THE HIGH COURT

6th Respondent

JUDGMENT

Zono AJ

Introduction

[1] The applicant is a female divorcee who, during the substance of her marriage, was married to Mr Kalipile Nomana Mabentsela, the deceased, in community of property. It appears from the order granted by Gqamane J dated 26th October 2023 annexed to the applicant's papers as annexure F, that the marriage between the applicant and the deceased was dissolved by a decree of divorce on 15th August 2017. Mjali J's order dated 19th October 2021 annexed to first and second respondents' papers ordered that the applicant is entitled to (50%) fifty percent of the joint estate and to the deceased members interest on a pension fund held and administered by Liberty Life Group Limited. It is this court that granted the division of joint estate and pension benefits.

[2] After the death of the deceased, the estate was reported to and registered with the Master of the High Court Makhanda, the sixth respondent herein. Subsequent to that, the Master issued Letters of Executorship in favour of the first and second respondent, appointing them as executors.

[3] In the exercise of their powers in terms of Section 28 (1) of Administration of Estates Act¹ the first and second respondents opened an estate account and

¹ **Section 28 of Administration of Estates Act No 66 of 1965** provides as follows:

“ (1) An executor-

(a) shall, unless the Master otherwise directs, as soon as he or she has in hand moneys in the estate in excess of R1 000, open a cheque account in the name of the estate with a bank in the Republic and shall deposit therein the moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate;

(b) may open a savings account in the name of the estate with a bank and may transfer thereto so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate;

deposited therein such money they may have from time to time received for the estate.

[4] In pursuit of the right the applicant might have been having on the estate, she approached this court on 30th April 2024 at 0930, or so soon thereafter on urgent basis for an order in the following terms²:

“1. Condoning the applicant’s non-compliance with the Uniform Rules of Court and dispensing with forms and service provided for in the normal Rules of this Honourable Court and directing that this (sic) disposing of this matter by way of urgency in accordance with Uniform Rule 6(12) of the above Honourable Court.

*2. An order directing the first and second respondents to pay the sum of **R500 000.00** into the Trust account of B.Nduli & Co whose details are as follows:*

Name of Bank : [...]
Name of Account : [...]
Account Number : [...]
Branch : [...]
Branch Code : [...]

3. An order directing first and second respondents to pay the said sum of money within two (2) days of the granting of the order.

4. That the costs hereof shall be costs in the main application.

5. Granting such further and/or alternative relief.”

[5] For Purposes of determination of Part A, which is an urgent application, it is ordinarily not necessary to make any reference to Part B of the application, save to set out the relief sought therein.

(c) may place so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate on interest-bearing deposit with a bank.”

² Part A of the application.

[6] The applicant seeks in Part B of the application the following relief:

- “1. An order interdicting the first and second respondents from attending further to the administration of estate of the late Kalipile Nomana Mabentsela Until such time that the estates of the late Kalipile Nomana Mabentsela and that of the applicant have been divided.*
- 2. An order appointing the Receiver Mr A.S. Peterson who will attend to the division of the joint estate of the late Kalipile Nomana Mbentsela and that of the applicant.*
- 3. An order directing Mr A.S. Peterson to convene a meeting within 30 days of granting of the order with the applicant and/or her legal representative to attend to division of estates of Kalipile Nomana Mabentsela and that of the applicant.*
- 4. That the first and second respondents pay costs of the applicant.*
- 5. Further and/or alternative relief.”*

[7] In Part A of the application the applicant seeks an order directing the first and second respondents to pay an of **R500 000.00** within two days of this order, ostensibly from the estate account held and controlled by first and second respondents, to the applicant’s attorneys Trust account held in East London. It is not apparent from the papers as to where the estates account is held. The bank with which the estate account is held is not stated in the papers. The essence of applicant’s papers is that the money is in possession of the first and second respondents.

[8] However, it is expressly set out in the applicant’s founding affidavit that the first respondent is an executor appointed in terms of the letters of executorship with his address at, care of Standard Bank Centre, 7th Floor Herenngracht, 2 Hertzog, Boulevald, Foreshore, Cape Town. Second respondent’s address is at Standard Bank Centre, Simmons Street,

Johannesburg. These are the respondents against whom the order is sought in Part A of the application.

[9] The first and second respondent in their answering affidavit challenges this court's jurisdiction. They contend that this court does not have the necessary jurisdiction to entertain this matter. They contend that this court's jurisdiction is limited only to the Magisterial District of East London. Secondly, they contend that the estates which is the subject matter of this application was reported to and registered with the sixth respondent, the Master of the High Court in Makhanda. They conclude that the estate vests with the Master of the High Court, Makhanda or with them at the addresses set out in paragraph 8 above. The nub of their contention is that this matter lacks the requisite jurisdictional connecting factors, which would enable this court to entertain this matter. It is not in dispute that if we were to follow first, second and sixth respondent's addresses, this court could not have jurisdiction to entertain these proceedings.

Discussion

[10] Superior Courts Act ³endows a Provincial or Local Division of the High Court with jurisdiction in civil matters "*over all persons residing or being in and in relation to all causes arising within its area of jurisdiction...*" The first and second respondent (parties against whom the relief is sought in Part A) are neither '*residing*' nor '*being in*' the area of this court. The issue remaining is whether it can be said, on the facts of this case, that "*all causes arising*" within the area of jurisdiction of this court are present. It must be established what is meant by "*all causes arising*".

[11] **Hoexter JA**⁴ (the appellate Division) held as follows:

³ Section 21(1) of Act 10 of 2013

⁴ *Bisonboard Ltd v K. Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 A at 486 D-E

"In a long line of cases, the words "causes arising" have been interpreted as signifying not "causes of action arising" but "legal proceedings duly arising", that is to say, proceedings in which the court has jurisdiction under the common law." The Supreme Court of Appeal (SCA) concurred with this exposition when Jafta JA⁵ had this to say: -

*"Plainly, what is meant in the above interpretation is that 'causes arising' does not refer to causes of action but to all factors giving rise to jurisdiction under the common law."*⁶

[12] The factors giving rise to jurisdiction are often referred to as the *"jurisdictional connecting factors."* The legal proceedings are based on facts from which legal inferences may be drawn (jurisdictional connecting factors).⁷ When referring to or considering jurisdictional connecting factors **Trollip JA**⁸ had this to say:

*" I therefore turn to consider whether the court a quo had jurisdiction in these proceedings according to the general principles of our law. That depends on (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases both (a) and (b)."*⁹

[13] The issue, therefore is whether the legal proceedings in this application can be said to have arisen within the area of jurisdiction of this court. The specific term *'jurisdiction'* has been defined as the power or competence of a court to hear and determine an issue between parties¹⁰. The Constitutional Court¹¹ held as follows with reference to the importance of pleadings in determining jurisdiction:

⁵ *Gordiant Trading CC v Daimler Chrysler Financial Services* 2005 (6) SA 205 (SCA) Para 11

⁶ *Leibowitz t/a Lee Finance v Mhlana and Others* 2006 (4) ALL SA (SCA) 428 at 430 Para 7

⁷ *Zokufa v Compuscan (Credit Bureau)* 2011 (1) SA 277 Para 32-33

⁸ *Estate Agent Board v Lek* 1979 (6) SA 1049 at 1063 F

⁹ *Gulf Oil Corporation v Rombrandt Fabrikante en Handerlaars (EDMS) Bpk* 1963 (2) SA 10 (T)

¹⁰ *Gcaba v Minister of Safety and Security and Others* 2010(1) SA 238 (CC) Para 74

¹¹ *Gcaba v Minister of Safety and Security (Supra)* Para 75

“75 Jurisdiction is determined on the basis of the pleadings...In the event of the Court’s jurisdiction being challenged at the outset (in limine), the applicant’s pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court’s competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant’s claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court.”

[14] While the relief sought in Part A is set out verbatim in paragraph 4 above, the applicant, under the rubric **JURISDICTION** lay the basis for this court’s jurisdiction as follows:

“9. I submit that the above Honourable court has jurisdiction to hear this matter as the deceased in the matter was resident and domiciled within its jurisdiction. Furthermore, the estate in question is situated within the jurisdiction of the above honourbale court. The third and fifth respondnets are also residents within the jurisdiction of the above honourable court.”

It is re iterated that there is no releif sought in Part A of this application against the third and fifth respondent. Their presence, for purposes of determining Part A of the application, is immaterial and of no moment, and thus cannot be regarded as a jurisdictional connecting factor.

[15] It worths a while to properly characterize a claim that is serving before court to determine if the court is endowed with the necessary jurisdiction to entertain the matter. **Nuggent JA**¹² observed as follows: *“The second observation is that a claim, which exists as a fact, is not capable of being converted into a claim of a different kind by the mere use of language. Yet that is often what is sought to be done under the guise of what is called*

¹² *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) Para 72

'characterising' the claim. Where that word is used to mean 'describing the distinctive character of' the claim that is before the court, as a fact, then its use is unexceptionable..."The relief sought in, and the nature of Part A is for payment of money.¹³ Whether the claim is a good one or a bad one is immaterial and is beside the point.¹⁴

[16] The applicant seeks a mandatory interdict. This is an order requiring a person to do some positive act to remedy a wrongful state of affairs for which he is responsible, or to do something which he ought to do if the complainant is to have his rights. It has been said that a mandatory interdict can serve to compel the performance of a specific statutory duty and to remedy the effects of unlawful action already taken.¹⁵

[17] It is now trite that the three requirements for a final interdict are (1) a clear right; (2) a threat to breach such right (in the case of a prohibitory interdict) or a refusal to act in fulfilment of such right (in the case of a mandatory interdict); and (3) no other remedy.¹⁶

Alkema J¹⁷ held that:

"In interdict proceedings a court will have jurisdiction if the requirements for the grant of an interdict are satisfied by the facts within the territorial area of jurisdiction of the court."

He found that this is the only test which should be applied in deciding jurisdiction in interdict proceedings.

¹³ *Estate Agent Board v Lek* 1979 (3) SA 1049 at 1063

¹⁴ *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) Paras 71 and 95

¹⁵ Erasmus : Superior Court Practice, 2nd Edition, Page D6-3

¹⁶ *Setlogelo v Setlogelo* 1914 AD 221 at 222; *Zokufa v Compuscan (Credit Bureau)* 2011 SA 272 Para 37

¹⁷ *Zokufa v Compuscan (Credit Bureau)* 2011 (1) SA 272 Para 62

[18] The applicant seeks to exercise her right to receive payment from the deceased estate/estates. She describes herself “*as an adult female presently residing at[...].*” In paragraph 62-63 of her founding affidavit under the rubric **Factors Pertaining to Part A of the application** the applicant states as follows:

“62. Around 14th, 15th, 16th and 17th April 2024, heavy rains fell in the Western Cape, Eastern Cape and KwaZulu Natal. As I am presently staying in Ngqamakhwe at the homestead in the Eastern Cape. This property was too affected by heavy rains.

63. The rain which fell on the 15th April 2024 usually referred to as a tornado. This is a destructive vortex of violently rotating winds and advancing beneath large storm system. This was followed by heavy rains which fell within a short period and leaving a destruction of property behind.”

[19] In paragraph 65 the applicant further states as follows:

“Even though the property is on a plain, when there was a lot of water, formed a small dam on the side of the houses and then move and flow towards the front entrance as well as the rear entrance of the house. This caused the damage to the house and therefore compromised the structure of the house.”

In paragraph 67 and 68 of the founding affidavit the applicant states that she requested the first respondent for an advance payment from her 50% part of the joint estate so that she can repair the property. That request was refused by the respondents.

[20] According to the facts of this case the applicant resides in Ngqamakhwe, in the former Transkei. The property that is sought to be repaired is the same property she is residing in, situating at Ngqamakhwe, in the former Transkei.

[21] The proceedings are for a breach of a right to payment. The right is rooted in the entitlement to the half share of the joint estate which is a legal consequence of a marriage in community of property. A rhetoric question is, *“where that right can rightfully be exercised. Where the breach of that right occurred?”*

[22] **Alkema J**¹⁸ opined as follows:

“Generally, a breach of a right occurs at the place where the right vests. The act of setting the breach in motion may occur somewhere else, but the breach usually takes place where the right vests.” The *situs* of a right is a determining factor in determining the jurisdiction in matters of this nature. It is important to take into account the dictum of **Trollip JA**¹⁹ where he held as follows:

“It is, of course, clear that ordinarily a person is free to carry on the trade, calling or profession of his choice. That is a right which the law recognises and protects from unlawful interference from others... It stems from his legal capacity or personality as a natural person of full age. It can be regarded as a real right in the sense that it is an absolute right, one available and enforceable against everybody... By its very nature it inheres in and is inseparable from the person. Hence, the situs of the right to carry on business as an estate agent., if it can be said to have one, is where the person is. And that cannot be affected in any way by the Boards power under the Act to permit or prevent the exercise of the right by granting or refusing.... the issue of the fidelity fund certificate. Its situs would remain where the person is...”²⁰

[23] It does not appear anywhere in the papers that the applicant, before instituting the present proceedings, requested the payment to be made anywhere otherwise than to herself. In the light of the fact that this kind of right usually inheres in the person unless otherwise stated, that presupposes that the

¹⁸ **Zokufa v Compuscan (Credit Bureau)** 2011 (1) SA 272 Para 44

¹⁹ **Estate Agent Board v Lek** 1979 (3) SCA 1049 at 1064 D-F

²⁰ 1067 B-D

first and second respondents who are carrying on businesses and residents in Cape Town and Johannesburg respectively, would make payment at Ngqamakhwe, where the applicant resides. Ngqamakhwe is located within the jurisdiction of the Eastern Cape High Court, Mthatha and not this court.

[24] I therefore conclude that the right to receive payment vested in Ngqamakhwe within the territorial jurisdiction of Mthatha High Court of the Eastern Cape Division. Having found that the right vested outside the area of jurisdiction of this court, I accordingly find that the breach of that right occurred outside the territorial jurisdiction of this court. No exercise of a right and breach thereof occurred within the area of jurisdiction of this court.

[25] The matter seems not to end there. The applicant in paragraph 2 of the notice of motion seeks an order in terms of which payment is made into the Trust Account of her attorneys in East London. That happens when there was neither exercise of a right nor breach thereof occurred within the territorial jurisdiction of the court. There is no evidence that, before instituting the present proceedings, that the applicant had a right to exercise within the territorial jurisdiction of this court. It follows that no breach seems to have occurred within the territorial jurisdiction of this court.

[26] Applicant's attorneys are within this court's area of jurisdiction. They hold their Trust Account within this court's area of jurisdiction. In my respectful view the address of the attorneys was appointed for purposes of the court order that may be obtained in these proceedings. Put differently, applicant's attorneys Trust account details were given for purposes of this application and for purposes of exercising the rights to receive the portion of half share of applicant's joint estate. These details were given with a view to bring this application within the territorial jurisdiction of this court. Whether this conduct

falls within the definition of the concept “*causes arising*” is the subject of next discussion. It is important to understand whether or not the appointment of applicants Trust account details within this court’s territorial area of jurisdiction, constituted a jurisdictional connecting factor.

[27] I intend to visit the second approach of **Trollip JA** in ***Estate Agents Boards v Lek***²¹, which is “*the nature of relief.*” **Trollip JA** describes it as approach (b) and defines it as approach based on the principle of effectiveness- which is the power of the court not only to grant the relief claimed, but also to effectively enforce it directly within its area of jurisdiction.

[28] The judgment this court may grant may be enforced or executed within the boundaries of this court’s area of jurisdiction as the payment would be made within the territorial jurisdiction of this court. An order sought required the first and second respondent to effect payment within the jurisdictional boundaries of this court. On that basis I find that this court is endowed with jurisdiction to entertain this matter. The fact that the step to bring this matter within the territorial limits of this court occurred belatedly is a matter to be considered for determination of costs. On the basis of Doctrine of effectiveness this court assumes jurisdiction in this matter.

[29] Even if I am wrong on the finding I made above, I find solace on the sentiments shared by **Herbstein and Van Winsen**.²² Where the court has jurisdiction in respect of some claims, but not others, it may apply the *causae continentia* doctrine, which is designed to avoid a multiplicity of process and the possibility of conflicting judgments on the same cause of action, and to provide for the convenient disposition of suits. In terms of this doctrine if a court

²¹ 1979 (3) SA 1049 at 1063 G

²² Herbstein and Van Winsen: The Civil Practice of the High Courts of South African, Fifth edition, Volume1, Page 76

has jurisdiction in respect of one claim it can assume jurisdiction in respect of the other claims in the same action which are based on different causes of action .²³

[30] A single notice of motion supported by a single founding affidavit was issued in this court on 24TH April 2024 consisting of two parts, namely Part A and Part B. Single motion proceedings were instituted in this court for determination at different stages of the case.

[31] In making submissions, applicant's Counsel contended that these proceedings are intended to give effect to the court order of Mjali J granted on 19th October 2021 which granted relief in the following terms:

"1. There shall be a division of Joint Estate

1.1 The applicant is entitled to the 50% of the joint estate"

It was contented that a claim for part or advance payment was based on that order and the fact that the deceased and the applicant were married to each other in community of property. Whether or not that is a good claim is neither here nor there for purposes of determination of jurisdiction of this court.

[32] Part B of the application is clearly a sequel to the court order of Mjali J aforesaid, especially paragraph 2 and 3 thereof. This court does have a jurisdiction to enforce its orders.

²³ ***Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd*** 1962 (4) SA 326 (A); ***Thomas v BMW South Africa (Pty) Ltd*** 1996 (2) SA 106 (C) at 127 H/I-128 A/B; ***Van Der Walt Business Brokers (Pty) Ltd v Budget Kilometers CC*** 1999 (3) SA 1149 (W) at 1154A

[33] I therefore conclude in my respectful view that this court is clothed with jurisdiction to entertain this matter on the grounds foreshadowed above.

[34] However, that is not the end of the matter. Whether or not the applicant has fully satisfied further requirements of a final interdict is a subject of discussion hereinunder. In next I discuss if the applicant has satisfied to the full extent the requirement of a clear right.

[35] The respondent raises the provisions of Section 26(1A) of Administration of Estates Act 66 of 1995, which provide as follows:

“The executor may before the account has lain open for inspection in terms of section 35 (4), with the consent of the Master release such amount of money and such property out of the estate as in the executor's opinion are sufficient to provide for the subsistence of the deceased's family or household.”

[36] It appears that the right to the release of money is exercisable only if a precondition of a consent by the Master has been given. Put different, the Master may exercise a power to release the money out of the estates to provide for the subsistence of the deceased family only when an objective jurisdictional fact of the consent of the Master has been given. In clear terms the applicant is not entitled to the release of the money for her subsistence in the absence of the consent given by the Master. There is no consent given by the Master, nor does it appear that the Master was approached for that consent.

[37] Under common law, necessary preconditions that must exist before an administrative power can be exercised are referred to as jurisdictional facts. In

the absence of such preconditions or jurisdictional facts, so it is said, the administrative authority effectively has no power to act at all.²⁴

[38] Legal writings on the subject are not silent²⁵. Cora Hoexter puts it thus:

“Jurisdictional facts refer broadly to preconditions or conditions precedent that must exist prior to the exercise of the power and procedures to be followed, or formalities to be observed, when exercising the power: substantive jurisdictional facts in the case of conditions, and procedural jurisdictional facts in the case of procedural requirements and formalities. These facts are jurisdictional because the exercise of the power depends on their existence or observance, as the case may be.... If the jurisdictional facts are not present or observed (or to put it differently if the administrator makes a mistake of fact about their presence or observance), then the exercise of the power will as a general rule be unlawful. To hold otherwise, the courts have always reasoned, would be to allow administrators to arrogate powers to themselves or inflate their own jurisdiction.”

[39] Consent of the Master of High Court is a condition precedent to the exercise of power to release the money for the subsistence of the deceased family or household. In the absence of that consent no power to release the money may be exercised by the executor. That quintessentially means that no right or entitlement to receive money if the Master has not been approached for and granted consent. For this reason applicant’s Part A application cannot succeed. It is therefore not necessary to deal with other issues raised on the papers and during oral submissions.

²⁴ **Kimberly Junior School and another v Head of the Northern Cape Education Department and others** 2010 (1) SA 217 SCA Para 11; **Paola v Jeeva No and others** 2004 (1) SA 396 (SCA), 2003 (4) ALL SA 433 (SCA) Paras 11,14, and 16; **President of RSA and Others v South African Rugby Football Union and others** 2000 (1) SA 1 (CC) Para 168

²⁵ Cora Hoexter, Administrative Law in South Africa, Second edition, Page 290

[40] I see no reason why costs of Part A cannot follow the result. The applicant in her submissions requested that in the event that they do not succeed in the application, third respondent should not be awarded costs. It was contended that no relief in this part of the application is sought against her. She should not have joined the fray at this stage.

[41] The third respondent is a surviving spouse of the deceased. The liquidation and distribution account is referred to in the applicant's founding affidavit and is annexed thereto as annexure H. At pages 48 to 49 of the papers, which is part of the liquidation and distribution account, reference is made to the third respondent's entitlement to the deceased estate as surviving spouse and a widow. Inheritance written under her name is as follows:

<i>"Movable Property</i>	<i>R4,661,482,85</i>
<i>Claims in favour of the estate</i>	<i>R6,221,59</i>
<i>Cash</i>	<i>R 8,563,523,60</i>
	<i>R13,231,228,04"</i>

[42] It was argued on third respondent's behalf that Part A of the application is a threat to third respondent's entitlement to the estate. It is so because it is not known what was the value of the applicant's entitlement (50%) during the time of the divorce. Therefore, an amount of R500 000.00 may have exceeded her value of the joint estate and have encroached to the third respondent's inheritance. Therefore, it was submitted that she could not sit back and do nothing when the legal proceedings have an effect of threatening her entitlement. I agree.

Order

[43] I accordingly make the following order

41.1 Part A of applicant's application is hereby dismissed.

41.2 The applicant is hereby ordered to pay costs of the application.

A.S ZONO

ACTING JUDGE OF THE HIGH COURT

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Date heard : 30th April 2024

Date Delivered: : 10th May 2024