

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED: YES/ NO

DATE: 09 October 2023 JUDGE: T THUPAATLASE AJ

CASE NO. 2023/095270

In the matter between:

Landy Khumalo

Applicant

And

The Master of High Court

Johannesburg

First Respondent

Sibongile Caroline Mdaki

Second Respondent

Judgment

Introduction

[1] The applicant approached this court on urgent basis for relief. The relief sought is stated in the notice of motion and supported by founding affidavit as required by the Rule 6(12). The applicant request this court to dispense with the normal rules prescribed by the Uniform of Court and Practice Directives applicable in this division.

[2] The relief sought by the applicant is to the effect that the court grant and order suspending the letter of executorship issued by the first respondent (Master of the High Court, Johannesburg). The order is to subsists under finalization of what the applicant refers to as Part B application declaring the letter of executorship unlawful and issuing a new one I her favour.

[3] The further to interdict the second respondent from dealing the with the deceased estate of late Obed Maliwe pending finalisation of Part B of the application and that the order sought should be of immediate effect and also costs.

[4] The applicant claims right to launch these proceedings as she alleges that she was universal partner of the deceased. She alleges that she has been staying with the deceased since 2011 until the death of the deceased in August 2023.

[5] According to the applicant she is entitled to the relief sought as she has prima facie right. This is because she had universal partnership with the deceased. According to her she contributed materially to the partnership. According to her she considered herself as 'wife' of the deceased and was so recognised by the family of the deceased. The applicant alleges she was also so recognised at the church where the deceased was a pastor.

[6] Despite the truncated timelines that the applicant imposed on the second respondent she was able to submit a comprehensive answering affidavit to refute the allegations made by the applicant. In a nutshell she denies that the deceased had a universal partnership with the applicant. The second respondent asserts that she is

the customary wife of the deceased. She has annexed some documentary evidence to substantiate her claim.

[7] The answering affidavit further provides background about what happened after the death of her customary law husband. Among the incidents was attempts by one of the relative of the deceased to interdict her from burying her husband. She also annexed the papers which were prepared in order to approach the high court. ultimately the contemplated proceedings were abandoned, and she proceeded to bury the deceased.

[8] The answering affidavit further confirms that the first respondent has issued her with a letter of executorship and that she is at the initial stages of executing her duties as executor of deceased estate. She denies that the applicant has any claim to the deceased estate of her husband.

[9] In addition to the factual basis on which the second respondent opposes the application, she opposes the granting of the order sought on legal grounds. The respondent asserts that the applicant has not established grounds urgency. And that applicant in here the founding affidavit has failed to establish right to obtain an interdict.

Urgency

[10] It is important to note that it is only in the replying affidavit that the applicant attempts to deal with the issue of urgency. It is trite that an applicant must state the facts that it is alleged the application is urgent. The applicant must show it will not obtain adequate relief in due course. It is also true that urgency is a question of facts. The applicant who is approaching the court on urgent basis is seeking condonation to dispense with the prescribed rules.

[11] The remarks by Coetzee J remains apposite in that 'undoubtedly the most abused rule is rule 6 (12) which reads as follows:

'12 (a) In urgent applications the court or a judge may dispense with forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to seems meet.

(b) In every affidavit or petition filed in support of the application under para (a) of the sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent'. See *LUNA MEUBELVERVAARDIGERS (EDMS) BPK V MAKIN AND ANOTHER (T/A MAKIN'S FURNITURE MANUFACTURERS)* 1977 (4) SA 135 (W) at 136. At 137F the court 'mere lip service to the requirements of Rule 6 (12) will not do and applicant must make out a case in the founding affidavit justify the particular extent of the departure from norm which is involved in the time and day for which the matter be set down'.

[12] Despite the observation the practice of abusing the practice appears to have continued unabated. The recent observation by Vally J in 39 *VAN DER MERWE STREET HILLBROW CC v CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY AND ANOTHER* (2023-069078) [2023] ZAGPJHC 963 (25 August 2023) bears testimony to this observation. At para [27] of the judgment the learned judge makes the following observation: 'Interim interdicts are capable of being, have been, and continue to be, abused by a party that succeeds in securing or resisting one. The applications wherein they are sought are often split into two, a Part A and a Part B, with the former being a call for an interim interdict while the latter constitutes a claim for final relief. The relief sought in Part A would be crafted along the lines of: 'Pending finalisation of Part B of the application the respondent is interdicted from ...'. They are also brought without a Part B. This would be in a circumstance where the final relief is sought in an action proceeding. In such a case the relief would be crafted along the lines of: 'Pending the finalisation of an action (or to be brought) by the applicant ...'. In either case, once the interim relief is granted or refused the successful applicant has little interest in having either Part B or the action finalised. Having secured victory, albeit only on an interim basis, the successful party can easily frustrate the finalisation of the matter by taking advantage of the rules set out in the Uniform Rules of Court. The experience thus far demonstrates that courts have to be more vigilant when dealing with applications for interim interdicts, especially when granting them'.

[13] The DJP of this division has made similar trend and issued a Notice dated 04/10/2021 titled '**Notice to legal practitioners about urgent motion court, Johannesburg**' directed as follows:

Para [6] 'The requirement to consolidate the case on urgency in a discrete section of the founding papers is mandatory. Often this is not done. In future a failure to observe the practice shall attract punitive costs orders'.

Para [7] Argument on urgency must be succinct. Too often a flaccid and lengthy grandstanding performance is presented. This must stop. If the matter is truly urgent an argument in support of it must be prepared before hearing and quickly and clinically articulated.'

[14] In this applicant has failed to even attempt to show any urgency. She was only alerted to this fact by the answering affidavit. The evidence shows clearly that if there is any urgency then it was self-created. The applicant does not take the court in her confidence regarding the chronology of events. She does not appear to have been part of the efforts to interdict the second respondent from burying the deceased. She does not appear to have been prepared to bury the deceased despite considering to be her husband. It is not clear from the applicant's papers as to when she became aware that the first respondent has issued the letter of authority.

[15] In her replying affidavit the applicant is not dealing with the evidentiary proof showing that the deceased paid lobola for the second respondent. She does not say anything about the nomination that the deceased completed at his place of employment, where he listed the second respondent as his spouse.

Requirement of Interdict

[16] The requirement of interdict are clearly articulated in the case of *SETLOGELO v SETLOGELO* 1914 AD 221 at 226 where the court stated that 'The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended and absence of similar protection by any other ordinary remedy'. The principle was further confirm to still good law in *V & A WATERFRONT PROPERTIES (PTY) LTD AND ANOTHER v HELICOPTER & MARINE SERVICES (PTY) LTD AND OTHERS* 2006 (1) SA 252 (SCA) at par 21 the Court states as follows 'The leading common-law writer on the subject of interdict relief used the words '*eene gepleegde feitelijkheid*' to designate what is now in the present context, loosely referred to as 'injury'. The Dutch expression has been construed as something actually done which is prejudicial to or interferes with, the applicant's right. Subsequent judicial pronouncements have variously used 'infringement' of right and 'invasion of right'. Indeed, the leading case, *Setlogelo*, was itself one involving the invasion of the right of possession. (references omitted). See also the confirmation of the requirements by the constitutional court in *MASSTORES (PTY) LTD v PICK N PAY RETAILERS (PTY) LTD* 2017 (1) SA 613 (CC) at para [8].

[17] Unlike in the quoted decision in casu the right of the applicant is not clear. I am satisfied no clear right has been shown. As I have noted her silence regarding documentary proof of the lobola payment and the nomination by the deceased where he designate the second respondent as his spouse.

[18] The allegation of a universal partnership remains just that an allegation. There is nothing to substantiate that claim. The applicant on her papers has failed to show that she had a clear right. There is no injury actually committed or reasonably apprehended.

[19] In respect of requirement of similar protection by any other remedy the applicant must also failed. If the applicant can proof universal partnership, then she becomes a creditor to the deceased estate. The Administrative of Deceased Act has inbuilt mechanism for the applicant to follow.

Costs

[20] The general rule in matters of costs is that the successful party be given costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See Meyers v Abramson 1951(3) SA 438 (C) at 455. I can think of no reason why this court should deviate from this general rule.

Order

Application is dismissed with costs. Costs on attorney and client scale.

Thupaatlase AJ

Acting Judge of the High Court

Heard on:05 October 2023

Judgment delivered on: 09 October 2023

For Applicants:

Adv. S Zimema

Instructed by: Gwede Attorneys

For second Respondents

Adv. B Mokgothu

Instructed by: Khoza and Associates Attorneys