REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 18676/2023

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

....
SIGNATURE **DATE**

In the matter between:

MAREDA, NDAVHELESENI LODWICK First Applicant

BOEZAART, NICO HENDRIK Second Applicant

and

HLONGWA- MADLALA, LINDA XOLELWA HLOBISILE First Respondent

NELSIE, LERATO NGAKE Second Respondent

205 TAISOAR INVESTMENTS PROPRIETARY LIMITED Third Respondent

SOARINGTAI CONSULTING PROPRIETARY LIMITED Fourth Respondent

TAISOAR CONSULTING AND PROJECTS PROPRIETARY LIMITED Fifth Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Sixth Respondent

Neutral Citation: *Ndavheleseni Lodwick Mareda & Another v Linda Xolelwa Hlobisile Hlongwa- Madlala & Others* (Case No. 18676/2023) [2023] ZAGPJHB 388 (17 April 2023)

REASONS FOR ORDER

THOMPSON AJ

[1] This application originated in urgent court due to the fact that the First and Second Respondents caused themselves to appointed, in an irregular manner, as directors of Third to Fifth Respondents consequent upon the death of the sole director ("the Deceased") of Third to Fifth Respondents. The First Applicant, the father of the Deceased's minor children, together with the duly appointed executor of the Deceased's estate launched the urgent application seeking the following relief:

"*2. That, pending the finalisation of the proceedings referred to below, the First and Second Respondent are interdicted from:*

2.1 Appointing any directors to the Third, Fourth and Fifth Respondents ("the Companies");

2.2 *Holding themselves out to be directors of the Companies, including any other such companies in respect of which the Deceased served as a director;*

2.3 *Taking any action whatsoever as purported director(s) of the Companies, including but not limited to:*

2.3.1 *Entering into any agreements between those Companies and any other party, including themselves;*

2.3.2 *Making payment of any amounts from those Companies to any other party, including themselves;*

2.3.3 *Disposing of any assets of the Companies in any manner (including sale, donation or exchange) whatsoever;*

2.3.4 *Disposing of any shares which may be held in the Companies or in any way diving effect to the sale or transfer of any shares in the Companies.*

2.4 *Diminishing, alienating misappropriating, or encumbering any of the Companies' assets in their capacities as directors or otherwise.*

3. That the Applicants shall institute proceedings against the First and Second Respondents, within 15 days of the granting of this order, in which they will seek inter alia:

3.1 That the First and Second Respondent's purported appoint of directors of the Companies be declared to be invalid and is set aside; and

3.2 That all acts taken by the First and Second Respondents, ostensibly in their capacities as directors of the Companies be declared invalid and set aside.

4. The First and Second Respondents shall jointly and severally pay the costs of this application on the scale as between attorney and own client.

5. *Further and/or alternative relief.*"

[2] At the time the Applicants fashioned the nature of the relief sought, they were under the impression and believed that the Third to Fifth Respondents were not trading companies and held the view that pending resolution of the other brewing disputes, the Third to Fifth Respondents did not require the immediate appointment of directors.

[3] For clarity sake, by the time the matter was heard by me, there was no clarity on who the shareholders of the Third to Fifth Respondents are who may call for shareholders' meetings to be held in order to appoint new directors in terms of Section 68 of the Companies Act 71 of 2008 ("the Companies Act") or appoint new directors in terms of Section 70 of the Companies Act.

[4] The First and Second Respondents, outside of the time periods stipulated by the Applicants in their Notice of Motion, delivered an answering affidavit on 6 March 2023, the day before the matter was set down for hearing. Simultaneously with the delivery of the answering affidavit, a counter-application was launched by the First and Second Respondents seeking to declare invalid and set aside the appointment of the Second Applicant as the executor to the Deceased's estate.

[5] As part of the case sought to be advanced in the counter-application, the First and Second Respondents relied on the existence of a written will duly executed by the Deceased wherein she appointed an executor other than the Second Applicant. The Applicants point out during the course of their founding affidavit that the First Applicant had requested a copy of the written will from the First Respondent prior to reporting the Deceased's death and estate to the Master and that the will was simply not forthcoming. It is further pointed out during the course of the founding affidavit that the First Applicant attended to the reporting of the Deceased's death and estate to the Master due to the First Respondent, purportedly being in possession of a written will whereby she is appointed as executrix to the Deceased's Estate, failing to

report same to the Master. A copy of the alleged written will only came to the fore during the course of this urgent application.

[6] The belated delivery of the answering affidavit had the effect that the Applicants did not have time to properly consider the contents thereof and, if they so wished, deliver a replying affidavit prior to the set down date of 7 March 2023. As a result, the matter stood down until Friday 10 March 2023 for the delivery of affidavits and for the parties to engage with one another in order to attempt to resolve the urgent application. I did mention, in passing, to *Ms Grobler* appearing on behalf of the First and Second Respondents, for her consideration, that the counter-application seems to suffer for a possible fatal defect, in that the Master of the High Court is not a party to the proceedings.

[7] By the time the matter was called before me for hearing on 10 March 2023, the Applicants had delivered a replying affidavit and the counter-application had been withdrawn. In my view, the decision to withdraw the counter-application, in light of the absence of the Master as a party to the proceedings, was a decision correctly taken. It was therefore not necessary for the Applicants to deliver an answering affidavit in respect of the counter-application. In addition, the Applicants uploaded a proposed draft order onto the electronic case management system, CaseLines, in the following terms:

"*1.* *Pending the finalisation of the proceedings referred to in paragraph 5 below ("the main proceedings") the First and Second Respondent are interdicted from:*

1.1 *Taking any action whatsoever as purported director(s) of the Third, Fourth and Fifth Respondents ("the Companies"), including any other such companies in respect of which Thandeka Hlongwa ("the Deceased") served as a director, including but not limited to:*

1.1.1 *Entering into any agreements between those Companies and any other party, including themselves;*

1.1.2 *Making payment of any amounts from those Companies to any other party, including themselves;*

1.1.3 *Transacting on the bank accounts of the Companies in any manner;*

1.1.4 *Disposing of any assets of the Companies in any manner (including without limitation: sale, donation or exchange) whatsoever;*

1.1.5 *Disposing of any shares which may be held in the Companies or in any way giving effect to the sale or transfer of any shares in the Companies; and*

1.1.6 *Diminishing, alienating misappropriating, or encumbering any of the Companies' assets in their capacities as directors or otherwise.*

2. *Further pending the finalisation of the main proceedings:*

2.1 *An independent director will be appointed in respect of the Companies being _____ [drafting note: that must be an employee of one of the big 4 accounting and auditing firms] ("the independent director").*

2.2 *The parties shall co-operate with each other and do all things necessary for the independent director to be appointed as such, including lodging any documents required by the Sixth Respondent.*

2.3 *That independent director shall, as soon as possible after his/her appointment as such render a written report to the Applicants and the First and Second Respondents setting out the transactions in respect of the Companies which were entered into after the death of the Deceased to date.*

2.4 *The costs associated with the appointment of that independent director will be paid by the First Applicant.*

3. *Further pending the finalisation of the main proceedings:*

3.1 *The First Respondent will not seek that she be appointed as an executor in respect of the Deceased's estate and the Second Applicant will continue to act as executor of the Deceased's estate subject to paragraph 3.2 and 3.3 below.*

3.2 *The Second Applicant shall not distribute any assets from the deceased estate but will continue to identify, collect and protect assets of that deceased estate as he is required to do in terms of the Administration of Estates Act.*

3.3 *In the event that the Second Applicant believes, in exercising his powers and duties as executor of the Deceased's estate, he is required to distribute assets of the Deceased's estate he will notify the First Applicant and the First Respondent of such intention in writing giving those parties at least 15 days' notice of his intention to do so.*

4. *The First Respondent will give the First Applicant's legal representatives and expert witnesses access to the original will of the Deceased, during business hours, provided that such access is requested in writing 48 hours before the date in which access is sought.*

5. *The Applicants shall institute proceedings against the First and Second Respondents, within 60 days of the granting of this order, in which they will seek inter alia:*

5.1 *That the purported will of the Deceased be declared to be invalid and/or not the will of the Deceased;*

5.2 *That the First and Second Respondents' purported appointment of directors of the Companies be declared to be invalid and set aside; and*

5.3 *That all acts taken by the First and Second Respondents in their capacities as directors of the Companies be declared invalid and set aside and that the First and Second Respondents be ordered to repay all such amounts which were paid by the Companies arising from such acts.*

6. *It is directed that papers in this application, which have been served on the Sixth Respondent (the CIPC), shall constitute a complaint in terms of section 168 of the Companies Act and the Sixth Respondent is directed to conduct an investigation in terms of section 169 of the Companies Act.*

7. *The First and Second Respondents shall jointly and severally pay the costs of this application including the costs occasioned by the postponement of the matter on 7 March 2023."*

[8] Without dealing with each specific difference between the relief prayed for in the Notice of Motion and the relief contended for in terms of the uploaded draft order, it is obvious that the relief framed in the draft order differs in various material respects to the relief sought in the Notice of Motion. However, the main relief sought in terms of prayers 2, 3 and 4 of the Notice of Motion is substantially repeated in paragraphs 1, 5.2, 5.3 and 7 of the proposed draft order.

[9] When the matter was called, *Mr Nel SC*, appearing with *Mr Van Reenen*, on behalf of the Applicants, immediately proceeded to refer me to the proposed draft order and addressed me on various aspects in relation thereto. The address was specifically directed at paragraphs 2 and 7 of the proposed draft order. The approach by *Mr Nel SC* was simply that due to the fact that the First and Second Respondents have alleged that the Third to Third Respondents are trading companies, the relief sought in prayer 2 of the Notice of Motion and/or paragraph 1 of the proposed draft order will leave the Third to Fifth Respondents rudderless and unable to trade. This approach by the Applicants, in light of the fact that the First and Second Respondents had no objection to paragraph 1 of the proposed draft order, constituted a pragmatic approach. The debate upon the manner of phrasing of paragraph 2 of the proposed order need not, for the obvious reasons hereunder, be dealt with.

[10] *Mr Nel SC* did not advance any address on paragraphs 3, 4, 5.1 and 6 of the proposed draft order. Notwithstanding the absence of any address by *Mr Nel SC* in respect of

these paragraphs, no indication was given by *Mr Nel SC* that the proposed relief in those paragraphs are not persisted with.

[11] *Ms Grobler*, in answer commenced with a submission that the proposed draft order was sent to the First and Second Respondents' attorney on a *without prejudice* basis and she submitted further that it would seem as if the Applicants is seeking to steal a march on the First and Second Respondents. This submission was taken no further as *Ms Grobler* then proceeded to make submissions in respect of paragraphs 2 and 7 of the proposed draft order. No submissions were made by *Ms Grobler* in respect of paragraphs 3, 4, 5.1 and 6 of the proposed draft order. As a matter of fact, no objection was raised, other than the aforesaid submission which was not advanced to any kind of conclusion that the proposed draft order should be ignored or is improperly before the court, in respect of the proposed draft order.

[12] After argument, I granted an order substantially in line with the proposed draft order. In my view, in light of the absence of submissions on paragraphs 3, 4, 5.1 and 6 of the proposed draft order, the First and Second Respondents did not object to those orders and, at least, by tacit conduct, consented to those paragraphs. In order to avoid confusion, I now repeat the order as granted by me:

1. *Pending the finalisation of the proceedings referred to in paragraph 5 below ("the main proceedings") the First and Second Respondent are interdicted from:*

1.1. *Taking any action whatsoever as purported director(s) of the Third, Fourth and Fifth Respondents ("the Companies"), including any other such companies in respect of which Thandeka Hlongwa ("the Deceased") served as a director, including but not limited to:*

1.1.1. *Entering into any agreements between those Companies and any other party, including themselves;*

1.1.2. *Making payment of any amounts from those Companies to any other party, including themselves;*

1.1.3. *Transacting on the bank accounts of the Companies in any manner;*

1.1.4. *Disposing of any assets of the Companies in any manner (including without limitation: sale, donation or exchange) whatsoever;*

1.1.5. *Disposing of any shares which may be held in the Companies or in any way giving effect to the sale or transfer of any shares in the Companies; and*

1.1.6. *Diminishing, alienating misappropriating, or encumbering any of the Companies' assets in their capacities as directors or otherwise.*

2. *Further pending the finalisation of the main proceedings:*

2.1. An independent director, being an auditor of no less than 10-years standing, will be appointed in respect of the Companies contemplated in paragraph 1.1 of this order by the Chairperson for the time being of the South African Institute of Chartered Accountants, who is requested to make such appointment from any one of the following firms:

2.1.1 PriceWaterhouseCoopers;

2.1.2 Deloitte Touche Tohmatsu;

2.1.3 Ernst & Young;

2.1.4 KPMG ("the independent director").

2.2. The parties shall co-operate with each other and do all things necessary for the independent director to be appointed as such, including lodging any documents required by the Sixth Respondent.

2.3. That independent director shall, as soon as possible after his/her appointment as such render a written report to the Applicants and the First and Second Respondents setting out the transactions in respect of the Companies which were entered into after the death of the Deceased to date.

2.4. The costs associated with the appointment of that independent director will be paid by the First Applicant.

3. *Nothing in this order will be construed as preventing the true and lawful holders or securities with voting rights to, by due process as prescribed by law, cause the election of a director, including the removal of the independent director.*

4. *Further pending the finalisation of the main proceedings:*

   4.1. *The First Respondent will not seek that she be appointed as an executor in respect of the Deceased's estate and the Second Applicant will continue to act as executor of the Deceased's estate subject to paragraph 3.2 and 3.3 below.*

   4.2. *The Second Applicant shall not distribute any assets from the deceased estate but will continue to identify, collect and protect assets of that deceased estate as he is required to do in terms of the Administration of Estates Act.*

   4.3. *In the event that the Second Applicant believes, in exercising his powers and duties as executor of the Deceased's estate, he is required to distribute assets of the Deceased's estate he will notify the First Applicant and the First Respondent of such intention in writing giving those parties at least 15 days' notice of his intention to do so.*

5. *The First Respondent will give the First Applicant's legal representatives and expert witnesses access to the original will of the Deceased, during business*

hours, provided that such access is requested in writing 48 hours before the date in which access is sought.

6. *The Applicants shall institute proceedings against the First and Second Respondents, within 60 days of the granting of this order, in which they will seek inter alia:*

   6.1. *That the purported will of the Deceased be declared to be invalid and/or not the will of the Deceased;*

   6.2. *That the First and Second Respondents' purported appointment of directors of the Companies be declared to be invalid and set aside; and*

   6.3. *That all acts taken by the First and Second Respondents in their capacities as directors of the Companies be declared invalid and set aside and that the First and Second Respondents be ordered to repay all such amounts which were paid by the Companies arising from such acts.*

7. *It is directed that papers in this application, which have been served on the Sixth Respondent (the CIPC), shall constitute a complaint in terms of section 168 of the Companies Act and the Sixth Respondent is directed to conduct an investigation in terms of section 169 of the Companies Act.*

8. The First and Second Respondents shall jointly and severally pay the costs of this application, including the costs of two counsel where so employed."

[13] Subsequent to the granting of the order, it now appears that the First and Second Respondents did not, at least by tacit conduct, consent to those specific paragraphs as they appear in the final order.[1] This appears from the fact that the First and Second Respondents have, informally, requested reasons as to why the orders in paragraphs 4, 5, 6.1 and 7 of the final order were made.

[14] I must first digress prior to dealing with the informal request for reasons. Rule 49(1)(c)[2] states that a party desiring reasons may, on application, request same. Although the rule indicates that reasons may be requested "*on application*", the word *"application"* is ascribed a wide definition[3] in Rule, by including other forms of applications provided for by Rule 6. Rule 6(11)[4] includes applications which may be brought *on notice*, supported by such affidavits as the case may require. Thus, an on-notice application, properly construed in terms of Rule 6(11) as read with Rule 49(1) can be on notice, without an affidavit as an affidavit is not required to "*make application for reasons*".

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[1] Paragraph 4 of the final order (paragraph 3 of the proposed draft order); paragraph 5 of the final order (paragraph 4 of the proposed draft order); paragraph 6.1 of the final order (paragraph 5.1 of the proposed draft order) and paragraph 7 of the final order, (paragraph 6 of the proposed draft order).

[2] *"When in giving an order the court declares that the reasons for the order will be furnished to any of the parties on application, such application shall be delivered within ten days after the date of the order."*

[3] "***'application'*** *means a proceeding commenced by notice of motion or other forms of applications provided for by rule 6*;"

[4] *"Notwithstanding the aforegoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge."*

[15] Even if I am wrong in the aforesaid and that the word "*application*" as used in Rule 49(1)(c) is to be contextually otherwise interpreted than as provided for by Rule 1, which contextual otherwise interpretation is in any event permissible in terms of Rule 1,[5] in my view, denotes some formal approach to the court in requesting reasons.

[16] My view is underscored by the longstanding practice that a request for reasons is done formally by way of a notice. In my experience, reasons are never requested by way of an informal request to a Judge by way of a letter. What experience has recently shown me is that as a fallout of the COVID-19 pandemic and the resultant extensive electronic communication to judges' registrars to keep the wheels of justice turning, practitioners has taken it upon themselves to on a more than frequent basis seek to correspond with Judges, even though through judges' registrars, as if they are parties to the litigation in matters that appear before them. Judges are being inundated with correspondences whereby indulgences are being sought for all kinds of procedural failures on the part of parties' legal representatives.

[17] The approaches to Judges by way of correspondences does not end there, frequently Judges are requested to provide informal directives which, on proper scrutiny, amount to no less than seeking the advice of a Judge on a particular manner where the answer, more frequently than not, lies in the established conventional practice and/or practice manual and/or practice directives of this court. I have even been privy to instances where Judges are, by way of correspondence, faced with a demand to explain a directive made which is well within the prerogative of the particular judge to make.

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[5] See the opening line to Rule 1: "*In these rules and attached forms, **unless the context otherwise indicates*** -"

[18] The Honourable Judge Seegobin recently penned an article[6] lamenting on how decorum within the judicial system is being flouted and plainly being thrown out of the window by practitioners, not only as against each other but also in respect of Judges. This failure by practitioners to adhere and respect long established practices and conventions in respect of their approach to judges is reaching epic proportions and is, in my view, a byproduct of judicial officers doing all they could during the COVID-19 pandemic to keep the wheels of justice turning. Often, due to the exigencies created by the COVID-19 pandemic, judicial officers departed from conventional practices and procedures so as not to prevent justice from being done.

[19] What is important to remember, however, is that the departure by judicial officers from the conventional practices and procedures was only in respect of the particular exigencies of a particular matter or, in some instances, in respect of a particular type of roll to which the judicial officer attend. The departure was also limited to the extent necessary in a particular instance and did not, by any stretch of the imagination, amount to a blanket departure from the conventional practices and procedures in respect of approaching judicial officers and on what judicial officers should be approached with.

[20] The writing of a letter whereby reasons are requested, outside of the usual practice of filing a formal notice in terms of Rule 49(1)(c) is, in my view, just another instance rife amongst practitioners in approaching judicial officers as if they are parties to the

[6] Restoring dignity to our courts: the duties of legal practitioners
https://www.groundup.org.za/article/restoring-dignity-to-our-courts-the-duties-legal-practitioners/

litigation or simply a belief that they should have unfettered access to judicial officers who preside over matters. The rules and practices (including the practice manual and practice directives) are designed and the conventions relating to approaches to judges have developed in order to ensure that judicial officers remain impartial and are not bogged down in attending to administrative issues, keeping them away from their primary function of hearing and deciding matters.

[21] The lamenting in the previous paragraphs IS to be considered a warning to practitioners that the aforesaid conduct should cease, the failure of which may very well lead to the reporting of practitioners to the relevant overseeing body/ies for improper and/or unethical conduct.

[22] Notwithstanding the above, I will oversee the conduct of *Witz Attorneys* in this instance as there is nothing to indicate that they have acted in any manner other than the recently budding, but improper, practice in respect of approaches to judicial officers.

[23] In providing reasons I must, from the outset, indicate that by no means do I hold the view that I was incorrect in accepting that the First and Second Respondents consented, by tacit conduct, to the paragraphs reasons are now being requested for. At the very least, even if the paragraphs cannot be taken as being consented to, the failure to object to those paragraphs when the matter was argued is equally fatal, in my view, to the First and Second Respondent's belated objection thereto.

[24] The first question that requires addressing is whether paragraphs 4, 5, 6.1 and 7 of the final order could have been granted in the absence of a specific prayer therefor in the Notice of Motion. Prior to dealing with the question, I must first lament that due to the failure of *Ms Grobler* to raise any objection or make any submissions in respect of the paragraphs now complained of leaves me at a disadvantage as I am now forced to provide reasons in respect of matters that no submissions were presented. I must also point out that after hearing argument, but prior to adjourning the matter, I requested *Mr Nel SC* to cause the proposed draft order on which argument was presented on 10 March 2023 to be emailed to my registrar in editable format. It should, at this stage, have dawned on the First and Second Respondents' legal representatives that I intend to consider making an order substantially in the vein of the proposed draft order. No leave was sought to address me on the paragraphs now complained of. Had such leave been sought, I would have had to grant *Ms Grobler* either such opportunity or, if I was disinclined to consider those paragraphs, indicate to her that no submissions are necessary due to my intended disinclination.

[25] During the course of argument in respect of paragraph 2 of the proposed draft order (which is also paragraph 2 of the final order), Mr *Nel SC* submitted that the Applicant is fully entitled to seek such relief by virtue of the "*further and/or alternative relief*" prayer in the Notice of Motion. This submission by *Mr Nel SC* is, in my view, slightly off-kilter. The authorities in this regard is clear, in modern practice this prayer redundant and mere verbiage.[7] What *Mr Nel SC* was resoundingly correct on in

[7] ***Hirschowitz v Hirschowitz*** 1965 (3) SA 407 (W) at 409
"The prayer for alternative relief is to my mind, in modern practice, redundant and mere verbiage. What ever the court can validly be asked to order on papers as framed, can still be asked without its presence. It does not enlarge in any way "the terms of the express claim", as pointed out by Tindall JA (op cit)."

respect of the developed argument in respect of the "*further and/or alternative relief*"-submission is that the court is fully entitled to grant relief ancillary to the specific relief prayed for. This is, of course, subject thereto that a case is made out for such relief on the papers[8] and had been ventilated by the parties.[9] To this I would add, in the absence of an issue being ventilated by the parties, that where an issue appears from the papers and such relief is clearly sought, nothing prevented a party from ventilating such issue/s.

[26] In this matter, the relief granted in paragraphs 4, 5, 6.1 and 7 of the final order clearly appears from paragraphs 3, 4, 5.1 and 6 of the proposed draft order. *Mr Nel SC*'s address during argument was plainly based on the proposed draft order and, as already pointed out, no indication was given that the entire contents of the proposed draft order is not being persisted with. In my view, the first bridge is crossed by the Applicants, namely the relief was clearly sought.

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[8] ***National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd*** *2011 (2) SA 157 (SCA)*
"The court below justified its approach on the ground that in joining the managers in the proceedings and supporting them the City became a co-wrongdoer and had to be restrained. This, however, does not dispense with the required prayer for relief against the City. The court also relied on the prayer for alternative relief. It erred because this superfluous prayer does not entitle a court to grant relief that is inconsistent with the factual statements and the terms of the express claim. . ."

[9] ***National Commissioner of Police and Another v Gun Owners of South Africa*** (561/2019) [2020] ZASCA 88; [2020] 4 All SA 1 (SCA); 2020 (6) SA 69 (SCA); 2021 (1) SACR 44 (SCA) (23 July 2020)
". . . a court is required to determine a dispute as set out in the affidavits (or oral evidence) of the parties to the litigation. It is a core principle of this system that the Judge remains neutral and aloof from the fray. This Court has, on more than one occasion, emphasised that the adjudication of a case is confined to the issues before a court:

> *'[I]t is for the parties, either in the pleadings or* ***affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute****, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded". .* ***There are cases where the parties may expand those issues by the way in which they conduct the proceedings****. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'"*

[27] Although there is a request for reasons in respect of paragraph 4 of the final order *in toto*, it is plain that paragraphs 4.2 and 4.3 is for the protection of all parties interested in the administration and winding up of the Deceased's estate. Although I intend to return to these paragraphs, I do not intend to dwell much hereon as there can hardly be any cogent objection to paragraphs that serves to protect the interests of all parties.

[28] The question, in my view, should rather be whether paragraph 4.1 of the final order should or could have been granted. These paragraphs is directed at the First Respondent potentially being appointed as the executrix of the Deceased's estate. The including this paragraph in the proposed draft order must be seen within the context that it arose. The First and Second Respondent initially, by way of the withdrawn counter-application, sought to have the Second Applicant removed as executor of the Deceased' estate, no doubt in order to cause the First Respondent to be appointed by the Master as executrix of the Deceased's estate in terms of the written will the First and Second Respondents allege to be in existence.

[29] The Applicants did, not having actual knowledge of the existence of the alleged written will nor having had sight of even a copy thereof, direct the court's attention to the fact that the First Respondent is facing being interdicted from obtaining an appointment as executrix of the Deceased's estate.[10] It is clear from Annexure "NM3" to the founding affidavit that the alleged written will has been requested and has not been furnished to the First Applicant. The conclusion advanced in Annexure "NM3" is

[10] 02-19, Par 31

that the alleged written will simply does not exist.[11] As a matter of fact, when the counter-application was still alive and well, I pointed out to *Ms Grobler*, in addition to the fatal absence of the Master, that there may very well a dispute as to the validity of the will. In addition, it clearly appears from the founding papers, in particular Annexure "NM3", that an argument is advanced that the First Respondent's conduct is of such a nature that she should not be appointed as executrix to the Deceased's estate.

[30] In the replying affidavit by the Applicants, it is again pointed out that the alleged written will was requested and not provided, the import of the allegation being that the existence of the alleged written will is disputed. The argument relating to the First Respondent's conduct is also repeated in the replying affidavit. The First and Second Respondents, alive to the relief sought in the proposed draft order, did not seek to make submissions on the relief sought in paragraph 3.1 of the proposed draft order (paragraph 4.1 of the final order), nor was any leave sought to file an affidavit dealing with those issues as repeated in the replying affidavit. In as much as the import of those allegations in the founding affidavit may have escaped the First and Second Respondents when preparing the answering affidavit, or even have been considered as irrelevant due to the framing of the relief sought in the Notice of Motion, the import thereof must have dawned on the First and Second Respondents' legal representatives after receipt of the replying affidavit in light of the proposed draft order presented to them and as uploaded onto CaseLines. In my view, a case has been made out on the papers in respect of this relief and nothing precluded the First

[11] 02-99, Par 93

and Second Respondents to cause submissions to be made in respect thereof, including seeking leave to file an affidavit dealing with this issue as it was elucidated in the replying affidavit, since it was already touched upon in the founding affidavit, as read with the proposed draft order.

[31] Two issues arise from the aforesaid. Firstly, an applicant is generally not entitled to make out a case, let alone a new case, in a replying affidavit, save in exceptional circumstances. Further, in instances of urgency a court may exercise a discretion in allowing some latitude in this regard.[12] In this matter, the belated delivery of an answering affidavit, the initial pursuing of a belated abandoned counter-application, in my view, enlarged the scope of the initial matter the Applicant brought to court. Otherwise stated, the First and Second Respondents, in my view, caused an enlargement of issues to be dealt with. In my view, the aforesaid coupled with the fact that matter was to be dealt with on an urgent basis gave rise to the exceptional circumstances necessary for the Applicant to deal in greater detail with issues in the replying affidavit than would usually permissible. As previously pointed out, the First and Second Respondents did not seek permission to more fully deal with such

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[12] ***Bayat v Hansa*** 1955 (3) SA 547 (N) at 553C – E
"*I come now to Mr. Warner's application to strike out paragraphs from the applicants' replying affidavits. He referred to Mauerberger v Mauerberger*, 1948 (3) SA 731 *(C) at p. 732, and the cases there cited and relied upon the principle which I think can be summarised as follows, namely, that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving ex parte or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by the respondent in his answering affidavits), still less make a new case in his replying affidavits. Mr. Friedman, in opposing the application to strike out, made the submission that in matters of urgency a measure of latitude is allowed to an applicant who is moving ex parte before the Court for a rule nisi. He also submitted, relying upon de Villiers v de Villiers*, 1943 T.P.D. 60, *that the power to strike out averments in affidavits should be used sparingly. Assuming that an applicant moving as a matter of urgency is entitled to some indulgence, I do not consider that the present application could rightly be described as a matter of urgency, but in any event I consider that, even if it were, the applicants have gone much too far in their replying affidavits, as I shall show. My reasons for concluding that this could not rightly be described as a matter of urgency are as follows:.."*

allegations in the replying affidavit nor did it seek the striking out of such allegations. Furthermore, and of significant importance, the First and Second Respondents failed to object to the manner of phrasing of the proposed draft order, nor were any submissions made against the granting of those prayers.

[32] Secondly, Annexure "NM3" to the founding affidavit is, in itself, a founding affidavit to an application wherein relief is sought against the First Respondent. The relief sought against the First Respondent seems, upon a reading of Annexure "NM3", to be substantially similar to the relief sought in paragraph 3.1 of the proposed draft order. No submissions were made by *Ms Grobler* that *lis pendens* applies, or should apply. Even if the point of *lis pendens* were to be raised, the court retains a discretion whether to hear the subsequent proceedings or not, depending on what is just and equitable in the circumstances, including the balance of convenience.[13]

[33] *In casu*, the First Respondent elected to withhold (at the very least) a copy of the alleged written will from the First Applicant until this application was launched. The First Respondent initially sought to have the Second Applicant removed as executor so that she may act in terms of the alleged written will to have herself appointed as executrix. The alleged written will is clearly placed in issue. To refuse to entertain the relief sought in paragraph 3.1 of the proposed draft order would merely postpone the inevitable; namely the parties again coming to court on substantially the same or

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[13] ***Standard Bank of SA Ltd v Tsheola Dinare Tours and Transport Brokers (Pty) Ltd*** (22011/2021) [2022] ZAGPJHC 311 (6 May 2022) at para [17]
"However, it does not follow that the plea of lis pendens *will serve as a bar to hearing the matter simply because the above requirements have been satisfied. The court has the discretion whether or not to stay the proceedings or to hear the matter depending on what is just and equitable to do in the circumstances, including consideration of the balance of convenience."*

similar issues that was before me. In light of paragraphs 3.2 and 3.3 of the proposed draft order, justness and equitability is served in respect the interdict sought against the First Respondent in paragraph 3.1 of the proposed draft order. She cannot be appointed as executrix until the dispute regarding the alleged written will is finally determined, however the Second Applicant cannot proceed to wind the Deceased's estate up or sell any assets without allowing for the First Respondent an opportunity to object thereto or, by way of court processes, attempt to put a stop thereto. The balance of convenience is, in my view, similarly satisfied. The parties are not put to the expense of litigating on issues that has been placed before me. Moreover, the balance of convenience is not only limited to convenience for the parties. It includes convenience to the court by preventing another judge from having to consider substantially the same facts in the near future. In my view, this would be a proper manner in which to exercise my discretion against invoking the principle of *lis pendens* if it had been raised.

[34] Paragraph 4.1 of the final order must be seen in light of paragraph 5 and 6.1 of the final order. It is clear that the alleged written will, which was not timeously presented to the Master, is placed in dispute by the First Applicant.[14] It is also clear that despite numerous requests in this regard, the First Respondent has failed to present same to the First Applicant. If the will had been timeously presented to the Master, the First Applicant could have inspected same at the offices of the Master due to the vested interest he has in the winding up of the Deceased's estate as father and natural guardian of their minor children. Had the alleged written will been timeously

[14] 09-13, Par 28

disclosed, much the litigation in this matter may have been avoided or, at least, been curtailed.

[35] As indicated to *Ms Grobler* during argument on paragraph 2 of the proposed draft order at the hearing of the matter, sometimes a pragmatic approach is required in hearing matters in urgent court in order to deal with matters as and when they arise. This holds equally true in respect of paragraph 4.1, 5 and 6.1 of the final order. It is clear from the papers before me that the existence, or at least validity, of the alleged written will is an issue that may be hotly contested and may give rise to further litigation. Pragmatically, it would also make no sense for the First Applicant to cause the estate of the Deceased to be engorged in costly litigation regarding the validity of the alleged written will if the Deceased clearly and plainly did execute it. An inspection of the alleged written will thus makes sense. Equally, it makes no pragmatic sense for the First Respondent to seek her appointment as executrix of the Deceased's estate based on a disputed will which may, in due course, be struck down by the court. Moreover, it makes no pragmatic sense for the First Respondent to seek her appointment as executrix of the Deceased's intestate estate (if it is an intestate estate) purely based on her familial relationship with the Deceased in circumstances where the appointment of an executor in such circumstances vests wholly within the discretion of the Master.

[36] A court order should also be effective, not only in enforcing its terms, but also in giving effect to the terms thereof.[15] No purpose would be served to record in the final order

[15] ***Eke v Parsons*** (CCt214/14) [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) (29 September 2015) at para [73]

that the Applicants (or First Applicant) intends to institute an action to declare the alleged written will invalid, but at the same time leave the door wide open for the First Respondent to seek her appointment as executrix in terms of the alleged written will.

[37] In my view, a case has been made out on the papers in respect of the relief granted in paragraphs 3 and 4.1 of the proposed draft order and nothing precluded the First and Second Respondents to cause submissions to be made in respect thereof, including seeking leave to file an affidavit dealing with this issue as it arises from the replying affidavit as read with the proposed draft order.

[38] This brings me full circle back to paragraphs 4.2 and 4.3 of the final order. This relief is clearly ancillary to the dispute as to who should be the lawfully appointed executor of the Deceased's estate and I have already dealt therein in terms of it in terms of paragraphs 3.2 and 3.3 of the proposed draft order in paragraph [29] hereof.

[39] It must also be indicated that paragraph 6.1, properly construed, does not constitute an actual order. It constitutes a recordal of the type of relief that will be sought in the action to be instituted. The failure to record such relief to be sought in due course will mean that the interdict granted in paragraph 4.1 of the final order would not be dependent on anything related to the interdict. It would leave the interdict overbroad. This is so as it would leave the First Respondent unable to claim that the interim order relating to her (in)ability to seek her appointment as executrix has

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"A court order must bring finality to the dispute or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance. In cases where, as here, the order deals with the parties' property rights which are subject to protections guaranteed by section 25 of the Constitution, a court granting the order is duty bound to issue an appropriate and effective order. . . ."

lapsed due to the failure to institute an action pertaining to the related relief in respect of paragraph 4.1 of the final order. Paragraph 6.1 of the final order was necessary to prevent an interim order from operating indefinitely, particularly where an action is instituted that is unrelated to the purpose of the interim interdict.

[40] This leaves paragraph 7 of the final order. The most pertinent question that must be answered in respect of this paragraph is whether it constitutes an order as contemplated in *Eke*.[16] Although paragraph 7 is included in the final order, it is not in my view an order as contemplated by *Eke*. It merely serves as an administrative-type recordal that the application as a whole is to be deemed by the Sixth Respondent as being a written complaint as envisaged by Section 168(1)[17] of the Companies Act. Directing the Sixth Respondent to investigate the complaint in terms of Section 169 of the Companies Act similarly does not constitute an order as contemplated by *Eke*. The manner or the type of investigation is not prescribed. All that the Sixth Respondent is directed to do is that which it must in any event statutorily do, namely exercise a discretion as to whether to act in terms of Section 169(1)(a), (b) or (c) of the Companies Act. By no means does paragraph 7 of the final order lend itself to an interpretation that a specific type of investigation must be conducted. The provisions of paragraph 7 does no more than, properly construed, direct the Sixth Respondent to

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[16] *Ibid*

[17] "***168 Initiating a complaint***

(1) Any person may file a complaint in writing-

(a) with the Panel in respect of a matter contemplated in Part B or C of Chapter 5, or in the Takeover Regulations; or

(b) with the Commission in respect of any provision of this Act not referred to in paragraph (a), alleging that a person has acted in a manner inconsistent with this Act, or that the complainant's rights under this Act, or under a company's Memorandum of Incorporation or rules, have been infringed."

act in terms of Section 169(1) of the Companies Act, as the Sixth Respondent may deem fit.

A PATENT ERROR

[41] There is, regrettably from my side, an aspect that I must address in closing in these reasons. After having received the request for reasons and perusing the final order, I had no independent recall of, in particular, paragraph 4 of the final order. I revisited the email forwarded to me by my registrar containing the draft order (which was emailed to my registrar at my request) and noticed that the email contained a second draft order. After perusing the second draft order attached to the email and in light of the fact that I could not independently recall the contents of paragraph 4 of the proposed draft order, I formed the (erroneous) view that I may have signed the wrong draft order due to an administrative error.

[42] I called for a meeting with the legal representatives to indicate to them it seems I may have committed an error in signing the incorrect draft order. During the course of the meeting held, it dawned upon me that I amended the proposed draft order to the final order format and there must be a reasonable explanation as to why I could not independently recall paragraph 4 of the final order and suspected that I signed the incorrect draft order. *Mr Van Reenen*, appearing without *Mr Nel SC* who had been called to perform judicial duties, suggested that the record of the proceedings be obtained for me to properly consider whether I may have signed the incorrect draft order.

[43] I must record that I have had the opportunity to listen and re-listen to the entire proceedings of 10 March 2023. The reason why I could not independently recall paragraph 4 of the proposed order was simply due to the fact that the terms thereof was, as set out earlier in this judgment, was not argued and, accordingly, failed to jog my memory when I read the final order again some almost 3 (THREE) weeks after having granted it.

[44] The revisiting of the recording of the proceedings refreshed my memory as to my reasoning during argument. Thus, for clarity to the parties, although I expressed the view that I may have signed the incorrect draft order, they may rest assured that I did not sign the incorrect draft order and the *raison d'être* for the final order is set out above.

Delivered: This Judgment was prepared and authored by Acting Judge whose name is reflected herein and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be the **17 April 2023.**

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CHARLES. E. THOMPSON
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing:	10 March 2023
Date of Judgment:	17 April 2023

Counsel for the Applicants:	Mr Gerry Nel SC
	With him Mr Van Reenen
Instructed by:	Nirenstein Incorporated Attorneys
Counsel for the First and Second Respondents:	Ms Lauryn Grobler
Instructed by:	Witz Incorporated