

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



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 16867/2023

REPORTABLE

In the matter between:

A[...] L[.]
(ID No.: [...])

Applicant

and

A[...] S[.]
(ID. No. [...])

First Respondent

A[...] S[...] N.O.
(ID. No. [...])

Second Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

JUDGMENT DELIVERED ON THIS THE 10TH DAY OF NOVEMBER 2023

Andrews AJ

Introduction

[1] This is an opposed urgent application for interdictory and related relief. On 23 October 2023, the court made a ruling in respect of prayer 1 that the matter be heard as a matter of urgency and that the forms, methods of service and service periods

provided for in the Uniform Rules be dispensed with in accordance with the provisions of Uniform Rules 6(12) and that the Applicant's non-compliance with the uniform rules be condoned. The matter was argued on the same day, and judgment was reserved.

[2] The Application is only opposed by First and Second Respondents.

Factual Background

[3] The Applicant and the late Mr. E[...] S[...] ("the deceased") were divorced on 31 August 2015. The salient terms of the divorce order granted by Allie J, which are central to this dispute, are as follows:

'1. That the joint estate is divided as follows:

IMMOVABLE PROPERTY

1.1 That the property situated at [...] Avenue, F[...], Table View, Province of the Western Cape ("the first Property") is to be placed on the market as from date of divorce. When the first Property is sold, the proceeds thereof are to be split between the parties equally;¹

[4] On 30 April 2016, the Applicant and the deceased entered into a written agreement to alter the terms of their decree of divorce. The alteration aimed to facilitate the sale of the Applicant's half share in the property to the deceased. The deceased fulfilled 61 instalments amounting to R914 290 over a period of 5 years. The deceased breached the terms of the variation agreement by failing to pay all the instalments due to the Applicant in terms thereof, which resulted in the Applicant

¹ Index, Annexure FA2, page 23.

instituting action against the deceased to recover the balance owing to her under Case Number 11597/2021. The action became opposed and ventilated at a hearing before Thulare J who granted the following orders:

- '(a) The applicant is authorised to place the property on the market, to sell it and to divide the proceeds from the sale thereof between herself and the first respondent equally in terms of paragraph 2.1 of the decree of divorce granted under case number 10338/2015 on 31 August 2015.*
- (b) Should the first respondent fail to timeously sign the necessary papers to effect the sale and transfer of the property, the Sheriff of the Court within whose jurisdiction the property is situated, is authorised to sign on his behalf.*
- (c) the first respondent is to pay the costs.²*

[5] The deceased parted this life through suicide on 24 September 2022. According to the Respondents, the deceased had little to no family or friends close by. A dispute arose between the Applicant and the First Respondent, who resides in the United Kingdom. This dispute culminated in the institution of an urgent application by the First Respondent under case number 16935/2022, wherein he unsuccessfully pursued interdictory relief against the Applicant.³ The application was dismissed by Dolamo J on 4 September 2023.⁴

[6] The First Respondent has been appointed as the Executor of the deceased's estate, which Letters of Executorship were approved on 2 June 2023.⁵ Prior to the First Respondent's appointment as Executor, he instituted Substitution proceedings

² Index, Annexure FA3, page 7.

³ Index, Founding Affidavit, para 15, page 13 '*...alienating, encumbering or transferring in any way any assets, whether movable or immovable in the deceased estate of the late Eric David Simpson...and that assets shall thereafter be administered by the executor appointed by the [Master] in due course.*'

⁴ Index, Annexure FA5, page 34.

⁵ Index, Annexure FA1, page 22.

in terms of Rule 15(2) of the Uniform Rules, which is being opposed by the Applicant. The Applicant applied for the First Respondent to furnish security for her costs as he is permanently resident in the UK and is as such a *peregrinus*. The Taxing Master has determined that the First Respondent furnishes an amount of R200 000 by 11 September 2023, which amount remains unpaid.⁶

[7] The Applicant avers that despite the dismissal by Dolamo J on 4 September 2023, the First and Second Respondents have continued to insist that the Second Respondent is entitled to market and sell the property. The Applicant approaches this court for urgent relief in the following terms:

‘2. That the First and Second respondents are ordered and directed to forthwith grant the Applicant and/or her duly appointed representatives and/or agents full and unfettered access to the immovable property and residence situate at [...] Avenue, F[...], Table View, Western Cape Province (“the property”), inter alia by means of providing the Applicant with:

2.1 All keys, alarm codes, and any/all other methods of access to the property; and

2.2 The full personal particulars and contact details of any persons currently occupying the property;

within 24 hours of service of this order on the respondent’s or their legal representatives (Mr Bennu Viljoen of Messrs VGV attorneys, Bellville);

3. That the First and Second respondents are ordered and directed to forthwith allow the Applicant and/or her duly appointed representatives and/or agents to do all things reasonably required to market and sell the property in execution / implementation of the following orders:

⁶ Index, Annexure FA6, page 14.

- 3.1 *The Decree of Divorce granted by the Honourable Justice Allie under case number 10338/2015 on 31 August 2015;*
- 3.2 *The judgment and orders granted by the Honourable Mr Justice Thulare under case number 11597/2021 on 24 May 2022;*
- 3.3 *The order granted by the Honourable Justice Wille under case number 16935/2022 on 13 October 2022;*
- 3.4 *The order granted by the Honourable Justice Dolamo under case number 16935/2022 on 4 September 2023.*

4. *That the Respondents are interdicted and restrained from preventing or otherwise hampering or hindering the Applicant in the exercise of her rights to market and sell the property in terms of the aforementioned Court orders.*

5. *That the Third Respondent be directed to refuse to approve any final liquidation and distribution account submitted to him by or on behalf of the second respondent unless same provides for the sum of R200 000 to be paid into a special investment security account in satisfaction of the Taxing Master's Determination of Security under case number 16935/2022 out of any monies accruing to the first respondent from the deceased estate of the late Mr E[...] S[...].*

6. *Costs of suit on an attorney and client scale.*

7. *Further and / or alternative relief⁷*

Principal Submissions on behalf of the Applicant

[8] The Applicant submitted that the First and Second Respondent's insistence and refusal to abide by the court orders which entitle the Applicant to market and sell the property without their interference or participation is evident from the various correspondence exchanged between the parties' respective legal representatives

⁷ Index, Notice of Motion, pages 2 -3.

since the dismissal by Dolamo J. It is contended that the correspondence bears out that the First and Second Respondents have and continue to frustrate the Applicant in the exercise of her rights by:

- (a) Purporting to regulate the Applicant's access to the premises and to limit it to "viewing" at pre-arranged times;
- (b) Purporting to act as the go-between between the Applicant and the current (unlawful) occupant(s) of the property;
- (c) Claiming some or other entitlement to market and sell the property in conjunction with the Applicant.⁸

Principal Submissions on behalf of the Respondents

[9] The Respondent raised a number of points *in limine*, which included the following salient issues:

- (a) The misjoinder of the First Respondent;
- (b) *Res judicata* and
- (c) improper relief being sought.

Misjoinder of the First Respondent and improper relief

[10] The Applicant seeks relief against the First Respondent in his personal capacity. It was contended that there is no basis to warrant interdictory relief against

⁸ Applicant's Heads of Argument, para 12 - 13, page 5.

the First Respondent in his personal capacity. Additionally, it was submitted that same was done in order to frighten and intimidate the First Respondent.

[11] Furthermore, it is contended that the joinder of the First Respondent is patently incorrect as the involvement of the First Respondent is limited to:

- (a) His representative capacity as the Executor, as per the citation of the Second Respondent and
- (b) The Applicant under the application under case number 16935/2022 which was finalised on 4 September 2023.

[12] The question to be answered is whether the Applicant makes out a case on the papers for any relief against the First Respondent. It bears mentioning that the second offer to purchase, which is attached to the First and Second Respondent's opposing papers, the sellers and purchasers are described as:

2 The Seller ...

2.1 *A[...] S[...] N.O. in his capacity as the duly appointed executor in the estate of the late E[...] S[...] ... and A[...] L[...]'*

2.2 *Address for acceptance of notices and post for A[...] S[...]: ...*

....

3 The Purchaser ...

3.1 *Full names: A[...] S[...] ... (my emphasis)..⁹*

⁹ Filing Notice, Annexure BV3, page 88.

[13] This essentially puts to rest the Respondents point *in limine* pertaining to misjoinder. It is manifest that the First Respondent is a party with an interest. On the strength of this Offer to Purchase, the Respondents argument of misjoinder holds no merit. Even if I am wrong, it is uncontroverted that the First Respondent was the Applicant in the proceedings before Dolamo J. Consequently, I am satisfied that the First Respondent is correctly cited as a party with an interest in regard to the factual matrix of this matter.

Res judicata

[14] The Respondents argued that the Applicant seeks to duplicate the relief which was already considered and pronounced on by Thulare J and that the relief being sought is premature and outside the bounds of what she is entitled to in the circumstances of this particular matter.

[15] It was argued that the order which the Applicant seeks to enforce essentially only provides for the sheriff to sign should the deceased or the Executor refuse to sign the necessary documentation or refuse to cooperate. The Respondents submitted that the Applicant failed to establish the prerequisite considerations for any contempt or compel which essentially requires that there must be an infringement of a right or non-compliance with an order.

[16] The Respondents contended that the directions being sought by the Applicant insofar as allowing the Applicant and/or her duly appointed representatives and/or agents to do all things reasonable required to market and sell the property in execution or implementation of the court orders, would be tantamount to a variation of the orders of Allie J and Thulare J, respectively. It is manifest that the Applicant already has the authority to market and sell the property. The question for determination would ultimately centre around whether the Applicant has succeeded in establishing the jurisdictional factors for the relief being sought. I will deal with this aspect later in this judgment.

Infringement on the rights of the lessees

[17] It is the Applicant's contention that the Respondents seek to control her communications with the tenant on the property. The contention by the Respondents is that the Applicant wishes to enjoy unfettered and unqualified access to the property without regard or consideration for the privacy and impact it will have on the convenience and rights of the current tenants occupying the immovable property. In augmentation of this submission, it was submitted that the Applicant's demand of unfettered access to the property is impossible to tender as it would potentially create an untenable situation with the lessees. The Respondents furthermore, contended that the relief sought by the Applicant is tantamount to a spoliation of the current lessees in the immovable property who ought to have been joined as parties with an interest.

[18] Not much is known about the tenants that currently occupy the property and whether there is an agreement, either oral or in writing, with them regulating

their tenancy. It is apparent that the Applicant has specifically requested a copy of the lease agreement in terms of Rule 35(12). Same has not been dealt with in argument as per the undertaking in the Applicant's Replying affidavit.¹⁰ The details surrounding the tenants are very vague and concerns in that regard would have been allayed had the lease agreement been provided. To reiterate, no address in this regard was presented during argument, bearing in mind that parties are restricted to issues defined in their pleadings.

[19] The Respondents submitted that the tenants should have been cited as parties with an interest as the Applicant seeks as part of the relief, to be provided with all, keys, alarm codes and any/all methods of access to the property as well as full personal particulars and contact details of any persons currently occupying the property. In my view, this is material oversight as the Applicant seeks substantial relief that impacts and involves parties whose rights may potentially be affected by the relief being sought by the Applicant. It would have been prudent to serve these papers on the lessee(s) who are in my view, parties with an interest.

Security

[20] The Applicant contended that the First Respondent did not dispute his liability to furnish security. The First Respondent disputed the quantum claimed by the Applicant. The Taxing Master ordered the First Respondent to furnish security in the amount of R200 000 by 11 September 2023 under case number 16935/2022, which amount is to be paid into a special investment security account out of many

¹⁰ Applicant's Replying Affidavit, paragraph 18.4 page 112.

accruing to the First Respondent from the deceased's estate.¹¹ According to the Applicant, the First Respondent has failed and/or refused to comply with the furnishing of security and seeks to deny that he is liable to furnish the security for the Applicant's costs. In this regard, it is the First Respondent's contention that the Applicant has misinterpreted the provision of the Rule.¹² According to the First Respondent the Rule provides *'for security in the event the applicant seeks to continue with the application. Since it is dismissed, that is no longer possible and becomes moot.'*¹³

[21] It is the Respondents' contention that the Applicant has no basis to insist on this relief sought against the Third Respondent as the Security for costs has been determined under another matter.

[22] Rule 47 states as follows:

'47 Security for costs

(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

¹¹ Index, FA6, page 35.

¹² Index, FA7, page 36.

¹³ Uniform Rule 47.

(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.

(5) Any security for costs shall, unless the court otherwise directs, or the parties other-wise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final.'

[23] The Determination of Security relates to a matter under case number 16935/2022, which is dated 29 August 2023.¹⁴ On 4 September 2023, Dolamo J dismissed the application, launched by the First Respondent *in casu*.¹⁵ According to the Respondents, there is a bond of security for R100 000 put up. The papers are silent on this issue. The relief sought in prayer 5 where the Applicant seeks the court to direct the Third Respondent to refuse to approve any final liquidation and distribution account, falls to be dismissed as there are other remedies at the Applicant's disposal to recover her costs as ordered by Dolamo J. Consequently, I

¹⁴ Index, FA6, page 35.

¹⁵ Index, FA5, page 34.

am not persuaded that the Applicant has exhausted other remedies at her disposal, which is a prerequisite for final relief.

Competing authorisations

[24] An expeditious resolution was envisaged by Thulare J whereby the Applicant is authorised to place the property on the market and sell it and to divide the proceeds from the sale thereof between herself and the first Respondent equally. The order clearly and unambiguously states that the property is to be placed on the open market. The attempt by the Applicant to purchase the property is therefore contrary to the purport of the order.

[25] The Applicant is desirous to market and freely sell the property in the manner permitted to her through the court order of Thulare J. It was argued that the order permits the Applicant alone to place the property on the market to sell it and divide the proceeds from the sale thereof between herself and the deceased estate equally. Inasmuch as the Applicant owns a half share in the property, it is evident that Thulare J's order did not envisage the current situation.

[26] The question to be answered is whether the Applicant, by virtue of Thulare J's order, enjoys an entitlement to access the property as of right and does she have the express right in terms of the aforementioned court orders to exclusively market and sell the property. This consideration is to be weighed up against the Executor's mandate by virtue of his authority as an Executor. The Second

Respondent was appointed as the Executor on 2 June 2023.¹⁶ Section 26 of the Administration of Estates Act¹⁷, stipulates that:

'26 Executor charged with custody and control of property in estate

- (1) Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.*
- (2) If the executor has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).*
- (3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document in any deceased estate is concealed upon any person or at any place or upon or in any vehicle or vessel or receptacle of any nature, or is otherwise unlawfully withheld from the executor concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.*
- (4) Such a warrant shall be executed in like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the executor concerned.'*

[27] This is the empowering provision that authorises the Executor to take into custody and control of all property in an estate. In this regard, it was submitted that the assets of the estate could not be taken under the control of, and the interests of the estate could not be protected by the Executor as envisaged in terms of the

¹⁶ Index, Annexure FA1, page 22.

¹⁷ Act No. 66 of 1965.

Administration of Estates Act. The contention by the Respondents is that the Applicant seeks to clothe herself with powers which she is not entitled to do, which begs the question whether Thulare J's order effectively precludes the Second Respondent from executing his mandate in terms of the Letters of Authority.

[28] The right to market and sell the property was never afforded to the deceased, bearing in mind that he was still alive at the time when the court order was granted. At common law a court's order becomes final and unalterable by that court at the moment of its pronouncement by the Judicial Officer. The Constitutional Court in ***Municipal Manager OR Tambo District Municipality and Another V Ndabeni***¹⁸ reaffirmed that a court order is binding until it is set aside by a competent court and that this necessitates compliance, regardless of whether the party against whom the order is granted believes it to be a nullity or not. Thulare J's judgment is unambiguous and the order remains undisturbed. However, the question remains whether the Applicant seeks to vary the order of Thulare J, given that the circumstances have significantly changed since Thulare J handed down his judgment. The landscape has changed by virtue of the Letters of Executorship issued in favour of the Second Respondent.

[29] Ordinarily, Thulare J's order stands and remain unalterable until it is varied or set aside. The circumstances *in casu* requires consideration of what may be perceived as a competing authority in terms of the Administration of Estates Act that empowers the Executor, in this case the Second Defendant to take control of the assets of the deceased estate. In my view, both the Applicant and the Executor who

¹⁸ [2022] 5 BLLR 393 (CC).

is authorised to take control of the half share of the interest in the property have valid authorisations; the Applicant by virtue of Thulare J's order and the Executor whose rights have been conferred by way of the Letters of Executorship.

Abuse of authority

[30] The Respondents however argued that the Applicant through this application seeks authority to substitute and subvert the Executor's responsibilities in the estate which essentially means that the Applicant will effectively have the power to sell the property to herself at a nominal value and the estate will have little or no say.

[31] In addition, there is an assertion that the Applicant has offered to purchase the immovable property in September 2023 for approximately half the market value which was submitted to be an opportunistic offer. According to the Respondents, the Applicant has rejected a counter offer with a higher purchase price. Upon closer scrutiny of the Deed of Sale where the Applicant attempted to sell the property to herself, the purchase price is recorded as R2 200 000.¹⁹ The counter offer, depicts the purchase price as R2 300 000, which is not substantially more than the Applicant's offer.²⁰ It is pellucid that the Second Respondent has an Offer to Purchase wherein it appears that the Executor will be selling the property to himself also at a significantly reduced market price as alleged in the papers. This raises a concern especially as the Respondents asserted that the Applicant's offer was opportunistic by putting in an offer for approximately half the market value.

¹⁹ Filing Notice, Annexure BV1, page 80.

²⁰ Filing Notice, Annexure BV3, page 88.

[32] The Respondents however contended that the Applicant brought this application as an underhanded attempt at obtaining the Court's authority for the sheriff to sign the deed of sale on behalf of the estate. The court is mindful that the consequence will potentially be to the Applicant's benefit, but to the estate's detriment, possibly overriding the provisions of Section 42 of the Administration of Estates Act²¹ which states as follows:

'42 Documents to be lodged by executor with registration officer

(1) Except as is otherwise provided in subsection (2), an executor who desires to have any immovable property registered in the name of any heir or other person legally entitled to such property or to have any endorsement made under section 39 or 40 shall, in addition to any other deed or document which he may be by law required to lodge with the registration officer, lodge with the said officer a certificate by a conveyancer that the proposed transfer or endorsement, as the case may be, is in accordance with the liquidation and distribution account.

(2) An executor who desires to effect transfer of any immovable property in pursuance of a sale shall lodge with the registration officer, in addition to such other deed or document, a certificate by the Master that no objection to such transfer exists.'

[33] It is apparent that the conversation of the parties has since moved from selling the property in question to themselves, to a point where they are intent on placing the property on the open market. This is borne out by the email correspondence sent by the Respondent's attorneys dated 26 September 2023:

'...my client also wishes to sell the property and to accommodate the current tenant prefers for the agents to view the property at the same time as your client's agents.

²¹ Act No. 66 of 1965.

*Alternatively, if your client is interested in selling her half share and / or interest in the property to my client, please let me have the price she is interested in...*²²

[34] The aforementioned proposition was evidently not considered and resulted in the institution of the present application. The Respondents have indicated that they harbour no contempt or ill-intentions towards the Applicant and reiterated that the Second Respondent is desirous to administer the estate in accordance with his statutory duties. It is noteworthy that the Respondents have indicated that they *'do not have, and never had the intention – directly or indirectly – to disobey the court order or act in any manner which would impugn the integrity of this Honourable Court and tenders their compliance with the order of Mr Justice Thulare.'*²³

[35] Notwithstanding, the Applicant submitted that the Respondents are in contempt of the Decree of Allie J and Thulare J's orders because of their insistence on regulating the Applicant's access to the property and on further limiting such access to granting her same for the purposes of viewing and inspecting the property.

[36] The Respondents further contended that the Applicant refused to give a reasonable opportunity for the Executor to be appointed and the estate to be administered and for her claim to be dealt with in accordance with the estate's processes.

²² Notice of Motion, Annexure FA14, page 46

²³ First and Second Respondents Opposing Affidavit, para 54, page 78.

[37] It is evident from the correspondence that the Respondent has in an email dated 11 September 2023, invited the Applicant to provide proposed times and dates for an inspection of the property. The response to this email rejected the offer of the Respondents in the following terms:

*'Our client has no intention of accepting your client's purported offer. What our client seeks is to sell the property on the open market in terms of the court orders authorising her to do so. To this end she requires a set of keys to the premises, which she has a joint ownership of and which your client has unlawfully let to a third party without her consent. Your offer of access for purposes of a joint inspection is accordingly of no moment to her...'*²⁴

[38] The Applicant has rejected the Respondents tender for access as aforestated, which tender was again attempted by way of correspondence dated 14 September wherein the following proposition was made:

*'I reiterate our tender for access by prior arrangement to the premises, albeit for inspection or viewing. There is a tenant in the property and his arrangements must be taken into consideration and for this reason, amongst others, your client will not receive unfettered access to the property....'*²⁵

[39] A follow up email to the Applicant's Attorney on 19 September 2023 ensued requesting them to:

'Please urgently advise if your client has been able to arrange for someone to come and view the property and what the suitable times would be? This would be the ideal time for my client's own agent to also do an inspection of the property.'

²⁴ Notice of Motion, Annexure FA11, page 41.

²⁵ Notice of Motion, Annexure FA12, page 44.

*They are busy with repairs after the geyser burst, but you remain welcome to let us have suitable timeslots and dates for a viewing.*²⁶

[40] The stalemate situation between the parties is palpable and perceived by the Respondents that the Applicant wishes to subvert the oversight of the Executor of the estate and then use the Sheriff of the Court to have her own Deed of Sale endorsed. The acrimony between the parties was possibly further fuelled when the Second Respondent issued summons against the Applicant for the repayment of the amounts the deceased paid to the Applicant in terms of the Variation Agreement in the amount of approximately R914 000 together with interests and costs.

Conclusion

[41] The Applicant seeks that the Respondents be interdicted and restrained from preventing or otherwise hampering or hindering the Applicant in the exercise of her rights and sell the property. It is trite that the Applicant must establish the existence of a clear right, prove the occurrence or reasonable apprehension of an injury and demonstrate the absence of any other satisfactory remedy. Even though the Applicant has a clear right *ex facie* the court order to sell the property, this right cannot be viewed in a vacuum because the Second Respondent too has a statutory obligation to take control of the deceased estate. The Applicant's request for free and unfettered access to the property and direct access to the tenant is not without challenges as earlier discussed in this judgment. Effective implementation of Thulare J's order has to be viewed in the context of the Second Respondent's mandate and statutory authority as the Executor of the deceased estate. This factor

²⁶ Notice of Motion, Annexure FA13, page 45.

cannot be ignored as the circumstances have changed since the granting of the Thulare J order. The Applicant's right to freely market must now be viewed within the current context of the matter.

[42] The Applicant has the right to sell the property and Second Respondent has the obligation to take control of the estate assets. Inasmuch as the Applicant seeks to be placed on equal footing with the Second Respondent, it bears mentioning that the Second Respondent too does not have access freely to the property. There are practical realities which includes potentially marketing of this property with tenants in occupation. Furthermore, the Respondents have tendered compliance with the order of Thulare J. In my view, there appears to be no evidence of intervening or interfering provided by the Applicant that leads to the conclusion of paragraph 4 of the Notice of Motion.²⁷ In fact, the Counsel for the Applicant argued that it was burdensome for the Applicant to go through the Respondents legal representative. This protocol, in my view, may be an inconvenience but cannot be construed as an interference or hindrance.

[43] Therefore, I am not persuaded that the Respondents have prevented, hampered or hindered the Applicant in the exercise of her rights to market and sell the property in terms of the Thulare J order. Thus, the Applicant has failed to establish the trite prerequisite considerations that there was an infringement of a right or non-compliance with Thulare J's order. The various correspondence inviting an arrangement demonstrates the opposite as referenced earlier in this judgment

²⁷ '4. That the Respondents are interdicted and restrained from preventing or otherwise hampering or hindering the Applicant in the exercise of her rights to market and sell the property in terms of the aforementioned Court orders.'

and demonstrates the effectors made by the Second Respondent to give effect to Thulare J's order. Consequently, I am not satisfied on the facts before me that there is a reasonable apprehension of harm or any impending harm.

[44] A person will ordinarily not obtain an interdict if he can obtain adequate redress through another remedy. It is trite that the alternative remedy must be adequate in the circumstances, be ordinary and reasonable, be a legal remedy and grant similar protection. The general principle behind this requirement is that a person must first exhaust other remedies at his or her disposal before seeking an interdict. *In casu*, I am not persuaded that the Applicant has exhausted other remedies, one such remedy can be found within the Administration of Estates Act, as the Second Respondent is beholden to execute his duties as statutorily prescribed. The purported hindrances and/or obstructions could have been brought to the attention of the Master of the High Court.

[45] The onus of proof rests with the Applicant to establish on a balance of probabilities that she has made out a case for the relief she seeks. In the circumstances I am not persuaded that the Applicant has discharged the onus. In the circumstances, on a conspectus of the evidence before me, the application appears to be premature.

[46] Furthermore, it is apposite to take cognisance of the fact that the order of the court and the authority granted by way of statute/legislation which are both authoritative sources in our law, must be given effect to. These authoritative powers

are distinguishable by virtue of how they regulate the obligations and/or rights and/or interests that flow from it and ought not be regarded as competing and/or conflicting obligations and/or authorisations. It is my view that the two authorisations in the form of a court order and the other statutorily conferred, must continue to co-exist.

[47] For these reasons, the application falls to be dismissed.

Costs

[48] The Respondents contended that the Applicant's case is no more than an ill-conceived, speculative attempt at holding the estate of the deceased hostage and creating the pressure she needs to circumvent the Executor and sell the property for her own benefit.

[49] The history of this matter clearly sketches the conflictual situation between the parties as demonstrated by the numerous court applications insurmountable concomitant frustrations exposed in the papers, to the extent that the Applicant has apparently failed to comply or even consider the implications of Rule 41A regarding mediation of the matter.

[50] According to the Respondents, the Applicant has rejected the tenders to joint inspections and access to the property with prior arrangements with the tenants in the property which was made during the course of September 2023. The Applicant in her quest to level the proverbial playing field, launched a premature

application, with little or no regard to the potential infringement such recourse may have had on the lessees of the immovable property.

[51] Thulare J attempted to put this matter to rest and sternly addressed the parties in his judgment. It appears that the acrimony that existed between the Applicant and the deceased continues beyond the grave. Thulare J in his judgment remarked:

'[9] Whilst it is desirable that litigants should comply with this rule [Rule 41A], where the issue of non-compliance is raised, the interest of justice especially that which calls for expeditious and if possible immediate resolution rather than a removal from the roll and a referral of the matter back to the parties who are at loggerheads with no discernible prospects of a successful mediation, is a relevant consideration...

*[10] The positions of the parties are like oil and water. This is one of those matters where a referral back for mediation would simply elongate the emotional trauma to which both are subjected and, which trauma each of the parties is meeting out to the other without compassion. **The use of litigation by one to the other as a wand to hit back after divorce must be expeditiously brought to camp...**²⁸ (my emphasis)*

[52] I am however reminded about the remarks made by the court in the seminal case of *In re Alluvial Creek Ltd*²⁹ where the court opined that *'[t]here are people who enter litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.'*

²⁸ Paras 9-10 of the Thulare Judgment, Annexure FA3, page 27.

²⁹ 1929 CPD 535.

[53] The Respondents seeks punitive costs on the basis of numerous deficiencies which is tantamount to an abuse of the process. In ***Johannesburg City Council v Television & Electrical Distributors***³⁰, the court warned against making such an order when all the facts are known:

'Naturally one must guard against censuring a party by way of a special costs order when with the benefit of hindsight, a course of action taken by a litigant turns out to have been a lost cause.'

[54] In the exercise of my judicial discretion, I am inclined to heed to the caution and not censure the Applicant with a punitive cost order. I do however deem it apt to echo the sentiments expressed by Thulare J, that the interest of justice demands the expeditious and possible immediate resolution to the current impasse between the parties.

Order

[55] Having heard Counsel for the Applicant and Counsel for First and Second Respondents, and having read the papers filed of record, the following order is made:

- (a) The application is dismissed with costs.

³⁰ 1997 (1) SA 157 (A) at 177E-F.

ANDREWS, AJ

APPEARANCES:

Counsel for the Applicant:

Advocate A R Newton

Instructed by:

Nita Brand Attorneys

Counsel for the Respondent:

Advocate A J Van Aswegen

Instructed by:

Van Niekerk Groenewoud & Van
Zyl Inc

Heard on 23 October 2023

Delivered 10 November 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email.