

SOUTH AFRICA / JUDGMENT

# Fisher v Dericksen N.O and Others (65494/2020) [2021] ZAGPPHC 512 (29 July 2021)

[2021] ZAGPPHC 512

## COURT

North Gauteng High Court, Pretoria

## BEFORE

L Sisilana

## CASE / FILE NUMBER

65494/2020

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IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE: NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

NO

Case number: 65494/2020

In the matter between:

DIANNA FISHER

Applicant

and

MONIQUE DERCKSEN

N.O.

First Respondent

AB LOWE

ATTORNEYS

Second Respondent

THE MASTER OF THE HIGH

COURT

Third Respondent

MONIQUE

DERCKSEN

Fourth Respondent

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## JUDGMENT

### Introduction

1. Ms Dianna Fisher seeks an interim interdict against the distribution of the assets of the estate of her late partner, Mr Theunis Wright. But an interim interdict is granted pending something. Otherwise it is not interim. This is not a mere terminological point. And it is on this point that Ms Fisher's application runs into trouble. On her case, there is nothing pending which I am to grant the interim interdict. Remedially, that can mean one thing. It means that whatever interdict I may be inclined to grant will not be interim in its effect. It will be final since it will not be reversible on any later occasion except an appeal. But no case for a final interdict has been advanced or borne out by any of the allegations in the founding affidavit. The application must therefore fail. To explain my conclusion, to which I was driven despite my great sympathy for Ms Fisher's situation, I ought to say something about the facts.

### The facts

2. Ms Fisher is, as I say, the applicant. She seeks an interim interdict. The first respondent (Ms Monique Dercksen) is the executrix of her partner Mr Wright's estate. Ms Dercksen is also Mr Wrights' daughter. The second respondents are Ms Dercksen's attorneys in her capacity as an executrix of Mr Wright's deceased estate. The third respondent is the Master of this court, against whom no relief is sought, and who (for reasons that will appear) does not oppose this application. The fourth respondent is again Ms Dercksen, now in her capacity as the interstate beneficiary of Mr Wright's deceased estate.
3. Ms Fisher seeks the interim interdict only against Ms Dercksen, qua executrix, and her attorneys. No relief is sought against her in her other capacity. Nor is any relief sought against the Master, who, as I have said, is not opposing the application. Those, then, are the parties.
4. Ms Fisher initially sought to interdict the distribution of assets of Mr Wright's estate pending a review (brought simultaneously with the application for the interim interdict) of the alleged failure by the Master to take a decision regarding Ms Fisher's right to participate in the distribution of the deceased estate's assets.
5. The review was brought under sections 6(2)(g) and 6(3) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The PAJA challenge was that the Master had failed to take a decision on Ms Fisher's objection to the executrix's refusal (in a letter dated 22 October 2020) to recognise Ms Fisher's claim for maintenance against the estate. Prayer 1 of the notice of motion sought to review that failure and to compel the Master to take a decision on Ms Fisher's objection to the rejection of her maintenance claim against the deceased estate. Ms Fisher's case, therefore, was that the Master should decide whether the rejection by the executrix (Ms Dercksen) of her maintenance claim was well founded. Under which section\*\*

6. In order to understand how Ms Fisher came to make the request of the Master, the chronology in this regard is important. I will restrict myself only to those aspects necessary for my decision, omitting what the parties might regard as crucial but in point of law irrelevant to my decision.
7. Mr Wright passed away on 16 October 2018. On 10 June 2019 Ms Dercksen, his daughter, appointed as executrix of his deceased estate. On 9 July 2020 Ms Fisher submitted her claim for maintenance against the estate in the amount of R2 070 000. On 31 August 2020 Ms Dercksen lodged a draft liquidation and distribution account with the Master. On 2 October 2020 Ms Fisher was furnished with the distribution and liquidation account. On 14 October 2020 Ms Fisher lodged an objection to the liquidation and distribution account. On 22 October 2020, Ms Dercksen rejected Ms Fisher's claim for maintenance.
8. Following the rejection of her claim by Ms Dercksen, Ms Fisher wrote to the Master on 23 October 2020, noting that her claim had been rejected and requested a meeting with the Master to resolve the matter. The requested meeting did not take place. I note, as this point, that Ms Fisher's letter of 23 October to the Master did not indicate the provision upon which she relied for the intervention of the Master.
9. On 10 December 2020, Ms Fisher issued this application seeking, as I have said, an interim interdict pending the final the resolution of the matter by the Master. Ms Fisher contended in the notice of motion that the decision she sought to compel the Master to take was to be taken under section 95 of the Administration of Estates Act.
10. However, before respondents could file answering affidavits, the Master issued a report on 24 December 2020, in which he said he could not decide whether Ms Fisher's objection was valid or not. He therefore advised that only the court could decide that question.
11. Therefore by the time the respondents filed their answering affidavit in this matter (on 1 February 2021), the Master had in effect decided to reject Ms Fisher's objection to the rejection of her maintenance claim on the ground that that question was to be resolved by the court. Naturally, the respondents' answering affidavit pointed this out; for by the time it was filed the Master's view had been rendered.
12. This left Ms Fisher in something of a fix. By the time she had to file a replying affidavit, prayer 1 could not be granted because the decision it sought to enforce had been taken by the Master. But prayer 2, the interim interdict, was to operate pending that very decision by the Master. This part of prayer 2 could therefore not be granted. There was however another part of prayer 2, the alternative part, which Ms Fisher could say, as she saw it, could still be granted. But that too was problematic, for reasons I shall explain. In order to follow this, it is necessary to quote prayer 2:

*“That the first and second respondent[s] be interdicted to [sic] proceed with the finalisation and distribution of any of the assets or monies in the estate under Estate number 000621/2019 pending the outcome of the decision as set out in prayer 1 alternatively after finalisation of any dispute in terms of section 95 of the Administration of Estates Act, 66 of 1965”*

13. Prayer 2, then, sought the interim interdict pending the decision by the Master, which it was said he had failed to make. In the alternative, Ms Fisher sought the interdict pending the finalisation of any dispute in terms of section 95 of the Administration of Estates Act 66 of 1965. That section provides that:

*“95. Review of Master’s appointments, etc.—Every appointment by the Master of an executor, tutor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master under this Act shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby, and the Court may on any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be.”*

14. However, as I have said, by the time the respondents had filed answering papers, the Master had made his decision the alleged failure to take which was by prayer 1 was sought to be reviewed. The position, when Ms Fisher came to file her replying affidavit, was that the review could not succeed because the decision (which it was said the Master had failed to take) had in fact been taken. In her replying affidavit, Ms Fisher acknowledged as much when she said at paragraph 3.4 that “I would not persist with prayer one of the notice of motion.” Her express reason, set out in paragraph 3.3 of the replying affidavit, was that the Master had indeed taken the relevant decision on 24 December 2020.
15. The result was that, on the notice of motion, Ms Fisher could only say that the interdict should be granted pending the section 95 appeal or review. I shall come back to what, in Ms Fisher’s view, the section 95 decision related to. For the present, I note only that Ms Fisher, for the first time in her replying affidavit, said that there was an obvious dispute as to her entitlement to share in the assets of the deceased estate and that, therefore, she would issue summons in which she sought a declaration that she was in “life partnership” with Mr Wright and that, in that capacity, she was entitled to maintenance from his deceased estate. Her maintenance claim amounted to R2 702 500.00. The value of the estate, according to the “draft” liquidation and distribution account, was approximately R489 500.00. The particulars of claim, proposed to be issued in due course, were then attached to the replying affidavit.
16. Understandably, there was an objection to parts of the replying affidavit as constituting new matter or, at any rate, a new case. It was also said that the replying affidavit was late and should therefore not be admitted. I indicated that I would hear the whole application and thereafter decide on the admissibility of the replying affidavit or parts of it. Ms Bronkhorst for the respondents mounted a vigorous argument why the late filing of the replying affidavit should not be condoned, and why, if condoned, certain parts of the replying affidavit should not be admitted into evidence.

17. I do not find attractive, even if technically correct, to decide this matter on condonation: the matter is plainly important to Ms Fisher, and it would puzzle her to be non-suited on condonation. I am therefore prepared to assume that Ms Fisher has made out a case for condonation of the late filing of the replying affidavit. It is however quite another matter whether Ms Fisher is permitted to mount a new case in the replying affidavit. Whether or not she has done so is a matter to which I must now turn.
18. It is necessary in this connection to go back to the notice of motion, and to the question I deferred earlier, namely what Ms Fisher says is the section 95 decision pending which the interim interdict should be granted. The interim interdict is now only sought pending the resolution of a “dispute” in terms of section 95 of the Administration of Estates Act. That section provides in the relevant part for the appeal or review of decisions, rulings or orders by the Master to the High Court. It says that:

*“... every decision, ruling, order, direction or taxation by the Master under this Act shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby...”*
19. Ms Swart, who appeared as counsel for Ms Fisher, submitted that the Master’s decision of 24 December 2020, declaring that there was a dispute of fact resolvable only by a court, was the decision to which the proposed particulars of claim (annexed to the replying affidavit) related. I say “related” because the particulars of claim are not an appeal or review pending which an interim interdict could be granted. The particulars of claim would commence an action by which a declaration and a maintenance claim are sought. They may be being sought because of the decision of the Master. But they were not a review or appeal of that decision. Therefore, as matters stand, there is no review or appeal pending which the interdict sought could be granted. This, quite apart from anything else, is in my view fatal against Ms Fisher’s application. She cannot get interim interdict.
20. Second, Ms Fisher was required to show that she has a prima facie right to the relief sought in the section 95 appeal or review. If, as I have found, the action in the High Court she proposes bringing is not a section 95 appeal or review, but an action, then she cannot even begin to assert a prima facie right based on success in that action.
21. There is another factor. The respondents could not pertinently deal in their answering affidavit with the question whether a prima facie case founded on the proposed particulars of claim had been made out (even assuming it to be relevant). This was because that case was sought to be made in the replying affidavit. It was therefore right for the respondents to argue, as they did, that

because the whole prima facie case for the interdict was based on the viability of the proposed particulars of claim, they were not obliged to deal with that prima facie case, coming as it did late in the day.

22. For the reasons given above, I have found that the late filing of the replying affidavit should be condoned. On whether Ms Fisher has made out a case for the interim interdict she seeks, I find that she has not because there is no relevant dispute under section 95 pending the appeal or review of which any interim interdict would run. No case for final relief was or could be made. Therefore the application is dismissed. I wondered whether it was fair to award costs against Ms Fisher since she is not responsible for the legal aspects of the conduct of this litigation. In the end, however, I consider, sympathetic as I am to her situation, costs must follow the cause. I make the following order:

The application is dismissed with costs.

L. SISILANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

Ms L Swart

For the 1st, 2nd and 4th respondents: Ms M Bronkhorst

Attorneys:

For the applicant:

Van der Hoff Cloete Attorneys, Pretoria

For the 1st, 2nd and 4th respondents: AB Lowe Attorneys, Pretoria

Date of Hearing : 28 May 2021

Date of Judgment : 29 July 2021

Judgment transmitted electronically

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Prepared on 9 October 2026 · Esheria