

SOUTH AFRICA / JUDGMENT

Njokweni v Qina and Others (3839/2022) [2023] ZAECMHC 13 (23 March 2023)

[2023] ZAECMHC 13

COURT

Eastern Cape High Court, Mthatha

BEFORE

Bands

CASE / FILE NUMBER

3839/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

Case No. 3839/2022

In the matter between:-

AMEN NJOKWENI Applicant

and

THANDUXOLO QINA

First Respondent

DEPARTMENT OF JUSTICE AND CORRECTIONAL

Second Respondent

SERVICES

THE MASTER OF THE HIGH COURT, MTHATHA

Third Respondent

JUDGMENT

BANDS AJ:

[1] The application was brought in two parts. Only part A of the application was before me for determination.

- [2] The applicant applied to interdict and restrain the first respondent, on an urgent basis, from dissipating, tampering with or otherwise disposing of the assets of the estate of the late Nkokheli Sizwe Njokweni (“the deceased”), pending the outcome of the relief set out in part B of the Notice of Motion.
- [3] Part B is an application for rescission of an order of this court, granted on 8 November 2022, directing the third respondent to accept a copy of the deceased’s Will as his last Will and Testament (interchangeably referred to as “the order” and “the Will proceedings” as the context dictates). The applicant, in seeking the rescission, relies on the provisions of Uniform Rule 42(1)(a);[1] alternatively, the common law.[2] The applicant further seeks an order that the appointment of the first respondent as the master’s representative of the deceased’s estate be declared unlawful and that he be removed as the executor of the deceased’s estate, together with ancillary relief.
- [4] Part A of the application was opposed by the first respondent[3] on two grounds. Firstly, that the application is not urgent, and secondly, that the applicant has failed to meet the requirements

for an interim interdict. Prior to dealing with the aforesaid issues, and the relevant applicable legal principles, I turn briefly to the common cause facts.

- [5] Pursuant to the demise of the deceased on 6 January 2021, the first respondent called a meeting at his offices with the deceased’s children, on 5 June 2021. During the meeting, the first respondent read out the contents of the deceased’s Will and provided the deceased’s children with copies thereof. Clause 3 of the Will reads as follows:

“I hereby appoint Mr Tanduxolo Richard Qina of Qina & Sons Attorneys to be the executor of my estate and the Master of the High Court should dispense with furnishing security by my executor.”

- [6] That such a meeting was held, was pertinently raised by the first respondent in an answering affidavit filed by him in a separate application, to which the applicant and the first respondent are parties, under case number 3841/2022. I return later, in this judgment, to these latter proceedings, which are running parallel to the present application. Such meeting was further raised by the first respondent in his founding affidavit filed in the Will proceedings. The answering affidavit filed by the first respondent in the application under case number 3841/2022, to which a copy of the papers filed in the Will proceedings was attached, is incorporated into the first respondent’s answering affidavit filed in the present application. Accordingly, both prior affidavits are before me. The applicant, in paragraph 37.2 of his founding affidavit in the present proceedings, confirms the holding of such a meeting.
- [7] Notwithstanding the aforesaid, and on the basis that the deceased had died intestate, the applicant, following his nomination, was appointed as the Master’s Representative in accordance with the provisions of section 18(3) of the Administration of Estates Act 66 of 1965 on 29 July 2021. The applicant, in the face of the aforesaid common cause facts; and the

positive assertions made by the first respondent, in all three of the aforementioned proceedings, regarding the applicant's concealment of the Will at the time of his appointment, is silent on how he came to be appointed in such circumstances.

- [8] Following the applicant's appointment, the applicant launched the application under case number 3841/2022, seeking that the first respondent be ordered to give a full account of the estate money held in the first respondent's trust account; and that such monies be paid over to the estate account, held by the applicant. The first respondent opposed the application inter alia on the basis that: (i) the deceased had executed a valid Will in terms of which he was nominated as the executor; (ii) the applicant, at the date of his appointment, was aware of the existence of the deceased's Will and concealed this fact from the third respondent; (iii) the applicant's appointment was irregular and unlawful; (iv) should the first respondent be ordered to pay the monies to the applicant, such payment would be in direct conflict with the wishes of the deceased as expressed in his Will; and (v) the first respondent had launched the Will proceedings, under case number 3839/2022, seeking an order that the third respondent be directed to accept a copy of the deceased's Will.
- [9] I pause to mention that whilst the applicant was not cited as an interested party in the Will proceedings nor was a copy of the application served on him at the time of its issue on 5 August 2022,[4] the first respondent's answering affidavit, under case number 3841/2022, to which a full copy of the papers filed in the Will proceedings was attached, was served on the applicant's attorney of record on 30 August 2022. I pause to mention that the applicant is represented by the same firm of attorneys across all the aforementioned applications.
- [10] The Will proceedings ultimately served before the court on 8 November 2022, unopposed, and the order was issued. Subsequent thereto, by letters of authority granted by the Assistant Master of the High Court, Mthatha, on 13 December 2022, the first respondent was appointed as the Master's Representative of the deceased's estate.
- [11] I return to the facts, as alleged by the applicant, which form the basis for the interim relief sought. In short, the applicant contends that the first respondent brought the Will proceedings and obtained the order, which the applicant seeks to rescind, in a clandestine manner.
- [12] The applicant further contends that he only became aware of the order, and subsequent letters of authority granted in favour of the first respondent, on 9 January 2023. He thereafter caused correspondence to be directed to the first respondent on 13 January 2023 seeking an undertaking that the first respondent refrain from implementing the terms of the Will and "pend the liquidation and distribution of the deceased's estate pending the rescission application sought to be made shortly." The first respondent communicated his refusal to accede to such request on 16 January 2023. The application was thereafter launched on 18 January 2023 and served on the first respondent on the same day. Whilst the

matter was originally set down for hearing on 24 January 2023 before Tokota J, being an ordinary motion court day, the matter was postponed to 31 January 2023 for argument, presumably due to the applicant's replying affidavit having been filed at 08h18 on the morning of 24 January 2023.

- [13] The applicant seeks to create the impression that he had no knowledge of the application in the Will proceedings prior to 9 January 2023. This is patently false. Significantly, whilst the applicant refers to the papers filed by the first respondent in the application under case number 3841/2022; he is decidedly silent on the fact that a copy of the Will proceedings had been attached thereto. Accordingly, as of 30 August 2022, some 5 months prior to the launch of this application, the applicant was aware of the Will proceedings and the relief sought therein and, for whatever reason, elected not to enter the fray.[5] The applicant offers no explanation for his inaction, despite having knowledge of the proceedings, nor for his non-disclosure of such knowledge in either of his affidavits filed in the present application. The applicant's failure to disclose to this court, what I consider to be a material fact, casts doubt on the bona fides of the applicant.
- [14] I pause to mention that the applicant, prior to the launch of any of the aforementioned proceedings, was expressly advised in writing by the first respondent on 7 July 2022, of his ongoing communication with the offices of the third respondent regarding the location of deceased's original Will[6] and of his intention to implement the wishes of the deceased in accordance therewith. High Court proceedings were threatened, should they be necessary. It can accordingly come as no surprise to the applicant that the first respondent, upon obtaining the order, and following his appointment, would seek to implement the Will without further delay.
- [15] In the circumstances of such inaction on the part of the applicant, in the context of the present proceedings, I am of the view that any urgency, which may have existed, if any at all, is self-created. An applicant cannot content itself to merely sit back and delay the assertion of his or her rights, and by doing so, create his or her own urgency. Such conduct does not amount to urgency justifying the determination of the matter in accordance with Rule 6(12). [7]
- [16] It is trite that in the event of a finding that the matter is not of sufficient urgency to warrant being entertained in accordance with Uniform Rule 6(12), the appropriate order is generally to strike the matter from the roll.[8]
- [17] However, in the event that I am incorrect in my decision on urgency, I am in any event not satisfied that the applicant has made out a case for the granting of an interim interdict. Accordingly, in the exercise of my discretion, I turn to deal with part A of the application.

- [18] The applicant, in order to persuade this court that he is entitled to an interim interdict, must establish: (i) the right that forms the subject matter of the main application and which he seeks to protect, on a prima facie basis at least (even if open to come doubt); (ii) a well-grounded apprehension of irreparable harm if the interim interdict is not granted and the ultimate relief sought in the main application is eventually granted; (iii) the balance of convenience favours the granting of interim relief; and (iv) he has no other satisfactory remedy.[9]
- [19] The proper approach for deciding matters of this nature was articulated in *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another*: [10]

“Save that the requirement of a prima facie right established though open to some doubt, is the threshold test, the factors are not considered separately or in isolation, but in conjunction with one another in the determination of whether the Court should exercise its overriding discretion in favour of the grant of interim relief. I refer here to Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D); Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and 1 1996 (3) SA 706 (C) at 714C-G Page 10 of 19 Another 1973 (3) SA 685 (A) and Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T).

In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is prima facie established though open to some doubt.

The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.

It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right prima facie established, though open to some doubt, involves two stages. Once the prima facie right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed.”

[20] In considering the elements of an interim interdict in the context of

the present application, I make no factual findings in respect of part B of the applicant's application. I now turn to consider the said elements.

Prima facie right

[21] On a proper construction of the applicant's papers, and simply put, the applicant's right, which he seeks to protect, is his right^[11] to inherit as an intestate heir of the deceased's estate. The applicant further relies on his right to take control of the assets of the deceased estate. In this regard, the applicant's contention is that "[a]cceptance of an invalid Will by the Master of the High Court directly effects my right to take control of the assets of the estate." Of necessity, such rights can only exist in the absence of the deceased's Will.

[22] In the context of this application, and in light of the relief sought in part B for a rescission, it is required of the applicant to establish, *prima facie*, that material facts were withheld from, or deliberately misrepresented to the court, or that the order was sought without notice to the applicant;^[12] alternatively, that there is a reasonable explanation for the applicant's default; that the application has been made *bona fide*; and that the applicant has a *bona fide* defence, which *prima facie* has some prospect of success.^[13] In respect of the further relief sought by the applicant for the removal of the first respondent as the Master's representative,

the applicant is required to establish, *prima facie*, conduct justifying such relief. The aforesaid is to be considered with due regard to the principles referred to in *Steak Ranches Ltd and Others* (*supra*).

[23] The applicant proceeds from the premise that the order was granted on

the basis of "misrepresentation, non-disclosure or fraud." In developing this argument, the applicant contends that the first respondent concealed from the court, communication between his offices and the third respondent, dated 11 May 2023, in which the third respondent alleges not to have received the original Will. The applicant's contention is misleading.

[24] The letter in question was attached by the first respondent to his founding affidavit in the Will proceedings, as annexure "TQ7". Seemingly, the purpose of such allegation is that "had the Court known that the original Will was never given to the Master, the court would not have granted the application on the basis that the Will was lost." The reason for such contention is that the High Court, in directing the third respondent to accept a copy of the deceased's Will as his last Will and Testament, directed "an illegality" given that there exists no provision in the Administration of Estate's Act which permits the lodgement of a copy of a Will. The applicant loses sight of the fact that this is precisely the reason why the first respondent launched the Will proceedings, which are legally competent. It is immaterial whether the first or third respondents had ever been in possession of the deceased's original Will.

[25] The applicant further contends that the third respondent's decision not to accept the copy of the deceased's Will, prior to the granting of the order, stands until set aside. In the face of the order expressly directing the third respondent to accept the copy of the deceased's last Will and testament, such contention has no foundation in law.

[26] In addition, it is the applicant's case that the first respondent, in the Will proceedings "did not tell [the] court that we considered the Will" to be "an end product of forgery" and moreover that the Will in question is invalid in numerous respects. The applicant, apart from the aforesaid broad

allegations, says no more regarding the alleged forgery nor does he state the manner in which he contends the Will to be invalid.

The applicant has failed to present evidence of a single primary fact in support of the aforesaid contentions, in the absence of which, such contentions amount merely to conclusions of law.[14]

[27] It is trite that where proceedings are brought by way of application, it is incumbent upon an applicant to raise the issues on which it seeks to rely, in the founding affidavit. It must define the relevant issues and set out the evidence upon which it relies to discharge the onus of proof resting on him or her.[15]

[28] This is more so in the present application where the first respondent, in his affidavit filed in the proceedings, under case number 3841/2022, as well as in his affidavit filed in the Will proceedings, repeatedly stated inter alia that (i) at the time of the deceased's death, the deceased and his wife were already divorced; (ii) the deceased and his children had no relationship whatsoever; (iii) the deceased, on 27 February 2019, procured an order evicting his ex-wife; (iv) the deceased had purposefully disinherited his children and ex-wife; and (v) when the Will was read to them in June 2021, the deceased's children were not shocked to hear of their disinheritance.

[29] The applicant in the present proceedings makes no attempt to address the aforesaid allegations, which on the probabilities, favour the existence of the Will. Moreover, on the probabilities, had the applicant been of the view that the Will was forged; alternatively, invalid, not only would he, upon becoming aware of the Will in June 2021, have brought an application to declare the Will invalid, which application has to date not been brought, but it is highly improbable that the applicant would have remained on the side-lines upon becoming aware of the Will proceedings on 30 August 2022.

[30] The applicant further alleges that the letters of authority issued to

the first respondent are irregular in that section 18(3) of the Administration of Estates Act is not applicable to persons nominated to act as an executor in terms of a will. The basis for such submission is presumably a misreading of the heading to section 18(3), which reads:

"[p]roceedings on failure of nomination of executors or on death, incapacity or refusal to act, etc." The applicant, in quoting the aforesaid heading has mistakenly omitted the abbreviation "etc", and has accordingly sought to interpret the heading, as a closed list, with insufficient regard to the provisions contained therein.

[31] In terms of section 18(3):

“If the value of any estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed.”

- [32] Accordingly, regardless of whether a deceased has died intestate or not, where the value of the estate is less than R250,000.00, being the current amount determined by the Minister by notice in the Gazette, the Master may instead of issuing letters of executorship, issue letters of authority in terms of section 18(3). The further allegation that neither the applicant nor his family members were called upon to make recommendations to the third respondent regarding the proposed executor is immaterial in the context of the present matter and is accordingly misplaced.
- [33] Lastly, the applicant’s alleges that the first respondent has wilfully made a false inventory and accordingly has committed an offence in accordance with section 102 of the Administration of Estates Act and falls to be removed as the Master’s Representative in terms of section 54 of the Act. In support of this allegation the applicant relies on the assets, as recorded in the first respondent’s letter’s of authority, and on the allegation that R500,000.00, which the applicant contends to have been paid to the first respondent by the deceased, does not form part of the assets listed in his letters of authority.
- [34] On the applicant’s own version “[a]n amount of R500,000.00 is accepted to have been paid to [the first respondent] by my late father but for a different reason.” This different reason, as alleged by the first respondent in his affidavit filed in the application under case number 3841/2022, upon which affidavit the applicant relies for the aforesaid allegation, is that the said sum of money was paid to him by the deceased for litigation costs pertaining to various litigious matters handled by him on behalf of the deceased. In any event, on the probabilities, and in the absence of any evidence to the contrary, there is nothing to suggest that list of assets recorded in the first respondent’s letters of authority, including the values thereof, were not simply obtained by the third respondent from the inventory already submitted by the applicant. I say this because the deceased’s assets and their values as contained in the first respondent’s letters of authority are identical to those reflected in the applicant’s letters of authority.
- [35] For the above reasons I am not persuaded that the applicant, on his own version, has met the threshold test, which version is in any event cast into serious doubt by the facts set out by the first respondent, which the applicant cannot dispute.
- [36] In light of the aforesaid finding, it is not necessary to consider the remaining elements of an interim interdict. Notwithstanding this, I intend to briefly address the elements pertaining to:

- (i) the apprehension of irreparable harm should the interim relief not be granted; and (ii) the absence of a satisfactory alternative remedy. My failure to deal with the element regarding the balance of convenience does not mean that I have found same to be present, such issue is left open).

Irreparable Harm

[37] The contention that the applicant will suffer irreparable harm is set

out rather vaguely in the applicant's founding affidavit, such allegations being confined to paragraph 75 thereof, which reads as follows:

"My mother who was married in community of property with my deceased father, my siblings and I will suffer irreparably once the impunged

Will is accepted. Once Mr. Qina effects the liquidation and distribution of my father's estate and render (sic) his account, I and my family members who are deceased heirs will suffer irreparably."

[38] Leaving aside that the Will has already been accepted, the said allegations amount to no more than a broad conclusion, in support of which no primary facts have been placed before this court. Irreparable harm may be defined as the loss of property (including incorporeal property and money) in circumstances where its recovery is impossible or improbable. The applicant makes no allegation that recovery of any money, if distributed by the first respondent, would be impossible or improbable.

[39] No information is provided as to why the applicant contends that he or any of the other intestate heirs will suffer irreparably, and accordingly the applicant's assertion, as set out above, is, in my view, insufficient to establish a well-grounded apprehension of harm, should the interim interdict not be granted.

[40] The further allegations upon which the applicant seeks to rely under this heading, which were raised in the applicant's heads of argument for the first time, presumably to address the shortcomings

on the applicant's papers, are not properly before me and cannot serve to assist the applicant.

[41] I now turn to consider the absence of an alternative satisfactory remedy.

No other satisfactory remedy

[42] This element is often closely linked to the element regarding the apprehension of irreparable harm since if there is some other satisfactory remedy, the injury cannot be described as irreparable.

[43] As already stated, there is no evidence before this court which suggests that the recovery of any money, if distributed by the first respondent, would be impossible or improbable. Moreover, the applicant makes no allegation as to why no alternative legal remedy is available to him and more particularly, why he cannot obtain

adequate redress in some or other form of relief in the event of an eventual finding that the deceased had died intestate. By way of example, nothing precludes the applicant from claiming, by way of an enrichment action, payment of the money distributed to any beneficiary under the Will.

[44] I am accordingly not satisfied that the applicant has established the absence of an alternative satisfactory remedy.

[45] For the reasons set out, the applicant's application for an interim interdict cannot succeed. I see no reason why the costs should not follow the result. The first respondent, in the heads of argument filed of record, does not persist with an attorney client cost order. I am, in any event, not inclined to grant such a cost order herein.

[46] I make the following order:

1. The application for an interim interdict is dismissed with costs.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Mr Zono Instructed by: A.S. Zono & Associates Suite 153 – 1st Floor, ECDC Building Mthatha For the first respondent: Mr Sintwa Instructed by: T. Qina and Sons 28 Madeira Street Clublink Building Mthatha Coram: Bands AJ Date heard: 31 January 2023

Judgment

delivered: 23 March 2023

- [1] The applicant contends that the order was erroneously sought and erroneously granted in his absence.
- [2] It is the applicant's case that the order was granted on the basis of misrepresentation; non-disclosure; or fraud.
- [3] The second and third respondents abide by the decision of this court.
- [4] For which the first respondent proffers no explanation.
- [5] For example, by launching intervention proceedings.
- [6] And the third respondent's contention that only a copy had been lodged.

[7] Lindeque and Others v Hirsch and Others, In Re: Prepaid24 (Pty) Limited (2019/8846) [2019] ZAGPJHC 122 (3 May 2019). See also: Masipa and Another v Masipa (23224/2020) [2020] ZAGPPHC 214 (4 June 2020).

[7] Lindeque and Others v Hirsch and Others, In Re: Prepaid24 (Pty) Limited (2019/8846) [2019] ZAGPJHC 122 (3 May 2019).

See also: Masipa and Another v Masipa (23224/2020) [2020] ZAGPPHC 214 (4 June 2020).

[8] Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others 2006

(4) SA 292 (SCA).

[9] Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton & Another 1973 (3) SA 685 (A).

[10] 1996 (3) SA 706 (C).

[11] As well as the rights of his siblings and his mother to inherit as intestate heirs of the deceased.

[12] This being with reference to the relief sought by the applicant in accordance with Uniform Rule 42(1)(a).

[13] This being with reference to the alternative relief sought by the applicant in accordance with the common law.

[14] Rees and Others v Harris and Others 2012 (1) SA 583 (GSJ). See also: Swissborough Diamond Mines (Pty) Limited and Other v Government of the Republic of South Africa and Others 1999 (2) SA 279 (W). See also: Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A).

[14] Rees and Others v Harris and Others 2012 (1) SA 583 (GSJ).

See also: Swissborough Diamond Mines (Pty) Limited and Other v Government of the Republic of South Africa and Others 1999 (2) SA 279 (W).

See also: Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A).

[15] Swissborough Diamond Mines (Pty) Limited and Other (supra).

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