1143

THE HIGH COURT OF SWAZILAND

THOKOZILE DLAMINI

Applicant

And

MASTER OF THE HIGH COURT

1st Respondent

MANENE THWALA N.O.

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

Civil Case No. 2617/2002

Coram	S.B. MAPHALALA – J
For the Applicant	MR. C.J. LITTLER
For the 1st Respondent	IN ABSENTIA
For the 2nd Respondent	MR. M. THWALA
For the 3rd Respondent	IN ABSENTIA

JUDGMENT

(19/09/2002)

The Application

The applicant brought this application as one of urgency. The urgency lay in the subject matter of the dispute which has arisen. The dispute is between the applicant on the one hand and the second respondent on the other. It concerns the estate of the late Gilbert Fanukwente Dlamini. I will refer to him as the testator. The 1st and 3rd respondents are cited in these proceedings in their nominal capacities and they did not file any papers either way.

The applicant is applying for an order in the following terms:

1. That the above Honourable Court dispense with normal and usual requirements of the Rules of the above Honourable Court relating to service of process and notices and that the matter be heard on an *ex-parte* basis as a matter of urgency.
2. That a Rule Nisi do hereby issue calling upon the respondents to show cause on a date and time to be fixed by the Honourable Court why the following orders should not be made final;
3. That the letters of administration granted in favour of the 2nd respondent in the estate of the Late Gilbert Fanukwente Dlamini, Masters Reference No. E.M. 364/2000 be withdrawn and/or set aside and/or declared of no force and effect pending the final determination of an action being instituted by the applicant declaring the Will of the Late Gilbert Fanukwente Dlamini to be invalid and of no force and effect.
4. That the 2nd respondent surrenders the said letter of administration to the Master of the High Court;
5. That the 2nd respondent and anyone acting under his instructions in the administration of the Estate of the Late Gilbert Fanukwente Dlamini be directed to place before the court a full account of all steps taken in the administration of the estate and any assets in the estate of which he or they have gained control.
6. That the 2nd respondent or anyone acting under his instructions in the administration of the estate of the Gilbert Fanukwente Dlamini be interdicted and restrained from taking any further steps instituted by the applicant to determine the validity or otherwise of the Will of the late Gilbert F. Dlamini dated the 8th May 2000.
7. That the Master of the High Court be and is hereby interdicted and restrained from allowing and/or permitting any further action to be taken in respect of the administration of the above estate by the 2nd respondent.
8. That the above honourable court appoint Sifiso Sibande of attorneys Maphanga, Howe, Masuku and Nsibande as curator to look after the assets and interests of the estate pending

the finalization of both this application and the action referred to in paragraph 2 and 5 above.

9. Directing the curator to forthwith release sufficient funds to applicant from her half (1/2) share of the joint estate for purposes of paying her medical expenses.

10. That order 2, 3, 4, 5, 6 and 7 above operate with immediate effect as an interim order pending the finalization of the matter.

11. That this honourable court give directions as to the mode of service of the summons upon the numerous persons and institutions named in the disputed Will whose addresses and legal capacity does not appear *ex facie* the Will;

a) that the respondent pay the costs of this application in the event that it is opposed;

b) Further/or alternative relief.

At the commencement of arguments before me paragraph 8 was amended with the consent of the 2nd respondent to read:

> "That the above honourable court appoint Sifiso Nsibandze of attorneys Maphanga, Howe, Masuku , Nsibandze or any other suitable person as curator to look after the assets and interest of the estate pending the finalization of both this application and the action referred to in paragraph 2 and 5 above".

The application is based on the founding affidavit of the applicant herself supported by that of one Ncane Mary Simelane who was also married to the testator in terms of Swazi law and custom, that of one Elliot Ngozo who is traditional healer who treated the testator before his death; and the supporting affidavit of one Lungile Dlamini who was employed at the Mbabane Government Hospital as Staff Nurse and was one of the witnesses in the disputed Will. Her supporting affidavit is confirmed by that of one Thembi Dlamini who was also a nurse at the Mbabane Government Hospital and also witnessed the signing of a document which had been prepared by attorneys from Manzini on behalf of the testator. These affidavits are accompanied by pertinent annexures, viz "TED1" being marriage certificate of the marriage between the applicant and testator; "TED2" being letters of administration appointing the second respondent as executor testamentary; "TED3" being the last will and testament of the testator; "TED4" being a letter from the Deputy Master of the High Court to the executor (2nd respondent) dated the 10th July 2002, making a number of observations about the performance of the 2nd respondent in the liquidation process of the estate;

and annexure "TED5" being a letter from a doctor confirming that the applicant suffers from hypertension, diabetes, mellitus and osteo-arthritis. She is on medication for these chronic conditions, which cost about E900-00 a month.

The 2nd respondent joined issue with the applicant by filing a Notice of Intention to Oppose and thereafter his answering affidavit. He also annexed a Notice of Withdrawal of the counter application by applicant's attorney in Case No. 1254/2001 which features in his answer to the applicant's claim.

The applicant then filed her replying affidavit together with annexure "TED6" being a letter from the Deputy Master of the High Court to one Miss Duduzile Dlamini dated the 27th August 2002 authorizing attorney Q.M. Mabuza to deduct a sum of E24, 954-84 from their trust account payable in cheque form to Duduzile Dlamini so as to enable her to prepare for the cleansing ceremony of the testator scheduled to take place on the 13th September 2002.

The applicant further moved a motion to strike out a certain paragraph of the 2nd respondent's answering affidavit. The motion seeks to strike out the entire paragraph 2 of the 2nd respondent's answering affidavit on the following grounds:

1. That the allegations contained therein are completely irrelevant in as much as they have absolutely nothing to do with the issue which has to be tried by the court namely:
    a) whether or not the potential invalidity of the contested Will justifies the granting of the interim orders prayed for; and
    b) whether if the facts deposed to by the applicant and her witnesses justify a finding that the Will is potentially invalid and are sufficient to render the matter fit for a full-blown trial.

2. The matters raised in this paragraph are irrelevant for the further reason that the counter-application in which applicant questioned the validity of the Will in the case number quoted has been withdrawn and is no longer before the court.
3. Lastly the contents of the paragraph objected to are irrelevant, prejudicial and embarrassing in as much as they relate to the cancellation of a Deed of Transfer and any evidence led in relation to it would be inadmissible as irrelevant to the issue for decision in the present case before the court namely whether or not the Will is valid.

When the matter came before me on the 10th instant it was agreed that the motion to strike out would be argued first and then the main application on the merits. I heard arguments on both in that order and reserved my judgment.

The History of the matter

The brief history of the matter is that the applicant is the testator's wife married by civil rites in community of property. The testator had other two wives who he married in terms of Swazi law and custom. The second respondent was appointed executor testamentary in the testator's deceased estate. The testator made his last Will and testament on the 8th May 2000 where he set up a trust and appointed the 2nd respondent as the executor of the Will. Incidentally the 2nd respondent facilitated as legal advisor in the drawing of the Will and the signing thereafter. It is common cause that the testator signed this Will at the Mbabane Government Hospital where he was a patient with a chronic and debilitating illness which ultimately claimed his life in South Africa shortly thereafter.

The testator for most of his life was a civil servant who was retired and pensioned during or about 1990 whilst employed as a Deputy Secretary in the Ministry of Works Power and Telecommunications. Shortly after his retirement during or about November 1991, he fell seriously ill. The nature of his illness was mental affliction. It is alleged by the applicant that during his mental illness the testator became extremely aggressive and violet and he withdrew from his bank virtually all his life savings including the money he had received as his pension and terminal benefits. What remains as the major asset of the estate and the sole source income (rental) of deceased is Lot No. 1591 Extension 12 Mbabane which is let out for rent at about E3, 000-00 per month. This major asset was not mentioned in the Will but other assets which applicant described as absurd as they do not exist.

The applicant challenges the validity of this Will on two grounds. Firstly, that the testator was so inflicted with mental illness that he was completely irrational and was not in his right mind. Secondly, applicant claims that the last Will and testament of the deceased, was not executed in terms of the Wills Act No. 12 of 1955, specifically Section 2 (ii) and (iii).

The applicant asserts that the purpose of this application is:

a) To have the appointment of the 2nd respondent as executor suspended and that Letters of Administration surrendered to the Master and declared of no legal force and effect pending the final determination of an action being instituted by the applicant for an order declaring the Will dated 8th May 2000, to be invalid and revoking the Letters of Administration.

b) To obtain an interim order in terms of which a curator is appointed to take control of the estate assets for purposes of safe guarding them for purposes of advancing applicant funds to pay her medical expenses and general maintenance and support.

The applicant is now wheelchair bound and she desperately requires financial assistance.

The Applicant's Submissions

Mr. Littler filed Heads of Arguments in this matter and his submissions followed the format outlined therein. In support of the motion to strike out paragraph 2 of the 2nd respondent's answering affidavit he contended that the matters raised in this paragraph are irrelevant in that the counter application in which applicant questioned the validity of the Will in Case No. 2617/2002 has been withdrawn and is no longer before the court.

On the application itself it is contended on behalf of the applicant that the facts set out in support the applicants case clearly establish: a) a clear right in favour of the applicant to the interim relief sought; b) an injury actually committed by the 2nd respondent by his refusal to pay her any maintenance and her medical expenses resulting in her being permanently being confined to a wheel-chair and an injury or loss reasonably apprehended viz the unlawful release of estate money to people who are not entitled to it for unlawful purposes and resulting in irretrievable loss. 2nd respondent has failed to account despite two years having lapsed since the issue of Letters of Administration. Applicant has established a well grounded apprehension of

irreparable loss in the event the interdict is not granted; and c) the applicant has no other remedies in as much as earlier approaches to the Master of the High Court have produced no solution to her problem. To buttress this point Mr. Littler referred the court to the celebrated case of ***Setlogelo vs Setlongelo 1914 A.D. 221.*** The second respondent does not dispute any of the above allegations in his answering affidavit.

On the question of urgency it is contended on behalf of the applicant that it is evidenced from the papers viz i) applicant's urgent need for medication and maintenance, she is now confined to a wheelchair and her condition is deterioting by the day; ii) the unlawful release of money to unauthorised people, and iii) the actual release of the money on the day the application was served upon the respondents.

On the validity of the Will it was contended that the deceased's mental capacity is clearly outlined *vis a vis* his incapacity to comprehend what he was actually doing at the time of the preparation and execution of the Will. Further, the complete non-compliance with Section 3 of the Wills Act No. 12 of 1955 should be re-visited, particularly as it a peremptory provision. In this regard the court was referred to the case of ***Dludlu vs Dludlu 1982 – 1986 (1) S.L.R.*** at *228*. Reference was also made to the case of ***James, Gerald Anthony Nelsen vs Master of the High Court and others*** by Sapire CJ delivered on the 14th June 2001, and the Court of Appeal case of ***Gabriel Keyser vs Gerald James Appeal Case No. 32/2001 (unreported).***

The 2nd Respondent's Submissions

Mr. Thwala also filed Heads of Arguments. On the issue of the motion to strike out paragraph 2 of his answering affidavit he contended that the said paragraph was inserted there purely to lay out the history of the matter and no prejudice whatsoever is visited on the applicant by its existence.

On the main application Mr. Thwala attacked the procedure which has been adopted by the applicant in *casu*. The gravamen of his argument is that it is generally accepted that proceedings to set aside a Will must be brought by way of action. To support this proposition he cited the cases of ***Steenkamp vs Steenkamp 1915 C.P.D. 176*** at *177* and the case of ***Van Der Byl and Haupt vs Scholtz (1897) 14 S.C. 483.***

It was argued that this is more so in a case such as the present one where there is a clear dispute of fact.

The *onus* of proof lies with applicant who attacks a Will which is complete and regular on its face, and by choosing to proceed by way of motion she is assuming to herself the risk of all facts being put to issue thereby lending herself in an unenviable position of not being able to discharge the *onus* laid on her by law. (see ***Kunz vs Swart 1924 A.D. 618*** and also ***Tregea and another vs Godart and another 1939 A.D. 16***). The presumption is that in case of doubt it ought to be held in favour of a Will, if *ex facie* it appears to have been duly executed, so that the one who alleges that it has not been properly executed or made according to law must prove that per Kotze JA in ***Kunz vs Swart (supra)*** at page ***673.***

Courts are enjoined to exercise extreme caution when asked to set aside a Will which has been duly registered with and accepted by the Master of the High Court and has been acted upon by those concerned. Clear evidence of invalidity must be presented to court otherwise the law states that courts must uphold the validity of the instrument embodying the last wishes of a deceased person (see ***Brink and another vs Brink and another 1927 C.P.D. 214***). In *casu*, so the argument goes this court will not be able to decide the present case on the papers as filed of record. Clearly *viva voce* evidence must be led to test the veracity of each witness. In order to achieve that the court has a discretion either to order that such evidence be led or it may dismiss the application and leave applicant to proceed by way of action if so advised.

All in all Mr. Thwala, contended that this application is inappropriate and ought to be dismissed with costs.

These are the issues before the court. There are essentially three issues for determination in this case. Firstly, the motion to strike out paragraph 2 of the 2nd respondent's answering affidavit. Secondly, whether the procedure adopted in the present case is appropriate, and if so, thirdly, whether the applicant has satisfied the requirements for an interim interdict as per the *dicta* in ***Setlogelo vs Setlogelo (supra).***

I shall proceed to consider these questions *ad seriatim.*

1. The motion to strike out

The paragraph which is sought to be struck out by the applicant reads in *extenso* as follows:

2.1 The issues being canvassed by applicant are no fresh matter. This honourable court has previously been seized with this matter under Case No. 1254/2001 wherein, I sought:

i) The cancellation of Deed of Transfer No. 231/2000;

ii) Costs of suit.

2.2 The said Deed is in respect of Portion 101 of Farm 50 and it passes title thereof from the applicant to one Nhlanhla Mdluli. The borne of contention being that applicant acted mala fide in causing Portion 101 to be transferred from the estate (which at the time of transfer, i.e. 24th May 2000, was the legal owner of the property).

2.3 This property formed part of the assets of the estate in terms of deceased's will.

2.4 Applicant vigorously opposed this application and denied that deceased had anything to do with Portion 101, this is despite the fact the elsewhere in her papers she asserts that her and deceased were married in community of property. As to what became of deceased's half share in the said Portion when she allegedly disposed of it a mere 5 days after his death, is not clear.

2.5 This application was to have heard simultaneously with the counter application that was filed by applicant under the same case number, in which counter application applicant claimed that the Last Will and Testament of deceased was invalid on the basis that the testator lacked the necessary mental capacity at the time when he purportedly executed the Will. That counter application now stands withdrawn as per the Notice of Withdrawal a copy of which is annexed.

2.6 This latest twist has greatly prejudiced 2nd respondent because applicant, though still relying on the same witnesses as before, has changed the basis of the relief sought. It would appear that in attacking the validity of the Will it is not clear to applicant whether it is invalid on the basis of a lack of mental capacity of the testator or by virtue of the non-compliance with the required formalities of the Will's Act.

2.7 While applicant is trying to hazard a guess as to the correct basis of impeaching the Will, the process of winding-up the estate has been harm strung.

The operative rule being Rule 23 of the High Court Rules reads as follows:

"***Exceptions and Applications to Strike out***

> 23 (1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action of defence, as the case may be, the opposing party may, within a period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of Rule 6 (14):
>
> Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed under this sub-rule by notice afford his opponent an opportunity of removing the cause of complaint within fourteen days provided further that the party excepting shall within seven days from the date on which a reply to such notice is received or from the date on which such reply is due deliver his exception."

I have considered the points raised for and against the motion. My view, after examining the offending paragraph is that it ought to be struck out. This paragraph is irrelevant for the reason that the counter-application in which the applicant questioned the validity of the Will in Case No. 2617/2002 has been withdrawn and is no longer before court. Further, the contents of the paragraph relate to the cancellation of a deed of transfer and any evidence led in relation to it would be inadmissible as irrelevant to the issue for decision in the present case before the court namely whether or not the Will is valid. As much as it is sometimes useful to trace the history of the matter but caution should be exercised to reflect relevant matters lest the issues get clouded by irrelevant facts.

For the afore-going reason I hold that paragraph 2 of the 2nd respondent's answering affidavit ought to be struck out.

2. Whether proper procedure have been adopted.

I have considered all points in this matter and it appears to me that the present application is an interdict *pendente lite* and thus a discretionary remedy. The exercise of this discretion ordinarily turns on a balance of convenience. In *casu* the court is not called upon to determine the merits or demerits of the Will but to secure the *status quo ante* until the merits are heard on trial. I agree in *toto* with the submissions made by Mr. Littler that this case is at all fours with the case by Sapire CJ in ***James Gerald Anthony Nelsen vs Master of the High Court and others*** *(supra)* where applicant in

that case brought an application as one of urgency. The applicant prayed for an interim relief the effect was that the court to suspend the administration of the estate pending the determination as to which two testamentary writing was a valid last Will and Testament of the testatrix therein. The application was replete with disputes of fact, however, the learned Chief Justice allowed the leading of *viva voce* evidence from witnesses. The learned Chief Justice proceeded with the matter and declared one of the Wills invalid. The matter was taken up on appeal where it appeared as ***Gabriel Gery Cornelis Keyser vs Gerald Anthony Nelsen James and other Appeal Case No. 32/2001*** where the Appeal Court embraced the findings *a quo* and dismissed the appeal with costs.

Mr. Thwala tried to distinguish the above case with the present case but I am not persuaded by his submissions. In that case the question was an invalidity or other wise of two Wills which application proceeded by way of motion proceedings up to the appeal court.

For the above cited reason I come to the conclusion that this court has a discretion to grant an interdict *pendente lite* on the facts of the present case.

3. **Whether the requirements for an interim order have been fulfilled in** *casu*

The following statement of the requirements by Corbett J (as he then was) in the case of ***L.F. Boshoff Investments (Pty) Ltd vs Cape Town Municipality 1969 (2) S.A. 256 © at 267 A – F*** is representative of what has become the almost standard formulation of the requirement:

> "Briefly these requisites are that the applicant for such temporary relief must show:
>
> a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;
>
> b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
>
> c) that the balance of convenience favours the granting of interim relief; and

d) that the applicant has no other satisfactory remedy".

In *casu* my view is that the applicant has satisfied all the requirement outlined in the above-cited *dictum*. Firstly, the applicant has a clear right to the interim relief sought. She was married to the testator in terms of civil rights in community of property and has every right to know how the administration of her deceased husband is being handled.

Secondly, there is an injury actually committed by the 2nd respondent by his refusal to pay her any maintenance and her medical expenses resulting in her being permanently being confined to a wheelchair. 2nd respondent has failed to account despite two years having lapsed since the issue of Letters of Administration. The 2nd respondent has overlooked letters by the Master of the High Court urging progress in terms of the provisions of the Administration of Estate Act.

Thirdly, the balance of convenience favours the granting of interim relief in this matter. The applicant is the surviving spouse married in community of property and as such she is entitled to at least (1/2) half of the estate. The estate has not been wound up by the executor despite a period of over two years having elapsed from the date of the issue of Letters of Administration. Furthermore, as I have stated immediately above that by letter dated 10th July 2001, the Master of the High Court gave the executor up until the 16th August 2002, within which to file the liquidation and distribution account. The executor has failed to do so. He has also failed, despite being ordered by the Master of the High Court to pay her E900-00 in respect of medication.

Lastly, it appears to me that the applicant has no other remedies in as much as her approach to the Master of the High Court has produced no solution to her problem.

For the above reasons I come to the conclusion that the applicant has prove all the requirements for an interim interdict following what was decided in the case of ***Setlogelo vs Setlogelo*** *(supra)*

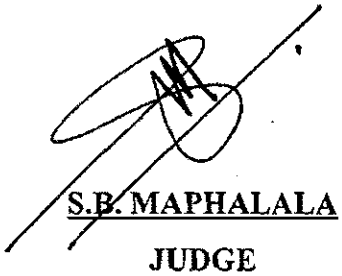
The Court Order

The following order is thus recorded:

a) The motion to strike out is upheld;

b) An interim order is granted in terms of prayer 3, 4, 5, 6, 7, 8, 9 and10 of the notice of motion and the applicant to issue summons in terms of prayer 3 within 14 days from date of this judgement.

c) Costs to be costs in the main action.



S.B. MAPHALALA

JUDGE