IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 287/2022**

In the matter between:

RUSSEL SUKUMANE **Applicant**

And

THE EXECUTOR IN ESTATE LATE

WILSON DAVIES SUKUMANE N.O. **1ST Respondent**

REFILOE MAMOGOBO **2ND Respondent**

SANDZISO DLAMINI **3RD Respondent**

PHUMZILE SUKUMANE (BORN LATOLA) **4TH Respondent**

PHILANI SUKUMANE **5TH Respondent**

PHIWAMANDLA SUKUMANE **6TH Respondent**

THE MASTER OF THE HIGH Court **7TH Respondent**

JUDGEMENT

Neutral citation:	*Russel Sukumane & The Executor in Estate Late Wilson Davies Sukumane and 6 others (287/2022) SZHC 217 (9th August 2023)*
Coram:	*S.M. MASUKU J*
Date of heard:	*11th July 2023*
Date delivered:	*09th August 2023*
Flynote:	*Interdict – Interlocutory interdict, requirements thereof examined. Whether the Applicant has established such requirements for the orders as prayed for.*
Summary:	*The Applicant instituted proceedings seeking an interdictory relief and other ancillary orders to suspend the winding up and distribution of the deceased testamentary estate, fourteen years after the deceased death pending finalization of an action proceedings to be instituted by Applicant challenging the validity of the Will and Testament of his deceased father.*
Held	*Applicant fails to satisfy the required elements of an interim interdict pending the action to challenge the Will. The application fails and is dismissed with costs.*

[1] Prodigiously, the Applicant instituted these interdict proceedings against the Respondents to pave way for him to challenge the Will and Testament of his late father Wilson Davis Sukumane, fourteen years after his death (date when deceased died, 21 January 2008). The Will had been deposited with the office

of the Master on the 1st April 2005 by the deceased through his attorneys. It was then produced during a next of kin meeting at the office of the Master in 2008 when the deceased died. The background *resume*' of the facts suggest that the Applicant and the Respondents were well informed of the contents of the Will. Ever since that time up to the hearing of the matter non of the parties including the Applicant have served any action proceedings to challenge the Will and Testament (the Will) of the deceased.

[2] The Applicant prayed that the court suspends the winding up of the estate by issuing an interlocutory interdict pending an action still to be instituted within 14 days after the granting of the order. The winding up and distribution of the estate itself is in the hands of a second Executor Testamentary and has dragged unduly for the past 13 years. The non action or delay by the Applicant of his wish to execute the challenge of the Will remains inexplicable when he states in his affidavit that on the 16th May 2021 his handwriting expert delivered to him a 'favorable report' that detailed primary symptoms of forgery. The Applicant preferred to first apply for an interdict before the action proceedings challenging the Will. This is perhaps akin to the proverbial idiom of putting the '*cart before the horse*'. The present application was itself launched in February 2022 and there is still no evidence in the papers to confirm that the action proceedings have been commenced. It is unavoidable to decide this matter without recounting the said background facts.

The Application

[3] The Applicant has instituted the present proceedings seeking an interdictory relief and other ancillary orders that the implementation of the last Will and Testament in the winding up and distribution of the deceased estate of the late Wilson Davis Sukumane ('the deceased') be interdicted pending the

finalization of an action proceedings which is still to be instituted challenging the validity of the will.

[4] By way of brief background from the pleadings before court, the deceased was a renowned businessman who was predominantly based in Manzini. He passed on way back on the 21st January 2008. In his lifetime he was married to Florenece Mkhatshwa who pre-deceased him in the year 1992.

[5] The deceased had three children, Namely, Russel Themba Sukumane ('the Applicant'), Queen Sukumane (Queen-who passed away in the year 2020 and Margaret Khanyisile Sukumane (Margaret) who predeceased her father in August 1999. Margaret is the biological mother of the 2nd Respondent.

[6] Queen had four children namely: Naomi Ngiba,Ncamiso Dlamini, Sandiso Dlamini (third Respondent) and Phumzile Sukumane (forth Respondent). Ncamiso and Naomi predeceased their mother.

[7] It is common cause that the deceased in his lifetime acquired vast estate assets comprising of public service transport vehicles immovable properties, shops and other movable assets. When he died he was buried at the Golf Course Cemetery in Manzini apparently in accordance with the provision of the Will still to be challenged by the Applicant.

[8] It is alleged that the Applicant left Eswatini some 29 years ago around 1993 during which time he did not maintain a relationship with the deceased. The Applicant says as much, when he averred in his Founding Affidavit that he returned to the Kingdom of Eswatini in June 2020 with no intention of reverting to the Republic of South Africa for there is nothing left for him to live for. His businesses in that country had to close down for unseen reasons.

[9] In taking up interest occasioned by the fact that his father's estate had not been wound up and distributed he then read the Will and Testament and was concerned about the provisions of the Will that distributed her mother's half share despite her marriage to the deceased in civil rites and in community of property. The deceased, he asserted had failed to take into account her mother's portion, presumably which should have catered for his own interest.

[10] He noticed, as he puts it, that an enormous portion of the deceased estate was bequeathed to his nieces and nephews whilst his biological siblings and him were only given a 'pint-sized'portion by their father's estate.

[11] In his quests to 'fix things for himself,' he got himself an attorney in March 2021 for advise. Notably, the advice he received as he puts it in the founding affidavit was that, 'unless the late Wilson Davies Sukumane had another will, then he would have died intestate'. In that event the Applicant would be entitled by virtue of being the only surviving son to be nominated as an executor dative and alternatively be the sole beneficiary of the entire estate of his late father (underlining added).

[12] His attorneys advised him to find a handwriting examination expert to examine the Will, investigate and analyze the signatures to determine if indeed it was signed by the deceased. It is not apparent in the founding affidavit whether the instructions to the handwriting expert was to examine the Will to find fault or was sought to launch a challenge of the Will so he could be the sole beneficiary of the entire estate. What is clear is that he had life issues that were manifested on his return from South Africa.

[13] The Applicant averred that on the 16th May 2021 he got delivery of the expert report which he shared with his attorneys of record and, the then Executrix

Testamentary together with the 6th Respondent. The report concluded that there were inconsistences in the signatures of the deceased so compared. There were primary symptoms of forgery with the signature specimen authored by the deceased during his lifetime. The Applicant concluded that from the report, it was clear that the specimen authored by the deceased in his lifetime which was furnished to the expert differed materially from the signature on the Will. He said the Will therefore fell to be declared invalid.

[14] The Applicant stated further that he will issue out summons to test the validity of the signature of the Will. This Application is premised on the prospects of his success which he enjoys in proving that the signatures on the Will are forgeries and are not for his late father (the deceased). He concluded that he does not have a suitable remedy other than an interdict that can protect his interest in the entire estate of his late father pending the final determination of the action proceedings to be instituted.

[15] The court cannot help but make the following observations with regards to Applicant's assertions as repeated in the preceding paragraphs. The first is that this Application was launched to self-serve the Applicant's interest, designed to push the estate of his father from being testamentary estate to an intestate estate so that he can inherit the entire estate as the only surviving child of the deceased. He came back to the country having lost business in South Africa. Secondly, he does not explain why he has failed to challenge the validity of the Will during the lifetime of her sister Queen who was appointed Executrix Testamentary of the estate. He was mute for a period of fourteen years since the death of his father and appointment of his sister. Thirdly, he does not explain why he has not launched the action during the

past thirteen (13) years period, let alone since he received the handwriting expert report in May 2021.

[16] Other prayers that the Applicant has applied for is an order directing that all rental payments in respect of the deceased flats situate at Mhobodleni area, Manzini region be paid into a Standard Bank estate account pending the finalization of this application and the intended court action. The challenge the Applicant has with this analogise prayer is that for the former, the application gets finalized within a short period of time and on the latter he sets a time frame when there is no action yet instituted by him. An order granted in the suggested fashion would not take the winding of the estate any further when it has already taken a longtime. It stands to be rejected.

[17] The Applicant also prays that the court interdict and restrains the Executor (appointed by the Master after the death of Queen) from performing his lawful duties as such. In short, he wants the administration and distribution of the estate that is lawfully sanctioned by section 51 of the Administration of Estate Act 28/1902 (the Act) to be stopped by a court order without any lawful course or reasons as set out in the Act. The prayer is couched in a final order fashion, without any basis for this kind of order supporting it. The winding up of a deceased estate flows naturally from when it is reported until distributed. It would be undesirable or even ludicrous to have this court permanently cease the process of winding up the estate before its completion. The court cannot grant such an order that would not give way to the winding up of the deceased estate. This prayer should also fail.

[18] The Applicant in his final prayer wants the Master of the High Court to furnish a full report to the Registrar of the High Court of what has been done to date

on the Estate file EM 34/08 pertaining to the winding up of the estate within a period of fourteen days.

[19] The duties of the Master (7th Respondent) is to supervise the administration of the deceased persons' estate. She supervises the persons who have been granted letters of administration according to law. The duties of the Executor/trix are all set out in the Act. If anything, it is the Executor of the estate who should be called upon to file a report on appropriate circumstances. There are instances where the Master is called upon to take certain decisions in terms of the Act (e.g under Section 51, 51 *bis* and 52 of the Act, this is where the High Court may in appropriate circumstances direct the master to file a report with the court. There are no such circumstances in Applicant's case that support his prayer for the Master to file a report to the Registrar of the High Court. This prayer also stands to fail.

[20] Belatedly, on the 1st June 2022 after the pleadings had closed in April 2022, the Applicant filed an amended notice of motion wherein he introduced a new prayer framed in this style; *'Also, pending the determination of all other issues in dispute to the Estate of the Late Florence Mkhatshwa and auxiliary, and/or intrinsic issues arising out of the dispute pertaining the winding up of the aforesaid estate, the distribution of Estate late Wilson Davies Sukumane who died on the 21st January 2008 be stayed*; The court is asked to grant this prayer together with the main prayers I have already dealt with.

[21] This prayer is an afterthought with no explanation of its belatedness, besides it is not even supported by one iota of evidence in the founding affidavit. One only reads about the late Florrence Mkhatshwa in the early paragraphs of the brief background that she was the Applicant's mother married to the deceased in 1949. The court is not told about her estate, its relevance to this application

or that of the intended action. The court is also not told of the issues in dispute. How relevant are those issues in these proceedings. What are the winding up issues in that estate that should compel this court to grant the order in these proceedings so as to protect the unnamed 'intrinsic' issues.

[22] Although the Applicant has a right to amend the notice of motion even at a late stage of the pleadings, it must be well supported by the evidence in the main affidavits for the court to exercise its discretion judiciously. This is not the case in *casu.* The court cannot help but to conclude that this is a telling indication of dilatory and tardiness on the part of the Applicant. It can best be described as obstructive to the main issues because it is not supported at all. The Respondents did not take issue in this regard and there are no apparent reasons for not doing so. The Applicant's prayer should also be rejected for the reasons aforesaid.

[23] The only prayer that stands to be considered is the first prayer that requires the court to issue an interdict pending an action challenging the deceased Will. The action is required to be instituted within fourteen (14) days after the orde, should it be granted.

[24] The general requirements of granting interim interdicts are well known. The first is that the Applicant must establish a *prima facie* right (which may be open to some doubt). 'In determining whether an Applicant for an interim interdict has crossed the threshold of proving a clear right or a right *prima facie* established though open to some doubt, the proper approach is to take facts set out by the Applicant together with any facts set out by the Respondent which the Applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the Applicant should, not could, on the facts obtain a final relief at trial. Once the requirement of a *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 as set out by the Respondent's 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, the Applicant cannot succeed *see* Spur Steak Ranches ltd vs Saddles Steak Ranch 1996 (3) SA 707 G-H.

[25] The remedy lies within the discretion of the court and is not one to which a party is entitled to. A balance is struck between the Applicant's prospects of success in the principal action and the balance of convenience or prejudice.

[26] In *casu* in the event the Applicant finally gets a chance of instituting an action challenging the Will, he would be faced with a barrage of challenges that the first three Respondents have demonstrated in this application. I agree that the Respondents' defenses to the challenges of the Will, should be considered at the trial but cannot be ignored in this application in the assessment of his prospects of success in the principal relief.

[27] The Respondents have gone into details highlighting the facts that militates against the Applicants prospects in challenging the deceased Will. They have asserted that 14 years of not challenging the Will by the Applicant means that he has acquiesced to the Will. He has benefited from the deceased estate and therefore is estopped from contesting its validity. They recognized that although there is no prescription that could be raised as a defence, reasonable time to challenge the Will is not on the Applicant's side. They stated further that the Applicant places reliance on an implausible handwriting expert report which itself was carried out without the original comparative signatures of the

deceased. In that regard they submitted the Applicant has not established a *prima facie* right.

[28] It is a fact the Applicant cannot countenance that it has unduly delayed the launch of the action challenging the Will even after he got his report from his expert he has not done so. It is also a fact that the best evidence used in comparison of the deceased signatures by handwriting experts is the use of original signatures and not copies. This of course does not mean that the Applicant is disallowed to use the report but it simple would call into question its probative value. The Respondents have also shown that the facts presented before this court reflect plausable defences that would militate against the Applicant's prospects of success in challenging the deceased Will. These are acquiescence and estoppel. The court is thus inclined to conclude that these facts have due regard to probabilities that the Applicant could fail to obtain a final relief at trial challenging the Will. There exist some doubts in his prospects of success at the trial.

[29] In considering the whether there shall be any irreparable harm if the interdict is not granted to the Applicant, i.e. the term 'injury' or harm with reference to any infringement of a right which has been established and any resultant prejudice. (See Setlogelo vs Setlogelo 1914 AD 221). The court has to examine the irreparable harm with the third requirement that of the balance of convenience.

[30] In doing so, the Master of the High Court's report attached to the pleadings is instructive. The Master has filed a report to demonstrate that a next of kin meeting was called by her office in August 2009 for the appointment of an Executrix Testamentary. No meaningful progress in the winding up of the estate was covered during that period. The Master reports that 'the family

disappeared until the 3rd August 2020 where she received correspondence from the Applicant requesting a next of kin meeting. The next of kin meeting as requested by the Applicant was called on the 16th September 2022 where the Applicant stated that he was contesting the Will. The report states that the Applicant was given 14 days to move his application contesting the Will. The Master confirms that the family had been aware of the Will the past 12 years.

[31] No application or challenge was filed by the Applicant. In October 2020 another next of kin meeting was called for the appointment of an Executor. The family failed to nominate one. Being guided by Section 24 of the Administration of Estate Act, the Master appointed Mr Nkosing'phile Dlamini on the 19th October 2020 as a neutral Executor Dative to finalize the winding up of the estate. It turned out that Mr Dlamini received threats in performance of his duties. He resigned on the 17th August 2021. The Master called another meeting and appointed yet another neutral Executor in the name of Mr Macdonald Mathunjwa. As at March 2022, the Master reports that Mr Mathunjwa had reached a stage of drawing up a liquidation and Distribution Account (L & D Account) in terms of the last Will and Testament of the deceased. Mr Mathunjwa is also in charge of the rentals collected from the rented properties that are deposited into the Standard Bank account, a subject matter, of one of Applicant's prayers.

[32] The Master's report illustrates that the winding up of the deceased estate has been unduly delayed. The report does not impute any blame for the delay that has been occasioned in the winding up of the deceased estate to any one;

[33] Section 51 (2) of the Act requires the Executor to frame and lodge with the Master a full and true account supported by vouchers of the administration

and distribution of the estate no later than six (6) months from the date of the issue of his letters of administration.

[34] The Master's report shows further that two consecutive Executor datives were appointed by her office, one Mr Nkosingivile Dlamini on the 17th August 2021 and another Mr Macdonald Mathunjwa on the 29th September 2021 to wind up the deceased estate. All the appointments were post the delivery of the expert handwriting report to the Applicant (16th May 2021). This means that the Applicant had the report and full knowledge that the estate was being wound up and must be brought to finality.

[35] The Applicant stands to suffer no irreparable harm if the interlocutory interdict is not granted for the reasons that there is no pending action challenging the Will after all the fourteen (14) years that has passed with all the knowledge that he has regarding the deceased will. This is more because he has held on his expert report for a period of two years. There is no legal authority and he has not presented any that held him back from issuing summons for his substantial relief preceding an interdict.

[36] On the other hand, it is in the interest of real and substantial justice that the deceased estate gets finalized in terms of the provisions of the Act, any further delay prejudices the winding up of the estate.

[37] The balance of convenience does not favour the granting of the relief sought. The Master's report recounts some of the activities that have been achieved in the winding up of the estate to date. It goes to the extent of stating that Mr Mathunjwa (the last appointed) Executor Dative) was in March 2022, in a position to draw up the L & D Account. The granting of an interim interdict will cause further inconvenience and prejudice to the winding up process.

The heirs apparent and the creditors of the estate also stand to be inconvenienced further if the interdict were to be granted..

[38] The last requirement is that there is no other satisfactory remedy available to the Applicant hence his application for the interlocutory interdict. An action challenging the validity or otherwise of the Will is one available option. Section 51 *bis* of the Act provides for an elaborate procedure once the L & D Account is advertised, objections are made. The Master in that process is called upon to adjudicate an objection and to make a decision. Any party who is not satisfied with the Master's ruling may apply by motion to the High Court within 30 days of the ruling for an order setting it aside or any such order the party applying may request. see section 51 *bis* (8) of the Act. These remedies are available during the winding up of the estate in terms of the Act.

[39] The circumspect of the matter inevitably brings the result that the application fails and is dismissed with costs.

S.M. MASUKU J

JUDGE - OF THE HIGH COURT

For the Applicant: L.Dlamini of Linda Dlamini & Associates.

For the 1st,2nd and 4th Respondents; Z.D.Jele of Robinson Bertram.