IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)

Case No: 1377/2021

In the matter between:

URSULA CLAASSEN N.O. Applicant

and

RHEA MULLER-WOLFF First Respondent
ABSA BANK LIMITED Second Respondent

JUDGMENT DELIVERED ELECTRONICALLY: 15 FEBRUARY 2022

MANGCU-LOCKWOOD, J

I.INTRODUCTION

[1] This is the return day of an order granted on an urgent, *ex parte* basis by Erasmus, J on 2 December 2021 (*"the December Order"*). That order was, in turn and in part, the return date of an order of 26 November 2021 (*"the November Order"*), also granted on an urgent *ex parte* basis, as will become clear below.

[2] This matter concerns the estate of the late Miko Wa Gatare Rwayitare (*"the deceased"*). The applicant is an agent appointed to act on behalf of the executor of

the estate (*"the executor"*), by means of a special power of attorney. The first respondent is an attorney who practices as a director of her own law firm, and was previously an agent appointed to act on behalf of the executor. The second respondent is a banking institution at which the bank accounts that are the subject of these proceedings are held.

II. THE COURT ORDERS

[3] The relevant part of the December Order to which these proceedings relate reads as follows:

> "2. The second respondent is authorized, directed and ordered:
>
> 2.1 to retain monies in the bank account with account number **[....]** held with the second respondent to a maximum amount of **R710 000**.**00**;
>
> 2.2 to ensure that no transactions for the transfer of monies from the bank account with account number **[....]** held at the second respondent are executed by any person whatsoever that would reduce the balance of the monies held in that account below **R710 000,00**…"
>
> 4. A rule *nisi* is issued calling upon any or all of the respondents to show cause on Thursday 3 February 2022 at 9h00 as to why the following order should not be made:
>
> 4.1 That the orders in **prayers 2.1 and 2.2** above shall continue to operate as interim interdicts pending the outcome of proceedings to be instituted by the executor of the Estate Late Miko Wa Gatare Rwayitare [*"the estate"*] against the first respondent for recovery of the amount of **R710 000,00**;
>
> 4.2 That no order as to costs be made against the second respondent (except if the second respondent opposes the relief sought;

4.3 That the first respondent shall not pay the costs of the application for further relief in her personal capacity on an attorney and client scale."

[4] The December Order also confirmed a rule *nisi* issued in the November Order, which was couched in the same language as the provisions above, but in relation to two other bank accounts, namely account numbers **[....]** and **[....]** (*"the two bank accounts"*). The confirmation of the rule *nisi* in this regard means that the monies in those bank accounts are to be retained pending the successful opening of new bank accounts in the name of the estate. There is therefore no decision to be made in this judgment regarding those two bank accounts.

[5] The issue in these proceedings is therefore whether the interim interdict regarding account number **[....]** should continue to operate pending the outcome of the action proceedings to be launched against the first respondent for the recovery of the amount of R710 000 (*"the action"*). The issue of costs relating to both orders also needs to be determined.

III. PRELIMINARY ISSUES

[6] The first respondent has raised some preliminary issues, namely a challenge to the *ex parte* and urgent nature of proceedings and the applicant's lack of *locus standi* to bring these proceedings.

[7] As regards the *ex parte* and urgent nature of the proceedings, both the November and December Orders have already made determinations. In terms of paragraph 1 in both orders the applicant's non-compliance with the rules of court relating to service and time limits *"are dispensed with and/or condoned"*. The first respondent did not anticipate any part of the December Order, in terms of Uniform Rule 6(8) before the matter appeared before me on 3 February 2022. Furthermore, the first respondent was legally represented at the proceedings of 2 December 2021, and did not take issue with either issue. In any event, I observe that, having regard to the factual matrix of the matter and the first respondent's conduct which will

become apparent in the factual chronology below, it is not surprising that the matter was conducted in the urgent and *ex parte* manner that it was.

[8] As regards the challenge to the applicant's *locus standi*, the first respondent's counsel referred to paragraph 4 of the founding affidavit which states as follows: *"I am the applicant in this application in my capacity as duly appointed agent for the executor in the estate late Miko Wa Gatare Rwayitare"*. (my emphasis) The first respondent's counsel made much of the opening phrase in this sentence which I have emphasized. However, the full sentence must be read for its context. It is clear from reading the full sentence that the applicant brings the application in a specific capacity, namely as the duly appointed agent for the executor. Apart from the clear wording of paragraph 4 of the founding affidavit, this is borne out by the inscription of N.O. (*nomine officio)* which appears after the applicant's name in the heading of all the applicant's papers. It is furthermore not disputed that the applicant was appointed by the executor by means of a special power of attorney. It includes a general power to attend to all things necessary for expediting the administration of the estate to finality.

[9] The first respondent's counsel places significant reliance on section 52 of the Administration of Estates Act 66 of 1965 (*"the Act"*) which provides that *"[i]t shall not be competent for any executor to substitute or surrogate any other person to act in his place"*. There is no indication in this case that the executor substituted or surrogated himself by not launching the proceedings himself. He, after all, deposed to two confirmatory affidavits in the matter, with one dated 30 November 2021 and the other 26 January 2022. In my view this indicates that the executor has not abdicated his responsibility. It is correct that the first confirmatory affidavit was deposed some days after the November Order was granted. However, even at that point, the executor had already appointed the applicant by means of a special power of attorney, on 20 November 2021. It must be remembered that the matter was dealt with with extreme urgency. But in any event, the executor filed a confirmatory before the proceedings of 2 December 2021, which are the subject of the proceedings before me. I also observe that the point *in limine* regarding the applicant's *locus standi* was only raised in the first respondent's answering affidavit deposed on 13 January 2022, after both orders had been granted.

[10] The first respondent's counsel furthermore referred to the case law[1] relating to the powers of the executor - that those powers are not transferable. However, a distinction must be drawn between abdicating powers and delegating powers. The case law relied upon by the first respondent's counsel indicates that the latter is permissible. It is the former that is prohibited. The case law does not support the view that an executor many not act through an agent. In *Bramwell*, it was held[2] that an executor may not appoint someone to act instead of him or herself, so as to relieve him or herself of responsibility; but (s)he may appoint someone, for whose acts (s)he will be responsible, to act on his or her behalf. A similar approach was followed in the recent case of *Jones v Pretorius NO*[3] where the Supreme Court of Appeal accepted that an agent was permitted to act on behalf of the executor, at least until the executor had passed away.

[11] I therefore find no merit in the first respondent's points *in limine*.

IV. THE FACTS

[12] The deceased passed away on 25 September 2007, leaving behind a sizeable estate consisting of assets in Rwanda and South Africa, which is valued in the region of R101 million. The South African assets amount to approximately R68 million. The deceased passed away intestate. Some delays ensued regarding the finalization of the estate, apparently due to some family complexities. Eventually, on 24 March 2020 the deceased's brother, Mr Albert Nunu Gatare was appointed by the Master of the South Gauteng High Court (*"the Master"*) as the executor in terms of letters of executorship. In August 2021 the first and final liquidation and distribution account (*"the L&D account"*) in the estate was presented to the Master.

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[1] For example *Bramwell and Lazar, NNO v Laub 1978 (1) SA 380 (W); Goolam Ally Family Trust t/a Textile, Curtaining and Trimming v Textile Curtaining and Trimming (Pty) Ltd 1989 (4) SA 985 (C); Lockhat's Estate v North British & Mercantile Insurance Co. Ltd* 1959 (3) SA 295; *Sentrakoop Handelaars Bpk v Lourens and Another 1991 (3) SA 540 (W); Gravett NO v Van Der Merwe 1996 (1) SA 531 (D).*

[2] At 383H – 385A .

[3] *Jones v Pretorius NO* (281 of 2019) [2020] ZASCA 113.

[13] The deceased, and later his family and the executor, are long-standing clients of an entity known as Tax Consulting, the principal of which is Christoffel Gerhardus Botha, who is referred to in these proceedings as Jerry Botha. It is common cause that, as far back as June 2019 an agreement was reached between Mr Botha, the deceased's family and the executor, that the amount of R2.7 million would be paid to Tax Consulting for the administration of the estate, which the parties agree was the executor's fee. In this regard, the parties point to email correspondence dated 21 June 2019 from a member of the Rwayitare family, which stated as follows: *"Good morning Jerry. Can we agree to a total 2,700,000 rands for all the fees? We commit to having the 2.5 million paid as soon as the account opens and the balance at closure of the estate."*

[14] From approximately May 2018, the first respondent held part-time employment with Tax Consulting, where she held the title of 'Deceased Estates Accountant'. From March 2020[4] the first respondent was appointed as an attorney and the agent of the executor in terms of a special power of attorney. In her capacities as the executor's attorney and agent the first respondent attended to everything relating to the estate, including the drafting of the final liquidation and distribution account and its submission to the Master on 3 August 2021. It is common cause that, when she worked at Tax Consulting, the first respondent still practised under the name and style of her law firm, JD Muller-Wolff, and operated a trust account. During her time at Tax Consulting, the first respondent received monthly remuneration on a fixed cost-to-company basis, and earned incentive bonuses on a 6-monthly basis when she exceeded her financial targets, similar to other employees there.

[15] With effect from 1 October 2021, the first respondent left the employment of Tax Consulting and no longer received monthly remuneration. Thereafter, it was agreed between the first respondent and Tax Consulting that, since she had worked on the estate for a considerable period of time she would finalize the estate and would be remunerated on an hourly basis in respect thereof.

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[4] There are two copies of the special power of attorney, which are both signed by the executor, with one dated 25 March 2020 and the other dated 16 June 2020.

[16] On 10 November 2021, the first respondent wrote to a Ms de Klerk at the Master's office stating that she wished to relinquish her mandate to act on the estate and requested cancellation of the court bond with immediate effect. This was apparently to prevent fee-sharing and other acts that are prohibited in terms of the Attorneys Act, most notably the fact that, according to her, Tax Consulting wanted to claim the executor's fees in her name and stead even though they lacked the necessary qualifications. She ended the letter with the following: *"May we please request your confirmation as to the rights to fees and your approval of my fees for the record."*

[17] On 11 November 2021 the first respondent addressed a further email to Ms de Klerk confirming that she had now motivated her concerns of holding office in the estate, required consent to be released, and *"approval of my portion of the fees"*.

[18] On 11 November 2021 Ms de Klerk sent an email with the following introductory sentence: *"Please find attached hereto our letter for the withdrawal of your fees"*. The letter stated that *"the contents of [the first respondent's] aforementioned letter and your motivation for the early withdrawal of your executor's fees in the amount of R2 700 000 as per the approved liquidation and distribution account dated 05 August 2021. With regards to the approval of your fees in terms of section 51(4) of Act 66/1965, the Master will allow for an early withdrawal of the executor's fee due to the reasons provided by your firm."*

[19] On 22 November 2021 the Master addressed a letter to the executor informing him that the first respondent had requested to be released from her duties as his agent and had terminated his mandate for her to act as his agent; and that he (the executor) was required to urgently appoint a new agent to assist in the winding up and finalization of the estate. It is common cause that the first respondent had not informed the executor of her resignation, and that the executor only discovered that in the correspondence of 22 November 2021.

[20] It is further common cause that the first respondent was the only person with access to and control of the estate bank accounts. It is also not in dispute that, by the time that the executor received the letter of 22 November 2021 from the Master,

he had repeatedly requested the first respondent to provide him with bank statements of the estate without success. The executor also states that he had received WhatsApp communication from the first respondent which gave him the impression that she was entitled to the executor's fee of R2.7 million in total. This impression was supported by an entry she had made in the L&D account as follows: *"Executor's /Agent Fees (Rhea Muller) / Professional Fees: Agreement – 2,700,000.00"*. Although the first respondent denies that this was her expectation, it is not in dispute that this was the impression that the executor held in the days leading up to the launching of the urgent application.

[21] As a result of the executor's growing uneasiness regarding the first respondent's failure to provide the estate bank statements, the applicant was appointed as his agent, initially on a provisional basis, and the Tax Consultant's attorney made attempts to meet with the first respondent, initially on an informal basis.

[22] After her appointment, the applicant immediately began a series of investigations with a view to determining the exact state of financial affairs regarding the estate. Those investigations included the applicant attending at First National Bank and at the second respondent, and contacting the Master's office. Some issues that were highlighted in the early stages of the investigation included an entry in the L&D account of two different bank accounts held at two different banks, but with the exact same account number; and the fact that one of the estate accounts was operated as a business account in the name of the first respondent. As a direct result of the issues highlighted, the applicant approached the second respondent with a view to obtaining bank statements in respect of the accounts. The second respondent declined, stating that it could only grant such access to the first respondent who was the appointed attorney and agent over the estate, or with the consent of the first respondent, which it had not received.

[23] According to the first respondent, on 24 November 2021 she did indeed instruct the bank to provide access to the applicant to the bank statements and does not know why the bank refused such access. She states that she also attended in person on 25 November 2021 to instruct the bank to release the bank statements

after receiving confirmation from the Master's office that the appointment of the applicant had been made and the details thereof were verified. In this regard, the first respondent refers to some correspondence between her and a bank official between 24 and 25 November 2021. However, the correspondence does not support the first respondent's version that she gave the bank instructions to immediately release the bank statements. Instead, it shows that on 24 November 2021 the first respondence required confirmation from the Master that a new attorney had indeed been appointed in accordance with a special power of attorney. Thereafter, the first respondent wrote to the bank stating as follows:

> *"We refer to the above matter and the recent developments and, in the interim, awaiting the new attorney to be appointed the following (sic) for your file and records:*
>
> *1. Letter to releasing of agent from the Master;*
> *2. Letter to the executor for new appointment of executor;*
> *3. Approval of agent fees to be withdrawn.*
>
> *<u>TRANSFER OF AGENT FEES</u>*
> *We will request the R2 million rand to be transferred to Attorneys Trust Account as per Master instruction received. The Master did advise us to invest the balance of the funds until the new Attorney has been appointed."*

[24] There is nothing in the correspondence attached by the first respondent and dated 24 November 2021 which supports her version that she gave instructions for the bank to provide the applicant with access to the bank statements. Instead, what it shows is that despite the fact that the first respondent had been released from acting on the estate, she still sought transfer of R2 million to her attorney's trust account, referring to that amount as *'agent fees'*.

[25] As I have already mentioned, Tax Consulting's attorney, Ms Schroter, made attempts to meet with the first respondent from about 22 November 2021. These attempts were unsuccessful, and on 24 November 2021 Ms Schroter sent a letter to the first respondent documenting what had transpired up to that point, and especially the following: the executor's grave concerns regarding the first respondent's failure

to provide bank statements to him despite repeated requests to do so; the first respondent's resignation without communicating with the executor; the impression the first respondent had created in previous correspondence to the executor that she was entitled to the executor's fee in total; the first respondent's failure to respond to Mr Botha's correspondence of 10 November 2021 seeking confirmation that she would honour her agreement to finalize the administration of the estate. The letter requested the first respondent to hand over the file and all information with regards to the estate as a matter of urgency. A meeting was also requested with the first respondent. The letter also recorded that the second respondent had requested permission from the first respondent to share the estate bank statements with the applicant, which permission was still outstanding. The letter ended as follows: *"Your behavior is causing alarm and suspicion, and we confirm that we have already on instructions of our client, consulted with counsel for purposes of bringing an urgent court application against you in order to protect our clients' interest. We are however of the opinion that the handover of the estate could and should be done in an orderly and collegial fashion and we request your cooperation."*

[26] On 25 November 2021 the first respondent contacted Ms Schroter and indicated her willingness to meet with the applicant's legal team. The parties met on the evening of 25 November 2021, where the first respondent provided a box and two lever-arch files full of documents. It is not denied that at that meeting Ms Schroter repeatedly made clear to the first respondent that the bank statements were what was needed as a matter of priority. It is also not in dispute that the estate bank statements were not included amongst the documents provided by the first respondent at that meeting.

[27] At the meeting the first respondent stated that she had instructed the bank to grant the applicant access to the bank statements. However, earlier on that same day the second respondent had sent communication to the applicant still refusing such access on the basis that the first respondent was still the existing attorney's firm dealing with the estate. In the communication the second respondent even referred to the fact that the investment of the estate was to expire on 17 December 2021, and that the funds would be transferred to the first respondent's trust account.

[28] As a direct result of the fact that no bank statements had been provided by, or with the cooperation of, the first respondent to the applicant an urgent application was launched on 26 November 2021 and the November Order was granted by this Court. However, that was not the end of the matter.

[29] Pursuant to the November Order the applicant did indeed obtain the estate bank statements. They revealed that two transfers had been made from the estate bank account into bank account number [....].

[30] The first transfer was made on 6 April 2021 for an amount of R475 000, and was referenced as *'Transfer Agent'*. This was before the lodging of the L&D account with the Master. The second transfer was made on 24 November 2021 for an amount of R235 000, and was referenced as *'Agent Fee'*. This was on the same day that the letter of Ms Schroter, referred to above, was sent to the first respondent. When the discovery of these transfers was made the applicant was not aware of the account-holder's name.

[31] These discoveries were the cause of the second urgent application, and the relief sought and obtained included an order that the second respondent should provide the identity and details of the account-holder of account number [....].

V.THE RESPONDENT'S CASE

[32] In the first place the first respondent states that her fees for attending to the estate did not form part of the work she performed at Tax Consulting, but that her tasks in relation to the estate were attended to during her hours of practice as an attorney. She seeks to distinguish the work she performed on the estate from the work that she was employed to perform at Tax Consulting, stating that her work description at Tax Consulting was to attend to tax issues, and did not include all the work she performed as an agent on the estate.

[33] As regards the transfers to her account amounting to R710 000,00, the first respondent states that this was the total amount of her fees for all the work done on the estate, and was part of the executor's fee agreed upon. She states that the first invoice for the amount of R475 000,00 was issued in April 2021, and the *"amount*

formed part of the agreed upon fee that would be allowed upon the opening of the bank account". She states that the second invoice of R235,000 was issued during November 2021.

[34] The first respondent also states that the executor's fee of R2.7 million was approved by the Master upon her request, and the Master allowed the early payment thereof. This is the reason she paid herself the amount of R710 000 and paid the remainder - an amount of approximately R2,000,000 - to the estate account.

[35] In addition, as part of her answering affidavit the first respondent has detailed several irregular payments made against the estate to, amongst others, Mr Botha, the executor, a previous administrator and a previous attorney who performed some work on the estate.

[36] The first respondent also states that, given the complexity of the estate and the amount of work she performed, the fees that she charged amounting to R710 000 were not unreasonable and should not be denied.

VI. THE LAW

[37] In effect the applicant seeks interim relief pending the outcome of action proceedings in the form of an anti-dissipation interdict.

[38] The purpose of an anti-dissipation interdict is to prevent a party (the intended defendant) who can be shown to have assets and to be about to defeat the plaintiff's claim or to render it hollow, by secreting or dissipating assets before judgment can be obtained and executed, from successfully defeating the ends of justice.[5]

[39] The applicant bears the onus to establish the necessary requirements for the grant of the interdict, and needs to show a particular state of mind on the part of the respondent, that (s)he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. However, it is not essential to establish an intention on the part of the respondent to frustrate an anticipated judgment if the

[5] *Knox D'Arcy Ltd & Others v Jamieson & Others* 1995 (2) SA 579 (W) at 582D-F; *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd & others* (835/2020) [2021] ZASCA 126 (29 September 2021) para [1].

conduct of the respondent is likely to have that effect. The question is purely whether, in principle and on authority, such an interdict should be granted, even in cases where the respondent is in good faith disposing of his or her assets, or threatening to do so, and has no intent to render the applicant's claim nugatory.

[40] In addition, the applicant must satisfy the requirements for an ordinary interim interdict, which are well-known. The applicant must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other available remedy. If a clear right is established, there is no need to establish element of the apprehension of irreparable harm.[6]

[41] When weighing the evidence the applicable test is that which is set out in *Webster v Mitchell*[7], as qualified by *Gool v Minister of Justice and Another*[8], in terms of which the applicant must show that on her version, together with the allegations of the first respondent that the applicant cannot dispute, the applicant should obtain relief at the trial. If, having regard to the first respondent's contrary version and the inherent probabilities serious doubt is then cast on the applicants' case, the applicant cannot succeed.

VII. DISCUSSION

[42] The first respondent's attempt to distinguish between the work she performed on the estate from the work that she was employed to perform at Tax Consulting is not borne out by the documents she has attached to her affidavit in support of these averments. According to an agreement she signed at Tax Consulting on 28 May 2018, her 'job purpose' is set out as follows: *"**To handle all deceased estates received from clients** and ensure that the tax returns of all the diseased estates are submitted to SARS and the estates are finalized as per SARS requirements"*. (my emphasis) In terms thereof *"she may sometimes be required to work outside of regular office hours due to time sensitive deliverables or availability for meeting with*

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[6] Erasmus, *Superior Court Practice* at D6-20.
[7] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 11189.
[8] *Gool v Minister of Justice and Another*, 1955 (2) SA 682 (C) at 688E.

line managers." These quoted provisions do not support the first respondent's version that the work she performed on the estate was somehow excluded or separate from the rest of the work she performed on other estates, or from the tax work that performed on them. The documents she has annexed also do not support her version that the work arrangement she had with Tax Consulting permitted her to charge for fees over and above the work she was being remunerated for. If anything, the correspondence of 2 March 2021 when she was resigning shows that there was no such agreement in place as at that time but that she wanted the agreement to provide for the arrangement that she now asserts was in existence.

[43] Apart from the discussion in the preceding paragraph, the nature of the employment relationship between the first respondent and Tax Consulting remains a point of dispute. However, it is not necessary to resolve that dispute for the purposes of this judgment because the first respondent's basis for transferring the amount of R710 000 to herself is that it was part of an agreement with Tax Consulting and the executor, that the alleged agreement or arrangement is supported by documents annexed to her answering affidavit; that she issued invoices to that effect; and that the Master approved the payment of her fees. Accordingly, the remainder of this judgment examines those defences.

[44] The most obvious problem with the first respondent's case is that, although she makes references to invoices issued for the two amounts making up the R710 000, she has not attached any invoices in this regard but relies on an account statement drawn by her and dated 25 November 2021, the contents of which I return to later. I observe in this regard that the first respondent in her answering affidavit has annexed documents dating as far back as 2009. I have no doubt that if the invoices indeed existed, she would have attached them to her affidavit or given an explanation for why she could not attach them. Upon questioning from the bench at the hearing of the matter, the first respondent's counsel was constrained to admit that there are no such invoices in the record, and that no such invoices were forwarded to the Master before permission was obtained for the early withdrawal of the executor's fees.

[45] Most fundamentally, there is no evidence of an agreement regarding the portion of fees that the first respondent claims to have been entitled to anywhere in the record. In this regard, it is relevant that the first respondent has annexed to her affidavit an email dated 1 July 2020 from the executor in which she was informed of the executor's fee agreement of R2,7 million for the first time. It is strange that the first respondent did not, at around that time, make reference to her own portion of the fees to the executor. After all, she had just been appointed in March 2020 as the attorney and agent in the estate. Similarly, the first respondent has not been able to produce any agreement between herself and Tax Consulting regarding her alleged share of the fees.

[46] As I have already mentioned, the first respondent relies on the correspondence of 10 and 11 November 2021 between her and Ms de Klerk of the Master's office, for her contention that she was given permission by the Master to draw the fees amounting to R710 000. She states that her fees were not only approved but she was also allowed to the early payment thereof. However, the correspondence between the first respondent and the Master's office of 10 and 11 November 2021 does not establish what she claims. On its express terms the letter from the Master dated 11 November 2021 refers to the first respondent's *"motivation for the early withdrawal of your executor's fees in the amount of R2 700 000"*. There is no mention whatsoever of the amount of R710 000 in that correspondence. It is correct that in the first respondent's correspondence to the Master she sought approval of her 'portion of the fees'. However, as I have stated, what the Master approved was the early withdrawal of the executor's fees in the amount of R2.7 million. In any event, she did not submit any proof of her alleged 'portion of fees' to the Master.

[47] It is worth repeating that the first transfer of R475 000 into the first respondent's account was effected on 6 April 2021. This was well before the alleged permission granted by the Master. It was also well before the L&D account had been lodged with the Master, and, since the first respondent has not provided any evidence of written approval by the Master, appears to have been contrary to the provisions of s 51(4) of the Act. It is common cause that the first respondent was the only person in control of the estate bank account, and that the executor was

accordingly not aware of the transfer of this amount, or of the later amount for that matter.

[48] The first respondent admits that she transferred the second amount of R235 000 to herself on 24 November 2021. It must be remembered that this was the day on which the applicant was attempting to gain access to the bank account statements and the first respondent had been informed thereof; and the day on which the letter raising alarm was sent to the first respondent by Ms Schroter after the latter had unsuccessfully tried to meet with her for days. In addition, once again, the first respondent was the only person in control of the estate bank account, even though she had already resigned from the employment of Tax Consulting and from acting as agent and attorney in the estate. The executor was furthermore not aware of the transfer of this amount. In fact, it was the discovery of these transfers, that led to the second of the two urgent applications. Lastly, there is similarly no invoice that was issued contemporaneously for this amount.

[49] As already mentioned, the first respondent relies on an account statement dated 25 November 2021 as proof of her entitlement to the two transfers. The first problem with the account statement is it was drafted after the first respondent had effected the last transfer and after she had ceased to act as an agent for the executor in the estate. Furthermore, the description accompanying the amount in the account statement states as follows: *"Master approval of withdrawal"*. As I have already indicated, this was not correct and is not borne out by any documentary evidence.

[50] The account statement was drawn up by the first respondent on 25 November 2021, the day on which she agreed to meet with the applicant's attorneys. It is especially problematic that the document was drawn up only on 25 November 2021 in circumstances where it is not disputed that the executor had repeatedly requested the first respondent to account on the estate bank accounts, and in circumstances where there are no contemporaneous invoices or agreements to charge these amounts. In those circumstances it is understandable that the applicant refers to the creation of this document as an *ex post facto* paper trail to justify the unlawful payment of R710 000 to herself.

[51] As I have already mentioned the first respondent has detailed several irregular payments made against the estate to, amongst others, Jerry Botha, the executor, a previous administrator and a previous attorney who performed some work on the estate. I do not regard these issues to be relevant to the present matter. Thus no more needs to be stated about these allegations.

[52] The first respondent also avers that her fees were not unreasonable and should not be denied. In my view, the 'reasonableness' or otherwise of her fees can only be determined with reference to an agreement that was in place for her to charge the fees that she did. The first respondent has been unable to present anything to support her case in that regard.

[53] It remains mentioning that the discovery of the transfers subsequently to the November Order confirmed the executor's apprehension about the conduct of the first respondent. She had made these transfers without providing any invoices, and without being transparent about the bank accounts, and without informing Tax Consulting or the executor. Even worse, the last transfer was made on the day on which Ms Schroter sent correspondence seeking her cooperation, raising alarm and requesting a meeting with her. There is no doubt that, in those circumstances the applicant was entitled to approach the Court urgently for a second time to safeguard the interests of the estate and of the executor by preserving the amount of R710 000 in the bank account until the outcome of the action. It is not in dispute that, when the second application was launched, the applicant was not aware of the identity of the account-holder of the account relevant to the second proceedings.

[54] I am of the view that that the applicant has established a *prima facie* case[9], and that the anti-dissipation interdict should continue to exist pending the finalization of the action proceedings.

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[9] See *Ferreira v Levin N.O. and Others; Vrynhoek and Others v Powell N.O. and Others* 1995 (2) SA 813 (W) at 817 F-H; *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383 C – F (*Olympic Passenger Service*); *Simon N.O. v Air Operations of Europe AB and Others* [1998] ZASCA 79; 1999 (1) SA 217 (SCA); [1998] 4 All SA 573 (A) at 228 G-H (*Simon N.O.)*; *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C) at 714 F-H (*Spur Steak Ranches*); *Gool v*

[55] I am furthermore of the view that, given the first respondent's lack of transparency regarding the true financial position chronicled above, and her stance that she is entitled to the funds that she has transferred to herself without agreement or permission, and the fact that she in fact transferred the funds after the executor's legal team intervened, there is a well-grounded apprehension that if the funds are not frozen and the first respondent is not interdicted from dissipating them, it may render the applicant's relief, if successful at the end of the action proceedings, hollow.

[56] I am furthermore of the view that the applicant had no other alternative but to approach the Court for such relief.

VIII. BALANCE OF CONVENIENCE

[57] The first respondent states that, as a result of this application (including the one launched on 26 November 2021) other investment accounts that she attends to have been frozen, including investments on other diseased states. She is accordingly not able to attend to any transactions in her practice, which has caused severe detriment to her practice and reputation.

[58] The first respondent has not provided much detail in this regard. As the applicant points out however, the relief sought and obtained in the December Order, was not wide enough to include other investment accounts managed by the first respondent. It is possible that the second respondent of its own accord, took that as a precautionary measure. However, there is paucity of information in this regard from the respondent.

[59] I do, however, take note of the fact that the two Court Orders granted in this matter thus far will have had reputational implications for the first respondent. However, the allegations involved in this matter are very serious, especially when regard is had to the important position of trust that the first respondent holds as a

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Minister of Justice and Another 1995 (2) SA 682 (C) at 688 (E); *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund* 2007 (1) SA 142 (N) at 13.

director of an attorneys' firm, and indeed held in regard to the estate. In this regard it is understandable that in both the November and December Orders the court ordered that copies thereof be furnished to the Legal Practice Council. I am of the view that the balance of convenience favours the protection of the estate and therefore the applicant in this regard.

[60] For all the reasons discussed in this judgment, namely the conduct of the first respondent which led to the launching of these proceedings, I am of the view that the estate should not be mulcted with the costs of these proceedings, that the Court should show its displeasure at the conduct of the first respondent, and that the first respondent should pay them in her personal capacity.

IX.ORDER

[61] In the result, the following order is made:

a. Pending the outcome of proceedings to be instituted by the executor of the Estate Late Miko Wa Gatare Rwayitare [*"the estate"*] against the first respondent for recovery of the amount of **R710 000,00** the second respondent is authorized, directed and ordered:

i. to retain monies in the bank account with account number **[....]** held with the second respondent to a maximum amount of **R710 000**.**00**; and

ii. to ensure that no transactions for the transfer of monies from the bank account with account number **[....]** held at the second respondent are executed by any person whatsoever that would reduce the balance of the monies held in that account below **R710 000,00**".

b. The applicant must institute the action against the first respondent referred to in paragraph 1 above within 30 days of the granting of this order.

c. The first respondent is to pay the costs of the applications of 26 November 2021 and 2 December 2021 in her personal capacity on an attorney-client scale.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant	**:**	**Adv A Schmidt**
Instructed by	**:**	**F. Schröter**
		Schröter & Associates
For the respondent	**:**	**Adv A De Villiers**
Instructed by	**:**	**J.C. Van Der Berg**
		J C Van Der Berg Attorneys