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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO**

**Case no: 332/2014
Date heard: 4.12.2014
Date delivered: 10.3.2015**

In the matter between:

BULELWA NAKU	First applicant
FUNDISWA NAKU	Second applicant
SIMPHIWE NAKU	Third applicant

and

MTHUTHUZELI NAKU	First respondent
ESTATE NOMZUZU C. YOLO	Second respondent
MASTER OF THE HIGH COURT (BHISHO)	Third respondent
ASANDA PRUDENCE BACA	Fourth respondent
NCEBA BACA	Fifth respondent
REGISTRAR OF DEEDS	Sixth respondent

JUDGMENT

MALUSI AJ:

[1] This matter served before me to consider a final relief in an application where an order had earlier been granted in favour of applicants by this Court.

The first, second, fourth and fifth respondents set down the application for hearing. I will refer to them in this judgment as the respondents. The third and sixth respondents did not participate in the application. The application was vigorously opposed by the applicants.

[2] It is necessary, as it will become apparent later in the judgment, to provide a background to the application. The dispute between the parties arose from the death of *Nomzuzu Christophina Yolo* who died intestate on the 31st March 2011. The first respondent was appointed by the third respondent (The Master) to be an executor of the deceased estate on the 6th May 2011. In that capacity the first respondent sold an immovable property situated at 4[...] NU8 Mdantsane belonging to the second respondent (the deceased estate) to the fourth and fifth respondents on the 10th December 2013. On the 15th May 2014, the fourth and fifth respondents initiated eviction proceedings in the Mdantsane Magistrate's Court against the second and third applicants. This led to the applicants launching an urgent application to this Court on the 9th June 2014.

[3] The relief sought by the applicants was in two parts. In part A, the applicants applied for an interdict against the first respondent prohibiting him from occupying the immovable property; presenting himself as a lawful owner of the immovable property and 'coming close' to the immovable property and the applicants. The fourth and fifth respondents were likewise to be prohibited

from 'coming close' to the immovable property or presenting themselves as lawful owners.

[4] In part B of the application, the applicants sought a declaratory order effectively setting aside all the steps and decisions taken in the administration of the deceased estate from the appointment of the first respondent to the registration of transfer of the immovable property. It is important to state that none of the orders sought either in part A or B were to be interim relief as no rule *nisi* was proposed in the notice of motion.

[5] On the 12th June 2014, the learned Maseti AJ granted an order (the June order) in the following terms:

- "1. The 1st Respondent is interdicted from occupying **ERF 4[...]** **MDANTSANE Unit [...]** (known as **NU8 [...]**) ('the property').
2. The 1st Respondent is further interdicted from representing to anyone that he has authority or that he is a lawful owner of the property in (2) above. He may not come close to the said property for as long as this interdict is in force. Furthermore he may not come close to the persons of the 1st, 2nd and 3rd Applicants, may not attempt to communicate with them and he may not remove or attempt to remove any movable property.
3. The 4th and 5th Respondents are interdicted from occupying **ERF 4[...]** **MDANTSANE Unit [...]** (known as **NU8 [...]**) ('the property'). They may not come close to this property and they are not allowed to represent to anyone that they are lawful owners of this property for as long as this interdict is in force.

4. The Letter of Executorship granted to the 1st Respondent in the estate of the late **MS. NOMZUZO CHRISTOPHINA YOLO** is null and void.
5. The agreement of sale entered into between the 1st, 4th and 5th Respondent is null and void.
6. The endorsement of the sale of **ERF 4[...] MDANTSANE Unit [...]** (**known as NU8 [...]**) ('the property') by the 3rd Respondent is null and void.
7. The registration of the property into the names of the 4th and 5th Respondents is null and void.
8. The 6th Respondent is instructed to cancel the registration of the property that has been registered into the names of the 4th and 5th Respondents.
9. This order is an interim order pending the decision of the Master of the High Court regarding the appointment of the Executor in the Estate of the 2nd Respondent.
10. The 1st, 4th and 5th Respondents are ordered to pay the costs of this application."

[6] The respondents applied for leave to appeal against the June order either to the full Court of this division or the Supreme Court of Appeal. On the 9th September 2014, the application for leave to appeal was dismissed with costs. The Court reasoned in its judgment that the applicants before me had satisfied the requirements for the grant of an interim relief. The learned Judge held at paragraph 29 of his judgment, that 'none of issues in the interim order

have the effect of a final relief other than restoring the status *quo ante* pending the final determination of the rights of the parties’.

[7] On the 6th October 2014, the Master submitted a report on the administration of the deceased estate to the Court. In the introduction to his report, the Master stated categorically that the report had been prepared in purported compliance with paragraph 9 of the June order.

[8] The respondents set down this application for hearing on the 20th November 2014. It was then postponed to 4th December 2014 when it served before me.

[9] At the hearing I raised the issue with both counsel whether or not the June order was final in effect. I was informed by counsel that the judgment on the application for leave to appeal had held the June order to be interim. I enquired whether the June order, if interim, had not lapsed as there was no rule *nisi* which had been extended to the date of the hearing. I was informed from the bar that there was ‘an understanding between the parties to revive the order if it had lapsed’. I thereafter heard argument on the merits of a final interdict.

[10] The question whether an interdict is interim or final is not a matter of form but of substance. The question depends on the effect of the interdict

upon the issue and not upon its form. An interim interdict is defined as a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination. The applicant must prove the requirements for the grant of a final interdict if the relief sought is interim in form but final in substance¹.

[11] A reading of the June order makes it abundantly clear that the rights of the respondents, at least, were finally determined. Their rights to visit the immovable property, own the immovable property, register ownership of the immovable were all finally determined. The right of the first respondent to administer the deceased estate was likewise finally determined. There is no indication in the order that there will be a reconsideration of the final determination. I am fortified in my view by the fact that the parties filed a full set of papers, the heads of argument were filed and the contesting parties were heard in argument. In such circumstances the practice in this division is to finally determine the issues unless there are exceptional factors requiring a re-hearing.

[12] The ninth paragraph of the June order evinces an intention by the learned Judge for the June order to be interim pending the provision of the report by the Master. In my view, that does not salvage the situation. The

¹ LAWSA Vol II (First Reissue) para 314 and the authorities cited therein; Oasis Group Holdings (Pty) Ltd and Another vs Bray [2006] 4 ALL SA 183 (C) at para 13

intention of the learned Judge would not prevail in circumstances where there is no ambiguity in the order nor an error on his part. I have no evidence that the learned Judge did not intend to grant the June order in the specific terms he granted it. In those circumstances, I only have to consider the substance of the order.

[13] The ninth paragraph of the June order may only reasonably be read to provide that the Master ought to consider the appointment of an executor afresh. The Court appears to have intended to exercise supervisory jurisdiction over the Master to appoint an executor without necessarily fettering with the discretion of the Master to decide on the person. This is in view of the evidence which alleged bias and impropriety on the part of members of staff of the Master's office.

[14] I did not read paragraph 9 of the June order to indicate that the learned Judge intended to hand down a structural interdict. There is no indication that the declaratory order would not have served its purpose. There is also no time frame within which the Master had to provide the report. The report of the Master was not to be used to assess progress nor to finally determine the issues. Ordinarily, the *status quo* is preserved and a report is sought from the Master or other state institution before a determination of the issues. *In casu*, the learned Judge specifically indicated in the judgment of the application for leave to appeal, that he intended to restore the *status quo ante*. On the facts

of this case, once that was done it had the effect of finally determining the rights of the parties and finally disposing of the relief claimed.

[15] Even if I am wrong and the June order was an interim interdict, the respondents have another insurmountable hurdle. The June order was valid until the Master made a decision regarding the appointment of the executor in the deceased estate. That eventuality occurred on the 3rd October 2014. The report was filed at Court on the 6th October 2014. Effectively, the interim order lapsed on the 6th October 2014 at the latest. Once the period of validity had expired and had not been renewed by an order of Court, the original order automatically lapsed².

[16] The respondents set down the matter for hearing only on the 30th October 2014. By then the interim order had long lapsed. There was no substantive application before me to revive the lapsed order. I am of the view that a Court has no authority to *mero motu* revive a lapsed order. This is based on the authority that an interim order has no independent existence but is conditional upon confirmation by the same Court (albeit not the same Judge) in the same proceedings after having heard the other side³. It will also be irregular to revive a lapsed order 'on the understanding between the parties' (whatever that means) without a substantive application before me.

² Fisher v Fisher 1965 (4) SA 644 (W); NDPP v Walsh & Others [2008] JOL 22905 (T)

³ MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd 2000 (4) SA 746 (SCA) para 6

[17] It must be manifest that I need not consider the merits of the application owing to the opinion expressed above. The only other issue I need to adjudicate upon is the costs of the postponement on the 20th November 2014 and the hearing on the 4th December 2014. The respondents took it upon themselves to set the matter down. There was no need to do so. The respondents ought to have petitioned the President of the Supreme Court of Appeal if they were not satisfied with the judgment of Maseti AJ, and believe that the order is still in force and has not lapsed. It seems to me fair and just to mulcate them with costs.

[18] In the circumstances and for the above reasons, it is ordered:

[18.1] The application for final relief is dismissed as incompetent.

[18.2] The first, second, fourth and fifth respondents are ordered to pay the wasted costs occasioned by the postponement on 20th November 2014 and the costs of the hearing on 4th December 2014.

**T. MALUSI
ACTING JUDGE OF THE HIGH COURT**

On behalf of the applicants
Instructed by

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