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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 2024-069450

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 15 July 2024

E van der Schyff

In the matter between:

NGOBENI FORTUNATE NONHLANHLA

FIRST APPLICANT

NGOBENI FORTUNATE NONHLANHLA N.O.

SECOND APPLICANT

and

LATE FREDDY PETER MALUNGANI

FIRST RESPONDENT

MALUNGANI TSHGOFATSO FLORENCE N.O.

SECOND RESPONDENT

MALUNGANI TSHGOFATSO FLORENCE

THIRD RESPONDENT

MINISTER OF HOME AFFAIRS

FOURTH RESPONDENT

DIRECTOR-GENERAL HOME AFFAIRS

FIFTH RESPONDENT

MASTER OF THE HIGH COURT

SIXTH RESPONDENT

SENTINEL PENSION FUND

SEVENTH RESPONDENT

NGM CONSULTANTS AND
ACTUARIAL ADMINISTRATORS

EIGHTH RESPONDENT

SIBANYE STILLWATER

NINTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant approached the urgent court on her own, and ostensibly her minor children's behalf. She seeks an order to the following effect:

- i. That the letter of executorship issued by the sixth respondent in favour of the third respondent, be suspended or stayed pending the finalisation of an action instituted under case number 2024-068617;
- ii. That the seventh respondent be directed to withhold or preserve the whole amount, or at least 50% of the funds held in the name of the deceased Freddy Peter Malungani pending the finalisation of an action instituted under case number 2024-068617;
- iii. That the eighth respondent is directed to withhold or suspend transfer of funds to the Estate Late Freddy Peter Malungani pending pending the finalisation of an action instituted under case number 2024-068617;
- iv. That the ninth respondent respondent be directed to withhold or preserve the whole amount, or at least 50% of the gratuities or benefits held in the name of the deceased Freddy Peter Malungani pending the finalisation of an action instituted under case number 2024-068617;

- v. That no party is authorised to make any payouts to the benefit of the third respondent or the first applicant pending the finalisation of an action instituted under case number 2024-068617.
- [2] Mr. Freddy Peter Malungani (the deceased) passed away on 21 May 2024. The first applicant claims to be his customary law wife. She is the mother of two children sired by the deceased. She instituted the application on her own behalf and in the interest of her minor children.
- [3] The first applicant claims to have been married to the respondent in terms of a customary marriage on 24 April 2011. At the time of the conclusion of the marriage both parties were older than 18, and both consented to the marriage. There were lobola negotiations, and she attached lobola minutes. Her customary marriage with the deceased was not registered, but she claims that both her family and the deceased's family were aware of the marriage. She attached affidavits from the daughter of the deceased's aunt, the deceased's nephew, an uncle, and her sister.
- [4] The first applicant claims that she was unaware of the civil marriage concluded between the deceased and the third respondent. She instituted action proceedings challenging the deceased's marriage in terms of the *Recognition of Customary Marriages Act* 120 of 1998 under case number 2024-068617. She claims to be the co-owner of several immovable properties, together with the deceased. The first is an immovable property situated at ERF 8[...], Vergelegen, which is registered in her and the deceased's names. A mortgage bond in favour of Standard Bank is registered over the property. This property is her and her children's primary residence. The second property is situated in 1[...] F[...] Avenue, Brits. Although the property is registered in the name of the deceased, she is entitled to a share thereof.
- [5] The third respondent challenges the applicant's decision to approach the urgent court. It is sufficient for purposes of this judgment to note that I am of the view that the applicant was correct to seek the urgent court's assistance, at least as far as the preservation of gratuity benefits that will not fall into the deceased estate is

concerned. Since it would be illogical to deal only with the relief sought in that regard, the application and the full extent of the relief sought are considered.

- [6] The requirement for granting an interim interdict is trite and need not be rehashed. By providing the alleged lobola letter and accompanying affidavits, the applicant made out a case that she has a *prima facie* right, though open to some doubt, to benefit from the division of the estate, and to any pension-or gratuity benefits that will not be paid into the estate. The authenticity of the letter and the validity of the proceedings can be decided by the trial court, which court will hear evidence and finally determine the issue.
- [7] If funds are not preserved pending the final determination of the validity of the customary union, and the applicant eventually succeeds at the trial, she may suffer irreparable harm in that it might turn out to be impossible to recover money paid out to other beneficiaries.
- [8] The balance of convenience favour the grant of the interim interdict in the terms that it is granted in that the winding-up of the deceased estate will not be unduly delayed or be left to lay dormant for an unidentified period of time, while her interests will be protected in the interim;
- [9] The applicant has no other satisfactory remedy to obtain the relief granted in this order.
- [10] I do not intend to suspend the letter of executorship at this juncture. No case has been made out that the third respondent is disqualified from acting as the executor of the estate, and unless evidence of that nature surfaces, it would not be in any party's interest to have the estate lying dormant. The executor may, however, not proceed with the drafting of the final liquidation and distribution account or the distribution of any inheritance to the heirs until the action instituted under case number 2024-068617 for the determination of the validity of the applicant's customary union with the deceased, has been finalised.

[11] As for the gratuity or pension benefits that do not fall into the estate, the relevant fund administrator must preserve the amount, if any, that would be paid to the applicant in the event that it is found that she was in a valid customary union with the deceased, and the amount that would be paid to the third respondent in the event that the pending litigation is unsuccessful. The remainder may be paid out to other lawful beneficiaries according to the respective Funds' policies.

[12] The application was partially successful. Since, however, this is an interim interdict, it is fair and just to determine that costs of this application follow the success of the pending application under case number 2024-068617.

ORDER

In the result, the following order is granted:

1. This application is heard as an urgent application, and any non-compliance with any requirements in the Uniform Rules of Court is condoned;
2. The executor of Estate Late Freddy Peter Malungani may not finalise the Final Liquidation and Distribution Account or proceed with the distribution of any inheritance to the heirs pending the finalisation or settlement of the proceedings under case number 2024-068617;
3. The executor of Estate Late Freddy Peter Malungani must regularly inform the applicant, or her nominated legal representatives, of all amounts received into the estate bank account, and all payments made;
4. The executor of Estate Late Freddy Peter Malungani may not take any action that will adversely affect the *status quo* as far as the applicant is concerned, without giving at least six weeks written notice to the applicant or her legal representative of the proposed action;
5. In the event that the seventh, eighth, or ninth respondent intends to pay any gratuity, benefit, or funds acquired and held in the name of the deceased, the late Freddy Peter Malungani, with identity number 7[...], directly to beneficiaries:

- 5.1. they are to **calculate and preserve** the percentage of the gratuity, benefit, or funds that would be paid to the applicant in the event that she is successful with the litigation under case number 2024-068617 in proving the validity of her customary marriage to the deceased, if any, and the amount that would be paid to the third respondent in the event that the pending litigation is unsuccessful;
- 5.2. No payout may be made to the first applicant or the third respondent pending the finalisation of the litigation under case number 2024-068617;
- 5.3. The remainder of the gratuity, benefit, or funds may be paid over to the lawful beneficiaries in terms of the respondents' respective policies.
6. The costs of this application are costs in the cause of the proceedings under case number 2024-068617, unless the applicant does not proceed with the proceedings under case number 2024-068617 in which case the costs are to be paid by the applicant.

E van der Schyff
Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant:	Adv. ZD Maluleke
Instructed by:	Bright Rikhotso Incorporated
For the respondent:	Adv. N. Matidza
Instructed by:	Ernest Nemusimbori Attorneys Inc.
Date of the hearing:	10 July 2024
Date of judgment:	15 July 2024