

**SANPOULUS MAPLANKA**

**Versus**

**OLIVER MASOMERA**

**And**

**THE DEPUTY MASTER**

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 12 NOVEMBER & 14 DECEMBER 2015 & 14 JANUARY 2016

*T. Masiye-Moyo* for the applicant

*S. Chatsanga* for the respondent

**TAKUVA J:** This is an urgent chamber application wherein the applicant claims in the interim the following relief:

“Pending confirmation or discharge of the provisional order:-

- (i) Second respondent be and is hereby interdicted from issuing first respondent the requisite consent for disposal of the assets of the Estate Late Fairchild Maplanka, DRB 334/09
- (ii) Should the second respondent have issued the consent in (i) above at the time this order is made, second respondent be and is hereby ordered to revoke it.
- (iii) First respondent be and is hereby interdicted from disposing of the assets of the late Fairchild Maplanka DRB 334/09, with or without the consent of the second respondent.
- (iv) The certificate of authority issued by the 2<sup>nd</sup> respondent in the Estate Late Fairchild Maplanka DRB 334/09 on the 16<sup>th</sup> October 2015 be and is hereby suspended.”

The facts are as outline hereunder. The applicant is one of the late Fairchild Maplanka’s sons. The 1<sup>st</sup> respondent is the Executor of the Estate Late F. Maplanka appointed thereto by the 2<sup>nd</sup> respondent. During his lifetime the late Mr F. Maplanka was married to three wives. Evelyn Maplanka, the first wife was applicant’s mother. Upon the death of Mr Maplanka, one Nomsa Hazel Ncube was appointed the executor of the estate. The finalisation of the distribution of the estate stalled and in July 2015, the 2<sup>nd</sup> respondent relieved Nomsa Hazel Ncube of her executorship. First respondent was subsequently appointed as the executor of applicant’s late father’s estate. This was on the 6<sup>th</sup> day of August 2015. Evelyn Maplanka passed on the 21<sup>st</sup> August 2015.

On 1<sup>st</sup> September 2015, applicant's legal practitioners wrote to the 2<sup>nd</sup> respondent complaining about 1<sup>st</sup> respondent's conduct. See annexure 'D'. Further on 2<sup>nd</sup> September 2015, applicant's legal practitioners wrote a letter to the 1<sup>st</sup> respondent complaining that he was not a neutral executor. See annexure E and F, the latter being 1<sup>st</sup> respondent's reply. Meanwhile on 9 September 2015 Messrs Lazarus and Sarif wrote a letter to second respondent in which they reiterated that they intended to challenge the removal of Nomsa Ncube as the executor. The 1<sup>st</sup> respondent sought from the 2<sup>nd</sup> respondent authority in terms of s 120 of the Administration of Estates Act Chapter 6:01 Amendment number 6/97 to dispose certain movable and immovable properties belonging to the estate. While the request was made on 20 October 2015, applicant became aware of its existence on 3 November 2015. Applicant's legal practitioners then addressed a letter to 2<sup>nd</sup> respondent on 4 November 2015 asking him to register applicant's mother's estate. The estate was subsequently registered under DRB 898/15 but no executor has been appointed. Despite this, 1<sup>st</sup> respondent insists on selling the assets of the Estate Late F. Maplanka DRB 334/09 in clear disregard of applicant's mother's interests.

In terms of section 219 of the Administration of Estates Act Chapter 6:01, applicant as the son to his deceased mother, is entitled to secure and take custody of the assets of his mother, including assets left by his mother in his father's estate. Applicant challenges the 1<sup>st</sup> respondent's "Distribution Plan" as indicated in annexure H.

In his founding affidavit, applicant averred that this matter is urgent in that if 2<sup>nd</sup> respondent issues the consent applied for, the estate of his mother will be prejudiced to an extent that such prejudice will be irreparable. On the other hand the 1<sup>st</sup> respondent will not be prejudiced by the order he seeks in that firstly, it is an interim interdict pending the appointment of an executor in his mother's estate, and secondly 1<sup>st</sup> respondent is only acting in his official capacity in that the property does not personally belong to him. Therefore, the balance of convenience favours the granting of the interdict so as to afford all concerned persons including applicant's mother's estate through its executor, an opportunity to make representations as to how the estate of applicant's father should be dealt with.

Further, as regards urgency, the applicant has contended that he approached this court as soon as he had knowledge of the intended disposal of his late father's assets. Applicant submitted that although he conducts his business in Victoria Falls, most of the time he will be out of reach and this is why his legal practitioner could not reach him by telephone timeously.

The application was opposed by both respondents. The 1<sup>st</sup> respondent's grounds for opposing the application as contained in his opposing affidavit are briefly that:

- (a) the matter is not urgent as the estate of Evelyn Maplanka will be treated like any other beneficiary in terms of section 52 of the Administration of Estates Act.
- (b) since the 2<sup>nd</sup> respondent has already issued the requisite consent to sell, the order sought is incompetent. In any case, the estate of the applicant's mother cannot

suffer any prejudice as it “will be awarded what is due to it in terms of the law” in due course.

- (c) in terms of section 5 (1) of the Act, the estate of the applicant’s mother ought to have been registered “within 14 days” of her death. She died on the 21<sup>st</sup> August 2015 and it “boggles the mind how non-appointment of an executor 12 weeks later creates urgency.”
- (d) applicant has no *locus standi* to represent his deceased mother as he was not appointed executor of that estate.

On the merits, the 1<sup>st</sup> respondent argued that:

- (i) there is no distribution plan but just a draft which was not signed by all the beneficiaries,
- (ii) in terms of section 25 (3) of the Act, the Master appoints such person or persons as to him seems fit and proper to be executor or executors of the estate ...”
- (iii) there is no basis for the allegation of bias,
- (iv) it is not 1<sup>st</sup> respondent’s fault that an executor is yet to be appointed for applicant’s mother’s estate and this omission cannot validly stop 1<sup>st</sup> respondent from administering the estate under his administration,
- (v) applicant’s mother’s interest in the estate under 1<sup>st</sup> respondent’s administration is secure,
- (vi) applicant and other beneficiaries connived with the former executor to sell estate property comprising cattle and immovable property illegally.
- (vii) applicant has “so many other remedies” available to him.

The second respondent submitted his report in terms of Rule 248 of this Court’s rules. He has as usual chronicled the history of the matter and the reasons for the previous executor’s removal from office. Also, he indicated that the sale of one property is to enable the 1<sup>st</sup> respondent to take care, of the liabilities so that the estate is finalised. Finally, he is of the view that the 1<sup>st</sup> respondent is in charge of the assets and since he has been issued with authority in terms of section 120, he should not be stopped from doing his work.

The sole issue for determination is whether or not the applicant has met the requisites for an interim interdict. An application for an interdict can only be granted if all the requisites of a prohibitory interdict are established. The *locus classicus* of the cases which set out these criteria is *Setlogelo v Setlogelo* 1914 AD 221 at 227. In *Tribal (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52, these criteria were stated as:

- “1. a clear or definite right – this is a matter of substantive law;
- 2. an injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.

3. the absence of a similar protection by any other ordinary remedy. The alternative remedy must (a) be adequate in the circumstances; (b) be ordinary and reasonable (c) be a legal remedy; and (d) grant similar protection.” See also *PTC Pension Fund v Standard Chartered Merchant Bank Zimbabwe Ltd and Anor* 1993 (1) ZLR 55 (H) at 63C.

In *Econet (Pvt) Ltd v Min of Information, Posts & Telecommunications* 1997 (1) ZLR 342 (H), it was held per ADAM J that for the grant of a temporary or interim interdict, the requisites are that –

- “(1) the right sought to be protected is clear; or
- (2) (a) if it is not clear, it is *prima facie* established, even though open to doubt; and
- (b) there is a well grounded apprehension of irreparable harm if the relief is not granted and the applicant ultimately succeeds in establishing his right;
- (3) the balance of convenience favours the grant of the relief; and
- (4) there be no other satisfactory remedy.” See also *Nyambi & Ors v Minister of Local Government & Anor* 2012 (1) ZLR 569 (H).

C. B. PREST *The Law & Practice of Interdicts* at page 57 states;

“The court has to decide, in its discretion, whether or not to grant a temporary interdict. In the exercise of this discretion, it must be satisfied that the applicant has proved an actual or well grounded apprehension of irreparable loss if no interdict is granted and it must have regard to the balance of convenience. The balance of convenience, however, becomes relevant only when a *prima facie* ground for an interdict has been established. This is the threshold that must be crossed and a failure so to do means that an applicant cannot succeed in his claim.”

Put differently, where an applicant for an interdict proves a clear right, then, he need not show that he will suffer irreparable harm if the interdict is not granted. He merely has to show that an injury has been committed or that there is a reasonable apprehension that an injury will be committed. Applying these principles to the case *in casu*, I find that the applicant has a *prima facie* right arising from the fact that he is Evelyn Maplanka’s son and that his mother had left property in expectancy in the estate of his late father. Section 21 of the Act requires him to take custody of assets of a deceased person in his mother’s position.

As regards irreparable harm, it is common cause that 1<sup>st</sup> respondent wants to sell the immovable property in order to take care of liabilities before the appointment of an executor in Evelyn Maplanka’s estate under DRB 898/15. Quite clearly, the letter dated 20 October

2015 annexure H violates the rights of the Estate Late Evelyn Maplanka. If this sale is permitted, the applicant will suffer financial prejudice in that in the absence of an executor in Evelyn Maplanka's estate, there is virtually no one to represent its interests.

In my view, the balance of convenience favours the granting of the interdict in that the 1<sup>st</sup> respondent will lose nothing if the order is granted since he is acting in his official capacity. All that is requested of him is that he acts fairly by consulting all beneficiaries before taking decisions that have far-reaching consequences. In other words, the 1<sup>st</sup> respondent's discretionary powers in terms of section 68 of the Act are not unfettered as the 2<sup>nd</sup> respondent ultimately makes decisions.

On the other hand, if the assets are disposed without granting the estate the right to be heard, this will obviously cause prejudice to Evelyn Maplanka's estate and ultimately to the applicant. The 1<sup>st</sup> respondent has made it abundantly clear that he intends to distribute the proceeds of the sale to "other beneficiaries" excluding Evelyn Maplanka's children including the applicant. The 2<sup>nd</sup> respondent had also taken the same stance. There is however one disturbing feature in this case. The authority granted by the 2<sup>nd</sup> respondent in terms of section 120 of the Act filed as annexure I by 1<sup>st</sup> respondent was issued four days before 1<sup>st</sup> respondent applied for it – see annexure H which is a letter addressed to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent conceded that it is improper and illogical for the authority to have been issued before the reasons for such a request had been communicated to the 2<sup>nd</sup> respondent. For this reason, I find that the authority was improperly issued and is therefore defective.

The applicant has no satisfactory alternative remedy other than to apply for the interdict. It was submitted by Mr *Chatsanga* for the 1<sup>st</sup> respondent that applicant has numerous other remedies in terms of s 52 of the Act in that whoever is eventually appointed as executor in Evelyn Maplanka's estate will have an opportunity to challenge the sale *ex post facto*. In my view, this is without merit as it amounts to closing the stable door when the horse has already bolted.

Finally, both respondents devoted quite considerable time to what they termed criminal or improper conduct by the applicant and the erstwhile executor. I take the view that these allegations have nothing to do with the request that 2<sup>nd</sup> respondent facilitates the appointment of an executor in estate Evelyn Maplanka under DRB 898/15. The alleged theft of stock from Estate Late Fairchild Maplanka by applicant is not a relevant factor in this application.

For these reasons, I am of the view that the respondents' opposition is without merit. The applicant has made a good case for an interdict.

Accordingly, it is ordered that:

Pending confirmation or discharge of the provisional order.

- (i) Second respondent be and is hereby interdicted from issuing 1<sup>st</sup> respondent the requisite consent for disposal of the assets of the estate late Fairchild Maplanka, DRB 34/09
- (ii) Should the 2<sup>nd</sup> respondent have issued the consent in (i) above at the time this order is made, 2<sup>nd</sup> respondent be and is hereby ordered to revoke it.
- (iii) 1<sup>st</sup> respondent be and is hereby interdicted from disposing of the assets of the late Fairchild Maplanka DRB 334/09 with or without the consent of the 2<sup>nd</sup> respondent.
- (iv) The certificate of authority issued by 2<sup>nd</sup> respondent to sell by private treaty immovable property described in annexure I belonging to Estate Late Fairchild Maplanka DRB 334/09 be and is hereby suspended.
- (v) This provisional order together with the urgent chamber application shall be served upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents by applicant's legal practitioners by a certificate of service.

*Masiye-Moyo & Associates incorporating Hwalima, Moyo & Associates* applicant's legal practitioners  
*Chatsanga & Partners* 1<sup>st</sup> respondent's legal practitioners