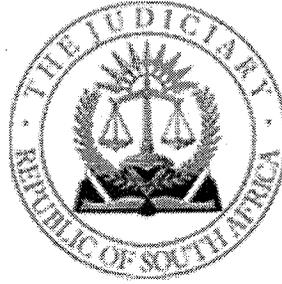


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 24895/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES

15 MAY 2019

RT Sutherland
RT SUTHERLAND

In the matter between

BEATRICE MWANANSHIKU
KAMPAMBA MWANANSHIKU
MUMBI MWANANSHIKU
ZOMBE MWANANSHIKU
NAMUKWANYA MWANANSHIKU
LUCY MWANANSHIKU

1st APPLICANT
2nd APPLICANT
3rd APPLICANT
4th APPLICANT
5th APPLICANT
6th APPLICANT

and

LINDA KAUNDA JANGULO MWANANSHIKU
LINDA KAUNDA JANGULO MWANANSHIKU N.O
O'HAGAN ATTORNEYS
THE MASTER, JOHANNESBURG
THE REGISTRAR OF DEEDS, PRETORIA

1st RESPONDENT
2nd RESPONDENT
3rd RESPONDENT
4th RESPONDENT
5th RESPONDENT

J U D G M E N T

SUTHERLAND J:**Introduction**

[1] This applicant seeks an interim interdict against the second respondent, (Linda) the executrix of the estate of the late Ngoshe Simon Mwananshiku (Estate Ngoshe). The objective is to prevent the distribution of the assets in the deceased estate Ngoshe. The relief is envisaged to endure until the fourth respondent, the Master of the High Court (the Master) makes a decision about an objection lodged in terms of section 35(7) of the Administration of Estates Act 66 of 1965 (Estates Act) to the final liquidation and distribution account in the estate Ngoshe, filed by the Linda. The objection was lodged on 17 January 2017, and no decision has yet been taken by the Master. Moreover, the relief sought is envisaged to extend to the period after the Master makes the decision so that in the event the decision is adverse to the applicants, the interdict shall endure pending a review application to set such decision aside.

[2] All the parties, save the Master, and the third and fifth respondents, an attorney and the registrar of deeds, are members of the Mwananshiku family. The underlying controversy is a dispute about who should have the assets in the estate Ngoshe. The applicants are the mother of the deceased (Beatrice) and Ngoshe's siblings. The first and second respondents are the same person; Linda, the widow of the deceased, cited in her personal capacity and as the executrix.

[3] The late Frederick Arthur Mwananshiku, who died in 1994, left substantial assets to his widow Beatrice, and the balance of his assets were supposed to be held in a trust for all the children; ie the deceased and his siblings. The trust was never formed and the estate Frederick remains open. This estate is, ostensibly, in Zambia. Beatrice is the executrix of the estate Fredrick, but she is not cited in these proceedings in that capacity. (The attempt to establish that status by a mention thereof in a letter of 6 February 2018 and an allusion in the replying affidavit is ineffective. What is necessary is an amendment to the notice of motion, which has not been done.) Self-evidently, the estate of the late Frederick is not privy to these proceedings.

[4] It is alleged that the deceased was orally authorised by Beatrice (supposedly in her capacity as executrix of the estate Frederick) to manage the business assets of the estate Frederick. It is further alleged that the assets in the estate Ngoshe were acquired by misappropriating funds from the estate Frederick. Hence, the demand by the applicants that such misappropriated funds amounting to some R7m be accounted for. A claim to that effect was lodged with the executrix, Linda and rejected by her.

[5] The present proceedings are met with these defences:

5.1 The applicants have no standing to object to the liquidation and distribution account.

5.2 The requirements for an interim interdict are absent.

5.3 The excessive delay by the applicants in pursuing a remedy for their grievances is such that the court should exercise a discretion to dismiss the application.

Evaluation

[6] First, the formulation of the relief calls for comment. It is not open to a litigant to obtain relief contingent on the possibility of a future uncertain administrative decision being adverse. Assuming for present purposes that an interdict was appropriate to inhibit an executrix from distributing the assets pending a decision by the Master, the second leg premised on the risk of an adverse decision by the Master is incompetent. Only once an adverse decision has been made that aggrieves a litigant, could further interim relief pending a review be appropriate. This leg of the relief was correctly abandoned in the hearing.

[7] Second, the objection lodged on 19 January 2017 must be examined. The full text reads thus:

**“ RE: CLAIM AGAINST THE ESTATE OF THE LATE: NGOSHE MWANANSHIKU
ESTATE NO. 010396/2016 & DATE OF DEATH: 11 MARCH 2016**

1. We refer to the abovementioned estate and confirm acting on behalf of the family of the late Mr Frederick Arthur Mutale Mwananshiku who passed away on the 10th February 1988, the siblings of the late Ngoshe Mwananshiku (who subsequently passed away in March 2016) as well Mutale Mwananshiku (the biological son of Ngoshe Mwananshiku).
2. Our client's instructions are that sometime in July 2016 they did the following:
 - 2.1 They placed information before the Executor of the estate of Ngoshe Mwananshiku as well as their attorneys Messrs Ryan D Lewis Attorneys which showed that the majority of the assets which was in possession of Ngoshe at the time of his death to the total sum of R7 584 143.70 belonged to the estate of the late Mr Fredrick Arthur Mutale Mwananshiku;
 - 2.2 The estate of the said Fredrick Arthur Mutale Mwananshiku was administered by his surviving wife who subsequently, and by way of verbal power of attorney instructed Ngoshe to administer the estate, but solely for the benefit of the family;

- 2.3 The said Ngoshe Mwananshiku had no known alternative source of income besides the income which he received from administering the assets of Fredrick on behalf of the family;
- 2.4 Despite his limited authority Ngoshe transferred much of the funds of the estate of Fredrick Arthur Mutale Mwananshiku without the family's approval to South Africa, which funds were used to purchase amongst other things properties in Johannesburg as well as other vehicles (accounted for a draft liquidation and distribution account as assets of Ngoshe).
3. In order to prove the abovementioned claims our clients submitted affidavits and lists of goods claimed to the executor but the Executor has refused to accept the claim or at least to investigate the claims sufficiently.
4. The Executor's attorney rejected the claims by means of a letter dated the 7th December 2016 (see copy attached).
5. As a result of the above, we hereby write to notify you that:
 - 5.1 The draft liquidation and distribution account which has been submitted (see copy attached) does not represent truly the assets of Ngoshe but rather those of Fredrick Arthur Mutale Mwananshiku;
 - 5.2 That the executor has failed to report fully and honestly to the Master about the status of the estate despite having knowledge that the majority of the estate belongs to another estate;
 - 5.3 The liquidation and distribution account is defective and is subject to objection.
6. Therefore, we kindly request you to call all the family members including the executor of the estate of Fredrick Arthur Mutale Mwananshiku to explain the status and extend of the insufficiency of the report submitted.
7. For your ease of reference, the following documents have been attached:
 - 7.1 A copy of the draft liquidation and distribution account submitted by Ngoshe's executor;
 - 7.2 Demands made on behalf of clients by their erstwhile attorneys of record, Messrs Werth Schroder Inc.; copy of Fredrick Arthur Mutale Mwananshiku's Will, correspondences exchanged with Ngoshe's executor's attorneys, copy of title deeds for properties owned by clients, affidavits by clients to confirm their claims and proofs of the transfers made by Ngoshe in respect of Fredrick's assets from Zambia and other countries to South Africa as well as other relevant documents.

Please note that since there are minor children involved in this matter it is important that unnecessary litigation is averted in order to safeguard the assets of both estates and the interests of the children.

We shall await your response and directions regarding how the claim should be dealt with."

[8] This letter purports to be an objection as contemplated by section 35(7) of the Estates Act. That section reads:

“(7) Any person *interested in the estate* may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons therefor, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.” (Emphasis supplied)

[9] The procedure that follows such an objection is provided for in section 35(8) - (10):

“(8) The executor shall, within fourteen days after receipt by him of the copy of the objection, transmit two copies of his comments thereon to the Master.

(9) If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of opinion that such objection is well-founded or if, apart from any objection he is of opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit.

(10) Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master’s decision and the Court may make such order as it may think fit.”

[10] It is plain that the gravamen of the complaint is the allegation that the claim made against the estate by an alleged creditor was wrongly rejected. That is a dispute premised on the fact of a legitimate claim. The Master has no authority to resolve such

a dispute. Section 33 of the Estates Act regulates the steps that an aggrieved creditor may take if a claim is rejected:

“33. Rejected claims.

(1) If any executor rejects any claim against the estate, he shall forthwith notify the claimant in writing by registered post and shall state in the notice his reasons for rejecting the claim.

(2) Any Court by which any claim against a deceased estate is adjudged in favour of a claimant may decline to grant the claimant his costs against the estate if the Court is satisfied that the information given by the claimant to the executor was insufficient or that the executor was justified in rejecting the claim under subsection (3) of section *thirty-two*.”

[11] Moreover, the allegation that the assets in the estate Ngoshe are the assets of the estate Frederick is misconceived. Elsewhere in the applicants' affidavits, detailed allegations are made of transfers of money from the estate Frederick to Ngoshe. In truth, if the misappropriation allegation is accepted as correct, Ngoshe in his lifetime used those funds to acquire the assets now vested in his estate. The claim of the legitimate creditor is for repayment of the R7m not for transfer of the assets.

[12] The applicants are not the heirs of Ngoshe. Moreover, it is the estate Frederick (and apparently various companies in which the estate Frederick has interests and whose funds have allegedly been misappropriated) that are, on the allegations relied on by the applicants, the creditor or creditors, not the heirs of Frederick or the putative beneficiaries of a non-existing trust to which the assets in estate Frederick were supposedly to have been devolved. As alluded to already, the estate Frederick is not a party to the proceedings.

[13] Accordingly, the applicants cannot be “interested persons” in the sense used in section 35(7) for as long as their claim remains rejected. In the scheme of the Estates Act, the stage at which a liquidation and distribution account is presented, the ‘interested parties’ are persons who are entitled to share in the distribution. Were it to be understood differently, it would imply that such an account could properly be drawn up before resolving the factual issue of who, as creditor or heir, was entitled to participate. The applicants’ proper relief is to challenge the rejection of the claim pursuant to section 33. Whether that can still, however belatedly, be accomplished, I express no opinion.

[14] In short, the applicants have not shown that they have standing and thus cannot show even a prima facie right, still less harm. On the whole, the application is misconceived. No grounds are established for an interim interdict.

[15] In addition to these considerations, it is argued on behalf of the respondent that the supine nature of the way the applicants have prosecuted these proceedings warrant its dismissal even if the application had merit. The facts support this perspective. Having elected, wrongly, to seek a remedy for the rejection of their claims by objecting to the liquidation and distribution account on 19 January 2017, the application for interim relief was launched on 10 July 2017. Since then no steps whatsoever have been taken to get the Master to respond substantively to the objection. The application was brought urgently, and the urgency was resolved by the respondent giving an undertaking. Since then the applicants have sat on their hands and ridden on the back of the undertaking. This hearing in May 2019, was precipitated by the initiative taken by Linda.

[16] That this conduct of the applicants is deserving of rebuke is plain and likewise warrants a dismissal. (See: *Juta & Co v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA443 (C) at 445B; *National Council of Societies For the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at [16] – [18].)

The Costs

[17] The costs must follow the result. In addition there are the costs reserved from the hearing on 25 July 2017 and the costs of the application for provision of security for costs in which an order was made that costs be costs in the cause, which the applicants must bear.

[18] The Order

- (1) The application is dismissed with costs, including the costs reserved in respect of the hearing on 25 July 2017 and the costs occasioned by the application in respect of the provision of security for costs.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of hearing: 13 May 2019
Date of judgment: 15 May 2019

For the Applicants:
Adv L Lipschitz,
Instructed by Noqwana Burns

For the First and Second Respondents:
Adv L Hollander,
Instructed by Ryan Lewis