


## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 2669/2018

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE: 19/03/19 SIGNATURE: 	

In the matter between:

SALOME NNANA RAPITSI

APPLICANT

And

STANDARD BANK

FIRST RESPONDENT

FIRST NATIONAL BANK

SECOND RESPONDENT

ABSA BANK

THIRD RESPONDENT

NEDBANK

FOURTH RESPONDENT

CAPITEC

FIFTH RESPONDENT

MOSINA CHRISTINA MALOPE

SIXTH RESPONDENT

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## JUDGEMENT

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**KGANYAGO J**

- [1] On 2<sup>nd</sup> of May 2018 the applicant bought an ex-parte urgent application before Muller J. The applicant obtained an interim relief wherein the banking account of the sixth respondent was frozen to the amount not exceeding R1 000 000.00. It was alleged that the sixth respondent has received an amount of R1 000 000.00 as a surviving spouse of the late Masoko Ephafra Rapitsi (deceased). The first to fifth respondents, were interdicted from receiving any instruction in relation to the bank account of the sixth respondent, including any transfer or withdrawal of any amount to any person/s pending the finalisation of the declaratory order application to be launched.
- [2] The background facts are that the applicant is the daughter of the deceased. The applicant is having three siblings and one of them is still a minor. The applicant's mother and the deceased divorced on the 30<sup>th</sup> July 2014.
- [3] At the time of his death the deceased was employed by Transnet SOC Limited. He passed away on the 30<sup>th</sup> January 2017. At the time of his death he was a contributing member of Transnet Retirement Fund underwritten by Momentum Retirement Administrators (Fund). The deceased has nominated his four children as the beneficiaries to his pension benefit.
- [4] According to the applicant after the passing away of the deceased they went to Transnet to claim money for burial of the deceased. They found that the sixth

respondent had already lodged a claim but has not yet been paid. After the funeral they went back to Transnet to lodge a claim for pension benefits. After lodging the claim Transnet assured them that they will be contacted before payment is made to enable them to raise any objection should they so wish. The purpose for that was enable the Fund to pay the benefits to the correct beneficiaries.

- [5] The applicant stated in her founding affidavit that on the 27<sup>th</sup> April 2018 she was informed by her attorney that an amount of R1 000 000.00 has been paid to the six respondent in her capacity as the deceased surviving spouse and that it is alleged that the deceased had paid lobola for her during 2015. They dispute that the sixth respondent was married to the deceased by customary union. According to the applicant the sixth respondent is conniving with other of their family members in order to defraud them of their pension benefits.
- [6] As proof of payment of the pension benefits to the six respondent, the applicant in her founding affidavit has attached a copy of a resolution dated 19<sup>th</sup> February 2018, taken by the Trustees of the Retirement Fund. In that resolution the four children of the deceased, the deceased ex-wife and the sixth respondent are to paid the pension benefits of the deceased. The sixth respondent was to be paid R1 000 000.00 by virtue of being the deceased surviving spouse. That is what led to the applicant approaching this Court on urgent basis on the understanding that payment has already been effected.
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- [7] The sixth respondent is opposing the applicant's application. According to the sixth respondent, she did not receive any payment from the Fund. She has also attached copies of her bank statement from her banking institution for the period 22<sup>nd</sup> February 2018 to 5<sup>th</sup> May 2018. From the said bank statement there is no



amount of R1 000 000.00 that was paid into her bank account during that period.

[8] It is trite that the granting of an interim relief pending an action is an extraordinary remedy which is within the discretion of the Court to either grant or withhold. The test for granting an interim relief were formulated in the well-known case of **Setlogelo v Setlogelo**<sup>1</sup> being a prima facie right, a well-grounded apprehension of irreparable harm, balance of convenience and the absence of any other satisfactory remedy.

[9] In **Knox D'Arcy LTD and Others v Jamieson and Others**<sup>2</sup> Grosskoft JA said:

“ ... Thus in **Messina (Transvaal) Development CO LTD v South African Railways and Harbours 1929 AD 195 at 215-16 Curlewis JA** said:

‘In an application for an interim interdict pending action, the court has a large discretion in granting or withholding an interdict. Where there is merely a possibility, not practical certainty, of inference or injury, as in the present case, the Court will be reluctant to grant an interdict, especially if the party seeking the interdict will have other means of redress and will not suffer irreparable damage. And the Court is entitled to and must regard the possible consequences, both to the applicant and the respondent which will ensue if the interdict be granted or withheld’

[10] The first requirement which the applicant in an application for an interim relief must satisfy is a *prima facie* right. It is trite that the right is required to be *prima facie*, though open to some doubt. The applicant in her founding affidavit has stated that she is a beneficiary of the deceased and has therefore a direct

<sup>1</sup> [1914] AS 221 at 227

<sup>2</sup> [1996] (40 SA 348 (A) at 360 H-J

interest to the amount paid to the sixth respondent, in that should the main application succeed, she stand to benefit financially from such payment. The applicant being one of the children of the deceased and the nominated beneficiaries stand to benefit directly should it be found that the sixth respondent is not entitled to benefit from the deceased pension interest. For that reason the Court is satisfied that the applicant has established a prima facie right.

- [11] The second requirement which the applicant must satisfy is to show that there is a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing. It must not have taken place already (**See Tshwane v City Afriforum 2016 (6) SA 279 (CC) at 360 B-C**)).
- [12] The applicant in her founding affidavit has stated that should the relief she is seeking not be granted, the sixth respondent shall freely be able to access her account and that should the money be depleted, the real possibility is that she will never recover the amount that will be due to her. She further stated that it will be a futile and/or academic for her to proceed with main application if the sixth respondent had already depleted the whole benefit paid to her.
- [13] The purpose of the interim interdict is to prevent the future harm. The applicant's application was premised on the fact that the benefit as at 28th April 2018 was paid into the sixth respondent's bank account. That is the basis upon which the interim relief was granted, which was to prevent the sixth respondent from depleting the money that was already into her bank account.
- [14] However, when the sixth respondent filed her answering affidavit on the 6<sup>th</sup> June 2018 she attached her bank statement for the period 22<sup>nd</sup> February 2018

to 5<sup>th</sup> May 2018 which shows that no such payment was made into her account. The applicant is relying on a resolution taken on the 19<sup>th</sup> February 2018 as proof that the sixth respondent has been paid. However, on reading the resolution it shows that it was a resolution of the trustees of the Fund who have resolved how to allocate the deceased pension interest to his ex-wife, the sixth respondent and his four children. It was not the actual payment as such. Muller J granted the interim relief on the basis that the money had already been paid into the sixth respondent bank account, whereas that was not the case.

- [15] The applicant's notice of motion was drafted in such a way that it relates to money already paid into the sixth respondent's bank account. The notice of motion was never amended to include money still to be paid. Had the applicant amended its notice of motion, it was going to be problematic for her to obtain the interim relief without having joined the Fund as at that stage they have not yet effected payments. It is trite that in application of this nature full facts must be placed before the Court to enable it to exercise its discretion properly. In my view, the interim relief was obtained without the full facts being placed before the Court.
- [16] The issue that that the Fund was still in the process of paying the sixth respondent should have been disclosed to the Court to enable it to exercise its discretion properly. Failure to disclose that information to the Court in my view, is fatal to the applicant's application.
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- [17] The third requirement which the applicant is required to establish, is the balance of convenience. With regard to this requirement there are two competing interests. Those interests are inextricably linked to the harm the respondent is likely to suffer in the event of the order being granted and the harm likely to be



suffered by an applicant if the relief sought is not granted. (See *Tshwane City v Afriforum supra* at 302 B-C).

[18] In this case the applicant did not attempt to deal with the requirement of balance of convenience. She is merely mentioning it in passing that the balance of convenience favours the granting of prayers as in the notice of motion, as she will suffer grave injustice if the order is dismissed. She is not stating the grounds upon which her view is based. The applicant is required to lay the basis why she is of the view that balance of convenience favours the granting of the interim relief.

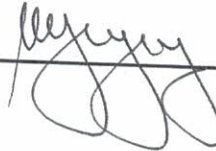
[19] The fourth requirement which the applicant is required to meet is the absence of any other remedy. The applicant in her founding affidavit stated that she did not have any appropriate, suitable or alternative remedy except the relief she is seeking in her notice of motion. At the time the application was launched the Fund had merely made allocation of benefits and was still in the process of paying. The Fund in making an allocation of benefits was performing a public function and its decision was susceptible to review. The applicant could therefore have sought an interim relief against the Fund with the purpose of reviewing its decision to allocate the benefits to sixth respondent. In my view, the applicant had an alternative remedy and has therefore failed to satisfy the fourth requirements.

[20] The applicant had obtained the interim relief without placing the full facts before the Court for it to exercise its discretion properly. The applicant in my view, has failed to satisfy the requirements for the granting of an interim relief.

[21] In the result the following order is made

21.1 The interim relief granted on the 2<sup>nd</sup> May 2018 is discharged.

21.2 The application for an interim relief is dismissed with costs.



MF. KGANYAGO J  
JUDGE OF THE HIGH COURT POLOKWANE,  
LIMPOPO DIVISION

**APPEARANCE:**

COUNSEL FOR THE APPLICANT	: Adv L Mohlapamaswi
INSTRUCTED BY	: PMK Tladi & Associates Attorneys
COUNSEL FOR SIX RESPONDENT	: Adv M Manthata
INSTRUCTED BY	: Machaba Incorporated
DATE OF HEARING	: 27 <sup>th</sup> February 2019
DATE OF JUDGEMENT	: 19 <sup>th</sup> March 2019

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