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

**Case Number: 39849/2021**

**REPORTABLE**
**OF INTEREST TO OTHER JUDGES**
**REVISED**
**DATE:23/01/2024**

In the matter between:

**MARTHA SOPHY MTHIMUNYE** Applicant

and

**HLABANE NORMAN KABINI** First Respondent

**THE MASTER OF THE HIGH COURT (GAUTENG DIVISION, PRETORIA)** Second Respondent

**JUDGMENT**

**JANSE VAN NIEUWENHUIZEN J:**

*INTRODUCTION*

[1] The applicant in her capacity as the duly appointed executrix in the estate of the late Piet Buti Kabini ("the deceased") claims the following relief:

> "1. That the first respondent be restrained and prohibited from interfering with the administration of the deceased estate.

2. That the First Respondent be ordered and directed to grant immediate access to the Applicant's motor vehicles with registration numbers and letters B[…] and D[…]."

[2] The first respondent opposed the application and filed a *"Notice of Motion"* (counter-application) which will be dealt with more fully *infra.*

**Application**

[3] The facts underlying the relief claimed by the applicant is common cause between the parties.

[4] The deceased died intestate on 8 November 2020 and the applicant was appointed as executrix in the estate on 4 February 2021. In her capacity as such the applicant must liquidate and distribute the assets in the deceased estate.

[5] The deceased estate consists of:

5.1 the two motor vehicles mentioned *supra*;

5.2 a guest house known as the Hlalahona Guest House situated in Kwamlanga; and

5.3 another guest house that was still under construction when the deceased passed away on 8 November 2020.

[6] In order to wound-up the deceased estate the applicant must take possession of the assets. Due to the conduct of the first respondent, the applicant is, however, unable to do so.

[7] The first respondent conceded that the applicant, but for the relief claimed in the counter-application, would, in her capacity as the executrix of the late estate, be entitled to the relief claimed in the application.

*Counter- application: Interim interdict*

[8] The first respondent is cited as the applicant in the counter-application and for ease of reference I will refer to the parties as cited in the application. The first respondent claims the following relief in the counter-application:

> "1. That the applicant be interdicted from interfering in the business operations of the Hlalakhona guest house situated at Kwamhlanga.
>
> 2. That the applicant be interdicted from attempting to dispose of or utilisation of the following vehicles with the following registration numbers and letters:
>
> 2.1 B[…];
>
> 2.2 D[…]
>
> 3. In the alternative to the above that it be ordered that the applicant and the first respondent jointly handle the running and finances of the property pending the finalisation of the action instituted by the first respondent.
>
> 4. Further, in the alternative to the above, that an independent person be appointed to run the business pending the finalisation of the action instituted by the first respondent herein."

[9] Although the relief claimed in prayers 1 and 2 appear to be final in nature, it transpired during the hearing of the application that the relief is sought pending the finalisation of an action that was instituted by the first respondent against the applicant in her capacity as executrix of the deceased estate.

[10] Mr Mbedzi, counsel for the applicant, did not take issue with the manner in which the relief was couched, and I proceed to adjudicate the counter-claim on the basis that the first respondent seeks interim relief pending the finalisation of the action.

[11] In support of the relief claimed in the counter-application, the first respondent states that the deceased informed him prior to his death that he wished to protect the assets in his estate for the benefit of his grandchildren. With the aforesaid in mind the deceased approached an attorney, Mr Mashego, with a view to create a trust that would administer his estate for the benefit of his grandchildren.

[12] A Trust, known as the Ingumuso Family Trust ("the Trust") was thereafter created and in terms of the Trust Deed the deceased and the first respondent were appointed as trustees of the Trust. The beneficiaries of the Trust are defined as follows in clause 1:

> "**Beneficiary** means income or capital beneficiaries in so far as the reference to beneficiaries … relates to the income or capital of the trust and shall include the following persons and trusts, namely:
>
> 1.1 **Income beneficiaries**
> The beneficiaries who may benefit from the income of the trust in terms of the discretionary powers vested in the trustee, and which beneficiaries shall be from of the capital beneficiaries and any trust created in terms of paragraph 15 of this trust deed.
>
> 1.2 **Capital beneficiaries**
>
> The beneficiaries on whom the capital of the trust will devolve during the currency or on termination thereof in terms of the provisions of the trust deed, and which beneficiaries shall be:

1.2.1 The grandchildren (the children born of sons and daughters) of Piet Kabini (Identity No. 5[…]) and their descendants".

[13] The Trust Deed was registered by the second respondent on 30 July 2020.

[14] Consequent to the trust being registered, the deceased fell ill and succumbed to his illness before he could donate his assets to the trust. As set out *supra* the deceased passed away on 8 November 2020, more than 3 months after the Trust Deed was submitted to the second respondent.

[15] In order to honour the wishes of the deceased, the first respondent instituted an action in which the following relief is claimed:

"1. That the guest houses specifically mention herein above be declared as assets of the Trust.

2. That the vehicles with registration numbers D[…] and B[…] be declared assets of the Trust."

[16] The relevant averments in the particulars of claim in the pending action reads as follows:

"6. The deceased communicated to the plaintiff and others that he intended that the Hlakakhona guest house and other guest house that was still under construction at the time of his death (hereinafter referred to as the properties) both situated in Thembisile Hani magisterial district along the motor vehicles bearing registration letter and number B[…]and D[…] would be donated to the trust for the benefit of his grand-children.

7. ..

8. The deceased, in his oral dying testament communicated to the Plaintiff and others on or about October / November 2020 at Kwa-

Mhlanga, reiterated his stance that the property along the motor vehicles ….should be donated to the trust for the benefit of his grand-children and further that I should undertake this process in his stead.

9. On or about 4 February 2021, the 1st defendant was appointed as executor of the deceased estate, pursuant to said appointment the 1st defendant sought to include the properties and motor vehicles …. as part of the intestate estate of the deceased.

10. The aforesaid act/conduct by the 1st defendant was not in accordance with the dying testament of the deceased and went against his wishes while he was still alive."

[17] In view of the aforesaid facts, the requirements for the granting of an interim interdict are discussed *infra.*

***Prima facie* right**

[18] At the hearing of the matter, I invited Mr Thumbathi, counsel for the he first respondent to address me on the cause of action underlying the relief claimed by the first respondent in the pending action.

[19] It is clear from the particulars of claim that, although the deceased expressed an intention during his lifetime, to donate his assets to the Trust, the deceased did not execute a written contract of donation in accordance with section 5 of the General Law Amendment Act, 50 of 1956.

[20] In the premises, a claim based on a *donatio inter vivos* is legally unsustainable.

[21] Faced with the aforesaid conundrum, Mr Thumbathi, submitted that the relief claimed by the first respondent in the pending action is premised on a *donatio mortis causa*. Mr Thumbathi readily conceded that a *donatio mortis cause* must be in writing and must comply with testamentary formalities to be valid and enforceable, but submitted that the facts in *casu* calls for the development

of the common law in order to give legal effect to an oral *donatio mortis causa*.

[22] Prior to delving into the admittedly enticing invitation by Mr Thumbathi to develop the common law, one should first of all determine whether the averments contained in the first respondent's particulars of claim satisfy the requirements for a valid and enforceable *donatio mortis causa*.

[23] The following extract from LAWSA, Vol 16, third edition: Donations: paragraph 38 pertaining to a *donatio mortis causa* is incisive:

> "A *donatio mortis causa* is a gift donated in anticipation of the death of the donor. It might be made in fear of imminent death or in contemplation of one's own mortality. The motive of the transaction must be pure benevolence. The mere fact that a person disposes of his or her property by gift and that the gift will come into operation and be implemented only after the donor's death does not characterise the gift as a *donatio mortis causa* if the expectation of the donor's death is not the motivating factor for the contract. A gift *mortis causa* is not necessarily made by a dying man or even by a man who is in immediate danger of death provided that it is made in contemplation of death, nor is a gift made by a dying man necessarily a *donatio mortis causa*. It is a question of intention. In case of doubt the presumption is in favour of a gift *inter vivos*. …..
>
> While sharing these features in common with a donatio *inter vivos*, a *donatio mortis causa* is also influenced by a totally different sphere of the law – the law of succession.
>
> A *donatio mortis causa* is akin to a testamentary disposition in that it contemplates the devolution of an estate at death in a manner chosen by the donor. Whatever may be validly bequeathed by a testator may also be given mortis causa. Persons who are competent to make a will may also make a *donatio mortis causa."* (footnotes omitted)

[24] The averments in the particulars of claim coupled with the evidence of the first respondent tend to support the legal conclusion, albeit *prima facie*, that the deceased intended to protect his assets for the benefit of his grandchildren,

which intention became more pronounced when his death was drawing closer. The deceased's conduct, properly construed, therefore, *prima facie* constitutes a *donation mortis causa*.

[25] Insofar as the requirements for a valid contract of donation are concerned, Van Zyl J, summarised the requirements as follows in *The Commissioner for the South African Revenue Services v Marx N,O.*[1]:

> *"*The donor's intention to make a donation (animus donandi) must arise from generosity (liberalitas) or liberality (munificentia) and be expressed as a promise (offer) to donate, which promise (offer) must be accepted by the donee before a binding contract of donation comes into existence…"

[26] The first respondent does not specifically allege that the donation was accepted by the Trust, but bearing in mind that the deceased and the first respondent were the only trustees of the Trust, I am prepared for present purposes to accept that their conduct constituted acceptance.

[27] In the result, I am satisfied that the first respondent's claim is based on a *donatio mortis causa* and proceed to consider whether the first respondent has made out a case for the development of the common law.

[28] The development of the common law is specifically provided for in section 39(2) of the Constitution. In *S v Thebus and Another*[2], the Court explained the import of section 39(2), to wit:

> "It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the

[1] (A720/05) [2006] ZAWCHC 9; 2006 (4) SA 195 (C) (9 March 2006) at para 24.
[2] 2003 (6) SA 505 (CC) at para 28.

inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution." (footnotes omitted)

[29] In order to achieve the aforesaid object, the Court provided the following guidelines in *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another*:[3]

*"Before a court proceeds to develop the common law, it must (a) determine exactly what the common-law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.*

[30] In terms of the common law a valid and enforceable *donatio mortis causa* must comply with the formalities required for a will.[4]

[31] The underlying reason for the formalities pertaining to a *donatio mortis causa* is, no doubt, to create certainty for both the deceased and his/her beneficiaries.

[32] Turning to question whether the formalities for a legally enforceable *donatio mortis causa* offend the spirit, purport and object of the Bill of Rights, Mr Thumbathi submitted that the *donatio mortis causa* involves two rights: namely, the right to contractual freedom and the right to freedom of testation.

[3] 2016 (1) SA 621 (CC) at para 38.
[4] See: Meyer and Others v Rudolph's Executors 1918 AD 70.

[33] In *BOE Trust Ltd v N.O.*[5] the Court held as follows in respect of the right to freedom of testation:

> "Indeed, not to give due recognition to freedom of testation, will, to my mind, also fly in the face of the founding principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away."

[34] Insofar, as the common law provides that a *donation mortis causa* must comply with certain formalities in order to be valid and enforceable it, at least *prima facie*, appears to offend the right to freedom of testation and in the result the right to dignity.

[35] In the result, I am satisfied that the first respondent has established a *prima facie* right, albeit open to some doubt, to the relief claimed herein.

***Reasonable apprehension of irreparable harm***

[36] The interim interdict is aimed at preserving the assets in the deceased estate pending the finalisation of the action instituted by the first respondent. In the event that the interdict is not granted, the deceased estate will be wound-up by the applicant and the assets will no longer be available.

[37] In such event and should the first respondent be successful in the pending action, the harm will be irreparable.

***Balance of convenience***

[38] The rights of the intestate heirs in the deceased estate will not be unduly prejudiced should the interim relief be granted. The assets will be preserved

[5] 2013 (3) SA 236 (SCA) at 27.

and will be available for distribution at a later stage if the pending action is not successful. In this regard, I propose to grant specific relief for the preservation of the assets pending the finalisation of the action.

[39] In contrast, the prejudice to the first respondent and more particularly the grandchildren of the deceased is manifestly clear if the interim relief is not granted.

[40] Consequently, I am satisfied that the balance of convenience favours the granting of the interim relief.

***Alternative remedy***

[41] There is no alternative remedy available to the first respondent to preserve the assets in the deceased estate pending the finalisation of the action.

***Costs***

[42] In as far as costs is concerned, the applicant was substantially successful and costs should follow the cause. The relief in the counter-application has, however, been granted on a *prima facie* and interim basis and it follows that the costs of the counter-application should be costs in the pending action.

***ORDER***

[43] The following order is granted:

1. The first respondent is ordered and directed to grant immediate access to the motor vehicles with registration numbers and letters **B[…] and D[…]** (“the motor vehicles”) to the applicant.
2. The first respondent is ordered to pay the costs of the application.
3. Pending the finalisation of the action instituted by the first respondent the applicant may not dispose / alienate or encumber the motor

vehicles, the Hlalakhona guest house and the guest house (under construction) at Thoza.

4. Pending finalisation of the action, the first respondent must:
   4.1 take all steps necessary to ensure the successful running of the Hlalakhona guest house ("the guest house");
   4.2 open a separate bank account for the purpose of running the guest house;
   4.3 provide the applicant with monthly bank statements of the account; and
   4.4 provide the applicant with monthly statements in respect of the income received and expenses incurred in the running of the guest house.
5. The costs of the counter-application is costs in the pending action.

**N. JANSE VAN NIEUWENHUIZEN**

**JUDGE OF THE HIGH COURT**

**DIVISION, PRETORIA**

**DATES HEARD:**

06 September 2023

**JUDGMENT RESERVED ON:**

02 November 2023

**DATE DELIVERED:**

**APPEARANCES**

For the Applicant: Advocate Am Mbedzi

Instructed by: Davi Masilela Attorneys

For the 1st Respondent: Advocate B Thumbathi

Instructed by: MJ Masombuka Attorneys