

OTILIA MPEPEREKI (NEE TSVENDA)
versus
DIANA NYARADZO MPEPEREKI
(In her capacity as executrix testamentary
Of the Estate of Late Sheunesu Mpereki
DR 163/21)
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 28 July & 9 August 2023

Opposed Matter

P T Mudekwa, for the applicant
G Madzoka, for the 1st respondent
No appearance for the 2nd & 3rd respondents

MAXWELL J: On 11 July 2023 I gave an order discharging the provisional order applicant had obtained on 23 November 2022. On 25 July 2023 I received a request of the reasons for the judgment. These are they.

BACKGROUND FACTS

Applicant is the second wife of the late Sheunesu Mpepereki (the deceased). First respondent is his daughter. First respondent's mother was the deceased's first wife. The deceased left a will in terms of which first respondent was appointed the executrix testamentary. Under the will, the deceased directed that his only immovable property, number 22 Dulverton Drive, Glen Lorne, (the immovable property) be sold and that from the proceeds realized, \$50 000.00 be given to the applicant. The balance of the estate was bequeathed to first respondent.

The will was submitted to second respondent and in recognition of it, second respondent was appointed as the executrix testamentary on 4 October 2021. On 25 October 2021 applicant, through Women and Law in Southern Africa wrote to the second respondent requesting spousal maintenance on the basis that the will did not provide any provision for her sustenance. The request was not acceded to. On 24 January 2022 applicant filed an

application for review under case number HC 430/22 seeking the setting aside of the registration of the Estate. The application was withdrawn on 2 February 2022. On 26 April 2022 applicant issued summons for a declaratur under HC 2782/22, the principal relief sought was the setting aside of the deceased's will. The matter is still pending. On 5 October 2022 applicant filed an urgent chamber application seeking an order impeding the administration of the deceased's estate. The order sought was couched in the following terms:

“TERMS OF ORDER MADE

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. Pending the determination of the action for a declaratur, filed out of this Honourable Court by the applicant under cover of case number HC 2782/22, first, second and third respondents be and are hereby permanently interdicted and prohibited from transferring the property known as 22 Dulverton Road, Glen Lorne held under deed number DT 3316/16 to the first respondent or any third party.
2. Pending the determination of the action for a declaratur filed out of this Honourable Court by the applicant under cover of case number HC 2782/22, the letters of Administration issued to the first respondent are temporarily suspended. The first respondent is interdicted from performing any functions as the executrix testamentary of the estate of the late Sheunesu Mpeperekhi held under DR 1631/21.
3. Pending the determination of the action for a declaratur, filed out of this Honourable Court by the applicant under cover of case number HC 2782/22 first, second and third respondents be and are hereby interdicted and prohibited from performing any administrative functions on the estate of the late Sheunesu Mpeperekhi held under DR 1631/21 in pursuance of the letters of administration issued to the first respondent. For the avoidance of doubt all consents to sale issued by the second respondent are hereby suspended.
4. The first respondent to hereby ordered to pay costs of this application.

INTERIM RELIEF GRANTED

That pending the confirmation or discharge of this order, applicant is granted the following relief:

1. Pending determination of this matter, first, second and third respondents be and are hereby temporarily interdicted from transferring the property known as 22 Dulverton Road, Glen Lorne, held under deed number DT 3316/16 to the first respondent or any third party.
2. Pending determination of this matter the letter of administration issued to the first respondent are temporarily suspended. The first respondent is interdicted from performing any functions as the executrix testamentary to the estate of the late Sheunesu Mpeperekhi held under DR 1631/21.

3. Pending the determination of this matter, first, second and third respondents be and are hereby interdicted and prohibited from performing any administrative functions on the estate of the late Sheunesu Mpeperekhi held under DR 163/21 in pursuance of the letters of administration issued to the first respondent. For the avoidance of doubt all consents to sale issued by the second respondent are hereby suspended.

SERVICE OF PROVISIONAL ORDER

That the applicant's legal practitioners of records shall serve the provisional order together with all supporting documents on the respondents."

The interim relief was granted on 3 November 2022. In seeking confirmation of the provisional order, applicant submitted that the application satisfies the requirements set out in law for the confirmation of a final interdict. Mr *Mudekwa* submitted that applicant has a clear right in the matter as she was married to the deceased and their marriage was solemnized in 2019. Further that it is not disputed that applicant is the surviving spouse. He argued that if interdict is not granted applicant would suffer irreparable harm in the event that the will is found to be fraudulent, she would have lost the matrimonial home and residue of the estate as the immovable property would be transferred. He also argued that there is no other fora to rectify the alleged illegalities perpetrated against the estate.

In opposing the confirmation of the provisional order, first respondent argued that applicant accepted the validity of the will and the administrative actions sought to be impugned were taken on that basis. Further that the challenge to the letters of administration and the Master's consent to sale ought to have been pursued through an application for review. It was further argued that the relief sought in HC 2782/22 is a disguised attempt to review out of time the acceptance of the will of the late Sheunesu Mpeperekhi, the appointment of the first respondent and the giving of consent to sale by the Master. First respondent submitted that no basis for the confirmation of the provisional order was laid.

THE LAW

An interdict is granted to prohibit unlawful conduct, to compel the doing of particular act or to remedy the effects of unlawful conduct. See *Herbstein and Van Winsen – The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th Ed.* p 1454. The requirements of a final interdict are:

- “(a) A clear right;
- (b) irreparable harm actually committed or reasonably apprehended; and
- (c) the absence of an alternative remedy.”

See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

ANALYSIS

The first issue to consider is whether or not applicant established a clear right entitling her to an interdict. Mr *Mudekwa* submitted that applicant was married to the deceased and is therefore the surviving spouse. He further submitted that the issue in the main matter involves a challenge to the authenticity of a will accepted by the Master as having been made by the deceased. The authenticity was said to have a bearing on the matrimonial home of the applicant as, in the event that the will is declared null and void, the deceased would have died intestate and applicant would be entitled to the matrimonial home and residence.

That the property in question is the applicant's matrimonial home is in dispute. In the founding affidavit applicant stated in para 7 that:

“At the time of the deceased's death we were staying with the deceased at No. 1977 Area “D” Westgate, Harare because the matrimonial house being stand 784 Glen Lorne Township 15 of Lot 41 of Glen Lorne also known as 22 Dulverton, Glen Lorne, Harare was being leased out in order to pay off a mortgage.”

In response first respondent, in her opposing affidavit state in para 5:

“Ad para 7 the Glen Lorne property was never at any point matrimonial property for the applicant and the late as at the time that the two started cohabiting the property was subject to a dispute between my mother and father who both appeared on the title deed as co-owners of the property and since the matter was still to be determined by the courts, my father started leasing a property in Westgate (where he stayed with the applicant) and leased out the Glen Lorne property since my mother was out of Zimbabwe. The leased property in Westgate remained my father's place of abode until the time of his death. I attach as Annexure C a copy of the title deed to the property before its transfer to my father in 2016.”

Applicant stated in her own affidavit that at the time of the demise of the deceased, they were staying in Westgate. In terms of s 3A of the Deceased Estates Succession Act [*Chapter 6:02*], in the event that the deceased is declared to have died intestate, applicant would be entitled to:

- “(a) the house or other domestic premises in which the spouses or surviving spouse, as the case may be, hired immediately before the person's death; and
- (b) „„„” (Underlining for emphasis)

In my view, for applicant to establish a clear right entitling her to the interdict sought, she ought to establish that she was living at the property in question “immediately before” Sheanesu Mpepereki's death. That is not possible, considering her statement in the founding

affidavit that she was living in Westgate with the deceased. In any event in the letter written on behalf of applicant on 25 October 2021, the provisions of the will were accepted. Women and Law – Southern Africa Zimbabwe in that letter indicated that the deceased left a will in which applicant was to be given \$50 000.00 for the purchase of a new home. Clearly, applicant cannot claim the immovable property but cash from the deceased's estate. To then interdict the sale and transfer of the immovable property in these circumstances is not justified.

Furthermore, it is trite that one cannot interdict a lawful process. Having accepted the will as the surviving spouse, applicant cannot interdict the administration of the deceased's estate by an executrix testamentary appointed in terms of the Will. To do so is to approbate and reprobate which is not allowed in law. See *Zimbabwe Revenue Authority v Stanbic Bank Zimbabwe Limited* SC 13/19. A position that is not consistent with the acceptance of the will is akin to blowing hot and cold water. This court cannot support such a position.

It is common cause that the immovable property in question was duly sold in January 2020 after the consent was given. What is outstanding is the transfer of the property to the purchaser. In oral submissions, counsel for the applicant conceded that the main matter does not contain an issue of whether or not the immovable property in question was the applicant's matrimonial home. An interdict would have been appropriate if that issue was before the court. That would have been an appropriate reason to continue prejudicing the innocent purchaser. As applicant was not residing at the immovable property in question immediately before the demise of the deceased, she has no claim to it if deceased is declared to have died intestate. She can sue for whatever share she believes she is entitled to from the deceased estate. There is therefore no irreparable harm she will suffer. She has other remedies to get her entitlement. The requirements for an interdict were not met in the circumstances.

For the above reasons I discharged the provisional order.

Mafume Law Chambers, applicant's legal practitioners
Khupe and Chijara Law Chambers, first respondent's legal practitioners

