REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO:7712/2012

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

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DATE SIGNATURE

In the matter between

LOUISE BERGMAN **APPLICANT**

And

THE MASTER OF THE HIGH COURT **FIRST RESPONDENT**

NADA LISA RIHAOUI **SECOND RESPONDENT**

J U D G M E N T

MOSIKATSANA AJ:

INTRODUCTION

[1] This is an application for a temporary interdict, to stay the confirmation of the first and final liquidation and distribution account by the first respondent, as well as the distribution in terms of thereof, by the second respondent, pending the institution of an action by the applicant, against the respondents, within 30 days of the date of the

temporary order being granted, on the basis that the applicant had a universal partnership with the deceased, which entitles her to claiming fifty percent from the estate, as the beneficiary, by reason of her cohabiting with the deceased.

[2] The applicant seeks that the first and final liquidation account of the deceased's estate be amended accordingly by the second respondent.

[3] The applicant also brought an application for the striking out of certain statements from the second respondent's affidavits in that it is scandalous, vexatious or irrelevant.

[4] The first respondent did not oppose the relief sought by the applicant. He submitted that he was willing to abide by the decision of the court, provided that no cost order is sought against him.

[5] The second respondent disputes that a universal partnership was created between the deceased and the applicant. And, that such partnership if found to exist, entitles the applicant to a fifty percent share of the deceased's estate.

[6] The second respondent also opposed the application to strike out.

FACTUAL BACKGROUND

[7] It is common cause that the deceased, Franck karim Rihaoui, died intestate on 29 March, 2010. His daughter, the second respondent, was appointed executrix of the deceased's estate.

[8] On 30 August, 2011 the applicant lodged a claim against the deceased's estate based on the alleged existence of a universal partnership, in terms of which the applicant, claims that she is entitled to fifty percent of the value of the estate.

[9] The first respondent rejected the applicant's claim on 19 October, 2011. The applicant requested the second respondent to investigate her claim in accordance with s 32 of the *Administration of Estates Act* 66 of 1965. The second respondent failed to do so.

[10] On 2 December, 2011an advertisement was placed in the *Government Gazette* stating that the liquidation account was lying open for inspection for a period of 21 days. On 19 December, 2011 the applicant objected timeously, to the liquidation and distribution account. If the applicant had not objected, the first respondent would have been entitled to confirm the account and the second respondent would have been entitled to distribute the deceased's assets.

[11] The second respondent opposes the application on the basis that the applicant has failed to establish the existence of a universal partnership and to satisfy the requirements of an interim interdict.

REQUIREMENTS FOR AN INTERIM INTERDICT

[12] Before she can succeed in obtaining an interim interdict, the applicant must satisfy the court that: she has a *prima facie* right; a well- founded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is granted; a balance of convenience in favour of the granting of the interim relief and that there is no other remedy.

Considering the discretionary nature of an interim interdict these requirement are not discrete, they interact and are, therefore, not to be judged in isolation.[1]

Prima facie right:

[1] *Ndauti v Kgami* 1948 3 SA 27(W).

[13] The applicant's submission that she has a *prima* facie right in that a universal partnership existed between deceased and herself is based on the following averments made by the applicant:

[13.1] At the time of the deceased's death on 29 March, 2010 he had been cohabiting with the applicant for a period of twelve years. They moved in together on 1 February, 1998 at 13 Drakenstein, Paulshof, Johannesburg. At which time they agreed to form a long term intimate and business partnership which entailed pooling of their resources and expenses.

[13.2] In order to facilitate the purchase of 13 Drakenstein, the deceased borrowed R 300, 000 from his mother, Mai Wehbe. The house was registered in the mother's name as the deceased was going through a divorce at the time.

[13.3] The applicant contributed towards the renovation of the house at 13 Drakenstein and the building of a cottage. The improvements made increased the value of the property by at least R500 000.00. Over the years, due to both the efforts of the applicant and the deceased, the value of 13 Drakenstein increased from R300 000.00 to R1 700 000.00.

[13.4] In 2003 the applicant and the deceased applied for a joint life policy which they subsequently decided against in favour of building a property portfolio.

[13.5] They operated two businesses, namely Nimba Trading Company Pty Ltd (Nimba) controlled by the deceased and an interior and house renovation business controlled by the applicant from the house at 13 Drakenstein. Applicant sold her 4x4 to raise the start-up capital for the two businesses. She also

contributed all her furniture for their common use. At the time the deceased only had a car, a PC and few personal items.

[13.6] In due course the businesses grew. Applicant became increasingly involved in the administration of Nimba. She agreed to close down the interior decorating business as requested by deceased, so that she could attend to the full time management of Nimba. She was responsible for the financial management, human resources, supervision of all administration, the general running of the office and financial responsibility for orders and shipping at Nimba. She had access to all the deceased's and the companies' bank accounts. She made payments according to her discretion. With the effluxion, of time the annual turnover of Nimba increased from R2.5 million in 1999 to R 91 Million in 2009 and decreased to R 60million in 2010.

[13.7] The applicant and the deceased also built a residential property portfolio through their joint efforts. They paid themselves salaries far below market value from Nimba and used the profits to acquire new properties. In 2004 they created another company Matunda, mainly for offshore trade. At the time of deceased's death, applicant was responsible for at least seventy per cent of Nimba. The deceased was more involved in Matunda.

[13.8] During their life together, they presented themselves publicly as life partners. On 19 July, 2007 the deceased wrote a letter confirming that they were life partners. In addition to her involvement in their business affairs, the applicant carried out all the domestic functions including the shopping, cooking and supervision of the domestic helpers. She was apparently introduced to their acquaintances as Mrs Rihaoui.

[13.9] They created four trusts with the aim of pooling their resources for their retirement. The trusts were also to provide for the deceased's two children who were studying in China and or Japan when he died.

[14] The second respondent disputes that the applicant has a prima facie right or that she cohabited with the deceased . According to the second respondent's version:

[14.1] There was no written cohabitation or partnership agreement between the applicant and the deceased.

[14.2] The deceased spoke to his mother, brother and the second respondent on a weekly basis and he also visited his family several times a year. He openly discussed his business and personal matters with the second respondent and his family. He informed his family that he did not wish to marry the applicant, or to make her a shareholder in his businesses. That the deceased, regarded the applicant as no more than a girlfriend or cohabitee.

[14.3] Wehbe, the deceased's mother, purchased the property at 13 Drakenstein. She allowed the deceased to live there. She and not the deceased and the applicant built the cottage on the property.

[14.4] The applicant ran her own business, Orange interior consultants. She closed it down in 2004 to take up full-time employment with Nimba. Her contributions at Nimba were no more than those of an ordinary employee.

[14.5] Second respondent disputes that the applicant was a signatory to any of Nimba's accounts and that the deceased and Wehbe were the only signatories. She also states that there were no joint bank accounts held by the applicant and the deceased. She notes that the applicant does not

mention any bank account held in her name to which the deceased had access. She also states that there are no powers of attorney or company resolutions authorising the applicant to act on behalf of Nimba or the deceased.

[14.6] Second respondent asserts that the fact that the deceased and applicant co-habited for a lengthy period of twelve years is not sufficient for the court to infer the existence of a universal partnership.

[14.7] Second respondent also disputes that the deceased held himself out to be in a universal partnership with the applicant and that the letter allegedly written by the deceased confirming the existence of the partnership between him and the applicant is not genuine.

[14.8] That the trust assets to the extent that they existed, were financed by Wehbe and the deceased.

[14.9] All the above factors are said to create 'some doubt' as to the existence of a universal partnership between the applicant and the deceased.

Balance of convenience

[15] The applicant argues that the balance of convenience is in her favour and it requires that the estate be preserved. She states that if interim relief is not granted, the estate will be distributed, and she will be faced with the arduous task of having to recover from beneficiaries who live outside South Africa, in countries such as the Netherlands where it is alleged the second respondent and her brother currently live.

[16] The second respondent on the other hand contends that the balance of convenience requires that the estate be distributed for the benefit of the intestate

heirs and the creditors. She argues that if interim relief is granted the estate will be 'frozen' for an inordinately long period while the applicant pursues her claim at trial and possibly even on appeal.

Irreparable harm

[17] The applicant argues that the distribution of the estate amongst the heirs and the creditors will cause irreparable injury to her claim for a fifty percent share of the estate and that the better option is to grant her interim relief as the preservation or "freezing" of the estate will not involve irreparable harm to the second respondent.

[18] The second respondent insists that if interim relief is granted, the estate will be 'frozen' for an inordinately long period, while the applicant pursues her claim at trial and possibly even on appeal and that this will unfairly delay her right to the inheritance.

No other remedy

[19] The applicant asserts that she has no other remedy other than to seek interim relief.

[20] Second Respondent argues that the applicant is not without alternative remedies. She asserts that the applicant has a potential unjust enrichment claim against the heirs and that she may also seek a review in terms of s 35(10) of the *Administration of Estates Act*. Second respondent further asserts that these alternative remedies may be pursued without restricting the deceased estate.

[21] Second respondent finally states that in view of the availability of an alternative remedy and the balance of convenience favouring her, the application ought to be dismissed with costs.

Probabilities:

[22] In dealing with the issue of an interim interdict pending the outcome of an action the correct approach was enunciated in *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C) at 714E in the following terms:

> 'The proper approach is to take the facts set out by the applicants together with the facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.
>
> It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right prima facie established, though open to some doubt, involves two stages. Once the prima facie right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed.'

[23] Applying this approach to the facts of this case, it is trite that in order to establish a *prima facie* right, the applicant need not do so on a balance of probabilities. It suffices for the applicant to establish a *prima facie* case even if it is open to some doubt.

[24] On the principle enunciated in *Webster v Mitchell* 1948 (1) (SA) 1186 at 1189 it does appear that the applicant has succeeded in establishing that a universal partnership existed between the deceased and the first respondent and that the balance of convenience favours the preservation of the estate in that if the estate is not preserved, the applicant will suffer irreparable harm. The applicant does not have an alternative remedy. The remedies of unjust enrichment and a review in terms of s 35(10) of the *Administration of Estates Act*, which have been suggested by the second respondent, are not feasible in this instance, because the heirs reside in jurisdictions outside South Africa.

[25] A final determination as to whether or not the existence of such an alleged universal partnership entitles the applicant to a half share of the deceased's estate in terms of the *Intestate Succession Act* 81 of 1987 or to seek contractual remedies falls outside the ambit of this enquiry. It falls to be determined by the trial court.

The applicant also made an application to strike out and I found no credible basis for such an application.

ORDER

[26] In the result:

[26.1] Temporary interdict is granted.

[26.2] Application to strike out is dismissed

[26.3] Costs reserved for trial.

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T MOSIKATSANA

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT:

COUNSEL FOR FIRST RESPONDENT:

COUNSEL FOR SECOND RESPONDENT:

DATE OF HEARING ***24 FEBRUARY 2014***

DATE OF JUDGMENT ***01*****AUGUST** ***2014***