REPUBLIC OF SOUTH AFRICA

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

CASE NO: 13985/2017

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

19 AUG 2019

SIGNATURE DATE

In the matter between:

VANESSA VALASHIYA N.O. Applicant

and

SIBANDA PALESA MOROESI First Respondent

ELLIOT SELEKA MOLOTO Second Respondent

THE REGISTRAR OF DEEDS, PRETORIA Third Respondent

JUDGMENT

MATOJANE J

Introduction

[1] The applicant, in her capacity as the executrix of the estate of the late Matsobane Samuel Moloto (the 'deceased estate') seeks an order declaring as void the transfer of certain property from the deceased estate to the first respondent by the second respondent. The applicant seeks to have the following property transferred back into the deceased estate:

A Unit consisting of—

(a) Section No. 88 as shown and more fully described on Sectional Plan SS 573/2011 in the Scheme known as Shicara in respect of the land and building situated at Bryanston Township, City of Johannesburg Metropolitan Municipality, of which section the floor area, according to the said sectional plan is 115 (one hundred and fifteen) square metres in extent; and

(b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

Held by Deed of Transfer ST 75560/2015 (the 'property').

[2] In the alternative, the applicant seeks to have the transfer of the property to the first respondent set aside. At the time of the transfer, the second respondent was the executor of the deceased's estate. The basis of the application is section 35 of the Administration of the Estates Act No 66 of 1965 ('the Act'). In this regard, the applicant argues that the transfer was unlawful and void as no final liquidation and distribution account had been compiled by the second respondent prior to the transfer of the property. The applicant also submits that the second respondent failed to obtain the consent of the Master to effect the transfer of the property.

Background facts

[3] The background facts are undisputed and not particularly complex. They are these: the deceased died intestate on 17 March 2015; he is survived by eight children; at the time of his death, the deceased owned six properties situated in the same sectional title scheme located at the Shicara complex on Dover Road, Bryanston.

[4] The second respondent, the deceased's biological son, was appointed by the Master of the High Court as the executor of the deceased estate in April 2015. The second respondent also had a unit in the same sectional title scheme registered in his name.

[5] On 28 August 2015 the second respondent, in his capacity as the executor of the deceased estate, transferred ownership of the property into the name of the first respondent, one of the biological children of the deceased. The deed of transfer of the property stated that the first respondent was 'the sole intestate heir' of the deceased in terms of section 1(1)(*b*) of the Intestate Succession Act 81 of 1987.

[6] The registration of transfer was effected before a liquidation and distribution account was finalised and accepted by the Master. On 17 November 2015, following the grant of a court order recognising her customary marriage to the deceased (granted on 31 August 2015) the applicant was appointed the executrix of the deceased estate by the Master of the High Court.

Service

[7] Despite filing an answering affidavit, the first and second respondents made no appearance at the hearing of the matter. The first respondent was served with a notice of set down on 29 April 2019 by Sheriff. The document was served on a domestic worker at the first respondent's residence. A further attempt was made to serve the notice of set down on the first respondent on 11 June 2019, with the Sheriff remarking that the first respondent appeared to be at the residence, but avoided meeting the Sheriff.

[8] In respect of service on the second respondent, on 7 November 2018, the applicant obtained the Court's leave to serve the notice of set down and other documents relating to the application to the second respondent by way of substituted service. Service was to be effected by delivery of the documents to the second respondent's mother, and by sending the documents to two of the second respondent's last known email addresses.

[9] Service was effected via email on 29 April 2019. On 20 May 2019, the Sheriff attended to serve the notice of set down on the second respondent's mother. The document was affixed to the principal door of the residence as the occupant refused to give her name or accept the document (on the instruction of the owner of the house).

[10] In light of the above, it is evident that the applicant has complied with the Uniform Rules of Court and the court order for substituted service. I am satisfied that the two respondents were properly notified of the proceedings.

Discussion

[11] It should be noted that the first and second respondents did not submit individual answering affidavits; nor did the second respondent file a confirmatory affidavit. Instead, the answering affidavit, deposed to by the first respondent, states that she deposed to the affidavit in her personal capacity and as a representative of the second respondent. There is no document attached to demonstrate that the first respondent is authorised to do so. The allegations made in the affidavit, insofar as they relate to the second respondent, have not been made under oath.

[12] The first respondent, in her answering affidavit, concedes that the second respondent had not compiled a final liquidation and distribution account. She maintains that there 'was nothing illegal or underhand in the way in which the second respondent dealt with this property'

[13] In this regard, the first respondent states that only seven beneficiaries were known of at the time of the death of the deceased. Given that the six properties were in the same complex, and shared a similar value, the second respondent decided to distribute one property to each beneficiary, rather than to realise the value of the properties through private sales. The beneficiaries included the applicant's two children with the deceased, although the second respondent did not transfer any properties into either of their names. The applicant asserts that her two children never received any benefit from the deceased estate; nor were they offered any such benefit.

[14] Nevertheless, the deed of transfer for the property states that the first respondent is the sole heir to the intestate estate in terms of s 1(1)(*b*) of the Intestate

Succession Act. This subsection provides that if the deceased dies intestate and is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate. The first respondent is admittedly not the sole heir of the deceased estate. The deceased estate, or even a portion thereof, could not be validly disposed of in terms of this provision.

[15] The first respondent has raised a number of other defences, the main contention being that the applicant failed to review the decisions taken by the second respondent, including the transfer of the property into her name, which constitutes an administrative action. She argues that—

'...the only way in which the applicant can assail the decisions taken by the second respondent is to have them reviewed and set aside by a competent Court. Until such time as they reviewed and set aside they remain valid and binding on all third parties including the applicant.'

[16] Lewis JA in *Nedbank Limited v Mendelow* held at paragraph 25 that:

'Administrative action entails a decision, or a failure to make a decision, by a functionary, and which has a direct legal effect on an individual. A decision must entail some form of choice or evaluation. Thus while both the Master and the Registrar of Deeds may perform administrative acts in the course of their statutory duties, where they have no decision-making function but perform acts that are purely clerical and which they are required to do in terms of the statute that so empowers them, they are not performing administrative acts within the definition of the PAJA or even under the common law. As Nugent JA said in *Grey's Marine* [*Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA)]:

"Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. . . ."'

[17] The decision of the Registrar of Deeds to transfer the property does not constitute an administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 (the 'PAJA'); it does not fall to be reviewed in terms thereof. Therefore there is no merit in the submission by the first respondent that the decision to register the transfer stands until it is set aside by a competent court.

[18]] Section 35 of the Act, which deals with liquidation and distribution accounts provides in subsection (1) that:

(1) An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but within—

(a) six months after letters of executorship have been granted to him; or

(b) such further period as the Master may in any case allow, submit to the Master an account in the prescribed form of the liquidation and distribution of the estate.

[19]] Section 35(4) provides as follows:

(4) Every executor's account shall, after the Master has examined it, lie open at the office of the Master, and if the deceased was ordinarily resident in any district other than that in which the office of the Master is situate, a duplicate thereof shall lie open at the office of the magistrate of such other district for not less than twenty-one days, for inspection by any person interested in the estate.

[20]] Section 35(12) reads—

(12) When an account has lain open for inspection as hereinbefore provided and

(a) no objection has been lodged; or

(b) an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection, if necessary, as provided in subsection (11), and no application has been made to the Court within the period referred to in subsection (10) to set aside the Master's decision; or

(c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period,

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration relating to such distribution, or lodge with the Master a certificate by the registration officer or a conveyancer specifying the registrations which have been effected by the executor: Provided that—

(i) a cheque purporting to be drawn payable to a creditor or heir in respect of any claim or share due to him and paid by the banker on whom it is drawn; or

(ii) an affidavit by the executor in which he declares that a creditor was paid or that an heir received his share in accordance with the account, may be accepted by the Master in lieu of any such receipt or acquittance.

[21] Section 102(1)(*f*) of the Act provides that an executor who wilfully distributes any estate otherwise than in accordance with the provisions of section 35(12) is guilty of an offence and is liable, on conviction, to a fine or imprisonment for a period not exceeding twelve months.[1] This section simply highlights the impropriety of transferring the property without following the requirements as set out in section 35.

[22] It is common cause that the second respondent did not submit a liquidation and distribution account to the Master of the High Court. Further, there is no evidence that the Master provided consent for the transfer of the property. The second respondent, as executor, acted beyond the scope of his powers as defined by the law. Therefore, the transfer of the property to the first respondent is void.

[23] The first respondent also raised an issue of non-joinder. She argues that the applicant did not join Mr Seleke, of Seleke Attorneys, to the proceedings. According the first respondent, the second respondent enlisted the services of Seleke Attorneys in April 2015 to assist with the winding up of the deceased estate. Mr Seleke was never the executor of the deceased estate. As the executor's attorney, he was authorised to act on the instructions of the second respondent; but he did not replace the executor. The applicant was not obliged to join Mr Seleke to the proceedings.

[24] The first respondent further argued that there was an undue delay in the applicant bringing the present application, as the applicant waited for more than a year before bringing it. She contends that the applicant needed to apply for condonation. The applicant appears to have become aware of the transfer of the property on or about 16 March 2016. The application was issued on 21 April 2017. The first respondent does not set out the time period in which the applicant should have brought the application; neither does she set out the legal provision relied upon for the assertion that there was an undue delay. This defence fails, especially in light of the fact that the PAJA does not apply.

[25] The following order shall issue:

Order:

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[1] Section 102(1)(iii) of the Administration of Estates Act.

1. The transfer of title for the property held by Deed of Transfer ST 75560/2015 is void and set aside. The title relates to the following property:

   A Unit consisting of—

   (a) Section No. 88 as shown and more fully described on Sectional Plan SS 573/2011 in the Scheme known as Shicara in respect of the land and building situated at Bryanston Township, City of Johannesburg Metropolitan Municipality, of which section the floor area, according to the said sectional plan is 115 (one hundred and fifteen) square metres in extent; and

   (b) An undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

   (the 'property').

2. The Registrar of Deeds, Pretoria is authorised and directed, in terms of the provisions of section 6(1) of the Deeds Registries Act 47 of 1937, to cancel Deed of Transfer No. ST 75560/2015.

3. The Registrar of Deeds, Pretoria is authorised and directed to register the title deed to the property into the name of the estate of the Late Matsobane Samuel Moloto (the 'deceased estate') in terms of section 6(2) of the Deeds Registries Act 47 of 1937.

4. The first and second respondent are to make payment of all costs of transfer of the property and re-registration of the property into the name of the deceased estate.

5. The costs of this application are to be paid by the first and second respondent jointly and severally, the one paying the other to be absolved, on an attorney and own client scale.

K E MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	19 June 2019
Date of judgment:	August 2019

Appearances:

Counsel for the Applicants:	Adv. Z Manentsa
Applicant's Attorneys:	Motsoeneng Bill Attorneys
Counsel for the 1st and 2nd Respondents:	No appearance
Respondent's Attorneys:	Mabuza Attorneys