24/10/17.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 61180/2016

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

24·10·2017 DATE

ESchyff SIGNATURE

In the matter between:

JOHANNES GERHARDUS GREEF NO **APPLICANT**

and

MARIE GREEF (PREVIOUSLY GROBBELAAR) **1ST RESPONDENT**

THE REGISTRAR OF DEEDS, PRETORIA **2ND RESPONDENT**

THE MASTER OF THE HIGH COURT, PRETORIA **3RD RESPONDENT**

Heard: 16 October 2017

Delivered: 20 October 2017

JUDGEMENT

VAN DER SCHYFF AJ:

[1] The Applicant in this matter filed a notice of motion with this court in August 2016, applying for an order that:

(a) the Registrar of Deeds, Pretoria, be authorised and ordered to register a *caveat* over the property described as Portion 76 of the Farm Mezeg 77, Ramotshere Moiloa Local Municipality, Registration Division J.P., North-West Province, held by Deed of Transfer: T49818/1999, that *'(t)he property is subject to a claim of the deceased estate of*

the late Gabriël Johannes Greef, estate number 15071/2012. The property may not be transferred or encumbered without the consent of the Master of the High Court, Pretoria or upon the direction or order of a competent court';

(b) the Master of the High Court, Pretoria is ordered to immediately re-open the estate of the late Gabriël Johannes Greef, estate number 15071/2012 and issue the Applicant with the necessary Letters of Executorship in terms of s 18(1) of the Administration of Estates Act 66 of 1995;

(c) the costs of the application if opposed; and

(d) further and/or alternative relief.

[2] The application is opposed by the First Respondent alone, who filed the necessary opposing papers.

[3] The matter was set down for hearing on 16 October 2017 by the First Respondent. Before the commencement of court on that day, counsel for the First Respondent informed me in chambers that the Applicant had passed away. During roll call Mr Krüger, an admitted advocate of this court, stated that although he had no instructions to appear in this matter, he was acting as an officer of this court and therefore informed me that the Applicant passed away on 26 August 2017. The application was stood down.

[4] When the matter resumed in court, Mr Krüger urged the court to consider postponing the matter, although he emphatically stated that he had no instructions to appear in the matter. Counsel for the First Respondent did not object to Mr Krüger addressing the court; neither was there any objection when Mr Krüger handed up certain documents to the court. The documents consisted of e-mail correspondence, sent by the deceased Applicant's attorneys of record to the First Respondent's attorneys of record, indicating that the former requested the latter to consent to postpone this matter. The postponement was requested because the deceased Applicant's attorneys have not yet been able to ascertain who the executors of the Applicant's deceased estate were. It is stated in the letter that they were 'accordingly not in possession of instructions in the matter'. First Respondent's counsel handed up copies of the same letters; the consideration of these letters therefore poses no problem.

[5] Counsel for the First Respondent also handed up to the court an uncertified copy of a Letter of Executorship indicating that two executors have been appointed to liquidate and

distribute the late Applicant's deceased estate. On being questioned by the court, counsel for the First Respondent confirmed that the said executors were not served with a copy of the notice of set down, or informed otherwise of the current proceedings before the court.

[6] The question arises whether the application needs to be postponed in order to afford the said executors the opportunity to be introduced as a party to the proceedings, either in substitution for the deceased Applicant or otherwise. It was held in *Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another* 2011 (1) SA 35 (SCA) para 12 that the court has the inherent power under the common law to substitute a party to the proceedings. If the court is of the view that the executors of the late Applicant's deceased estate need to substitute him as the Applicant in this matter before the application can be considered, the court has to order a postponement of the matter. The executors must then formally be notified of the proceedings.

[7] Counsel for the First Respondent advanced the argument that it was not necessary to extend the notice of set down to the executors appointed in the estate of the late Applicant. Unfortunately counsel was unable to substantiate this contention with authority. First Respondent's counsel further submitted that the late Applicant purported to act in an official capacity when he brought the application. First Respondent's counsel's argument essentially boils down to the view that even if it is assumed – and it is not – that the late Applicant had the necessary *locus standi* to bring the application before court, the executors of his estate cannot replace him as Applicant in this matter since he meant to act *nomine officio.*

[8] It is apparent from the statements made in the founding affidavit that the late Applicant did not purport to institute the application in his personal capacity. He intended to act in a representative capacity, *nomine officio,* as representative of the estate of the late Gabriël Johannes Greef estate number 15071/2012. In order to determine whether the executors of the estate of the late Applicant need to step into applicant's shoes before the main application can be considered, it is necessary to determine the nexus, if any, between the Applicant's executors and the present application.

[9] The duties of an executor who has been appointed to administer the estate of a deceased person was set out in *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 (3) SA 295 (A) 302E-G:

'The duty of an executor who has been appointed to administer the estate of a deceased person is to obtain possession of the assets of that person, including rights of action, to realise such of the assets as may be necessary for the payment of the debts of the deceased, taxes, and the costs of administering and winding up the estate, to make those payments, and to distribute the assets and money that remain after the debts and expenses have been paid among the legatees under the will or among the intestate heirs on an intestacy.'

This was reiterated in *Clarkson v Gelb* 1981 (1) SA 288 (W) 293C:

'A deceased estate is an aggregate of assets and liabilities. It has no legal personality and, when referring to it as an entity, one must be careful not to imply or understand thereby that one is dealing with anything like a persona. The executor is vested with its administration and he alone has the power to deal with this totality of rights and obligations. He is not merely a procurator or agent. His primary duty is to obtain possession of the assets of the deceased, to realise them as far as may be necessary, to make payment of debts and expenses, to frame a liquidation and distribution account and thereafter to effect a distribution to the heirs and legatees.'

[10] An executor is therefore tasked only with the administration of the deceased estate for which he or she was appointed. In addition, s 13(1) of the Administration of Estates Act 66 of 1965 (hereafter "the Act") provides:

'(1) No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section fifteen, or in pursuance of a direction by a Master.'

[11] Having regard to the above, this court cannot find that, even if the deceased had the *locus standi* to act in a representative capacity as the administrator of the estate of the late Gabriël Johannes Greeff, that the executors of his own deceased estate can now replace him as a party to this proceedings. If he was indeed authorised to act *nomine officio* pursuant the Letter of Authority issued by the Master of the High Court, the said Master would, upon his passing, need to issue a new Letter of Authority appointing the executors of Applicant's deceased estate to administer the estate of the late Applicant's father. The executors of his own deceased estate cannot automatically or *mero motu* step into his official shoes.

[12] In addition, and in light of the court's finding pertaining to the late Applicant's lack of *locus standi* in paras [26] and [27] below, it is held that even if the court's view in this

regard is wrong and that substitution *should* be considered before the main application is considered, it was held in *President of the Republic of Bophuthatswana v Milsell Chrome Mines (Pty) Ltd* 1996 (3) SA 831 (B) at 849F-G that the party to be substituted must have legal standing in the case.

[13] The next question that needs to be decided is whether the non-service of the notice of set down on the Second and Third Respondents necessitates a postponement. It has been stated that the matter was set down by the First Respondent. From the notice of set down it is clear that it was not served on the Master of the High Court, despite the Master being the Third Respondent in this matter. In answer to a question by the court, counsel for the First Respondent stated that it was not necessary to inform the Third Respondent of the date of the hearing of the application since the Second and Third Respondents were not opposing the matter. It is apparent from the content of the file that no notices or opposing affidavits were filed by the Second or Third Respondents.

[14] The court is of the view that it would only have been necessary to ensure that the Third (and/or Second) Respondent is made aware of the current turn of events if the Applicant had the necessary *locus standi* to approach the court for the relief sought in the application, and if the Applicant had made out a proper case which would require the granting of the relief asked against the other Respondents.

[15] It is thus necessary to consider the application brought by the late Applicant in order to determine whether the matter needs to be postponed to ensure that the possible interests of the Third and/or Second Respondent are protected.

[16] After the death of his father the late Applicant was duly authorised, in terms of a Letter of Authority (No. 15071/2012), to take control of the assets of the deceased estate as reflected in the inventory filed with the Master of the High Court. He had to pay the debts and to transfer the residue of the estate to the heir(s) entitled thereto. It is important to note that this Letter of Authority was issued in terms of s 18(3) of the Act. Section 18(3) empowers the Master of the High Court to dispense with the appointment of an executor, and to give directions as to the manner in which such estate shall be liquidated and distributed if the value of the estate does not exceed the amount determined by the Minister by notice in the *Gazette*. The late Applicant duly dealt with the assets listed in the inventory.

[17] At one or other time during 2013 the late Applicant 'went through [his] father's personal items and clothing' and found a written and signed memorandum of agreement entered into between his father and Marie Greef, his late father's wife and the First Respondent to this application. This agreement was dated 11 December 2006. Only an uncertified copy of this agreement is attached to the affidavit. On face value this document purports to be an agreement of Sale of Land in terms whereof the said Marie Greef sold the property described in prayer one of the notice of motion to the late Applicant's deceased father. This property was not listed in the inventory of the Letter of Authority and, it should be noted, was not mentioned at all in the deceased's will dated 5 January 2011. A copy of the will was annexed to the late Applicant's founding affidavit and marked annexure "JG6". If this property would formed part of the late Applicant's deceased's father's estate, it would cause the value of the late Applicant's father's deceased estate to exceed the amount provided for in s 18(3). This would necessitate the appointment of an executor for the estate.

[18] From the founding affidavit it is clear that the late Applicant wanted to re-open the estate of his deceased father. A letter dated 15 October 2013 written by the late Applicant's legal representative to the Master, annexure "JG9" to the founding affidavit, signifies the commencement of this process. The last sentence of this letter reads: '(i)n the circumstances, we received instructions from the Executor to re-open the estate and urgently await your directions in respect thereof.' In the founding affidavit the late Applicant related how, due to a confluence of circumstances, the file at the Master's office got lost. Since 2013 he never succeeded in securing an appointment as executor of his deceased father's estate. In 2016 he decided to launch the application that is the subject matter of this judgment. From the prayers contained in the notice of motion and the founding affidavit it is evident that the Applicant wanted to ensure that the registered owner of the property, whom he cited as the First Respondent in this application, would not be able to alienate the property pursuant to him being appointed as the executor of the estate. This he endeavoured to attain by joining the Registrar of Deeds, Pretoria as the Second Respondent and asked for an order that a *caveat* be registered over the property. In order to obtain an appointment as executor in the estate of his deceased father, the late Applicant joined the Master of the High Court, Pretoria as Third Respondent and asked for an order that the Master be ordered to re-open the estate of his deceased father immediately, and to issue him with the necessary Letter of Executorship. No order is asked

against the First Respondent and she was clearly joined to the application because of the direct and substantial interest that she has as registered owner of the affected property. It is of paramount importance to keep in mind that in instituting this Application, the late Applicant proceeded on the basis that he was acting in a representative capacity.

[19] Although there is no evidence on the court file that the application was properly served on any of the Respondents, the First Respondent's notice of intention to oppose the matter was duly served on both Second and Third Respondents. It can therefore be assumed that they are aware of the existence of this application, and choose not to oppose the application.

[20] The First Respondent raised three points *in limine* in opposing the application. The first is that the Applicant lacked the necessary authority and *locus standi* to bring this application; the second is that the Applicant instituted the application in the wrong court and that this court does not have the necessary jurisdiction to deal with the application; the third is that the Applicant has failed to establish the requirements for the relief that he sought.

[21] All three points *in limine* need to be taken into account when the court considers whether this application needs be postponed in order to provide for either the joinder of additional parties (the executors of the late Applicant's estate), or the service of a notice of set down on the Second or Third Respondents.

[22] The allegation is made in the First Respondent's answering affidavit that this court does not have jurisdiction to hear the matter. This allegation is founded on the fact that the First Respondent resides in North West and that the property concerned is also situated in that province. Despite the fact that a replying affidavit answering to this allegation has not been filed, the court, in applying the *Plascon Evans* rule, is not going to find that it does not have the jurisdiction to hear the matter. One of the common law grounds of jurisdiction includes *ratione rei sitae*. It is trite that some immovable properties situated in the North West province are registered at the Deeds Office in Pretoria. Annexure "JG 3" to the late Applicant's founding affidavit is a copy of a Deeds Office search that indicates that the property is indeed registered at the Deeds Office in Pretoria. The First Respondent's denial that this court has jurisdiction because the property is situated in the North-West, and that the Registrar of Deeds cited in this application should therefore have been the

Registrar of Deeds situated in the North-West, contradicts the factual reality of the property being registered at the Deeds Office in Pretoria. It does not substantiate a finding that this court does not have the necessary jurisdiction to hear the matter and I accordingly hold that this court does indeed has the jurisdiction to consider this application.

[23] The remainder of the *points in limine* are, however, relevant to the specific question under discussion.

[24] The next *point in limine* that is considered is whether the Applicant lacked the necessary authority and *locus standi* to bring this application.

[25] The late Applicant brought this application in a representative capacity. On his own version, as contained in the founding affidavit, he has finalised what he has been appointed to do in terms of the Letter of Authorisation No 15071/2012. His capacity to act as administrator of his late father's estate was cast within the confines of this Letter. There was no lingering authority entitling him to act *nomine officio* once he dealt with the assets listed in the Letter of Authority. This would also have been the case had he been appointed as the executor of the estate and discharged after finalising the administration of the estate – s 18(5)*(b)* specifically empowers the Master to:

> 'at any time **if after** the discharge of any executor it appears that there is property in the estate which has not been distributed by such executor, appoint and grant letters of executorship to such person as he deems fit and proper to liquidate and distribute such property.'

[26] The remainder of the points in *limine* submitted by the First Respondent are, respectively, that the Applicant has failed to establish the requirements for the relief that he seeks, and that the Applicant did not have the necessary *locus standi* to approach the court for this order.

[27] The late Applicant sought interdictory relief. However, he did not make out a proper case in his founding affidavit to convince the court that it would be justified to grant a *mandamus* against the Master of the High Court, ordering the latter to appoint him as executor of the concerned estate. Despite the statement contained in para 18.2 of the founding affidavit that the necessary documents to secure an appointment as executor of his father's deceased estate were lodged with the Master, the court is not provided with

enough facts to hold that the Third Respondent either unreasonably denied to appoint the late Applicant as executor or unreasonably delayed the appointment. The court cannot usurp the functions of the Master and it is found that the Applicant did not make out a case for the relief asked against the Third Respondent. Until the applicant was appointed as the executor of his late father's deceased estate, he subsequently had no standing to approach the court for an order against the Second Respondent that would ultimately also impact on the interests of the First Respondent. Accordingly it is found that the Applicant did not have the necessary standing to bring this application. The issue of substitution therefore becomes moot.

[28] In light of the above, the court finds that:

(a) the late Applicant cannot be replace by the executors of his own estate;

(b) the late Applicant did not have the *locus standi* to approach the court in a representative capacity; and that

(c) the claims necessary to oblige the Master of the High Court to appoint the Applicant as executor in the deceased estate of Gabriël Johannes Greef are not made out in this application.

In conclusion, the proceedings instituted under case number 61180/2016 terminated by reason of the Applicant's death and should be dismissed.

[29] This leaves the question of costs. First Respondent's counsel retracted the claim that costs in this matter be granted *de bonis propriis*. Without arguing the matter with reference to authority, they asked that the court grant a cost order on attorney and client scale against the estate of the late Applicant.

[30] The court has to consider whether a cost order that will adversely impact on the late Applicant's deceased estate can be made without having afforded the executors of his estate the opportunity to address the court in this regard, especially after a finding that the executors need not substitute him as Applicant for the main application to be considered. On the principle stated in *Rosner v Lydia Swanepoel Trust* 1998 (2) SA 123 (W) at 127B it is accepted that when an executor litigates in a representative capacity, judgment cannot be granted against him personally. However, it has already been held that the late Applicant did not have the necessary capacity to act on behalf of the estate of the late Gabriël Johannes Greef. In this regard he was 'on a frolic of his own'. As a result it is only

just and equitable that, had the Applicant still been alive, the costs that the First Respondent incurred in opposing this fatally flawed application, had to be carried by him.

[31] However, the reality is somewhat different. The Applicant is deceased. It was stated by Ramsbottom JA in *Lockat's Estate v North British & Mercantile Investment* at 302D-E:

'The estate which the executors have been appointed to administer came into existence after the death of the deceased . . . '.

The deceased estate, from which the First Respondent now wants to claim the costs of this application, came into existence after the Applicant passed away. Although the executors of the late Applicant's deceased estate had no interest in the main application, I am of the view that they do have an interest in any cost order that will impact negatively on the Applicant's deceased estate. The court cannot make an order that will negatively impact on the deceased estate without the executors of the being afforded the opportunity to be heard. Accordingly, no order will be made as to costs.

I THEREFORE MAKE THE FOLLOWING ORDER:

1. The application is dismissed.
2. No order is made as to costs.
3. The order is granted without prejudice to the First Respondent's right to seek a cost order against the estate of the late Johannes Gerhardus Greef pertaining to the application instituted under case number 61180/2016.

E VAN DER SCHYFF
Acting Judge of the High Court
Gauteng Division, Pretoria