

SOUTH AFRICA / JUDGMENT

Kekana and Another v Master of the High Court and Others (78433/2014) [2016] ZAGPPHC 771 (26 August 2016) [2016] ZAGPPHC 771

COURT

North Gauteng High Court, Pretoria

BEFORE

Van der Westhuizen

CASE / FILE NUMBER

78433/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 78433/2014

DATE:

26/8/2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

In

the matter between:

PATRICK
LESIBA
KEKANA.....First
Applicant
FLORENCE
HUNGWANE.....
Second Applicant
and
MASTER
OF THE HIGH
COURT.....
First Respondent
ZUKISWA
SKEPU-LYIMO.....
Second Respondent
TEBOGA
KEKANA.....Third
Respondent
HAPPY
KEKANA.....
Fourth Respondent
PHILLIP
KEKANA.....
Fifth Respondent
DAVID
KEKANA.....Sixth
Respondent
VICTORIA
MOLUFEFE
MFUNDISI.....Seventh
Respondent
MARIE
VICTOR ATTORNEYS &
CONVEYANCERS.....Eight
Respondent
REGISTRAR
OF DEEDS
.....Ninth
Respondent
STANDARD
BANK
.....Tenth
Respondent
CLEAR
CREEK TRADING (PTY)
LTD.....Eleventh
Respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. This is an application for review, in terms of the provisions of section 6(1) of the Promotion of Administrative Justice Act (PAJA), 3 of 2000, of decisions by the first and/or second respondents taken on 24 July 2012 and 12 August 2012 respectively.
2. The aforesaid decisions relate to:
 - (a) the "revoking" of the letter of authority, number 7528/07, appointing the second applicant as executrix in the estate late Malumo Mary Kekana;
 - (b) the "appointment" of the third respondent as executrix in the estate late Malumo Mary Kekana under letter of authority number 6307/10; and
 - (c) declaring the appointment of the third respondent as the duly appointed executrix in the estate late Malumo Mary Kekana.
3. The applicants seek additional relief in the event that the review succeeds. I shall deal therewith later in this judgment.
4. The first respondent is the Master of the High Court, Pretoria. The second respondent is the Assistant Master who issued the aforesaid two letters of authority to the second applicant and the third respondent respectively. I shall refer to the first and second respondents collectively as the Master.
5. The third, fourth and fifth respondents are grandchildren of the late Malumo Mary Kekana. The sixth respondent and the first applicant are sons of the late Malumo Mary Kekana. The seventh respondent is the purchaser of immovable property that was registered in the name of the late Malumo Mary Kekana. The eighth respondent is the attorney who attended to the transfer of the said immovable property of the late Malumo Mary Kekana into the names of third, fourth, fifth and seventh respondents. The ninth respondent is the Registrar of Deeds.
6. The tenth respondent, Standard Bank, opposes this application. The seventh respondent filed a notice of intention to oppose, but did not file any opposing affidavit and was not represented at the hearing of the application.
7. None of the other respondents opposes this application.
8. The relevant facts are:
 - (a) The late Malumo Mary Kekana passed away on 9 July 2005;
 - (b) Her estate, being intestate, was reported to the first respondent during April 2007 by the second applicant;

- (c) The Master on 25 April 2007 issued a letter of authority appointing the second applicant as executrix in the intestate estate of Malumo Mary Kekana;
- (d) On 5 May 2010, the estate of the late Malumo Mary Kekana was reported for the second time to the Master by the third respondent;
- (e) The Master on the same day issued a letter of authority, under number 6307/10, in terms whereof the third respondent was appointed
as executrix in the estate of the late Malumo Mary Kekana;
- (f) The third respondent was also appointed as executrix in the estate of Mosela Emma Kekana, her mother, the daughter-in-law of the
late Malumo Mary Kekana;
- (g) The appointment of the third respondent as executrix in the estate late Malumo Mary Kekana only came to the knowledge of the applicants when the occupier of the immovable property in the estate late Malumo Mary Kekana attempted to purchase electricity for the property. She then discovered that the said property had been transferred into the name of the seventh respondent;
- (h) In February 2011, the applicants' attorneys addressed a letter in this regard to the Master, objecting to the appointment of the
third respondent in the estate late Malumo Mary Kekana;
- (i) The Master, in response to the aforementioned letter, directed the issue to the Magistrates' Court, Pretoria, for an investigation
into who the heirs to the estate late Malumo Mary Kekana were;
- (j) The Chief Magistrate, Pretoria, declined in writing to undertake the requested investigation on the ground that he was no longer vested with the power to supervise and administer deceased estates;
- (k) During June 2011, the first respondent filed a report in then pending matters before the North Gauteng High Court (as it was then known). In that report the Master conceded that the double appointment of executors in the estate late Malumo Mary Kekana arose as a result of the change in the computer programme used by the Master's Office when registering a new estate. It appears that the matters in which the report was filed, came to naught, neither of the two matters were finalised;
- (I) Only during July 2012 did the Master respond in writing to the applicants' initial objection of February 2011. That response was merely to the effect that the letter of appointment of the third respondent was "in the system" and hence it was valid. The letter of appointment of the second applicant was "not in the system and therefore have no effect" (sic);

- (m) Ongoing litigation, including an application for the eviction of the occupier of the said property, ensued between the seventh respondent and the applicants and also between the third respondent and the eighth respondent. The litigation initiated by the seventh respondent was abandoned by her;
 - (n) The first applicant launched an application in this Division in which similar relief as that sought in this application for review of the first and second decisions. That application was dismissed on 13 October 2014. The apparent ratio of that court's decision being that the first applicant ought to seek a review of the Master's decisions;
 - (o) On 20 October 2014 this application was launched.
9. The tenth respondent was cited as a party to these proceedings in view of a loan agreement entered into by the tenth respondent and the seventh respondent.
10. In its opposition to this application, the tenth respondent has raised a number of objections to the relief being sought. These are:
- (a) The applicants' delay in bringing this application and the explanation provided in respect of condonation sought for the delay;
 - (b) The locus standi of the first applicant in these proceedings;
 - (c) The determination of the first respondent in respect of the two appointments of executors;
 - (d) The setting aside of an agreement entered into by the third respondent and the seventh respondent.
11. The issue of the tenth respondent's locus standi to oppose this application was raised with counsel for the tenth respondent. He submitted that the tenth respondent had indeed the required locus stand, firstly, in view of the applicants having cited the tenth respondent and secondly, in view of the tenth respondent's interest in the property by virtue of the loan agreement with the seventh respondent and the mortgage bond registered as security over the property in favour of the tenth respondent.
12. Counsel for the tenth respondent submitted, in respect of the second ground referred to above, that the abstract approach to the transfer of the property is to be applied, as opposed to the causal approach. In such an instance, the tenth respondent has the required locus standi to oppose the application.
13. The tenth respondent's interest in the said property lies in respect of the loan agreement entered into between it and the seventh

respondent. The tenth respondent has no direct, substantial or legal interest (apart from a financial interest vis-a-vis the seventh respondent) in this application. It is common cause that the mortgage bond registered over the said property constitutes nothing more than security. The underlying relationship between the tenth respondent and the seventh respondent is that created by the loan agreement, which creates rights and obligations between the parties thereto.

14. There is no allegation on the part of the seventh respondent that she was an "innocent buyer" of the property, or that

she did not have any knowledge of the tainted rights in and to the said property on the part of the third to fifth respondents. The abandonment of the aforesaid litigation on the part of the seventh respondent is telling.

15. Further in this regard, there is no gainsaying evidence on the part of the third respondent that she had not acted mala fide when registering the estate late Malumo Mary Kekana for the second time, when applying for letters of authority to be issued to her in respect of the estate late Malumo Mary Kekana and when entering into the agreement with the seventh respondent.
16. It follows that the tenth respondent does not in its own right have the required locus standi to oppose this application.
17. That being said, Mr Whittington greatly assisted in debating the relevant issues and he is thanked for his able argument.
18. The relevant facts in respect of the merits and the issue of condonation for the time elapsed since the issuing of the second set of letters of authority are closely intertwined. It is apparent that all parties are to blame for this matter not coming to fruition sooner. Condonation is granted for what follows.
19. It is common cause that the first/second respondent issued letters of authority to the second applicant in the estate late Malumo Mary Kekana. It is also common cause that the first/second respondent thereafter issued letters of authority to the third respondent in the same estate. It is common cause that the issuing of the second set of letters of authority to the third respondent occurred due to the prevailing circumstances at that time relating to the implementation of a new computer system in the offices of the Master.
20. The question is whether the Master had the power to issue the second letter of authority in respect of the third respondent in view of the issuing of the first letter of authority to the second applicant that has not been withdrawn.
21. It is trite that once the Master has issued letters of authority, it is functus officio in that regard.[1] It is only in special circumstances, as provided in the Administration of Estates Act, No. 66 of 1965, (the Act) that a letter of authority can be withdrawn. [2] None of those circumstances apply in casu.

22. There is no allegation, nor is there any suggestion, that the letters of authority issued to the second respondent constituted a

"fraud" or were not issued by the Master. The Master accepts that it was duly issued.

23. The explanation offered in respect of the issuing of the second set of letters of authority was dealt with in the Master's report referred to earlier. It is apparent from that report that the second set of letters of authority were issued due to an administration error, i.e. the implementation of a new computer system for the registration of estates. However no explanation was provided in respect of the steps that were taken to prevent any "duplication" in the registration of estates during that period.

The reasoning on the part of the Master that because the first letters of authority was not in the system does not justify holding the second set of letters of authority valid and the first set of no effect. The Master was obliged to investigate the matter once the objection was lodged. The Master failed to do so. The referral of the objection to the Magistrate's Court was uncalled for and did not relieve the Master of his/her obligation to investigate the circumstances.

25. It is thus clear that, whilst knowing of the problems relating to the implementation of the new system for registration of estates,

and not implementing appropriate steps to prevent any duplication, the Master could not properly have applied his/her mind when

appointing the third respondent as executrix in the estate late Malumo Mary Kekana.

Furthermore, the Master was *functus officio* at the time.

26. There is a further aspect that requires consideration. That relates to documentation that was placed before the Master by the third respondent allegedly in support of an appointment as executrix in the estate late Malumo Mary Kekana. At least two of those documents are of utmost importance. The first is a declaration that no letters of authority have been issued in respect of the estate of late Malumo Mary Kekana. That document was not signed. The second document relates to the declaration of subsisting marriages and/or cohabitation of relationships. This document is also not signed. It is not explained by the Master, how, in the absence of duly completed declarations, the issuing of letters of authority could have been done. This is a further aspect that sways against a finding that the Master had applied his/her mind properly when issuing the second set of letters of authority to the third respondent. There are other documents that were submitted in support that were also unsigned.

The validity of the appointment of the second applicant as executrix in the estate late Malumo Mary Kekana is not contested.

It follows that the Master's decision to appoint the third respondent cannot stand. Likewise, the Master's decision that the third

respondent's appointment as executor in the estate. Malumo Mary Kekana is valid and that the appointment of the second applicant as executor in the estate Malumo Mary Kekana is of no effect, cannot stand.

29. It follows that the said decisions by the Master stand to be reviewed and set aside.

30. The applicants further seek that the respective transfers of the estate property that followed on the appointment of the third

respondent as executrix be set aside.

31. It is not disputed that the third to fifth respondents never occupied the property of the late Malumo Mary Kekana. In fact there

were attempts to evict the occupier of the said property, albeit after the transfers had taken place. Those evictions were never

pursued to finality and were abandoned. I find that the actions of the third respondent in attempting to obtain the requisite authority

to deal with the estate property to be seriously questionable. The attempt to obtain letters of authority in respect of the estate late Malumo Mary Kekana only occurred five years after her death and three years after the death of Mosela Emma Kekana.

32. In the absence of an allegation that the sixth respondent had passed away or of any proof thereof, the statement by the first applicant that the sixth respondent is still alive is to be accepted as correct. It follows that the late Mosela Emma Kekana (who passed away on 14 March 2007) could not have inherited intestate from the late Malumo Mary Kekana together with the third to fifth respondents

per stirpes.

33. In view of the fact that the sixth respondent is still alive, and in the absence of any statement or proof to the contrary, I am of the view that the only inference that could be drawn is that the third to fifth respondents knew that they had no right to the estate property and could thus not validly dispose thereof either to the seventh respondent or any other party.[3]

34. I have already found that the decision of the Master relating to the issuing of the second set of letters of authority to the third

respondent is to be set aside, the Master being functus officio at the time, consequently the third respondent had ab initio no authority to deal with the estate property.

35. For the aforesaid reasons there are defects in the real agreements.

36. Consequently, the third respondent had no right in and to the title to the estate property and could not give transfer thereof to

any third party, including himself.

37. It follows that the transfers of the said property stand to be set aside.

I grant the following order:

(a) The decisions by the first and second respondents:

(i) On 24 July 2012 effectively revoking the letter of authority issued to the second applicant under number 7528/07 on 25 April 2007

in the estate late Malumo Mary Kekana;

(ii) On 5 May 2010 issuing letters of authority under number 6307/10 to the third respondent in the estate late Malumo Mary Kekana; and

(iii) On 12 August 2012 confirming the letter of authority issued under number 6307/10 to the third respondent in the estate late Malumo Mary Kekana;

are set aside;

(b) The purported agreement between the third and seventh respondents be and is hereby declared invalid;

(c) The Registrar of Deeds is directed to reverse or cancel the transfers of the property known as ERF [35..], Atteridgeville Township,

Registration Division J.R. Province of Gauteng, on 5 April 2011:

(i) From Estate Late Malumo Mary Kekana to Estate Late Mosela Emma Kekana under Deed of Transfer number [T019...];

(ii) From Estate Late Mosela Emma Kekana to Tebogo Kekana, Phillip Kekana and Happy Kedibone Kekana under Deed of Transfer number [T01916...]; and

(iii) From Tebogo Kekana, Phillip Kekana and Happy Kedibone Kekana to Victoria Molufefe Mfundisi under Deed of Transfer [T01916..].

(d) No order as to costs.

CJ VAN DER WESTHUIZEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

On behalf of Applicants:S Tshabalala

Instructed by:.....M L Kekana Incorporated

On behalf of First to Ninth Respondents:No appearance

Instructed by:

On behalf of Tenth Respondent:D Whittington

Instructed by:.....Van Hulsteyns Attorneys

- [1] Welgemoed NNO v The Master 1976(1) SA 513 (T); See also Transair (Pty) Ltd v National Transport Commission et al/ 1977(3) SA 784 (A)
- [2] Section 54 of the Act
- [3] See Nedbank Limited v Mende/ow NO 2013(6) SA 130 (SCA) at [12]; see also Legator Mekena Inc et al v Shea et al 2010(1) SA 35 (SCA) at 44G-J
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