

SOUTH AFRICA / JUDGMENT

Moeko v Moeko and Others (271/2017)

[2017] ZAFSHC 140 (11 June 2017)

[2017] ZAFSHC 140**COURT**

Free State High Court, Bloemfontein

BEFORE

NM MBHELE

CASE / FILE NUMBER

271/2017

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 271/2017****In**

the matter between:

MAKHOTSO

ALICE

MOEKO

Applicant

and

MALEFETSANE

JOSEPH MOEKO

1st

Respondent

REGINA

DUMAZILE KHUTSOANE

2nd

Respondent

MOHLOLO

ANDREW KOMAKO

3rd
Respondent
HARRINGTONS
INCORPORATED
4th
Respondent
REGISTRAR
OF DEEDS, BLOEMFONTEIN
5th
Respondent
PHUTHADITJHABA
MAGISTRATE'S OFFICE 6th
Respondent
MALUTI-A-PHOFUNG
MUNICIPALITY
7th
Respondent
HEARD

ON: 6
JUNE 2017

JUDGMENT

BY: MBHELE, J

DELIVERED ON: 11 AUGUST 2017

- [1] This is an opposed application in terms whereof the applicant moves for an order in the following terms:
1. Declaring that certificate of appointment under file number 216/94 issued at Phuthaditjhaba Magistrate's Offices in favour of first respondent is illegal, unlawful and null and void.
 2. Declaring that title deed number: T7078/2012, registered in the names of the second respondent on the property described as [...] R. S. Phuthaditjhaba is unlawful and null and void.
 3. Declaring that the title deed number: T10867/2014, registered in the names of the third respondent on the property described as [...] M. S. Phuthaditjhaba is unlawful null and void.
 4. That the Honourable court make an order directing the registered of deeds Bloemfontein, do cancel the abovementioned title deeds.
 5. That the Honourable court make an order directing re-transfer of the said properties to Sello William Moeko, being the original owner thereof.
 6. The first, second and third respondents to pay the costs of this application as between attorney and client jointly and severally, the one paying the order to be absolved.

- [2] First respondent is the surviving son of the late William Sello Moeko (the deceased). The deceased died on 03 September 1992. It is the applicant's case that she is the surviving spouse of the deceased whom she married on 27 June 1986, 7 months after his divorce from the first respondent's mother.
- [3] Applicant and first respondent have each been issued with letters of appointment from Phuthaditjhaba Magistrate court to administer the deceased's estate. Applicant is of the view that she is the sole beneficiary to the deceased's estate.
- [4] First respondent sold two immovable properties belonging to the deceased's estate to the 2nd and 3rd respondents respectively. The said properties are the subject matter of this application.
- [5] There are numerous factual disputes on the papers which are incapable of resolution through motion proceedings.
- [6] The first dispute is whether the applicant was indeed married to the deceased. Whether the applicant and first respondent were duly appointed as representatives of the estate.
- [7] It is, further, disputed that the applicant ever occupied the properties at the centre of this application.
- [8] Where an application cannot be decided on affidavit the court has a discretion to refer the matter for oral evidence with a view to resolving any dispute of fact apparent from the papers. (See Rule 6(5)(g) of the uniform rules of court).
- [9] The general principles relating to referral of motion proceedings to oral evidence was set out in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 743 (A) 979F- J where, the court said the following:

"The applicant may, however, apply for an order referring the matter for the hearing of oral evidence in order to try to establish a balance of probabilities in his favour. In those circumstances, the Court should have a discretion to allow the hearing of oral evidence in an appropriate case. The alternative, viz refusal of the provisional order of winding-up, represents a final decision against the applicant and, if such a decision is always made purely on the affidavits, injustice may be done to the applicant. In exercising such discretion, the Court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant. Therefore, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant."

- [10] In *Khumalo v Director-General of Co-operation and Development*

[1990] ZASCA 118; 1991 (1) SA 158 at 167G-J the court said the following:

"In Moosa Bros & Sons (Pty) Ltd v Rajah 1975

(4) SA 87 (D) Kumleben J, after a review of relevant authorities, arrived at the following conclusions (at 93):

'(a) As a matter of interpretation, there is nothing in the language of Rule 6(5)(g) which restricts the discretionary power of the Court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.'

(b) The illustrations of "genuine" disputes of fact given in the Room Hire case at 1163 do not and did not purport to set out the circumstances in which cross examination under the relevant Thiensville rate of court could be authorised. They a portion do not determinate the circumstances in which such relief should be granted in terms of the present rule 6(5)(g).

(c) Without attempting to lay down any precise rule, which may have effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.

(d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly or refuted by the opposite party, are to be carefully scrutinised".

[11] I cannot find on the papers before me, that the factual disputes can be resolved in motion proceedings. The disputes are genuine, relevant and material.

[12] I am of the view that the matter should be referred to oral evidence. There are reasonable grounds to doubt the correctness of two sets of letters of authority issued to the parties.

ORDER

[13] Consequently the following order is made:

1. The application is postponed to 9 October 2017 for certification, as ready for hearing viva voce evidence by the pre-trial Judge.

2. The issues to be determined are the following:

2.1 Whether the applicant is the surviving spouse and sole heir of Sello William Moeko's estate.

2.2 The validity of two letters of appointment issued to the applicant and the first respondent.

3. Should any party wish to lead the evidence of any person who has not deposed to an affidavit in these proceedings, that party shall submit an affidavit containing a summary of such person's evidence together with any documents upon which they rely and do so within 15 days prior to the hearing of this matter.

4. Whether a party is entitled to call any witness who has not presently deposed to an affidavit will be determined by agreement between the parties failing which on application to the court at the hearing of this matter.

5. The provisions of Rule 35 are made applicable to this matter.
6. Cost to be costs in the application.

NM MBHELE, J

On behalf of applicant: Mr. Radebe

Instructed by:

Bokwa Attorneys

Bloemfontein

On behalf of respondents: Adv. Rautenbach

Instructed by:

Phatshoane Henney Attorneys

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