

SOUTH AFRICA / JUDGMENT

Moloto and Others v Velashiya and Others (2015/17117) [2016] ZAGPJHC 126 (24 May 2016)

[2016] ZAGPJHC 126

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala

CASE / FILE NUMBER

2015/17117

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/17117

DATE: 24 MAY 2016

In the matter between:

MOLOTO THANDO MICHELLE.....FIRST APPLICANT

MOLOTO ELLIOT SELEKA.....SECOND APPLICANT

SIBANDA PALESA MORESI.....THIRD APPLICANT

THANDI MASEKO.....FOURTH APPLICANT

MOKOKA MASEKAU JACOBS.....FIFTH APPLICANT

And

VELASHIYA VANESSA.....FIRST RESPONDENT

FIRST NATIONL BANK LT.....SECOND RESPONDENT

MASTER OF THE HIGH COURT.....THIRD RESPONDENT

J U D G M E N T

TWALA AJ

[1] The applicants came before me on urgent basis seeking the following orders:

I. That the application be dealt with as one of urgency in terms of Rule 6

(12) and that the normal time period and service be dispensed with in the circumstances.

II. That the First Respondent be prevented from administering, dissipating, hiding or alienating the deceased estate of the late Samuel Matsobane Moloto;

III. That the First Respondent be ordered to hand over the administration of the deceased estate to the Master of the above Honourable Court, pending the outcome of the application for the rescission of the default judgment granted on 31 August 2015 (“the rescission application”).

IV. Alternative to prayer 3, that the Second Respondent be ordered to freeze the funds currently available on the estate account being managed and operated by the First Respondent with the Second Respondent on behalf of the deceased estate of the Late Samuel Matsobane Moloto, pending the outcome of the rescission application;

V. Ordering the First Respondent to pay the costs of this application in her personal capacity;

VI. In the event of their non-opposition of the present application, no cost order is sought against the Second, Third, Fourth and Fifth

Respondents. Costs are only sought against the Second, Third, Fourth and Fifth Respondents only in the event of their opposition of the present application.

[2] Only the First Respondent filed opposing paper to this application. It is noted that prayer VI relates to Second, Third,

Fourth and Fifth respondents whereas there are only three (3) respondents cited in this case.

[3] It is common cause between the parties that the applicants are the biological children and therefore heirs and/or beneficiaries to the estate of the deceased, the late Samuel Matsobane Moloto, who died intestate on the 17 March 2015. Immediately after the death of the deceased, the Second Applicant was appointed Executor of the estate of the deceased. The First Respondent opposed this appointment of the Second Applicant as the Executor of the estate of the deceased but was unsuccessful at the time.

[4] On 31 August 2015, the First Respondent was granted an order by the above Honourable Court condoning the late registration of her

customary marriage to the deceased. This order was granted against the opposition mounted by the Second Applicant who failed to appear at the hearing of the matter – hence the order was granted by default.

- [5] On 17 November 2015, the Third Respondent withdrew the Letters of Executorship issued to the Second Applicant and appointed the First Respondent as the Executrix in the estate of the deceased. However, the Second Applicant handed over control of the deceased estate, closed the estate banking account and transferred the funds into the new account under the control of the First Respondent only on the 27 January 2016.
- [6] It is not in dispute that on 11 December 2015, Zwiegers Attorneys, on the instructions of the Second Applicant, addressed a letter to the First Respondent's attorneys of record enclosing a copy of the application for rescission of the judgment of the 31 August 2015 which condoned the late registration of the customary marriage of the First Respondent and the deceased. This letter demanded confirmation that the First Respondent "will do nothing in her capacity as the so called executor, pending the outcome of the applications to be brought by the applicants". The letter continued to state that should they not receive confirmation as requested by end of business on that day, they hold instructions to proceed on urgent basis to interdict the First Respondent from executing her duties as the executrix in the estate. The application for the rescission of judgment was however withdrawn on the 27 January 2016.
- [7] On the 4 February 2016 the First Respondent was served with an urgent application interdicting and restraining her from disposing
cash and/or assets of the deceased estate. This application was struck of the roll for lack of urgency on the 12 February 2016.
- [8] In March 2016 another application for rescission of the judgment of the 31 August was launched and is still pending before the Court. The parties are still exchanging the pleadings in this case.
- [9] On the 24 March 2016 the Applicants attorneys of record dispatched a letter to the First Respondent's attorneys demanding that the First Respondent furnish them with certain information and transactions that have taken place in the late estate account. It further demanded an undertaking from the First Respondent that she will forthwith desist from acting or purporting to act as the administrator and/or executrix of the estate pending resolution of the dispute between the parties.
- [10] The First Respondent's response to the letter of the 11 December 2015 was that she will not confirm that "she will do nothing in her capacity as the so called new executor, pending the outcome of {your clients'} applications. Her response to the letter of the 24 March 2016 was that she is fatigued and would prefer to utilise her financial resources on dealing with the court application launched recently, (meaning the rescission of judgment application launched in March 2016).
- [11] Counsel for the Applicants contends that it is the attitude of the First Respondent that galvanised the Applicants into bringing this urgent application which was initiated on the 6 April 2016 and was to be heard on the 19 April 2016. Applicants have a reasonable

apprehension that the assets of the estate might be dissipated by the First Respondent. When they demanded information and undertakings

from the First Respondent, she failed to give such information and undertakings. However, on the 10 April 2016 after she was served with this urgent application, she furnished the information on the estate account. The information furnished by the First Respondent has now confirmed the suspicions of the Applicants that the assets of the estate are being dissipated by the First Respondent. There are amounts of money that have been withdrawn from the estate bank account to the tune of about R400 000 without any reasonable explanation.

- [12] Counsel for the First Respondent contends that the application is not urgent. The applicants have on two (2) previous occasions brought similar urgent applications. One was withdrawn in January 2016 and the other was on the 12 February 2016 struck off the roll for lack of urgency. Secondly, this application was set down for hearing on the urgent roll of the 19 April 2016 and was removed by agreement because the Applicants wished to file a replying affidavit to the First Respondent's answering affidavit.
- [13] The previous two urgent applications were for the removal of the First Respondent as the executrix of the deceased estate. Couched differently, the application presently before Court is aimed at achieving the same result as were intended in the previous two applications. There is no dissipation of the assets of the estate that has occurred or assets that have not been accounted for. All the monies withdrawn from the estate account are legitimate and/or reasonable expenses of the estate. First Respondent is not obliged to account to the heirs and/or beneficiaries during the winding up of the estate. She is accountable to the Master of the High Court. She is obliged to prepare and lodge a Liquidation and Distribution account with the Master and if anyone has an objection to her handling of the estate, the objection should be lodged with the Master.
- [14] During his tenure as the executor of the estate, the Second Applicant paid himself and his co-applicants a sum in excess of R8.5m from the estate without lodging a liquidation and distribution account to the Master as required by the Administration of Deceased Estates Act. He further transferred immovable property valued at R1.7m from the estate into the name of the Third Applicant.
- [15] The Applicants have never accepted the appointment of the First Respondent as the executrix in the estate of the deceased. It took the Second Respondent more than two (2) months to hand over the estate to the First Respondent and barely six (6) weeks thereafter, the applicants started all this litigation. The Applicants are not approaching this Court with clean hands. They have shared the assets of the estate amongst themselves at the exclusion of other estate heirs. The First Respondent and her children were deliberately excluded from the estate.

- [16] I agree with Counsel for the First Respondent that this matter is not urgent. The fact that the founding papers were issued and served on the First Respondent on the 6 April 2016 when the matter was enrolled for hearing on the urgent roll of the 19 April 2016 but was removed from the roll and place on the urgent roll of the 26 April 2016 bears testimony to the fact that the matter is not urgent. The matter cannot be for ever urgent on the same facts. The prayers in the notice of motion are couched differently from the previous two
- (2) notices of motion. The one notice of motion was struck off the roll for lack of urgency and the other was removed from the roll. However, the intended result is the same, to remove the estate from the control of the First Respondent or to remove the First Respondent as the executrix of the estate.
- [17] It is my view therefore that this application is not distinguishable from the other two except that it is couched differently. Therefore this matter falls to be struck of the roll for lack of urgency.
- [18] However, since I have read all the pleadings and have allowed both counsels to argue the merits of this matter, I am of the view that I will be failing in my duty if I were not to finalise it.
- [19] The issue to be determined by this Court is whether the First Respondent (the Executrix) in the performance of her functions is dissipating or hiding or alienating and/or will, in the process of administering the estate,
- dissipate or hide or alienate the assets of the deceased estate.
- [20] It is the applicants' contention that the letter of the 10 April 2016 from the First Respondent's attorneys is proof that the Executrix is dissipating the assets of the estate. This letter is in response to the applicants' letter of the 24 March 2016 wherein a demand was made for the Executrix to make certain undertakings and to furnish certain information.
- [21] In the letter of the 10th April 2016, the Executrix listed and made a narration for each amount of money that was withdrawn from the estate late bank account. She further listed the creditors of the estate which were due to be paid. These payments can be summarised in terms of their narration as legal fees, maintenance of the minor children, school fees and insurance for motor vehicles belonging to the estate totalling R219 124.72.
- [22] The Master of the High Court (The Master) is a department within the Department of Justice and Constitutional Development created by Legislation. One of its functions is to supervise the administration of the deceased estates. It is created by the Administration of Deceased Estate Act, Act 66 of 1965 ("the Act"). The Master has the power to appoint and/or to remove the executor in terms of the provisions of the Act.
- [23] The purpose of the Act is "to consolidate and amend the law relating to the liquidation and distribution of the estates of deceased persons, the administration

of the property of minors and persons under curatorship, and of derelict estates; to regulate the rights of beneficiaries under

mutual wills made by any two or more persons”.

[24] It is trite that once a deceased estate is reported to the Master and an executor is appointed, the estate will be administered and liquidated in terms of the Act. The executor is then obliged to administer the estate under the supervision and is accountable to the Master. It is absurd to suggest that the executor should account to the heirs and/or beneficiaries of the estate at any given moment when they demand her to do so.

[25] In terms of section 35 of the Act, the executor has a duty to lodge a liquidation and distribution account with the Master. Once the account has been approved by the Master, it lies in the Master’s office for inspection by anyone including the heirs and/or beneficiaries of the estate. Any person who has an objection to the liquidation and distribution account, has the right to lodge such objection with the Master. It is therefore my view, that there was no reason for the Executrix and she was not obliged to respond to the demand of the applicants dated the 24 March 2016. It is only the Master who has the power in terms of section 35 of the Act to demand that the executor lodge an account and/or vouchers in relation to an account.

[26] Section 36 of the Act provides as follows:

“Failure by executor to lodge account or to perform duties

(1) If any executor fails to lodge any account with the Master as and when required by this Act, or to lodge any voucher or vouchers in support of such account or any entry therein in accordance with a provision of or a requirement imposed under this Act, or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of the estate, the Master or any person having an interest in the liquidation and distribution of the estate may, after giving the executor not less than one month’s notice, apply to the Court for an order directing the executor to lodge such account or voucher or vouchers in support thereof or of any entry therein or to perform such duty or to comply with such demand.

(2)

[27] The Act obliges the executor to lodge a liquidation and distribution account with the Master and if he fails to do so, the Master or any person who has an interest in the liquidation and distribution of the estate may apply to the Court for an order directing the executor to lodge such account or to comply with such demand only after giving the executor not less than one month’s notice.

[28] I am of the view that the step taken by the applicants in this case is not in line with the provisions of Section 36 and therefore the Executrix was not obliged to respond or account to them.

[29] Section 26 (1A) of the Act provides as follows:

“The executor may before the account has lain open for inspection in terms of section 35(4), with the consent of the Master release such amount of money and such property out of the estate as in the executor’s opinion are sufficient to provide for the subsistence of the deceased’s family or household.”

[30] It is apparent from the papers filed of record that there has been a lot of litigation between the parties in relation to the deceased estate. It is not unexpected that parties would incur legal costs in such a case. Payment of the legal fees by the estate can therefore not be said to be a dissipation or alienation of the assets of the estate. Some of the legal fees to be paid are for the attorneys which represented the Second Applicant when he was the executor of the estate. Further, the executor is empowered in terms section 26 of the Act to provide for maintenance for the family or household of the deceased if she is of the opinion that it was necessary do so. I conclude, therefore, that the amounts withdrawn from the estate late bank account by the executrix from 27 January 2016 to 24 March 2016 are reasonable and legitimate expenses of the deceased estate.

[31] I agree with Counsel for the First Respondent that the applicants never accepted the appointment of the First Respondent as executrix of the estate and have since embarked on the course to remove her. The alleged apprehension that she is dissipating or alienating and/or will in the course of her administration of the estate dissipate or alienate the assets of the estate is just a smoke screen aimed at removing her as the Executrix of the estate.

[32] I conclude therefore that the apprehension of the applicants that the Executrix is dissipating or alienating or hiding and/or will in the performance of her functions dissipate, alienate or hide the assets of the estate is unfounded and unreasonable. It cannot be said that because the applicants dispute her customary marriage to the deceased then she will dissipate, alienate or hide the assets of the deceased estate.

[33] It is not correct to say that there is now only a balance of R5m in the estate bank account whereas the Executrix received an amount in excess of R10m when she took control of the estate in January 2016. The Executrix has disclosed that she has invested a sum of R5m in an interest bearing account and that she is in the process of recovering, from the Third Applicant, the immovable property that was illegally transferred into her name by the Second Applicant.

[34] Section 23(1) of the Act provides as follows:

“(1) Subject to the provisions of section twenty – five, every person who has not been nominated by will be an executor shall, before letters of executorship are granted, or signed and sealed, and thereafter as the Master may require, find security to the satisfaction of the Master in an amount determined by the Master for the proper performance of his functions: provided that if such person is apparent, spouse or child of the deceased, he shall not be required to furnish security unless the Master specially directs that he shall do so.

(2).....

”

[35] It is trite that, for an applicant to succeed with an interdict, there are three elements that must be proved which must be present at the same time, that is:

- (a) a clear right
- (b) reasonable apprehension of irreparable harm
- (c) absence of a satisfactory alternative remedy

[36] The Master did not find it necessary to call for security from the Executrix when she was appointed. Nothing stops the Master from calling for security if there are facts before him that suggest that the Executrix will not perform her functions properly. In terms of section 23 of the Act, it is irrelevant whether the executor is a parent, spouse or child of the deceased.

[37] It is my view therefore, that the applicants have a clear right in that they are the biological children of the deceased and therefore the heirs and/or beneficiaries to the estate of the deceased. However, the applicants have failed to justify the existence of a threat or reasonable apprehension of irreparable harm and that there is no satisfactory alternative remedy.

[38] I conclude therefore that there is an alternative remedy as provided for in section 23 of the Act. The application therefore falls to be dismissed.

[39] It is surprising that the applicants drag the First Respondent to Court in her capacity as executrix in the estate of the deceased but seek a costs order against her in her personal capacity. The applicants came before this Court on urgent basis when in fact this matter was not urgent. The applicants are determined to abuse the processes of this Court to get to the First Respondent. This cannot be allowed and the Court frowns upon such behaviour by litigants. It is therefore appropriate for this Court to grant punitive costs against the applicants in this case.

[40] In the circumstances, I make the following order:

I. The application is dismissed;

II. The Applicants to pay the costs of this application including the costs occasioned by the postponement on 19 April 2016, jointly and severally the one paying the other to be absolved, on a scale as between attorney and own client.

TWALA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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Date of Hearing: 26 APRIL 2016

Date of Judgment: 24 MAY 2016

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