

SOUTH AFRICA / JUDGMENT

Pillay and Another v Sewlal and Others (A139/2019) [2021] ZAGPPHC 728 (5 November 2021) [2021] ZAGPPHC 728

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay, A Basson, C van der Westhuizen

CASE / FILE NUMBER

A139/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)
Case number: A139/2019

Date:

In the matter between:

SUSAN
PILLAY FIRST
APPELLANT
PARAVATHIE
PILLAY SECOND
APPELLANT
And
VARSHA SEWLAL
NO FIRST
RESPONDENT
MICHAIL MABUELA
NO SECOND
RESPONDENT
PRASHABT MAHARAY
NO THIRD
RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION

- [1] On 28 May 2019 the appellant noted an appeal against the whole of a judgment of this Court delivered on 1 January
2019. In this judgment the Court a quo dismissed the appellants' application to review and set aside a decision taken by the respondents (the Master) regarding a deceased estate.
- [2] The appellants were the biological parents of the deceased, who was married to the third respondent, out of community of property with inclusion of the accrual system. No children were born from the marriage. The deceased died intestate on 24 July 2015. The appellants asked costs de bonis propriis against the Master, which resulted in the Master opposing the application only against such a costs order.
- [3] The third respondent was appointed as executor of the deceased estate by the Master. The appellants complained that the Master failed to comply with sections 35(7) and 35(8) of the Administration of Estates Act, No 66 of 1965 (the Act). The third respondent was sued in his capacity as executor of the estate. The appellants alleged that the third respondent, as executor failed to comply with the provisions of the Act regarding an objection raised by them.
- [4] The appellants did not comply with Rule 49(2) of the Uniform Rules of court in that the appeal was noted out of time. I deem it appropriate to first deal with the background and merits.

FACTUAL**BACKGROUND**

- [5] The deceased and her brother was each the owner of half a share in an immovable property, which was bought by the appellants for them and transferred into their names. The appellants contended that the children were aware of the fact that the property was bought for their use only and that should either of them die, the property should revert back to the appellants. They were also under the impression that the deceased had a will to that effect. No such will could however be found.
- [6] Third respondent stated that he was aware of how the property was obtained, but denied the existence of the agreement proclaimed by the appellants to have existed. Settlement negotiations failed.

- [7] Third respondent appointed an attorney to assist him in the execution of his duties as executor. The attorney, Mr Han advertised a notice in terms of section 29(1) of the Act in the Government Gazette and the Star newspaper which circulates in the Johannesburg area. The notice called on parties to lodge claims against the deceased estate within 30 days of publication of the notice, this period expired on 15 December 2015.
- [8] The appellants only approached the Master during December 2016, a year after the expiry of the 30 day period referred to above. As a result their claim was not included in the account. They lodged an objection to the account with the Master on 8 December 2016. The complaint was received by the Master, on 4 January 2018 according to a stamp on the letter. The letter raised their objection and claim to the property as well as certain expenses incurred by them with regard to the improvement and maintenance of the property.
- [9] The appellants allege that neither the Master nor the third respondent responded to their claim. They launched an application to remove the third respondent as executor, on the ground that he maliciously failed to include their claim and had put undue pressure on them to make the title deed of the property available to them.
- [10] In a letter dated 6 January 2017, the Master acknowledged receipt of the letter of objection, and informed the appellants that a copy was sent to the third respondent. Neither the appellants nor the third respondent received this letter. It transpired that the letter was erroneously sent to the attorney who initially represented the third respondent, but whose mandate was terminated. The third respondent eventually received the letter and on 16 August 2017, he suggested in a letter to the Master that the appellants submit a detailed affidavit to his attorneys and that he would then respond to it in an affidavit. These affidavits were filed, setting out the parties' versions.
- [11] The Master on 8 February 2018 stated that consideration was given to the issues and he ruled that, due to the factual disputes and complicated issues of law, the objecting party was given the opportunity to bring the dispute before a Court of law.

THE APPLICATION OF THE LAW

- [12] The appellants then launched an application to review and set aside the decision by the Master and for an order to refer the decision back on the basis that sections 35(7) and (8) have not been complied with.
- [13] Section 35(7) and 35(8) of the Act reads as follows:

“(7) Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons therefor, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.

- (8) The executor shall, within fourteen days after receipt by him of the copy of the objection, transmit two copies of his comments thereon to the Master.”
- [14] The Court a quo found that, in this instance, there was compliance with section 35(7) as the objection was received by the Master and sent to the third respondent, despite initially being waylaid.
- [15] Section 35(8) requires of the executor to transmit his comments to the Master. This was done and the parties submitted their versions to the Master on affidavits. The appellants denied that their version was submitted to the Master. However, the objective fact is that in the Master’s letter of 8 February 2018, it was stated that the objection was considered and due to the factual disputes and the complexity of law the matter should be referred to Court. The Court a quo thus correctly found that, due to the dispute of fact, the matter could not be determined on the papers.
- [16] The Court a quo in paragraph 25 of the judgment stated it as follows:

“Final relief is sought in these proceedings and a clear factual dispute as to whether the third respondent’s comments were considered by the Master when she took her decision on 8 February 2018 has developed. The applicants have not applied for referral of the factual dispute for oral evidence therefore the dispute in this instance has to be decided on the basis of the rule in Plascon-Evans, above. As such, I have to consider whether the factual dispute is not real or genuine, or the third respondent’s version raises such obviously fictitious factual disputes, or is palpable implausible, or far-fetched or so clearly untenable that this court would be justified in rejecting the third respondent’s version on the basis that it obviously stands to be rejected.”

- [17] The appellants’ decision to bring a review application under these circumstances was ill advised. They ought to have instituted an action, as it is abundantly clear that there exists a dispute of fact. In this instance there are two diametrically opposed versions and the Master correctly requested the parties to approach the Court. This was ultimately the ruling made by the Master after considering the parties’ versions as set out in their affidavits. The appellants under these circumstances were, as already stated, ill advised to bring a review application.
- [18] The Court a quo dealt with this issue as follows in her judgment:

“[32] I cannot, as such, say that the factual dispute identified in these proceedings is not real or genuine, or the respondents version raises such obviously fictitious disputes of fact, or is palpable implausible, or far-fetched or so clearly untenable that this court is justified in rejecting that version on the basis that it is obviously stands to be rejected. To the contrary I find the applicants’ submission that the Master may not be telling the truth by stating in her letter of 8 February 2018 that she considered representations of all interested parties in the matter before deciding on the objection, far-fetched and untenable.

- [33] I hold, therefore that the Master complied with the provisions of section 35(7) and 35(8) of the Act. The evidence before me. Which I accept, is that the third respondent's comment was sent to the office of the Master and when the Master considered the applicant's objection she had regard to the comment. On that basis the review stands to be refused."
- [19] The Master cannot resolve factual disputes between the parties as no proper procedures for that exist.[1] The Master may in terms of section 35(9) "give any direction" as she may deem fit and that was exactly what she did, when she directed the appellants in terms of section 35(10) to approach the Court due to the substantial factual disputes between the appellants and third respondent. Apart from a review of his decision not being legally sound, it has the further complication that reviewing and setting aside the order will accomplish nothing. The parties want clarity regarding the ownership of the property and the only legal way to establish that is through evidence before a Court of law.
- [20] In this instance the complaint that the Master and the third respondent did not comply with the Act is unsubstantiated. In any event, even if the Court a quo erred in finding so, which she did not, the appellants' objection was considered and a ruling was made after consideration of the complaint, despite the fact that the complaint was lodged out of time. As a result, the appeal has no merit.

THE CONDONATION APPLICATION

- [21] The appellants did not comply with Rule 49(2). It states that a notice of appeal shall be delivered within 20 days after the date upon which leave to appeal was granted or within a longer period upon good cause being shown. Leave to appeal was granted on 28 February 2019. The notice of appeal was only filed and served on 28 May 2019.
- [22] In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus curiae)*[2] the Constitutional Court set out what need to be considered when deciding whether a condonation application should be granted. First and foremost are the interests of justice, which will depend on the circumstances of the case. Other factors include the nature of the relief sought, the extent and cause of the delay, the effect of the delay, the reasonableness of the explanation for the delay, the importance of the issues to be raised in the appeal and the prospects of success[3].
- [23] The reasons for the delay given in the affidavit supporting the condonation applications seems to be that the appellants requested their attorney and counsel to attend at the office of the State Attorney in order to determine whether the third respondent timeously furnished the comments in terms of section 35(8) of the Act. The explanation is neither reasonable nor does it explain the entire period of the delay. This was apparently done in order to determine the factual correctness of the Court a quo's finding that there was compliance with the relevant sections of the Act.

[24] The appellants did not show good cause for an extension of the time period. The appeal has also, for the reasons set out above, not a reasonable prospect of success on the merits. It will furthermore not be in the interest of justice to review and set aside the decision of the Master, as it will not bring the dispute to finality and the Master is not empowered to determine the factual dispute between the parties. As a result, the application for condonations should be dismissed.

[25] The following order is made:

1. The application for condonation for the late noting of the appeal in terms of Rule 49(2) is dismissed.
2. The appellants to pay the costs of the appeal.

R G TOLMAY

JUDGE OF THE HIGH COURT

A BASSON

JUDGE OF THE HIGH COURT

C VAN DER WESTHUIZEN

DATE OF HEARING: 4

AUGUST 2021

DATE OF JUDGMENT: NOVEMBER

2021

ATTORNEY FOR APPELLANTS: NENE ATTORNEYS INC

ADVOCATE FOR APPELLANTS: ADV I GOBERDHAN

ATTORNEY FOR RESPONDENTS: BARNARD INC

ADVOCATE FOR RESPONDENTS: ADV A S L VAN WYK

[1] Broodryk v Die Meester en 'n ander 1991(4) SA 825 (C)

[2] 2008(2) SA 472 (CC)

[3] Ibid para 477 A-B

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