

SOUTH AFRICA / JUDGMENT

Tung'ande and Others v Tung'ande and Others (67369/15) [2017] ZAGPPHC 49 (14 February 2017) [2017] ZAGPPHC 49

COURT

North Gauteng High Court, Pretoria

BEFORE

Hughes

CASE / FILE NUMBER

67369/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

14/02/2017

CASE NO: 67369/15

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between: TUNG'ANDE
HR
1st Applicant
TUNG'ANDE
E
2nd Applicant
TUMG'ANDE
J
3rd Applicant
TUNG'ANDE
E
4th Applicant
and
TUNG'ANDE
B
N
1st Respondent
JORDAAN
J
N.O.
2nd Respondent
THE
MASTER OF THE HIGH COURT
3rd Respondent

Coram: HUGHES J

JUDGMENT

HUGHES J

- [1] This opposed application is for the removal of the executrix, the first respondent, and the appointed agent, the second respondent, as executrix and agent of the deceased estate of the late DUNCAN HARRY TUNG'ANDE (the deceased).
- [2] The executrix is the surviving spouse of the deceased and the stepmother of the applicant's in this application.. The applicants are the children of the deceased. The second respondent is the duly appointed agent by the executrix in the administration of the deceased estate. A bonded property situated at 1[...] C[...] Avenue, Eastleigh, Edenvale, Gauteng (the property) is the only immovable asset of the deceased estate.
- [3] The relief sought by the applicants is set out below:
- a. That the first respondent be removed as executrix of the deceased estate of the late DUNCAN HARRY TUNG'ANDE appointed in terms of the letter of executorship No 16197/2013 issued by the Master of the High Court on 22 October 2013;

- b. That the first respondent return her letter of appointment as executrix of the aforementioned estate to the third respondent forthwith;
- c. That the second respondent's appointment as agent in respect of the aforementioned estate is terminated;
- d. That the first respondent forfeit any entitlement to executors fees;
- e. That the third respondent be directed to appoint the first applicant as the executor of the deceased estate, alternatively that the third respondent be directed to appoint a fit and proper person other than the first respondent as executor of the deceased estate in terms of section 18(1)(a) of the Administration of Estates Act, 66 of 1965.

[4] In this application the pertinent facts are as follows:

4.1. The deceased died on 21 September 2013 and the first respondent was appointed executrix by way of a letter of executorship on 22 October 2013;

4.2 The executrix appointed the second respondent as her agent to administer the deceased estate;

4.3 The first respondent and the deceased were married out of community of property subject to the accrual system;

4.4 In the deceased estate is an immovable asset being a bonded property situated at 1[...] C[...] Avenue, Eastleigh, Edenvale, Gauteng (the property);

4.5 The respondent's, first and second, state that the estate has a substantial shortfall and the property is to be sold to make up this shortfall;

4.6 The applicants were given first option to purchase but failed to do so. The respondent then received an offer from the daughter of the first respondent which offer the respondents are considering.

[5] The applicants argue that the first respondent has in fact accepted the offer from her daughter and as such there is thus a conflict of interest. They further argue that the first respondent, after numerous request has failed to furnish them with list of creditors and the proof of the creditor's claims. She also failed to disclose how much her estate was at the time of the death of the deceased to enable them to determine whether the estate has a claim against the first respondent's estate.

[6] The respondent's argue that the applicants do not have a vested right or interest in the property and they have failed to make out a case for the relief that they seek on the papers.

[7] This application is premised on section 54 (1)(a)(v) of the Administration of Estates Act 66 of 1965 (the Act) which reads as follows:

"54 Removal from office of executor

- (1) An executor may at any time be removed from office
 - (a) by court
 - (v) if for other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned; and..."
- [8] On a reading of the aforesaid provision it is evident that the desirability of the executor to continue acting as such is key in

determining whether to remove the executor or not.

- [9] In my reading of the case at hand I am of the view that the only aspect that points to the executrix's desirability to still hold

the position of executor is the fact that the applicant's contend that a conflict of interest arose when the executrix and the agent accepted an offer to purchase the property of the deceased estate. From the bar counsel for the respondents advised that the offer to purchase made by the daughter had not been accepted and the property had not been sold as yet. This differs from the papers put up which indicate that the first and second respondent were incline to accept the offer made as far back as 3rd August

- 2015. In the answering affidavit the executrix states "... The offer complained of by the Applicants represents an offer in the amount of R900 000.00. The offer is indeed consider(ed) as reasonable having regard to the valuation done on the property ..."

- [10] Section 49 of the Act states:

"49 Purchases by executor of property in estate, or mortgaged or pledged to the deceased

- (1) If any executor or his spouse, parent, child, partner, employer, employee or agent purchases any property in the estate which he has been appointed to liquidate and distribute, the purchase shall, subject to the terms of the will (if any) of the deceased, and, in the case of an executor who is the surviving spouse of the deceased, to the provisions of section thirty eight, be void, unless it has been consented to or is confirmed by the Master or by the Court.
- (2) An executor may, in his capacity as such, and subject to the consent of or confirmation by the Master, buy in any property mortgaged or pledged to the deceased."

- [11] In this instance there is no evidence that the consent of the Master or the heirs was obtained as regards the sale to the daughter

of the executrix. The respondent though place emphasis that the requited consent or confirmation will be obtained. Firstly, it is clear from the papers that the consent of the heirs, who incidentally are the applicants, will not be forthcoming. As regards the Masters confirmation, nothing in the papers indicates that the respondents have attempted to seek same. Thus without the confirmation the sale is void and as such technically has not or could not have been accepted as alleged by the applicants.

[12] It would seem that the application on this premise is thus premature.

[13] In respect of the disclosure of the value of the executrix's estate and disclosure of the creditors of the deceased estate, that

information is obtainable from the agent, being the second respondent, who is tasked with finalising the deceased estate. The applicants have stated that they had requested this information from the agent and the executrix however same was not forthcoming. On the other hand the respondents state that they have provided this information to the applicants and they put up proof thereof. I note that, what is put up is schedule of the creditor and the amounts due to each creditor. The applicants then sought proof or vouchers depicting the said amounts due to each creditor. In essence the respondents have complied substantially with the request of the applicants and their conduct could not be said to be obstructive or maladministration of the deceased estate, warranting the removal of the executrix.

[14] With regards to the value of the estate of the executrix the first respondent states that the applicants are not entitled to this

information. The other side of this argument, by the applicants, is that the applicants require this information to establish if the executrix needs to pay into the deceased estate as result of the accrual. This would make the first respondent a debtor of the deceased estate.

[15] In my view, this request is yet another that is premature as the applicants have not indicated whether they sought to obtain same

from the Masters offices as these documents and that of the creditors would have been placed before the Master. In fact the respondent points the applicants in the direction of the Master if they are not satisfied with what they have been provided with and have not taken this up. This is found in the respondent's letter of 19 August 2015. In this same correspondence the applicants are also advised that the offer for the property could not be regarded as accepted until an endorsement was obtained by the Master.

[16] For the reasons set out above, I am in agreement with the respondent's contention that the applicants have on the papers before me not made out a case for the removal of the executrix and the ancillary relief sought. I find that there is no conflict that exists as yet, that there is no obstructive behaviour on the part of the executrix and that there has been no maladministration or nonadministration of the deceased estate.

[17] Turning to the issue of costs in the circumstances of this case I am of the view that the applicants are trying as best as they can to prevent the finalisation of this deceased estate, having not exhausted avenues available to them before coming to court. It is only correct that they pay the costs, however I am of the view that it be on a normal scale and not a punitive scale.

[18] Consequently the following order is made:

[18.1] The applicant's application for removal of the executrix and the ancillary relief sought is dismissed with costs. Such costs to be on a party and party scale.

W. Hughes

Judge of the High Court Gauteng, Pretoria

Appearances:

For the Applicant: I M Lindeque

Instructed by: Mamba Attorneys

For the Respondent: J J Greeff

Instructed by: Kemp De Beer & Goosen

Date heard: 31 January 2017

Date delivered: 14 February 2017

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