

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A5056/2017

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

In the matter between:

DERRICK THABO MOSUETSA

APPELLANT

And

PERCY SULI MOSUETSA

FIRST RESPONDENT

GARY SEFAKO MOSUETSA

SECOND RESPONDENT

TSHEPO REUBEN MOSUETSA

THIRD RESPONDENT

MASTER OF THE HIGH COURT

FOURTH RESPONDENT

REGISTRAR OF DEEDS

FIFTH RESPONDENT

JUDGMENT

MAKUME J:

[1] On the 13th October 2016 my brother Vally J ordered as follows:

1.1 The Second Respondent (the Master) is directed to retrieve and reactivate his files on the following deceased estates:

- i) Sibongile Norma Mosuetsa – Estate Number 1999/08.
- ii) Mosuetsa Solomon Pusetso – Estate number 8893/2012.

1.2 The Second Respondent is to receive a full and detailed report from Derrick Thabo Mosuetsa as to what he has done with regards to each of the estates.

1.3 The report referred to in paragraph 2 above is to be made available to the first Applicant (Percy Mosuetsa), the second Applicant (Gary Sefako Mosuetsa) and the third Applicant (Tshepo Mosuetsa).

1.4 The second Respondent is to convene a meeting between first Respondent (Derrick Thabo Mosuetsa) and the three Applicant and receive representations from them regarding the finalisation of the administration of the two Estates referred to in 1 above.

1.5 The second Respondent is to file a report with this court within five months of the date of this as to finalisation of the administration of the two estates referred in paragraph 1 above.

[2] Leave to appeal against the orders referred to above was granted. The Appellants main grounds of appeal being the following:

2.1 Whether when presented with an application to remove the Appellant as the Master's appointed representative of the deceased estates, it was available for Vally J to grant orders not sought by either the first Respondent or the Appellant.

2.2 Whether the first Respondent has *locus standi* to seek removal of the Appellant as the appointed Master's representative to the deceased estate of S.P. Mosuetsa's

2.3 Whether the order by Kgomo J dated the 10th October 2013 in terms of which it was directed that the first Respondent be evicted from the property situated at Erf [...] Molapo Township, Soweto (the property) is *res judicata*.

FACTUAL BACKGROUND

[3] In order to contextualise the dispute it is necessary to provide a brief chronology of salient events leading up to the proceedings in the court below. What follows is a summary of relevant facts that were either common cause or not seriously disputed or refuted on the papers.

[4] The deceased Sibongile Norma Mosuetsa (Sibongile) and Solomon Pusetso Mosuetsa (Solomon) were married in community of property during or about the year 1968.

[5] It would appear that prior to their marriage Sibongile had given birth to the first Respondent. Solomon is not the biological father of the first Respondent.

[6] During the subsistence of their marriage the couple gave birth to the Appellant Derrick Thabo as well as Gary Sefako and Tshepo Reuben, the second and third Respondents in this appeal.

[7] The couple owned two properties namely:

- i) Erf [...] Kgopotso Street, Molapo, Soweto (the property);
- ii) Erf [...] Rockville, Soweto.

[8] Sibongile passed away in the year 2003. The Appellant was issued with letters of Authority by the Master on the 21st February 2008 under Estate number 1999/08.

[9] The letter of Authority authorised the Appellant to take control of the assets of the deceased (Sibongile) which includes Erf [...] Molapo (the property) to pay the debts and to transfer the residue to the heirs entitled by law. The letter of Authority was issued in terms of Section 18(3) of the Administration of Estate Act No 66 of 1965.

[10] On the 20th December 2011 Solomon passed away and on the 12th April 2012 the Appellant was issued with Letter of Authority by the Master.

[11] On the 14th October 2007 Solomon had deposed to an affidavit at Moroka Police Station in which he said that he is the owner of the house situated at [...] Molapo, Soweto that he is donating that property to the Appellant.

[12] On the 12th December 2012 the fifth Respondent (the Registrar of Deeds) Transferred the property to the Appellant and his wife Gertrude Teboho Mosuetsa (Deed of Transfer number T00047855/2012)

[13] On the 10th October 2013 under case number 45494/2011 Kgomo J issued an order evicting the first Respondent Percy Suli Mosuetsa from the property. That judgment still stands and has never been appealed.

[14] It was shortly after the judgment by Kgomo J that the first Respondent issued a notice of motion citing himself as the first Applicant supported by Gary and Tshepo as second and third Applicants in which he sought the following relief:

14.1 That the second Respondent (the Master) be ordered to remove the first Respondent (Derrick Thabo Mosuetsa) as an Executor or representative of the Estate of Sibongile Norma Mosuetsa 1999/08 and Estate of Solomon Pusetso Mosuetsa estate number 8893/2012.

14.2 That the second Respondent be ordered to appoint an independent Executor in both the estates of the late Sibongile and Solomon Mosuetsa.

14.3 That the third Respondent (the Registrar of Deeds) be ordered to reverse transfer of ownership of the property described as [...] Kgopotso Street, Molapo, Soweto from the first Respondent's name

14.4 That the fourth Respondent be ordered and interdicted from carrying out and or executing a warrant of ejectment against the first Applicant (Percy Suli Mosuetsa) and all those claiming occupation through him whilst this matter is still pending.

14.5 That the annexure PSM3 be declared null and void and that the estates of both Sibongile and Solomon Mosuetsa be administered in terms of interstate succession.

[15] Pleadings were closed and the matter served before my brother Monama J who then issued the following order on the 7th November 2014:

15.1 The application is postponed *sine die*.

15.2 The first Respondent (Derrick Mosuetsa) is ordered to finalise the administration of his late mother's estate and his late father's estate within 3 months from 7th November 2014 or any extended time that may be agreed to by the Master of the High Court.

15.3 In the event that the first Respondent fails, refuses and or neglect to perform as ordered above, the Master of the High Court is ordered to remove him as the representative of the two estates. In that event the relatives of the deceased are ordered to commence the appointment for the administration of the two estates *de novo*.

15.4 Pending the compliance with order 2 above the first Respondent and his wife are prohibited to alienate the property mentioned in order 5 below.

15.5 The eviction of the first Applicant from the property known as Erf [...] Molapo, Soweto is postponed sine die pending the proper finalisation of the liquidation and distribution of the estate as ordered in order 2 above.

[16] On the 21st April 2016 this matter served before Coppin J who made an order that the Master of the High Court (Second Respondent) should furnish a report about the two estates. The matter was postponed to the 30th May 2016 and then to the 8th August 2016 for hearing in the opposed motion roll. It was then heard by Vally J who made the order that is the subject of this appeal.

[17] The property situated at Molapo originally belonged to the parents of Solomon namely Isaac and Pauline Mosuetsa, Solomon donated that property to Derrick the Appellant as it had been the instruction of his grandparents.

[18] On the 13th April 2016 the Appellant complied with the order by Monama J and deposed to an affidavit in which he stated that he had finalised the administration of the estate in that he had already taken transfer of the property at Molapo which in any case had been donated to him by his father which means that in any case when Solomon passed away the Molapo property did not fall within his estate.

[19] In his report the Appellant stated that the home at Rockville was still registered in the names of his parents and that the house was occupied by his brothers namely Gary and Tshepo. He stated that because of lack of funds the three of them have not been able to finalise the transfer of that property to the three of them as the only heirs to that property. He finally in paragraph 3.4 stated that "*there are no assets remaining in the estate which require distribution, liquidation and administration.*"

[20] On the 26th May 2016 the Master of the High Court (Second Respondent) filed a report pursuant to the order by Coppin J dated the 21st April 2016. In the report the second Respondent says that on the death of Solomon his three children namely

Derrick, Sefako and Tshepo became the only interstate heirs to their father's estate and that the Appellant was duly appointed as the Estate Representative.

[21] Of critical importance is what the Master says in paragraph 6 of his report which reads as follows:

"I hereby confirm that as the Master issued letter of Authority the matter has been filed off."

[22] The supplementary master's report dated the same day made it clear that once a Section 18(3) Letter of Authority is issued it is the end of the Master's involvement in the estate that is why a file is therefore closed and filed away.

ISSUES FOR DETERMINATION IN THIS APPEAL

[23] The following issues are in my view pertinent for the resolution of the disputes in this appeal:

- i) On the death of Mrs Sibongile Norma Mosuetsa what happened to her estate?
- ii) The effect of the judgment by Kgomo J dated the 10th October 2013.
- iii) The orders granted by Vally J are they orders resulting from what was asked for by the Respondents.
- iv) Has the Appellant and the second Respondent (the Master) complied with the orders by Monama J and Coppin J.
- v) The difference between an appointment in terms of Section 18(3) of the Administration of Deceased Estate and the issue of letter of Executorship.

vi) The first Respondent having correctly identified in his heads that he is only entitled to inherit from the estate of his deceased mother, the question is what did the late mother's estate comprise of?

[24] It is perhaps appropriate to have an understanding as to what a Letter of Authority issued by the Master in terms of Section 18(3) of the Administration of Estate Act means to the holder thereof.

[25] It is common cause that if the gross value of an estate is presently less than R250 000.00 the master has a choice, he can appoint an Executor to administer the Estate in accordance with the provisions of the Administration of Estates Act or give directions to a person of his choice to finalise the estate in a fast and simple manner.

[26] If the Master decides on a Section 18(3) appointment he issues a written directive in which the person charged with the duties is ordered to take control of the estate assets, pay the estate liabilities and transfer ownership of the residue to the beneficiaries. The master then regards the matter as finalised and closes his file. The onus to execute the directive rests entirely with the person charged therewith. The provisions of the Administration of Estate Act regarding the administration of an estate are not applicable in such a case. Consequently it is not necessary to publish a notice to creditors or to prepare an estate account. The master exercises no control over the administration and no master's fees are payable.

[27] At the time of the death of Sibongile the value of the estate was less than the prescribed amount of R125 000.00 hence the master issued the Appellant with a section 18(3) Letter of Authority.

WHAT HAPPENED TO THE ESTATE OF MRS SIBONGILE NORMA MOSUETSA

[28] In answering the first question as to what happened to the estate of Mrs Sibongile Norma Mosuetsa on her death the answer lies in the provision of Interstate, Succession Act 81 of 1987. Sibongile and her husband were married in community of property. The Section 18(3) letter of Authority issued to the Appellant stated that the value of her estate was R44 000.00. This is less than the prescribed

amount of R125 000.00. This means that the whole assets devolved to Mr Solomon Mosuetsa in his capacity as the surviving spouse to the exclusion of all others.

[29] On the 9th October 2007 Mr Solomon Pusetso Mosuetsa who had inherited his late wife's half share in respect of the property situated at Molapo then decided to donate same to the Appellant as he was entitled to do. So when Mr Solomon Pusetso Mosuetsa died in the year 2011 that property was no longer an asset in his estate. In a letter addressed to the Registrar of Deeds dated the 7th December 2012 the Master confirmed that the donation was valid and that the property will not be dealt with in terms of Interstate succession.

[30] When his Lordship Kgomo J granted judgment against the first Respondent during 2013 it was on the basis that the Appellant was the undisputed owner of the property.

[31] This means that when my brother Monama J, Coppin J and Vally J made the orders as they did in respect of the property such orders had no effect. The estate of Mrs Sibongile Norma Mosuetsa had been finally wound up when her husband inherited her half share in terms of Interstate Succession Act.

THE EFFECT OF THE JUDGMENT BY KGOMO J DATED THE 10TH OCTOBER 2013

[32] That judgment confirmed the changed ownership of the property based on the donation made by Mr Solomon Pusetso Mosuetsa. It vested ownership of the property on the Appellant. That situation still maintains to date hereof and has not been challenged. Any subsequent attempt to get judgment based on the right of ownership of the home at Molapo became *res judicata*. Accordingly, all the orders by Monama, Coppin and Vally J could not reverse this *fait accompli*.

[33] In the court a quo the first Respondent sought an order that ownership of the property described as [...] Kgopotso Street, Molapo, Soweto (the property) be reversed from the names of the Appellant and his wife to that of the deceased parents (See prayer 3 of the notice of motion dated 18th October 2013).

[34] The Application by the first Respondent came against the backdrop of a judgment and order by Kgomo J dated the 10th October 2013 under case number 45494/2011 in which he found in favour of the Appellant as the registered owner of the property that the first Respondent had no title or right to remain on the property.

[35] In paragraph 5 of his answering affidavit dated the 19th May 2014 the Appellant Derrick Mosuetsa specifically raised the issue of *res judicata*. That plea remained alive throughout and was never dealt with.

[36] Brand JA in the matter of **Prinsloo N.O. v Goldex 2014 (5) 297 SCA at page 301 paragraph 10** said the following:

“The expression “*res judicata*” literally means that the matter has already been decided. The gist of the plea is that the matter or question raised by other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42 1.1. the exception was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (See **National Sorghum Breweries Ltd t/a Vivo African Breweries v International Liquor Distribution (Pty) Ltd 2001 (2) SA 232 (SCA)**). In time the requirements were however relaxed in situations which gave rise to what became known as issue estoppel.”

[37] Ownership of the Molapo property was at the centre of the dispute in the matter before Kgomo J and it is also at the centre of this application. It so happens that the parties are the same in both matters. The court a quo as well as on previous occasions when this matter was set down should have decided the matter on the plea of *res judicata* or issue *estoppel*. It would have brought an end to the first Respondent’s application.

THE ORDERS GRANTED BY VALLY J

[38] In the court a quo the first Respondent sought various orders at the centre of which was that the Appellant be removed as a Representative of the estates of his parents and for an Independent Executor or Estate representative be appointed by the master so that the new Executor reopen the estates and deal with the issue around succession and inheritance afresh.

[39] The orders by Vally J do not address what the first Respondent sought in that it was ordered that the master should retrieve and reactivate the two estate files and to receive a full and detailed report from the Appellant as to what he has done with regards to each of the estates.

[40] The SCA in **Fischer and Another v Ramahlele and Others 2014 (4) SA 614 at page 620 paragraph 13 and 14** expressed itself as follows on such issues:

“(13) Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence) to set out and define the nature of dispute and it is for the court to adjudicate upon those issues.

That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution for (i) it is impermissible for a party to rely on a Constitutional complaint that was not pleaded”

(14) It is not for the court to raise new issues not traversed in the pleadings or affidavits however interesting or important they may seem to it and to insist that the parties deal with them.”

[41] In the **Minister of Safety and Security v Slabber t [2010] 2 ALL SA 474 (SCA)** at paragraph 11 the court said:

“A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a Plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial

court to have recourse to issues falling outside the pleadings when deciding a case.”

[42] What is evident is that the orders that are being appealed against do not deal with what the first Respondent had come to court for. The question that arose before us as a court of appeal is whether to remit the matter back to the court a quo or whether to deal with the issues raised. We decided on the latter.

[43] In deciding on this appeal two issues are in my view dispositive on the dispute. The first is the issue of *locus standi* and secondly the issue of *res judicata*.

[44] An executor can only be removed from his position by a court if a court is satisfied that it is undesirable that such a person should act as such. In such an instance a person who has an interest in the administration of the estate must furnish sufficient or good cause and reason why such a person should be removed.

[45] An executor may also be removed by the master in terms of Section 54(2) of the Administration of Estate Act if such person amongst others fails to perform satisfactorily any duty imposed upon him or her under the Act or fails to comply with any lawful orders at the request of the master.

[46] The first Respondent has not succeeded in his removal application to place himself within the requirements of Section 54(1) of the Administration of Estate Act. He has no interest in the estate of Sibongile Norma Mosuetsa his mother because the property devolved upon his stepfather Solomon Mosuetsa who disposed of the property in Molapo to the Appellant.

[47] In the matter of **Four Wheel Drive Accessory Distribution CC v Leshni Rattan NO SCA case No. 1048/17** decided on the 26th September 2018 the court in dealing with the issue of *locus standi* said the following at paragraph 7:

“ [7] The logical starting point is locus standi:- whether in the circumstances the Plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally the requirements for *locus standi* are these. The Plaintiff

must have an adequate interest in the subject matter of the litigation usually described as a direct interest in the relief sought, the relief must not be too remote, the interest must be actual, not abstract or academic and it must be a current interest and not a hypothetical one. The duty to allege and prove *locus standi* rests on the party instituting the proceedings.”

[48] In the founding affidavit the first Respondent denies that the late Solomon Mosuetsa signed an affidavit in which he donated the Molapo property to the Appellant. He said that he intended calling an expert to prove that it was not a genuine signature. He did nothing after that neither did he challenge the judgment by Kgomo J. He has no *locus standi* to seek the removal of the Appellant as the Executor in both estates.

[49] As regards to issue of res judicata, it is worth mentioning that the Applicant as well as the master complied fully with the interlocutory orders as directed by Monama J and Coppin J and duly filed reports in that respect.

[50] In his supplementary report dated the 26th May 2016 the Master told the court that:

- i) On the 21st February 2008 he issued letter of authority in favour of the Applicant in terms of Section 18(3).
- ii) Secondly that on their side an estate is finalised once letters of authority have been issued.

[51] If the first Respondent is not happy with how the Appellant dealt with the estate his claim lies against the beneficiary without recourse to the Master’s office. The first Respondent should file a claim against what he says should have been transferred or awarded to him.

[52] In the result I make the following order:

ORDER

1. The appeal is upheld.
2. The judgment and order by Vally J is hereby set aside and substituted with the following order:
 - 2.1 The application is dismissed with costs.

DATED at JOHANNESBURG this the 28 day of JULY 2021.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

DATE OF HEARING	:	17 MAY 2021
DATE OF JUDGMENT	:	28 JULY 2021
APPEARANCES	:	ADV MUNDEL SC
INSTRUCTED BY	:	CARVALHO INC.
FOR RESPONDENTS	:	MR M. MOTAUNG
INSTRUCTED BY	:	SOWETO JUSTICE CENTRE