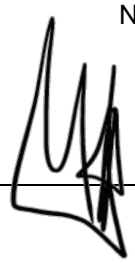
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case no: 25312/2016

1.	REPORTABLE:	NO
2.	OF INTEREST TO OTHER JUDGES:	NO
3.	REVISED:	NO

DATE: 30 August 2021

SIGNATURE OF ACTING JUDGE:



In the matter between:

MPOYANA LAZARUS LEDWABA N.O. Applicant

and

MILONG LAZARUS MTHEMBU First Respondent

LANNIS FATHER MAKUME Second Respondent

THE REGISTRAR OF THE DEED OFFICE Third Respondent

THE ESTATE MAGISTRATE, JOHANNESBURG MAGISTRATE COURT Fourth Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG Fifth Respondent

THE MASTER OF THE HIGH COURT, PRETORIA Sixth Respondent

In re:

MILONG LAZARUS MTHEMBU	Applicant
and	
LANNIS FATHER MAKUME	First Respondent
THE REGISTRAR OF THE DEED OFFICE	Second Respondent
THE ESTATE MAGISTRATE, JOHANNESBURG MAGISTRATE COURT	Third Respondent
THE MASTER OF THE HIGH COURT, JOHANNESBURG	Fourth Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 30 August 2021.

PRETORIUS AJ:

[1] This matter has a protracted history with a number of legal proceedings which preceded the present application. It may therefore be necessary to set out some background.

A brief history

[2] The immovable properties forming the subject of this matter, described as erven 1506, 1507, and 1508, Orlando East ("*the Properties*"), belonged to Mr Oupa Makume ("*the deceased*") prior his passing on 8 April 1993. According to the deceased's death certificate, he passed without being married. On 4 May 1993 the brother of the deceased, the second respondent ("*Mr Makume*"), was appointed in terms of regulation 4(1) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks as the executor of the estate. Mr Makume submitted an inventory

in terms of section 9 of the Administration of Estates Act on 4 May 1993. The inventory listed amongst other assets five immovable properties.

[3] A dispute ensued regarding the estate and on 22 June 1993, Mrs Khosi Gladys Makume ("*Mrs Makume*") obtained an order granted by Van der Walt J directing the Master of the Supreme Court (as it then was) to accept a will apparently signed by the deceased on 7 April 1993 as a valid will ("*the 1993 order*"). In terms of the will the deceased had appointed Mrs Makume as the executor of his estate and bequeathed a fifty percent share of his estate to Mrs Makume.

[4] On 13 September 1993 Mr Makume launched a rescission application seeking to rescind and set aside the 1993 order. Unfortunately, neither the applicant nor the first respondent before me has knowledge what the fate of the said rescission application was. Despite attempts by the first respondent's attorney she was not able to locate any order which may have been granted in respect thereof. Assuming that the rescission application was not successful or finalised, Mrs Makume was the appointed executrix in the estate during the period 1993 to at least 2010. There is however no evidence that Mrs Makume performed any executory functions during this period. There is also no affidavit deposed to Mrs Makume before me.

[5] On the other hand, there is evidence that Mr Makume acted as if was the appointed executor. It bears mentioning that Mr Makume has also since passed away.

[6] It appears that the dispute regarding the estate resurfaced when it became known that Mr Makume was involved in a lease agreement in terms of which the first respondent leased the Properties in terms of a lease concluded in February 2008 for a period of three years.

[7] The applicant was appointed as executor of the estate on 18 August 2010. On 3 December 2010 the applicant wrote to Mr Makume advising of his appointment as executor and requesting details regarding the lease in respect of the Properties. There is no evidence that Mr Makume responded to the letter.

[8] On 31 May 2011, the first respondent purchased the Properties for the amount of R500 000. The first respondent contends that, having leased the Properties for three years, he believed that Mr Makume was the duly appointed executor and was unaware of any facts which may have prevented him from taking ownership of the Properties. Transfer of the Properties to the first respondent was registered on 24 January 2012.

[9] The first respondent contends that he made extensive improvements to the properties since becoming owner. In this regard the first respondent states that he constructed a block of flats housing 23 families on one of the erven and businesses on the other two erven, which businesses serve the needs of 60 people in the community and provide employment for eight people.

[10] The applicant addressed a further letter to Mr Makume on 4 April 2013. In the letter the applicant afforded Mr Makume sixty days to vacate the properties and cancel any leases in respect thereof, failing which the applicant would launch eviction proceedings. The applicant also addressed a letter to the first respondent on 16 July 2013 in which he advised of his appointment as executor. In the letter the applicant demanded that the first respondent enter into a new lease agreement with the estate or vacate the Properties, failing which the applicant would launch eviction proceedings.

[11] The first respondent denies receiving the said letter. The applicant did not launch the intended eviction applications.

[12] Instead, on 29 August 2014 the applicant instituted an application in the Gauteng Division, Pretoria (case number 73286/2014) in which he sought an order declaring the sale agreement invalid ("*the 2014 application*"). The first respondent contends that it is at this point that he learnt of the dispute concerning the estate. The first respondent opposed the 2014 application on the grounds he was a *bona fide* purchaser and that a declaration of invalidity would cause him severe prejudice.

[13] The first respondent contends that he requested his erstwhile attorney (who has also subsequently passed) to seek a transfer of the 2014 application to this court. Instead, so the first respondent contends, his attorney instituted a fresh application

under the present case number to have the sale agreement declared valid. The applicant was not cited as a respondent in the application and was, according to him, not aware of the application despite the notice of motion having been published in the Star Newspaper on 25 July 2016.

[14] The first respondent contends that he was not aware that the applicant was not cited and that he was surprised, at the hearing thereof, that the applicant was not present. The first respondent contends that he assumed that the applicant had abandoned the application.

[15] On 31 August 2016 an order was granted by Monama J in the following terms:

> "1. A declaratory Order is hereby made confirming the Notice issued and granted by the 3rd Respondent on behalf of the First Respondent under Estate No. 943/93 on the 4th May 1993 that was made final by the Third Respondent on the 3rd January 2003 under the provisions of regulation 4(2) of Government Notice NO. 200 of 1987, promulgated in terms of Section 23(10) of Act 38 of 1927 is hereby declared lawful and binding.
>
> 2. A declaratory Order is hereby made confirming the Certificate of Appointment of the First Respondent under Estate Number 943/93 that was issued in terms of Regulation 4(1) of the regulations published under GN. R200 of 6/2/1987.
>
> 3. The Fourth Respondent is directed within thirty (30) Court days from service of this Order on the Fourth Respondent by the Sheriff of this Honourable Court to re-issue and/or re-report to the First Respondent the letters of Executorship in terms of Section 13 and 14 of the Administration of Estates Act, Act No. 66 of 1965 as amended, bearing Estate No. 943/1993.
>
> 4. The Deeds of Sale of the immovable properties Erf 1506, Erf 1507 and Erf 1508 Orlando East entered into by the First Respondent and the Applicant herein attached to the Applicant's founding affidavit is hereby declared lawful.
>
> 5. The Sale of Agreements entered into between the Applicant and the First Respondent in respect of the immovable properties Erf 1506, Erf 1507 and Erf 1508 Orlando East is hereby declared lawful.
>
> 6. The transfer and registration done by the Registrar of the Deeds Office Johannesburg (herein referred thereto as the Second Respondent) to the Immovable properties Erf 1506,

Erf 1507 and Erf 1508 Orlando East to the name of the Applicant (Milong Lazarus Mthembu) is hereby declared lawful.

7. The First Respondent is directed within thirty (30) court days from service of this Court Order to the First Respondent to furnish and provide a written report under oath and/or on affidavit to the Third and Fourth Respondents with regard to the liquidation and distribution account under Estate Number 943/1993.

8. There is no order as to costs."

[16] It is this order which the applicant seeks to rescind in the present application.

[17] The applicant contends that he learnt of the order on 7 August 2017 when the 2014 application was heard. The 2014 application was then removed from the roll.

[18] The present application was launched by the applicant and served on the first respondent on 20 August 2018. The applicant seeks that the late filing of his application be condoned and, if condoned, that the 31 August 2016 order be set aside.

The first respondent's opposition

[19] Only the first respondent opposes the relief sought in the application. The opposition can be summarised thus:

(19.1) The application was not launched within a reasonable period of time, that the applicant's application for condonation be dismissed and, as such, that the application be dismissed; and

(19.2) Should condonation be granted, the applicant has not made out a case for relief under rule 42(1)(a) or under the common law.

[20] The first respondent has in addition launched a conditional counter application to which I will return below.

[21] I will deal with the merits of the recission application to the extent necessary when dealing with the applicant's application for condonation.

Condonation

[22] Unlike rule 31(2)(b), neither rule 42 nor the common law specifies a time period within which a rescission application in terms thereof should be launched. It must accordingly be launched within a reasonable period of time. What is a reasonable time depends upon the facts of each case.[1]

[23] The Constitutional Court[2] held in respect of condonation for special leave to appeal:

> "It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."

[24] In my view this is equally applicable to an application for condonation in the present circumstances.

[25] The relevant facts pertaining to this issue are the following:

(25.1) Mrs Makume was appointed as executrix in 1993 but apparently performed no functions as such until 2010 when the applicant was appointed as executor;

(25.2) Apart from the letters addressed by the applicant to Mr Makume and the first respondent there is no further evidence that the applicant performed any functions as executor until the launch of the 2014 application;

(25.3) The 2014 application was removed from the roll in August 2017;

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1 *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) 421G

2 *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) [3]

(25.4) The 2016 order was granted on 31 August 2016 pursuant to the 2016 application;

(25.5) The applicant became aware of the 2016 order on 7 August 2017;

(25.6) The present application was launched in July 2018 and served on the first respondent on 20 August 2018.

(25.7) The present application was set down for hearing three years after it was launched.

[26] The applicant contends in the founding affidavit that the application was launched within a reasonable time having regard to the to the launching of the 2014 application and the removal thereof for this application to be launched. The applicant further contends that he "*had to wait for the deceased (sic) wife to put [him] in funds to pursue the matter further.*" The applicant's contention has little relevance to the issue of condonation or the reasonableness of the delay. It was for instance not explained why the applicant was dependent on funding from the deceased's wife for purposes of the present application. Moreover, a lack of funds is not an appropriate reason not to timeously launch proceedings. I will return to this issue below. The applicant's explanation for the delay in the founding affidavit is inadequate.

[27] A further attempt was made in the applicant's heads of argument to explain the delay. However, the explanation in the heads of argument is not supported by the evidence on affidavit and cannot be given regard to.

[28] The first respondent challenged the applicant's explanation that he was dependent upon funding from Mrs Makume in his answering affidavit. Despite the challenge, the applicant did not take the issue further in his replying affidavit.

[29] In *Uitenhage* the SCA[3] held:

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3 *Uitenhage TLC v SARS* 2004 (1) SA (SCA) [6]

> "[6] One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."

[30] The principles expressed apply equally in the present matter.

[31] I am not satisfied that the applicant has set out sufficiently the facts upon which he places reliance for the delay in launching and advancing the present application. In particular, the applicant did not deal adequately with the extent and cause of the delay, the effect of the delay on the administration of justice, prejudice and the reasonableness of his explanation for the delay.

[32] The reasons given by Fisher J in *Northern Wholesale* for dismissing a condonation application are equally applicable in the present matter:[4]

> "The defendant only brought this application for rescission a year after the judgment coming to his attention. The defendant explains this substantial delay on the basis that he did not have the financial means to bring the application. The assertions made in this regard are vague and uncompelling."

[33] The applicant's explanation for the late launching of this application is limited to the lack of funds to launch the application timeously. His explanation for launching the application a year after obtaining knowledge of the order is ambiguous and unconvincing.

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4 *Northern Wholesale Tiles CC v K Warmback* 2017 JDR 1066 (GJ)

[34] Other factors such as the applicant's lack of action since 2010 when he was appointed as executor and the lapse of time since the 2014 application was launched are also weighing factors when considering condonation.

[35] The dispute regarding the estate has commenced in 1993. Almost 28 years later there is still continuing litigation. It is apparent from the documents before me that the applicant has not only been dilatory in this application but also in the 2014 application and his duties as executor.

[36] The principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality) dictates that the power of the court should come to an end.[5] After years of litigation, the parties, particularly the first respondent – who is a *bona fide* purchaser of the properties and who was before the 2014 application not involved in the dispute regarding the estate - are entitled to the assurance that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order.

Prospects of success

[37] I will deal with the applicant's prospects of success to the extent necessary.

[38] The court has a discretion whether or not to grant an application for rescission under rule 42[6] subject thereto that one of the jurisdictional facts in rule 42(1)(a)-(c) do

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[5] *Zondi v MEC, Traditional and Local Affairs* 2006 (3) SA 1 (CC) [28]; *Freedom Stationery (Pty) Ltd v Hassam* 2019 (4) SA 459 (SCA) at 465A–B; *Thobejane v Premier of Limpopo Province* 2020 JDR 2799 (SCA) [6]

[6] *First National Bank of Southern Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 (T) 681F; *Van der Merwe v Bonaero Park (Edms)Bpk* 1998 (1) SA 697 (T) 703G

exists. In the absence thereof, the court does not have a discretion to set aside an order.[7]

[39] The test for rescission under rule 42(1)(a) is whether there existed at the time of the granting of the order a fact of which the court was unaware, which, firstly, would have precluded the granting of the order and, secondly, would have induced the court, if aware of it, not to grant the order.[8]

[40] When requesting the applicant's counsel during the hearing of the matter to identify the fact of which Monama J was unaware when he granted the order and which may have precluded him from granting the order, the applicant's counsel submitted that had Monama J been made aware of the fact that the applicant was the executor of the estate, it would have precluded him from granting the order.

[41] It is not clear from the papers what exactly transpired before Monama J. The papers in the 2014 and 2016 applications were not made available in the present application and as such it is not possible to determine from them whether the applicant's appointment as executor was withheld.

[42] The applicant contends in his founding affidavit that "*the reasons for the applicant's absence before the honourable court on 20 July 2016 was never disclosed in these proceedings*" and as a result "*a gross error in law as in procedure has occurred*". The applicant contends further that the "*court would not have considered granting the order if the court was favoured with the correct facts and information that there is an appointed executor of the deceased estate*". In answer the first respondent contends that he was not aware that the 2016 application was a new application but was under the impression that the application was aimed at transferring the 2014 application to this division. The first respondent contends that he did not fail to "*cite [the applicant] with maleficent intent of depriving him the opportunity to be heard.*"

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7 *Van der Merwe v Bonaero Park (Edms) Bpk* 1998 (1) SA 697 (T) 702H; *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C) 222B–C

8 *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk) 510D–G; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) 153C; *Rossitter v Nedbank Ltd* (unreported, SCA case no 96/2014 dated 1 December 2015) [16]; *Thomani v Seboka NO* 2017 (1) SA 51 (GP) 58C–E; *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) 366E–367A

[43] Is the failure to disclose the applicant's appointment a fact which would have precluded the court from granting the 2016 order? Possibly, but it depends on what facts the applicant would have placed before the court had he been cited. Would the mere fact that the applicant was appointed as the executor have induced the court, if aware of it, not to grant the order? Unlikely. The mere fact that the applicant was the executor would in my view not be sufficient to induce the court not to have granted the order.

[44] What is it that the applicant would have brought to the court's attention had he been joined in the 2016 application? I can only assume the issues which the applicant would have raised in the 2016 application had he been cited are the same as the issues he raised in in 2014 application. But the applicant's evidence before me in this regard is inadequate.

[45] Having regard to the nature of the relief granted in terms of the 2016 order, I find it difficult to believe that the history of the matter, including the appointment of executors (Mr Makume, Mrs Makume and the applicant) would not have featured. However, as I have mentioned, the papers of the 2016 application (nor the 2014 application) were placed before me.

In conclusion

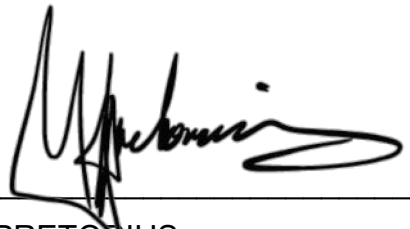
[46] I conclude that upon a consideration of the pertinent factors, particularly the length of time, the inadequate explanation for the delay, the prejudice to the first respondent and others occupying the properties, and the fact that there are limited prospects of success, I am of the view that condonation should be refused in the interests of justice.

[47] In the exercise of my discretion I am satisfied that, even if the applicant demonstrated the requirements of rule 42(1)(a), he should not be heard to complain after the lapse of a reasonable time.[9]

[48] The normal principle is that costs follow the result. There is no reason to deviate from this principle.

In the circumstances I make the following order:

1. The application is dismissed with costs.



JF PRETORIUS
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DATE OF HEARING:	10 August 2021
DATE OF JUDGMENT:	30 August 2021
COUNSEL FOR THE APPLICANT:	NS Mteto
INSTRUCTED BY:	Mpoyana Ledwaba Inc.
COUNSEL FOR THE RESPONDENT:	D Gondo and N Nyembe
INSTRUCTED BY:	P Nkosi

9 *First National Bank of Southern Africa Ltd v Van Rensburg NO: in re First National Bank of Southern Africa Ltd v Jurgens* 1994 (1) SA 677 (T) 681B–G; *Firestone South Africa (Pty) Ltd v Gentiruco* AG 1977 (4) SA 298 (A) 306H; *Kisten and Another NNO v Absa Bank Limited* (unreported, KZP case no AR179/15 dated 23 August 2016) [13]