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REPUBLIC OF SOUTH AFRICA

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

CASE NO: 18448/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

12/9/2022

In the matter between:

SELLO CHRISTOPHER MOTSEPE

Applicant

And

THE MASTER OF THE HIGH COURT, JHB

First Respondent

OLGA MAIDE MABUZA N.O.

Second Respondent

(ID NO.: [...])

KEKATHORISO ESTATE ADMIN. (PTY) LTD

Third Respondent

OLGA MAIDE MABUZA

Fourth Respondent

JUDGMENT

MAKUME, J:

[1] In this matter the Applicant seeks an order interdicting the first, second and third Respondents from dealing with the estate of the late Ms Margaret Nelly Motsepe (the deceased) pending an action to be instituted in which the validity of the Last Will and Testament of the deceased dated 14 January 2020 will be challenged. Secondly that the appointment of Olga Maide Mabuza as executor of the estate be set aside.

[2] This application was issued on the 13th April 2021. The Applicant is represented by Menzi Vilakazi Attorney. The respondents are represented by Sebola Attorneys.

[3] The Applicant and the deceased married each other in community of property during the year 2005. No children were born out of that marriage.

[4] The deceased became ill suffering from cervical cancer during 2019 and was hospitalised at Bara in Soweto, from the 6th June 2020 till the 24th January 2020 when she was discharged into the care of her mother the 4th Respondent.

[5] The deceased passed away on the 25th January 2020 at her mother's place in Soweto.

[6] During her life time the deceased acquired assets that include a house in Parkmore in which she and the Applicant lived, she also had a house in Palmsprings as well as 2 motor vehicles.

[7] Shortly after her death the Applicant proceeded to the office of the Master in Johannesburg to report the Estate. He was given certain correspondence detailing to him what he must bring along to the Master's office in order to secure his appointment as executor of the estate.

[8] It was during his absence that the first Respondent proceeded to the Master's office armed with a will signed by the deceased dated 14 January 2020. The will was accepted by the Master who then issued Letters of Executorship in favour of the second Respondent.

[9] The Applicant disputes the validity of that will and maintains that the deceased was not of sound mind as on the 14 January 2020 and could not have signed or executed a valid will.

[10] The Respondent raised one point in *limine* namely that the Applicant failed to join 2 people who have been nominated as heirs in the estate thus pleading non-joinder.

[11] There is in my view a dispute of facts in this matter which cannot be resolved in motion proceedings. The central issue is not necessarily the non-joinder. It is the validity of the will and it is that issue that must go to trial as set out in Part B of the application.

[12] It is so that a Court when approached with an application seeking the removal of an executor is vested with a discretion which discretion must not only be executed judicially but must at all times take into account the interests of the estate and those of the beneficiaries.

[13] In this matter what is disturbing and of great concern to this court is firstly the Master having been served with papers challenging his decision to accept the will of the deceased has not deemed it appropriate to file a report as to what has been happening in the winding up of the estate. Secondly the second Respondent herself has not told this Court how far since her appointment has she progressed with the administration of the estate. I must take into consideration that the second Respondent was appointed as executor in February 2020 she has not taken control of the estate assets for over two years.

[14] An executor after appointment is in terms of the Estate Administration Act and the Regulations required to meet certain time frames the first being a notice to creditors and debtors calling on them to file claim if any against the deceased estate. There is no such report which clearly indicates that the Executor has not assumed control of the estate. Section 29(1) of the Act requires the Executor to within six months of his or her appointment file a liquidation and Distribution account with the

Master and have it advertised and lodged with the office of the Master and the Magistrate. All that has not been done.

[15] Section 54 (1) of the Administration of Estate Act subsection (v) thereof empowers a Court to remove an Executor “If for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned.”

[16] The Respondent referred this Court to the unreported case of **SNNMS and Another vs Peter Le Mottée and Another Case No 64484/2020** held at North Gauteng Division of the High Court a decision by Madam Justice Collis dated the 21st September 2021. The Court in that matter dismissed the application to remove the executor that had been nominated in a will of the deceased.

[17] The facts in that matter are distinguishable from the facts in this matter. In that matter the appointment of the Executor was challenged on two fronts firstly that the will itself had been written by the first Respondent thus disqualifying him in terms of Section 4A of the Wills Act secondly that the second Respondent when completing his acceptance of trust as executor was not resident or domiciled in the Republic of South Africa accordingly that fact alone disqualifies him because the Master was misled when and if the second Respondent had indicated that he was living in Australia the Master would have asked for security.

[18] Collis J in dismissing the application concluded that there was no evidence that the executor will endanger the estate assets or detrimentally affect the proper administration and winding up of the deceased estate.

[19] In any case that matter dealt with an application for removal of the executor. In Part A of this application I only have to deal with interdictory relief, the final order of removal will be dealt with in action proceedings in Part B.

[20] The test for interim relief has been well established in the matter of **Setlogelo v Setlogelo 1914 AD 221** and in many other cases that follows

The requirements are:

- i) A *prima facie* right
- ii) A reasonable apprehension of irreparable and imminent harm
- iii) The balance of probabilities and convenience favour the granting of the interdict.
- iv) The Applicant has no other remedy.

A PRIMA FACIE RIGHT

[21] The Applicant is the surviving spouse of the deceased to whom he was married in community of property. He is not only a fifty percent owner of the assets but is also an interstate heir in the event the will is declared invalid.

A REASONABLE APPREHENSION OF IRREPARABLE AND IMMINENT HARM

[22] There is a dispute about the validity of the will. The dispute is based on triable issues that still need to be ventilated. If the interim order is not granted the executor will proceed to wind up the estate and should it be found that the will was indeed fraudulently executed it will be too late. The assets may have long been dissipated.

THE BALANCE OF CONVENIENCE FAVOURING THE GRANTING OF THE INTERDICT

[23] The Respondent will not be inconvenienced nor prejudiced in any case they have since February 2020 done nothing about the estate. So far the appointment as executor is still on paper the executor has failed to comply with the requirements of the Act. In my view waiting a further few months for adjudication of Part B will not greatly prejudice or inconvenience the Respondents.

THE APPLICANT HAS NO OTHER REMEDY

[24] Prior to instituting this application the Applicant sought to get hold of all the documents in the possession of the Master inclusive of the original will in order to

satisfy himself of facts surrounding the execution of the will he has been denied access to the Master's file. In the result the only avenue left is to interdict the process of winding up of the estate.

[25] If the interdict is not granted and the will is later declared invalid the assets may have been disputed and it may be difficult to recoup same.

[26] I am in the final analysis satisfied that all four requirements for an interim interdict have been met by the Applicant. I need not deal with the issue of non-joinder as it has no bearing in Part A. The two persons will have to be joined in Part B of the dispute. In the result I make the following order:

ORDER

1. The first, second and third Respondents are hereby interdicted from commencing and or proceeding with the liquidation and distribution account in the estate of the late Ms Margaret Nelly Motsepe pending finalisation of Part B.
2. The first, second and third Respondents are interdicted from proceeding with the Final Liquidation and Distribution account of the late Ms Margaret Nelly Motsepe pending finalisation of Part B.
3. The Applicant is hereby ordered that within 30 days of this order he shall institute action to declare the last will and testament of the deceased invalid.
4. The second and third Respondents are ordered^{3w} to pay the taxed costs of this application which shall include the costs of counsel.

Dated at Johannesburg on this day of September 2022

M A MAKUME
JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 24th AUGUST 2022

DATE OF JUDGMENT : 12th SEPTEMBER 2022

FOR APPLICANT : ADV B MKHIZE

INSTRUCTED BY : MESSRS MENZI VILAKAZI INC.

FOR RESPONDENT : ADV M.D. MALULEKE

INSTRUCTED BY : TS SEBOLA ATTORNEYS