**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO:2020/46493**
REPORTABLE:***NO***
*OF INTEREST TO OTHER JUDGES:****NO***
REVISED
Date: ***19 April 2021***

**DATE OF HEARING:** **4th** MARCH 2021

In the matter between:

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| **MALEKA, PHOGOTI** | Applicant |
| and | |
| **MASTER OF THE HIGH COURT, PRETORIA** | First Respondent |
| **MANYAKA, MARIA HUNADI** | Second Respondent |
| **REGISTRAR OF DEEDS, PRETORIA** | Third Respondent |
| **NDLOVU, GRACE** | Fourth Respondent |
| **ABSA BANK LIMITED** | Fifth Respondent |

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**JUDGMENT**

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**NYATHI AJ:**

[1]. This is an opposed application in which the applicant seeks an order against the respondents in the following terms:

(a) An order in terms whereof the appointment of the Second

Respondent as an executrix of the estate late Mapula Evah Manyaka [ ID Number: […]] by the First Respondent is reviewed and set aside in terms of section 91 of the Administration of Estates Act 66 of 1965;

(b) An order in terms whereof the Second Respondent is removed as Executrix of the estate of the deceased Mapula Evah Manyaka [ID Number: […]] in terms of section 54 (1) (a) of the Administration of Estates Act;

(c) An order in terms whereof the Second Respondent is declared incapable, for the period of her life, to hold office of executrix;

(d) An order in terms whereof the liquidation and distribution of the estate of the late Mapula Evah Manyaka (ID Number: […]] is reviewed and set aside;

(e) An order in terms whereof the deceased estate of the late Mapula Evah Manyaka [ID Number: […]] is to be liquidated and distributed *de nova;*

(f) An order in terms whereof the Applicant or her nominee shall replace the Second Respondent as executrix;

(g) An order in terms whereof the purchase and sale agreement between the Second Respondent and the Fourth Respondent dated 27 November 2018 is reviewed and set aside;

(h) An order in terms whereof the decision of the Third Respondent to transfer the deed of title in respect of Erf […], City of Tshwane Metropolitan Municipality, Gauteng to the Fourth Respondent is reviewed and set aside;

(i) An order in terms whereof the transfer of the immovable property, namely Erf […], City of Tshwane Metropolitan

Municipality, Gauteng from the estate of the late Mapula Evah Manyaka [ID Number: […]] to the Fourth Respondent and all subsequent transfers is set aside and declared null and void and cancelled;

(j) The Registrar of Deeds (Pretoria) be and is ordered to cancel the title deed […] in respect of ERF […], City of Tshwane, Gauteng, Registration Division JR, Province of Gauteng, and to cancel all the rights accorded to the Fourth Respondent (Grace Ndlovu) and the Fifth Respondent (ASSA Bank Limited) by virtue of the deed;

(k) That the Mortgage Bond No: […] be simultaneously cancelled with Title Deed No: […], and which bond is registered in favour of Fifth Respondent, ABSA Bank Limited;

(l) An order in terms whereof the Second Respondent is ordered to pay the costs of this application, *de bonis propriis;*

(m) An order in terms whereof any other party opposing this application shall be liable for costs of application, together with the Second Respondent, jointly and severally, one paying and the other absolved.

(n) Further and/or alternative relief.

[2]. The first, third and fourth respondents have not filed any opposing documents and opted to abide by the outcome of the application.

APPLICANT'S AFFIDAVIT

[3]. The applicant in her founding affidavit alleges that the deceased:

3.1 had died intestate.

3.2 was not survived by a spouse and did not have any children in her life.

3.3 had elected to raise her sister's children as her own. The second respondent was also raised in the same house by the deceased.

[4]. She sharply takes issue with the second respondent's use of the Manyaka surname. Applicant further accuses the second respondent of having deceived the first respondent and misrepresented herself as a descendent of the deceased and sole heir to her estate.

[5]. The applicant states that she and the second respondent's mother were cousins.

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

[6]. Second respondent raises four (4) points *in limine* at the onset and then responds to the applicant's allegations.

6.1 Firstly; there is a dispute of fact which cannot be resolved on the papers. Second respondent alleges that applicant's application is premised on the fact that the former is not the biological child of the deceased. Consequently, so the allegation goes, she is not eligible to inherit, in terms of the Intestate Succession Act No 81 of 1987. The second respondent submits that on this ground alone, the application ought to be dismissed with punitive costs.

6.2 The second point *in limine* deals with second respondent's locus standi to be the heir presumptive and the reverse situation in so far as the Applicant is

concerned.

6.3 The third point relates to procedural matters more specifically that; whilst Section 95 of the Administration of Estates Act 66 of 1965 does provide foe a review to be instituted in appropriate cases, such review should comply with the provisions of Rule 53 of the Rules of the High Court. The second respondent avers that the applicant failed to comply with the said rule 53 in that the record of the master's proceedings does not form part of the purported review application. The second respondent thus submits that the application is for this defect alone, fatally flawed and stand to be dismissed.

6.4 A further procedural point relates to the applicant seeking an order for the removal of the second respondent from the office of executor of the estate in terms of section 54 (1) of the Administration of Estates Act. The subsection stipulates five specific instances of misconduct for which a Court can order the removal of an executor of an estate. The second respondent submits that not even one of those specific instances of misconduct was alleged or proved against her. Thus, the reliance on section 54 (1) is misplaced and the application ought to be dismissed with punitive costs.

6.5 The fourth point in limine is an allegation that the applicant's founding affidavit is vague and embarrassing. Essentially this point relied on a reference to by the applicant to the master of the High Court Polokwane in the affidavit. This was conceded by the applicant's Attorney as a genuine typing error.

[7]. The second respondent then devotes a chapter in her replying affidavit with the heading "history of birth and schooling". Herein she avers that she was born on the […] in […] […]. That she is the surviving and only daughter of the late MANYAKA Mabotha Frank and MANYAKA Mapula Evah. She attached a birth certificate to this effect. It should be noted that the birth certificate does not bear the names or identity numbers of the parents are.

[8]. The subsequent paragraphs of second respondent's affidavit go to great lengths to set out the factual situation about this dispute and goes on to deny and contradict the applicant's assertions.

[9]. In her reply the applicant also goes on the offensive in denying the second respondent's averments. This whilst stating that there is no dispute of fact in these proceedings.

FACTUAL POSITION

[10]. It is common cause that the deceased died on the 19 September 2009 without a will.

[11]. The applicant alleges that she is the surviving sister of the

deceased and the only heir to her estate. She further states that second respondent is not a blood relative, let alone a daughter of the deceased. The second respondent alleges that she is the surviving and only daughter of the deceased. What the parties contend in turn is that the one party having locus standi to be an heir, the other lacks such, and vice versa.

LEGAL POSITION

[12]. One of the first things to be established when adjudicating a litigious matter is whether the party initiating the proceedings has the necessary *locus standi,* in other words, does he or she have a sufficient and adequate direct interest in the subject matter of the litigation to qualify to approach the courts. See *Four Wheel Drive Accessory Distributors* CC *v. Leshni Rattan N.*O. 2019 (3) SA 451 (SCA)

[13]. A similar requirement is expected of a defendant or respondent to allege and prove their locus standi in a matter. In so far as the second respondent is concerned, her locus standi in these instant proceedings arise from the fact of her being an appointed executor of the deceased estate when the application was launched. In *Booysen and Others v Booysen and Others* 2012 (2) SA 38 (GSJ) it was held that: *"In regard to the legal status of both the deceased estate and the executor, the deceased estate is not a separate persona, but the executor is such person for the purposes of the estate and in whom the assets and the liabilities temporarily reside in a representative capacity. The executor only, has* ***locus standi*** *to sue or to be sued."*

[14]. I now turn my attention to the legal principles governing the existence or otherwise of a dispute of fact in application proceedings. In *Room Hire* Co *(Pty) Ltd v Jeppe Street Mansions* 1949 (3) SA 1155 (T) the court held that the crucial question is whether there is a real dispute of fact. Where such is apparent, it is undesirable for the court to attempt to settle disputes of fact solely on the probabilities disclosed in

contradictory affidavits.

[15]. Where a dispute of fact is shown to exist, however, the court has a discretion as to the future course of the proceedings. The court may adopt a robust common-sense approach and call for viva voce evidence to be led to resolve the dispute of fact in terms of Rule 9. This approach was laid out in *Soffiantini v Mould* 1956 (4) SA 150 (E).

[16]. If the above approach clearly cannot yield the result of resolving the dispute of fact then the parties may be sent to trial in the ordinary way (either on the affidavits as constituting the pleadings, or else with a direction that pleadings be filed; otherwise, the application may be dismissed with costs.

CONCLUSION

[17]. The dispute relating to locus standi is but one of many disconnects contained in the affidavits filed of record by the applicant and the second respondent in this epic battle of wits. It points to the intractability of the issues central to the opposite contentions by the party. This does not lend the matter to easy determination without more on the affidavits alone. The existence of the dispute of fact is clearly an event that could be foreseen by the applicant on herversion alone.

[18]. I conclude that this matter should have been brought before court by wayof action proceedings.

[19]. In the circumstances, the application is dismissed with costs.

**JS NYATHI**

*Acting Judge of the High Court*

*Gauteng Division, Pretoria*

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| HEARD ON: | 4th March 2021 |
| JUDGMENT DATE: | 19th April 2021 |
| FOR THE APPELLANTS: | Mr JV Skosana |
| INSTRUCTED BY: | JV Skosana Attorneys |
| FOR THE RESPONDENTS: | Adv Clinton Muza |
| INSTRUCTED BY: | Mabapapa Attorneys Inc |