IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 11855/2021

In the matter between:

MMALATLHA JERITA MAMABOLO	Applicant
and	
MAGGY MAMABOLO	1st Respondent
IRIS SEMAKALENG MAKGATHO	2nd Respondent
PARTICK MAKGATO	3rd Respondent
JOHN NGOBENI	4th Respondent
CLEMENTINE NGOBENI	5th Respondent
MASTER OF THE HIGH COURT, MAHIKENG	6th Respondent
THE REGISTRAR OF DEEDS	7th Respondent
CITY OF TSHWANE MUNICIPALITY	8th Respondent

JUDGMENT

BEFORE: HOLLAND-MUTER AJ:

[1] The applicant, in the application issued on her behalf on 8 March 2021, seeks the following relief in her application:

> [1.1] That the registration of the immovable property described as Erf [....], Section B, M[....], City of Tshwane *("the property1,* in the names of the 4th and 5th respondents during December 2019 (date of transfer into the names of the 4th and 5th respondents), be declared null and void;
>
> [1.2] That the *7th* respondent cancels the title deed TG79338/2019 in favour of the 4th and 5th respondents and that the respondents ensure that the property is re-transferred into the name of the estate of the late Job Mathata Mamabolo *("deceased'1;* and
>
> [1.3] The applicant further challenges the validity of the last will of the deceased dated 16th July 2003 and by necessary implication, to have the final liquidation and Distribution Account ("L & D" account) reviewed and the Letter of Executorship issued towards the 2nd respondent on 17 August 2005 set aside.

[2] The application was issued some 16 years after the deceased passed away on 17 April 2005.

INTRODUCTION:

[3] The applicant was married to the deceased on 26 May 2000 in

community of property according to a copy of their marriage certificate. There are two Letters of Executorship issued in this matter, the first by the Assistant Master at the Ga-Rankuwa Magistrate's Court on 8 July 2005 to the applicant and the second by the Master of the High Court at the Mahikeng High Court on 17 August 2005 to the second respondent. It is not clear whether any of the two appointed executors were aware of the other's appointment and why two different executors were appointed.

[4] The will in dispute was attested to by the deceased on 16 July 2000. There is no indication at all what the grounds are that the applicant levels to have this will declared null and void.

[5] The 2nd respondent had the property transferred into her and the 3rd respondent's name during 2012 and the applicant was requested to vacate the property.

[6] The 2nd respondent later, somewhere during 2013, informed the applicant of her plans to sell the property. An ejectment application was served on the applicant during 2020 which obliged the applicant to obtain legal assistance resulting in the present application before the court.

[7] The applicant indicated in her application her desire to appoint an expert to obtain an opinion **with** regard to the signature of the deceased in the disputed will. This report was not annexed to her founding affidavit resulting in the 2nd and 3rd respondent's answering affidavits to be out of time. The applicant's attorney later served the report and granted them extension of time for that reason. There is no reason why the court should not grant the requested condonation for the late filing thereof.

[8] The applicant later annexed a report of an expert but no supporting affidavit was filed rendering the report hearsay.

2nd and 3rd RESPONDENTS' LEGAL POINTS IN LIMINE:

[9] The 2nd and 3rd respondents raised three points *in limine* while the 4th and 5th respondents raised similar points *in limine* in particular that a material factual dispute arose which cannot be adjudicated on affidavit. This aspect will be dealt with simultaneously with the 2nd and 3rd respondent's point raised.

[9.1] **Prescription:**

[9.1.1] The 2nd and 3rd respondents argue that the applicant's claim became prescribed because the application was issued more than three (3) years after the claim arose. Section 11 (d) of the Prescription Act, 68 of 1969 is clear that a debt is extinguished by prescription after lapse of the period which applies in respect of a debt, in this instance after three years. The court may not of its own take notice of prescription but the party who wishes to invoke prescription must do so. The 2nd and 3rd respondents did raise the question of prescription in their answering affidavits. The applicant may have a valid reason in replication but failed to do so. No reasonable explanation was raised. See **Harms, Amler's Precedents of Pleadings** 6th ed p 262.

[9.1.2] The applicant obtained notice of the will during 2005 and knew since 2013 that the property was to be sold. This is far beyond the three years to interrupt prescription. In terms of section 12 of the Act prescription started to run as soon as she became aware of her possible claim against the executor of the estate. *On* this point alone the application should fail. Debt in this matter includes a claim of a right to the value of the property (her undivided half share due to the marriage in community of property.

[9.1.3] The applicant did not acquire any real rights to the property but only a *jus in personam ad rem acquiredem,* meaning that she obtained a personal right against the estate of the deceased for the value of her undivided half share in the estate in community of property. The property was never co- registered in her name to entitle her on real protection. She should have instituted a personal claim against the deceased estate during 2015 at

the latest.

[9.2] **Unreasonable delay:**

[9.2.1] The applicant does not give any explanation for the long delay before the application was instituted. Her seeking to set aside the decision of the Estate Clerk of the Court at the Ga-Rankuwa Magistrate Court appears to a judicial review of the decision. This should be done in terms of Promotion of Administrative Justice Act 3 of 2000 *("'PAJA").* In terms of section 7(1) of the Act any proceedings for judicial review must be instituted without reasonable delay but not later than 180 days after the date on which she was informed of the decision or became aware of the decision. On her own version she became aware of the decision when she was requested to return the appointment letter supra.

[9.2.2] It is clear that the applicant was aware of the revocation of her appointment and the later appointment of the 2nd respondent as executor of the deceased estate. There is further no application for condonation for the late institution of the application and this aspect, read together with the other aspects, warrants the dismissal of the application.

[9.2.3] A similar argument is can be made with regard to the L & D account's review.

[9.3] **Material dispute of facts:**

[9.3.1] It is trite that a party, when instituting legal proceedings against another party, has two options to litigate. He/she can proceed by way of action or application.

[9.3.2] The applicant elected to issue application in this instance. Before instituting litigation by way of application, a party should be aware of the dangers of application procedure. The basic principle over many years is that an applicant may use application procedure when there is no genuine

dispute of fact. A dispute of fact is as referred to in Rule 6(5)(g) of the Uniform Rules of Court.

[9.3.3] It is for the court to ascertain whether a genuine material dispute of fact exists and in the *locus classicus* of **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** it was held that a court will not only consider the aspect of probabilities which should not arise in motion proceedings, but also the aspect of credibility of witnesses giving evidence *viva voce.* In that event it is more satisfactory that evidence should be led and the court have the opportunity to of seeing and hearing the witnesses before coming to a conclusion. See **Herstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th Ed p 234-236.**

[9.3.4] It is a robust test to be applied and not all disputes will amount to real material disputes of fact. The **Plascon-Evans Rule** was considered and re-affirmed in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another (2008] ZASCA 6; 2008 (3) SA 371 SCA PAR [12] &[13).** *"{14} A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the said fact to be disputed."*

[9.3.5] The facts averred to cause the real material dispute of facts accordingly to the 2nd & 3rd respondents are that the applicant contests the last will of the deceased. This is attempted to be done by annexing what purports to be an expert report by a hand writing expert but no confirming affidavit was annexed to render it evidence but as is it is hearsay without any foundation to have it allowed in terms of the Law of Evidence Amendment Act 45 of 1988. In **Lagoon Beach Hotel (Pty) Ltd v Lehane NO 2016(3) SA 143 SCA at IS0H-151D** it was held that the court may in particular, in urgent applications accept hearsay evidence, but where urgency lacks, the court may decline to exercise its power under section 3(1) of the Law of Evidence Amendment A et. Also see **Erasmus, superior Court Practice Vol 2, D1-86-87.**

[9.3.6] The applicant further attacks the L & D account and the second letter of authority issued by the Estate Clerk of the Ga-Rankuwa Court making allegations of fraud and misrepresentation. This inadvertently burdens the applicant with the onus to prove the allegations on a balance of probabilities that the respondent's conduct amounted to wilful pervasion of the truth made with the intention to deceive resulting in prejudice to the applicant. See **Pillay v Krishna and Another 1946 AD** on the general rule that he who alleges has to prove. This cannot be achieved on application and the applicant should have been alerted hereto and follow action procedure.

[9.3.7] To attack the final L & D account (by necessary implication to have the property re-transferred onto the estate of the deceased) and the validity of the will the applicant should follow the provisions of the Administration of Estates Act 66 of 1965. It also should be remembered that the applicant was at no stage the registered owner of any portion of the property. She merely has an undivided right to half of the value of the estate of the deceased. She never had any real right in respect of the property. This aspect is another blow to her application to avert material dispute of fact.

CONCLUSION:

[10] I am of the view that the applicant did not raise any ground to convince the court that the running of prescription was interrupted. Her claim has therefore become subscribed.

[11] The applicant should have foreseen that real and material disputes arose and that the matter should have proceeded on action and not by way of motion. There is further no application on her behalf to have the matter referred for oral evidence or to trial for adjudication. Not being urgent, there is also no compelling reason why the court should apply the provisions of section 3(1) of the Law of Evidence Amendment Act to accept the 'expert' report although it is clear hearsay evidence.

ORDER:

[12] The application is dismissed with costs, costs on a party and party scale.

J HOLLAND-MUTER
ACTING JUDGE OF THE HIGH COURT

Matter heard on	8 August 2022
Judgment handed down on	8 September 2022

On behalf of the Applicant:

Advocate M N Molema
(advocate with trust account)
Advocate.molema@gmail.co.

On behalf of 2nd & 3rd Respondents:

Attorney: Scholtz Attorneys
andries@scholtzlaw.co.za
Advocate M Hugo
martinhugo@advchambers.co.za

On behalf of 4th & 5th Respondents:

Attorney: Bright Rikgotso Attorneys
Brightrikgotso@gmaii.corn
Advocate: A Baloyi & H Bucksteg
Hanno.bucksteg@gmail.co.