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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **YES**

Date: **4th MAY 2016** Signature: _____

CASE NO: 2015/35630

In the matter between:

MALISEKELE, EVELYN SINA

Applicant

And

CHEELA, MOTHUPI DANIEL

First Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Second Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

Third Respondent

JUDGMENT

ADAMS AJ:

[1]. This is an application in terms of section 6 of the Deeds Registries Act No. 47 of 1937 for the cancellation of a Deed of Transfer in favour of the first respondent in respect of Erf [1.....] [O....] [E....] Township (*‘the property’*), which was previously registered in the name of the Manku Annah Mpele (*‘the deceased’*).

[2]. The deceased estate of the deceased is the subject of the dispute between the parties. The applicant alleges that the first respondent had through fraudulent means and by forging official documentation from the office of the second respondent taken charge of the assets in the deceased estate after getting himself appointed as the Executor in the said estate. Thereafter, so it is alleged by the applicant, and as a continuation of his fraudulent conduct he caused the property to be transferred into his name out of the estate.

[3]. On the other hand, the first respondent claims that his actions were all regular and above board. He denies that the official documentation from the office of the second respondent is a forgery, and is adamant that the Letter of Executorship in his favour was in fact issued by said office. During arguments before me, Mr Masake, who appeared on behalf of the

applicant, submitted that he had personally made enquiries with the office of the second respondent, who disavowed any knowledge of the Letters of Executorship issued in favour of the first respondent. The said office did however confirm the existence of the person who signed off the said document, and it was also confirmed that he is in fact employed by the Master of the High Court in Johannesburg.

- [4]. The applicant also relies on an alleged Last Will & Testament of the deceased dated the 15th March 1999. The first respondent denies the authenticity of the said Will, and accuses the children of the applicant of forging this document with a view to defrauding him out of the property owned by the deceased, whom the first respondent alleges was his biological mother with whom he resided at the property up and until the date of her death on the 23rd June 2008. After her death and until recently the first respondent continued living at the property, but due to threats of violence and actual violence allegedly perpetrated against his person by family members of the applicant, he was forced to moved out of the property during or about January 2016.

- [5]. The most important bone of contention between the parties relates to the fact that first respondent alleges, and quite forcefully so, that he is the son of the deceased. This is denied by the applicant, who appears to be the sister of the deceased. The first respondent was staying at the property with his mother at the time of her death, and remained in occupation until

fairly recently when he was forced to leave the property under threat of being physically assaulted and harmed.

[6]. In this matter, there are clearly a number of factual disputes in respect of material issues, which, in my view, are incapable of being resolved on the papers. It seems inconceivable that there could possibly be such divergent versions of the aspects relevant in this matter. How is it possible that the persons of the same family can be at logger heads relative to whether or not the first respondent was or was not the son of the deceased?

[7]. In *Plascon – Evans v Van Riebeeck Paints*, 1984 (3) 623 (AD), the principles relative to the assessment of factual issues in motion proceedings are set out as follows at pg 634:

'It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be

such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155 (T) at 1163 - 5; Da Mata v Otto NO, 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd, 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another, 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the Associated South African Bakeries case, supra at 924A).

[8]. Applying these principles to this matter, I am of the view that the application should to fail. The applicant should have foreseen the factual disputes and ought not to have proceeded by way of motion proceedings.

[9]. To complicate matters further, on the day of the hearing of the application on the 28th April 2016 I was advised by Counsel for the third respondent

that the property was recently registered into the name of a third party, same having been sold on to the said third party by the first respondent. This obviously meant that the relief claimed by the applicant cannot be granted as the new registered owner, who has an interest in the subject matter of the litigation, should be a party to these proceedings.

[10]. For all of these reasons the application stands to be dismissed.

[11]. Counsel for the third respondent has submitted that, in view of the fact that the applicant has insisted on costs against third respondent, it was necessary for her to appear to ensure that no such cost order is granted.

[12]. Whilst cost should, as a general rule, follow the suit, I am of the view that circumstances of this matter are exceptional, and it would be unjust to burden the applicant with a costs order. By the same token, the first respondent seems convinced of his version and confident that his account of the circumstances surrounding this matter is likely to prevail. The third respondent is a public body whose statutory duties entailed *inter alia* the registration of ownership of immovable property. This is a public function and the applicant was well within her rights to join the said respondent as a party to these proceedings.

[13]. Accordingly, I do not intend making any order as to costs.

ORDER

Accordingly, I make the following order:

The application is dismissed.

L ADAMS

*Acting Judge of the High Court
Gauteng Local Division, Johannesburg*

HEARD ON: 28th April 2016

JUDGMENT DATE: 4th May 2016

FOR THE APPLICANT: Mr Masake

INSTRUCTED BY: Masake Incorporated

FOR THE FIRST RESPONDENT: In Person

INSTRUCTED BY: In person

FOR THE THIRD RESPONDENT: Adv J Maisela

INSTRUCTED BY: The State Attorney