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THE REPUBLIC OF SOUTH AFRICA



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

Case number: 28182/2017

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

DATE

SIGNATURE

In the matter between:

Y P

Applicant

OBO O C &

J M

and

ABSA BANK LIMITED

First Respondent

SHONGWE BONISWASecond Respondent

JUDGMENT

Molahlehi, J

Introduction

[1] This is an application for rescission of the summary judgment of this court made on 10 August 2017. The rescission in terms of the applicant's papers is made in terms of rule 42 (1) (a) and (b) of the Uniform Rules of the High Court (the Rules). The applicant also seeks the removal of the second respondent, Mrs. Boniswa Shongwe (Boniswa) as executrix of the estate of her late husband.

[2] The applicant, Ms Yeni Ndongumiso Passionate (Yeni), contends that she is entitled to the relief sought because the summary judgment was made in her absence.

[3] Rule 42 of the Rules provides:

“The court may, in addition to any other powers it may have, *mero mutu* or upon application of any party affected, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) . . .”

[4] Yeni based her *locus standi in judicio* on the grounds that she has substantial interest in the matter because she is the biological guardian of her children born of the extramarital relationship she had with the deceased. In support of this contention she attached to her founding affidavit a one sentence affidavit which states nothing more than that the deceased is their biological father. She also attached the birth certificate of the children.

- [5] The surnames of the children, appearing on the birth certificate which are attached to the founding papers are not the same as that of the deceased. She has not attached any supporting affidavit to support her contention that she had a relationship with the deceased. Nor has she in the context of the children using a different surname to that of the deceased attached any supporting evidence in that regard. She further contended that the first respondent did not have *locus standi* standing to foreclose the property which was the subject matter of the summary judgment.
- [6] The other point that she raised is that the appointment of Boniswa as the executrix of the late deceased estate of her husband was unlawful because she had stated after the death of her husband that she was not interested in the estate and did not wish to inherit from it.
- [7] In this proceedings the first respondent raised *locus standi* of the applicant as a preliminary point. The first point relates to the issue of whether the children on whose behalf she instituted these proceedings are children of the deceased. It should be apparent from the above discussion that Yeni has failed to make out a case in as far as the relationship between the deceased and the children is concerned. It follows therefore that the point as raised by the first respondent stands to succeed.
- [8] The other point raised by the first respondent is that the mortgage bond over the property in question was registered in its favour. In argument Yeni conceded that the deceased had obtained a loan from the first respondent, and that was secured by a mortgage bond. The mortgage bond in the sum of R520 000.00,

was signed by the deceased, Mr Oben and the executrix, Mrs Boniswa Shongwe. In the particulars of claim the first respondent cited as *domicilium citandi et executandi* [...] M. Road Bellevue East Township, Johannesburg, Gauteng. This has not been disputed by the applicant neither has it been disputed that the notice in terms of s 129 (1) of the National Credit Act of 2005 was delivered by registered mail to the same address.

[9] It follows in law that the first respondent as a secured creditor in the deceased estate had to first be paid before any contribution could be made to the heirs of the deceased. In the circumstances the person who had a direct and substantial interest in the foreclosure proceedings which were instituted by the first respondent, was Boniswa in her personal capacity and nominated capacity as executrix. The name of the applicant appears nowhere in any of the official documents concerning the loan which was taken by both the deceased and Boniswa.

[10] It is quite clear from the facts of this case that the house was foreclosed in order to settle the outstanding debt due to the first respondent. The contention that the first respondent should have conducted some investigation about the executrix and to have her removed from her nominated position has no merit. It is the Master of the High Court in terms of s 54 of the Administration of the Deceased Estate Act who has power to seek an order removing the executrix from her position.

[11] In light of the above, I am of the view that the applicant has failed to make out a case showing that she has direct and substantial interest in the claims between

the first respondent and the executrix of the estate. Accordingly, I find that Yeni lacks *locus standi* institute these proceedings.

Order.

[12] The application is accordingly dismissed with costs.

E Molahlehi
Judge of the High Court;
Johannesburg.

Representation:

For the Applicant: In person

For the Respondent: Adv AP Ellis

Instructed by: Strauss Daly Inc

Heard on: 17 March 2018

Delivered on: 20 April 2018