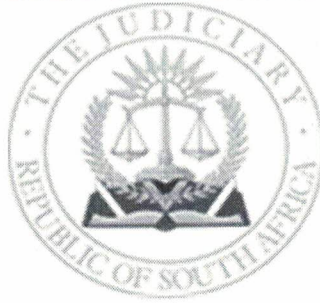


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 37609/2021

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>16/3/2023</u> DATE	
 SIGNATURE	

In the matter between:

SCHEPERS DEBORAH CHRISTINE

Plaintiff

And

DE JAGER BARBARA WILHEMINA N.O.

1st Defendant

JAGER: URSULA NO

2nd Defendant

MASTER OF THE HIGH COURT, JHB

3rd Defendant

JUDGMENT ON EXCEPTION

MAKUME, J:

INTRODCUTION

- [1] This matter is about whether the particulars of claim of the Plaintiff lack the necessary averments necessary to sustain a cause of action for the relief sought therein and whether the four grounds of exception as raised by the Defendants should be upheld and if so whether it will be appropriate to dismiss the action or to grant the Plaintiff leave to amend her particulars of claim.

BACKGROUND FACTS

- [2] I shall in this application refer to the parties as they are described in the summons and particulars of claim.
- [3] The matter involves the status of three wills executed by the late Mrs Ruth Charlotte Greiter Identity number 301030 0068 083 (the deceased) who passed away on the 13th September 2020.
- [4] When she died she was a widow her late husband Helmut Greiter having passed away on the 5th March 2010.
- [5] On the 12th August 2019 the deceased signed a Will (the first Will) in which she nominated the first and second Defendants as Executrices of her estate. She also nominated a number of persons and institutions as beneficiaries amongst them the Plaintiff as well as the first and second Defendants.
- [6] On the 29th September 2019 the deceased executed another Will (the second Will) in which she appointed the Plaintiff as executrix.
- [7] In this second Will she once again made bequeathals that to a number of persons and institutions. The deceased also directed that the balance of cash in her estate after payment of all heirs be awarded to the Plaintiff.
- [8] The third Will is dated the 3rd December 2019 and was executed at Richmond. She nominated the Plaintiff as the executrix of the estate. In it she refers to the Plaintiff as "my cousin" and appointed her as the sole heir of her large estate.
- [9] On the 5th October 2020 the Master of the High Court "accepted" the first will dated the 12th August 2019 and appointed the first and second Defendants as Joint Executrices in the estate of the deceased.
- [10] On the 22nd October 2020 Plaintiff's attorneys Messrs Le Roux Matthews & Du Plessis addressed a letter to the Master quoting estate number 019425/2020

and informed the Master that there are other Wills executed by the deceased after the Will that he had accepted and on the basis of which he the Master issued letters of Executorship to the first and second Defendants.

- [11] The Plaintiff's attorneys asked the Master to have regard to the Wills referred to in the letter especially the Wills dated the 29th September 2019 and the one dated 3rd December 2019.
- [12] It does not seem that the Master either acknowledged receipt or responded to the letter. There is however a stamp of the Master dated 29th October 2020 proving that the Master did receive the letter.
- [13] On the 25 June 2021 the joint executrixes submitted the first and final liquidation and distribution account in the estate of the deceased and made awards as per directions of the Will dated 12 August 2019.
- [14] On the 6th August 2021 the Plaintiff issued summons against the first and second Defendants in their capacity as the joint executrixes of the estate of the deceased. On the 4th September 2021 the Defendants entered appearance to defend.
- [15] On the 23rd September 2021 the Defendants filed and served a notice to remove causes of complaint. The first complaint was in terms of Rule 30(2)(b). In it the Defendants say that it is an irregular step for the Plaintiff to ask for invalidation of the Liquidation and Administration account before seeking remedy in terms of Section 35 (7) of the Administration of Estate Act. In other words, the Act first requires an interested party to first lodge an objection to the account and only if the Master does not agree to the objection is the party allowed to approach Court for relief.
- [16] The second complaint is based on what is pleaded and prayed for in prayer 3. It is an objection on similar grounds that the Master having accepted the first Will can only be challenged on review in terms of Rule 53(1) and not by way of a declarator in the summons.

- [17] In response to the notice in terms of Rule 30(2) (b) the Plaintiff says that such notice is out of time it should have been served within ten (10) days after receipt of the summons or ten (10) days after having filed their Notice to Oppose.
- [18] On the 13th October 2021 the Defendants filed their Notice of Exception in terms of Rule 23(1). The Defendant takes exception on four grounds listed therein and claim that the Particulars of Claim lack the necessary averments to sustain an action.

THE FIRST OBJECTION

- 18.1 The Plaintiff in prayer 5 of her Particulars of Claim seeks relief that the liquidation and distribution account be declared null and void because it is based on a Will that the Plaintiff says should not have been accepted.
- 18.2 The Plaintiff did not follow the correct procedure as set out in Section 35 (7) read with Section 35 (10) of the Administration of Estate to object to the Liquidation and Distribution account.

THE SECOND OBJECTION

- 18.3 Similarly in prayer 3 the Plaintiff seeks a declaratory order relating to the validation of the first Will. Once again the Plaintiff does not plead that the Master who has the power and in terms of Section 8(4) of the Act has not expressed a view on the validity or otherwise of the Will.

THIRD OBJECTION

- 18.4 It is argued that in her Particulars of Claim the Plaintiff seeks an order setting aside the decision of the Master accepting the first Will by accepting the Liquidation and Distribution account. The complaint is that this being an administrative action by the Master the Plaintiff should have followed the procedure in Rule 53 (1) of the Uniform Rules.

FOURTH OBJECTION

18.5 This complaint related to paragraph 15 of the Plaintiff Particulars of Claim read with prayers 1,2 and 3 in which the Plaintiff seeks an order compelling the Master to accept the second and third Will as the Will of the deceased and to summarily appoint the Plaintiff as the Executrix.

This allegation or statement affects the discretionary power of the Master whose decision can only be attacked in terms of Section 8(4) of the Act.

[19] In the final analysis the Defendants argue that the exception cannot be remedied by an amendment because the remedy sought by the Plaintiff can only be sought by way of motion proceedings and not action proceedings.

THE LAW

[20] The purpose of an exception that a pleading lacks averments which are necessary to sustain an action is to dispose of the leading of evidence at the trial. It is also proper to except if a point of law will dispose of the case in whole or in part.

[21] In **Kahn v Stuart and Others 1942 CPD at 392** it was stated: -

“In my view it is the duty of the Court when an exception is taken to pleadings first to see if there is point of law to be decided which will dispose of the case as a whole or in part.”

[22] The Plaintiff in opposing the exception correctly points out that there is no evidence that the third Defendant the Master has exercised its discretion in respect of the consideration of the second or third Wills.

[23] Section 35(7)(8) (9) and (10) of the Administration of Estate Act 66 of 1965 sets out a procedure that must be followed by any aggrieved person who has an interest in any estate. In **Wessels v The Master of the High Court (1892) 9 SC 18** the functions of the Master were described as the protection of the

interest of creditors, heirs, legatees and all other persons having any claim upon an estate. In the exercise of this function the Master is given extensive powers of supervision by the Act.

THE FIRST GROUND OF OBJECTION

[24] In prayer 5 of the Particulars of Claim the Plaintiff seeks relief that the Liquidation and Distribution account lodged and accepted by the Master be declared null and void.

[25] The basis of the objection is that the Liquidation and Distribution account is based on the provisions of an impugned Will.

[26] The difficulty with the Plaintiff's contention is that she did not make use of procedures set out in Section 35 (7) (8) (9) and (10) of the Act. Section 35 (10) in particular is instructive and reads as follows:

“Any person aggrieved by any such directive of the Master or by refusal of the Master to sustain an objection so lodged may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow from an order to set aside the Master's decision and the Court may make such order as it may think fit.”

[27] There is nowhere in the Particulars of Claim wherein the Plaintiff pleads that she lodged an objection to the Liquidation and Distribution account and that despite such objection the Master allowed that the Executrixes proceed to advertise the account for objection.

[28] The Plaintiff is not without remedy the account has been advertised her remedy is to formally lodge an objection and if such objection is ignored or dismissed then her next step is to approach this Court on motion.

[29] The Plaintiff relies on the decision of Singh vs Singh NO & Others 1959 (2) page 192 Durban & Coast Local Division. This decision was decided not in

terms of the Administration of Estates Act it does not deal with a Liquidation and Distribution account but with a Will on which a name of an heir had been deleted. The finding in that decision is not helpful to the Plaintiff's case.

- [30] Similarly the Plaintiff's reliance on the decision of Kirsten and Others vs Bailey and Others 1976 (4) SA 108 C is not helpful. In that matter the validity of the Will was challenged on the basis of the testamentary capacity of the testatrix. It was argued that at the time of her executing all the three (3) Wills she did not have sufficient intelligence, possessing a sufficiently sound mind and memory for her to understand and appreciate the nature of the testamentary act in all its different bearings.
- [31] Secondly in the Kirsten matter there is no evidence that the Liquidation and Distribution account had been filed. In this matter what differentiates it from the Kirsten matter is that a Liquidation and Distribution account has been filed and advertised. That Act alone has brought about a different regime which has to be followed to undo what the Plaintiff is praying for.

THE SECOND OBJECTION

- [32] In prayer 3 the Plaintiff prays for an order that this Court declare that the Estate of the late Ruth Charlotte Greiter not be administered in terms of the first will dated the 12th August 2019 stated otherwise the Plaintiff seeks a declaration that the first Will is invalid as it had been revoked by subsequent Wills.
- [33] It is correct that the decision to declare a Will invalid lies with the Court and not the Master. However, the Master exercises certain powers on receipt of a Will. The provisions of Section 8(4) of the Act read as follows: "If it appears to the Master that any such document being or purporting to be a Will, is for any reason invalid, he may, notwithstanding registration thereof in terms of subsection 3 refuse to accept it for purpose of this Act until the validity thereof has been determined by the Court."

[34] The evidence or the allegation before me do not demonstrate that the Master has refused to accept any of the three (3) Wills which will have then triggered an action before this Court in terms of Section 8 (4). The Plaintiff has not made an allegation that the Master has refused to accept the two last Wills what is known is that the Master accepted the first Will. The Plaintiff's remedy lies in the procedure laid out in Section 35 (7) (8) and (9) of the Act. The Plaintiff's failure to follow the procedure set out therein makes his Particulars of Claim excipiable.

[35] There is no evidence *ex facie* the pleadings that the Master provided any answer after having being handed the second and third Wills. It is therefore in correct for the Plaintiff to allege that the Master has exercised its discretion on the 3 Wills. There is no such evidence. In the result the second ground of exception must also succeed.

THE THIRD GROUND OF OBJECTION

[36] In her Particulars of Claim the Plaintiff seeks an order setting aside the decision by the Master to accept the first Will of the deceased.

[37] The excipient maintains that challenge to a decision of the Master should be brought by way of a review and not by way of action proceedings as it has been done in this matter.

[38] A litigant who makes a choice to proceed by way of action proceedings and not motion proceedings may be justified to do so if he or she perceives that there may be a dispute of fact which is incapable of resolution on the affidavits.

[39] The difficulty in this matter is that it is not known what the decision of the Master was when he was handed the other Wills by the Plaintiff's attorneys. It can therefore not be correct to argue that the Master has applied his discretion in terms Section 8(4) of the Act. There is no strict requirement in Common Law or in the Administration of Estates Act or the Wills Act that decisions of the Master on his failure to act must at all-time be taken on review.

[40] In the matter of Tobacco Exporters and Manufactures vs Bradburg Road Properties 1990 (2) SA 420 it was held that an exception directed at a prayer in a declaration which is concerned solely with consequential and ancillary relief relating to execution of any judgement which might be obtained by the Plaintiff should not be entertained. Such a prayer does not represent a separate and distinct cause of action in the ordinary sense.

[41] In my view this objection cannot be upheld and falls to be dismissed.

FOURTH GROUND OF OBJECTION

[42] In paragraph 15 read with prayers 1, 2 and 6 of her Particulars of Claim the Plaintiff seeks an order compelling the third Defendant to accept the second Will alternatively the third Will and to summarily appoint the Plaintiff as the executrix of the deceased estate.

[43] Once again the Plaintiff has not prior to this allegation sought a mandamus compelling the Master to exercise his discretion in terms of Section 8(4) of the Act. The exercise of the discretion whether to accept or reject a Will lies not with the Court but with the Master.

[44] In the result the relief sought by the Plaintiff in so far as she seeks mandatory interdictory relief against the Defendants lacks the necessary averments to sustain a cause of action.

CONCLUSION

[45] In my view the first, second and fourth grounds of objection are upheld and the Particulars of Claim are deemed excipiable and not sufficient to sustain a cause of action.

[47] The dismissal of the excepted prayers and the deleting of the paragraphs in the Particulars of Claim will have the effect of eradicating most of the disputes in this matter. In the result no opportunity need be afforded to the Plaintiff to

enable her to amend the Particulars of Claim as in the nature of the exceptions the pleadings are simply bad in law.

ORDER

1. The Plaintiff's claim is dismissed.
2. The costs of this application shall be costs in the estate.

Dated at Johannesburg on this 16th day of March 2023



M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	18 TH JANUARY 2023
DATE OF JUDGMENT	:	16 TH MARCH 2023
FOR APPLICANT	:	ADV R GOSLETT
INSTRUCTED BY	:	MESSRS DE JAGER ATTORNEYS ROODEPOORT
FOR RESPONDENT	:	ADV DU PLESSIS
INSTRUCTED BY	:	DIEDERICKS, OUDEGEEST ATTORNEYS ROSEBANK