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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2918/2021

In the matter between:

NYUBA MADINTJA ANNAH

Applicant

And

WANDILE MELBOURNE APRIL N.O.

1st Respondent

S[...] T[...] on behalf of the minor child

T[...] S[...]

2nd Respondent

THE MASTER OF THE HIGH COURT: BLOEMFONTEIN

3rd Respondent

THE REGISTRAR OF DEEDS: BLOEMFONTEIN

4th Respondent

THE METSIMAHOLO LOCAL MUNICIPALITY

5th Respondent

THE FIRST NATIONAL BANK

6th Respondent

CORAM:

LOUBSER, J

HEARD ON:

23 MARCH 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 4 MAY 2023. The date and time for hand-down is deemed to be 4 MAY 2023 at 11:30

- [1] This is an application that came before this court on an opposed basis. The relief sought by the applicant can be summarised as follows:
- 1.1 That the 1st respondent be discharged from his duties as the executor of the estate of the late Nyolohelo Thomas Rantsane (estate no. 23077/2014) with immediate effect.
 - 1.2 That the applicant's attorneys, N. J. Belcher Attorneys, be appointed as the new executors in the said estate within ten days.
 - 1.3 That the 4th respondent be ordered to cancel the registration of the immovable property situated at 24 P[...] Street, Sasolburg, in the name of the minor child who is represented by the 2nd respondent, and to transfer the property back into the name of the deceased estate mentioned above, and
 - 1.4 That the 1st and 2nd respondents be ordered to pay the costs of the application on the attorney and client scale.
- [2] The factual matrix that gave rise to the launching of this application appears from the affidavits and additional documentation filed by the respective parties. The deceased featuring in the papers died on 31 May 2014 in a car accident. He left no will behind and he therefore died intestate. According to the 2nd respondent, he was the biological father of the minor child T[...] S[...]. The child has recently reached the age of majority. The 2nd respondent was never married to the deceased nor did they live together. They were only in a romantic relationship for a period of time. It was during this time that she fell pregnant with the said child.

- [3] Section 1(1)(b) of the Intestate Succession Act¹ provides that, if a person dies intestate, and he is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate. In compliance with this provision, the 1st respondent caused the residential property situated at 24 P[...] Street, Sasolburg, to be transferred into and to be registered in the name of the said child on 11 March 2021 by the offices of the 4th respondent. The child was the only descendant of the deceased, and the property concerned appeared to have been the only asset in the deceased estate. According to the Deed of Transfer, the property was valued at the sum of R600 000.00.
- [4] The applicant, on the other hand, based her application on the premise that the deceased was not the biological father of the child and that the property in question therefore ought not to have been transferred into her name after the death of the deceased. The applicant is the biological sister of the deceased. According to her, the deceased had denied responsibility for the pregnancy of the 2nd respondent before his death. He even wanted to have a paternity test done prior to his untimely death, she says. The applicant further mentions in her founding affidavit that she had rented the property in question out to tenants after the death of the deceased, and that the monthly rentals were paid to her. On 18 June 2021 she was surprised to hear that the property has meanwhile been transferred into the name of the child.
- [5] The applicant also states in her founding affidavit that her attorney sent a letter to the 1st respondent on 30 March 2021 informing him that she had arranged for a paternity test to be done on the child at Pathcare, for which test she had already paid. However, the 2nd respondent and the child failed or refused to attend the paternity test appointment, the applicant says. As far as the 1st respondent is concerned, the applicant alleges that the 1st respondent was initially instructed by herself before his appointment as executor. Later she was surprised to learn that the 1st respondent was now acting as the attorney for the 2nd respondent and her child. According to her, the 1st respondent knew of the dispute relating to the paternity issue, but had nevertheless proceeded to cause the transfer of the property into the name of the 2nd respondent's child.

¹Act 81 of 1987

At the hearing of this application, counsel appearing for the applicant has pointed out additional aspects which could be interpreted as irregular conduct by the 1st respondent in the administration of the deceased estate. Most of those issues are not mentioned in the founding affidavit.

[6] Now it is clear that there is a massive and material dispute of fact on the application papers before me. This dispute relates to the question whether the deceased was the biological father of the child or not. Since there is no scientific evidence before the court in this respect, the court is not in a position to make a reliable finding. There is also no prayer in the notice of motion for an order to compel the 2nd respondent's child, who has now reached the age of majority, to undergo tests to determine the question of paternity. Nor is there any request made by either of the parties to have the matter referred to oral evidence so that this aspect can be properly canvassed. It is undesirable that a court *mero motu* orders a referral to oral evidence.²

[7] The court therefore has to resort to the established principles regarding the adjudication of applications where there are material disputes of fact on the papers before the court. These principles dictate that a final order will only be granted on notice of motion if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.³ In the present proceedings, the facts as stated by the 2nd respondent (that the deceased was the father of the child) together with the facts alleged by the applicant that are admitted by the respondent (none for all intents and purposes) do not allow for the relief sought by the applicant.

[8] It is also crystal clear to this court that the relief sought for the discharge of the 1st respondent as executor of the estate, is fully dependent on a reliable finding that the deceased was not the father of the child. This is so, because if it could be found that he in fact was the father, it would not serve any meaningful purpose to remove him as executor of the estate, despite the fact that certain irregularities could have been committed in the administration of the estate. The result hereof is that the question of paternity goes to the core of all the relief

² **Santino Publishers CC v Waylite Marketing CC 2010 (2) SA 53 (GSJ)**

³ **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)**

sought in the application. So much was conceded by counsel appearing for the applicant responding to a question by the court. He conceded that if the child had gone for tests to establish paternity, this application would not have been launched at all.

[9] It follows that the application cannot succeed. To my mind, there exists no reasons why the costs of the matter should not follow the result. The costs will include the costs of the condonation application that preceded this application. In the condonation application, the court granted condonation for the late filing of the answering affidavit to the 2nd respondent. Costs were ordered to be costs in the cause on that occasion.

[10] The following order is made:

1. The application is dismissed with costs, including the costs of the condonation application for the late filing of the answering affidavit by the 2nd respondent.

P. J. LOUBSER, J

For the applicant:

Instructed by:

Adv. B. T. Ngqwangele

G. M. Makete Attorneys, Johannesburg

c/o M. C. Radebe Attorneys, Bloemfontein

For the 1st and 2nd respondents:

Instructed by:

Mr. Masoha

Jam Jam Attorneys, Sasolburg

c/o Rampai Attorneys, Bloemfontein

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