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

Case No: **4199/2013**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the application of:

BAREND FRANCIS SMITH

Applicant

and

DIEDERIK ARNOLDUS SNYMAN

1st Respondent

GERHARDUS PHILLIPUS MILLS N.O.

2nd Respondent

MASTER OF THE HIGH COURT, PRETORIA

3rd Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN

4th Respondent

BEATRICE LINDA MILLS, N.O.

5th Respondent

In the matter between:

BAREND FRANCIS SMITH

1st Applicant

BAREND FRANCIS SMITH, N.O.

2nd Applicant

and

DIEDERIK ARNOLDUS SNYMAN

1st Respondent

GERHARDUS PHILLIPUS MILLS N.O.

2nd Respondent

MASTER OF THE HIGH COURT, PRETORIA

3rd Respondent

REGISTRAR OF DEEDS, BLOEMFONTEIN

4th Respondent

In the matter between:

BAREND FRANCIS SMITH

Plaintiff

and

DIEDERIK ARNOLDUS SNYMAN

1st Defendant

GERHARDUS PHILLIPUS MILLS N.O.

2nd Defendant

MASTER OF THE HIGH COURT, PRETORIA

3rd Defendant

REGISTRAR OF DEEDS, BLOEMFONTEIN

4th Defendant

BEATRICE LINDA MILLS, N.O.

5th Defendant

In re: -

BAREND FRANCIS SMITH

Plaintiff

and

DIEDERIK ARNOLDUS SNYMAN

1st Defendant

GERHARDUS PHILLIPUS MILLS N.O.

2nd Defendant

MASTER OF THE HIGH COURT, PRETORIA

3rd Defendant

REGISTRAR OF DEEDS, BLOEMFONTEIN

4th Defendant

BEATRICE LINDA MILLS, N.O.

5th Defendant

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 14 APRIL 2022

DELIVERED ON: 22 AUGUST 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 13:00 on 22 August 2022.

[1] In 2013 Barend Francis Smith (as plaintiff) instituted action under civil case number 4199/2013 against Diederik Arnoldus Snyman (as first defendant) and Gerhardus Phillipus Mills N.O. (as second defendant) claiming, amongst others, damages resulting from a sale of the farm O[....] [....] ("the farm"). The action was defended and two special pleas, namely a lack of *locus standi* and prescription, were raised.

[2] Two applications served before me. An application by plaintiff (as applicant) for his joinder in terms of Uniform Rules of Court 10 in an official capacity as the executor and trustee of the estate of the Late Ms Johanna Catharina Smith (the "Smith Estate"), and leave to amend the particulars of claim in case number 4199/2013 in terms of Rule 28(4).

[3] The third defendant in the main action is the Master of the High Court Pretoria, who is cited as the third respondent in the applications before me, whilst the fourth defendant is the fourth respondent is the Registrar of Deeds, Bloemfontein.

[4] It would appear from court orders in the court file that rule 15(3) notices dated respectively 26 May 2015 and 25 June 2020 were set aside by orders of this court respectively on the 23 May 2020 and 3 September 2020. In a further order dated 29 October 2020 Beatrice Linda Mills N.O. (in her capacity as executor of the Gerhardus Phillipus Mills Deceased Estate) has been joined as 5th Defendant.

[5] In the main action the summons bears a stamp of the registrar dated 21 October 2013. In view of the decision that I have come to, I deem it appropriate to repeat the plaintiff's cause of action as pleaded in the particulars of claim (annexed to the founding affidavit in the amendment application) as it stands before the amendment sought herein. He avers:

“6. The Plaintiff's mother, Anna Johanna Catharina Smith (**“the Deceased”**), passed away on **25 April 2004**, following which the Second Defendant became the executor of her estate.

7. The Plaintiff is one of the beneficiaries of the Deceased's estate in terms of her last will and testament, a copy of which is attached, marked **“Annexure A”** (the “Will”).

8. One of the assets sold by the Second Defendant in his capacity as executor of the estate was an immovable property known as Section 9 of the Farm O[...] number [...] (**“the Farm”**).

9. A true copy of the First and Final Liquidation and Distribution Account in the estate is attached, marked Annexure **“B”**.

10. The Farm was sold to the First Defendant, the exact circumstances of which are not known to the Plaintiff.

11. The above sale of the Farm is null and void and stands to be set aside on the following grounds:

11.1 In terms of Section 47 of the Administration of Estates Act 66 of 1965 ("the Act") the executor of an estate is obliged to obtain the written consent of all the heirs of an estate before he can sell any property in an estate;

11.2 The Plaintiff did not consent to the sale of the Farm as required in terms of Section 47 of the Act;

11.3 The Third Defendant (the Master, Pretoria) consented in terms of section 42(2) of the Act to the sale of the Farm on the basis of a forged consent form presented to it by the Second Defendant: had the Third Defendant known about the forgery, it would not have consented to the sale of the farm.

11.4 The Farm was sold to the First Defendant for R150,000.00 (one hundred and fifty thousand rand), which was at least R484,338.00 below its market value;

11.5 The Farm was sold by the Second Defendant under the pretence that the Deceased's estate was insolvent: the estate was not insolvent.

11.6 It was unnecessary to sell the Farm in order to pay the debts owed by the estate.

12. In acting as described above, the Second Defendant breached his fiduciary duty to the estate in that:

12.1 he failed to act in the best interests of the heirs and the creditors of the estate;

12.2 he failed to realize the assets of the estate in a manner most beneficial for the heirs and the creditors of the estate.

13. The First Defendant was not a *bona fide* purchaser for value in that he was at all times aware and knew that his purchase of the farm was substantially below market value and that he accordingly knew, *alternatively*, he subjectively foresaw the possibility that his purchase of the farm occurred in circumstances where the Second Defendant had no legal authority to sell the farm to him.

14. The First Defendant has been occupying the Farm and deriving an income from it, the exact details and amounts of which are not known to the Plaintiff.

WHEREFORE the Plaintiff claims as follows from the First and Second Defendant:

1. An order declaring that the sale of the land known as **Portion [....] of the Farm O[....] [....], District of Kroonstad, Free State Province** by the Second Defendant to the First Defendant was unlawful and is null and void;

2. Directing and authorizing the Fourth Defendant to effect the re-registration of the above-mentioned Farm Portion back into the name of the Estate of the Late Anna Johanna Catherina Smith (No 13122/04); *alternatively* payment by the First and Second Defendant, jointly and severally, the one paying the other to be absolved, to the Estate of the Late Anna Johanna Catherina Smith (No 13122/04) of the value of the abovementioned farm portion, less the amount of R150 000,00, that is R484 338.00 plus interest thereon at the prescribed rate from 15 November 2007 to date of payment.

3. Ordering the First Defendant to give a full account of all rental value received and all income generated by him on the above-mentioned Farm

Portion, debatement of such account, and payment of such income and rental to the estate of the Late Anna Johanna Catherina smith;

4. An order directing the First Defendant personally and the Second Defendant *de bonis propriis* to pay the costs of the action, jointly and severally, one to pay the other to be absolved.”

[6] The plea bearing the registrar’s stamp date of 6 August 2014 was filed in Afrikaans. A loose translation thereof is a first special plea of lack of *locus standi* averring that plaintiff is a beneficiary in the Anneke Smith Trust wherefore plaintiff has no *locus standi* to institute the action and averring that plaintiff is not an heir of the deceased. In a second special plea the defendants aver that plaintiff’s claim has prescribed on the basis that the property in question (the farm) had been sold by second defendant to first defendant on 24 July 2006 where after transport was affected on 15 November 2007. As the summons was served on 4 November 2013 any claims which plaintiff could possibly have, has prescribed. No reply was filed to the afore mentioned special pleas.

[7] I intend to deal with the joinder application first. It bears the registrar’s date of 26 February 2019. Plaintiff now seeks an order joining the first plaintiff as second plaintiff in his capacity as executor to the estate of the Late Anna Johanna Catharina Smith and as the only trustee of the Anneke Smith Testamentary Trust on the basis of his appointment by the Master as such following the death of Mr Gerhardus Phillipus Mills, the previous executor in his mother’s estate.

[8] The fifth respondent (and the fifth defendant in the main action) opposes the relief for his joinder. In the opposing affidavit it is averred that the second applicant had been appointed as executor on 6 July 2015. At best therefore, the relief (for the setting aside of the sale of the farm) became due at the latest on 6 July 2015 including all payments claimed. At best therefore, prescription was completed on 6 July 2018 and the application for joinder delivered on 25 February 2019 wherefore the second plaintiff’s substantial interest it alleges and/or claimed, have prescribed.

The relief sought in both applications are opposed by the fifth respondent, Beatrice Linda Mills (N.O.) in her capacity as executor of the deceased estate of Gerhardus Phillipus Mills (the “Mills Estate”).

[9] The application for joinder is opposed on other grounds as well, however I do not deem it necessary to deal therewith. Suffice to say that the applicant in his replying affidavit deals with the prescription by averring the following:

“11. The farm was sold without my knowledge as a result of my signature being forged on the relevant documents referred to in paragraph 11 of the particulars of claim.

12. Extinctive prescription cannot be raised as a defence in this matter, as registration of transfer of the farm to the First Respondent was effected by fraud which results in the title deed having no effect and being void *ab initio*. The estate of the Late Johanna Catharina smith remains owner of the Farm.

13. I am advised and submit that it where registration of a transfer of immovable property is affected pursuant to fraud or a forged document; ownership of the property does not pass to the person in whose name the property is registered after the purported transfer.

14. I am further advised and submit that South Africa’s system of deeds registration is a negative system as it does not guarantee the title that appears in the deeds register. Although registration is intended to protect the real rights of persons in whose names such rights are registered; registration does not guarantee title, and if it is effected as a result of a forgery or fraud the right apparently created is no right at all.

15. As a result of the title deed being of no effect, the Respondents cannot rely on prescription as the title deed itself is invalid and the court will not give effect to an invalid transaction.”

[10] The Supreme Court of Appeal in dealing with a similar factual matrix, considered the question of prescription in ***Leketi v Tladi NO and Others* [2010] 3 All SA 519 (SCA)**:

“[8] In this context and for the purposes of considering the provisions of the Prescription Act, the appellant is the ‘creditor’ and any obligation on the part of the estate of Albert to restore to its rightful owner, property which he fraudulently appropriated is a ‘debt’ as described in s 11(d) of that Act. In terms of the section the ordinary period of prescription for the ‘debt’ is three years from the date upon which a debt becomes due. However, the matter is further complicated by s 12(3) which provides:

‘A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.’” (emphasis added)

And further:

“[20] A further ground advanced by the appellant for his contention that his claim has not prescribed is that the fraud committed by his grandfather, Albert, on 25 June 1969 was a continuing wrong. Mr Bokaba for the appellant, argued that for as long as the property remained registered in the name of Albert, the claim remains alive. No authority was cited for the submission that a claim based on fraud does not become prescribed.

[21] The point is clearly without merit. Fraud is an act of deceit which resulted in a single act of transfer and registration which was completed on 25 June 1969. It is that single act which constitutes the appellant’s cause of action and does not amount to a continuing wrong.”

[11] On my reading of the applicant’s version it raises no factual or legal defence to the question of prescription. It remains therefore uncontested that the second

applicant was appointed on 6 July 2015 and in that capacity instituted no action on/or before 6 July 2018.

[12] Assuming therefore the best scenario for the estate, (and the second applicant) any claim it might have had, had prescribed and on that basis the application for joinder must fail.

[13] In the application for leave to amend the particulars of claim, the applicant (the plaintiff in the main action) moves for relief as follows:

“1. The insertion in the heading of the Combined Summons after the citation of the 4th Defendant of a line reading as follows:

“BEATRICE LINDA MILLS NO 5th Defendant”.”

2. The insertion on the 2nd page of the Combined Summons before the word “**THAT**” of a paragraph reading as follows:

“Linda Beatrice Mills N.O. cited in her official capacity as executor to the estate of the late Gerhardus Phillipus Mills in terms of letters of executorship no 040374/2014 c/o Mills Groenewald attorneys at 81 General Hertzog Road, Three Rivers, Vereeniging”.

3. The insertion of a new paragraphs 6 and 7 of the Particulars of Claim to read as follows:

“6. The Fifth Defendant is Linda Beatrice Mills N.O. cited in her official capacity as executor to the estate of the late Gerhardus Phillipus Mills in terms of letters of executorship no 040374/2014 c/o Mills Groenewald attorneys at 81 General Hertzog Road, Three Rivers, Vereeniging.”

“7. After the close of pleadings in this matter 2nd Defendant died. Upon his death the Fifth Defendant was appointed executor in the

estate of the 2nd Defendant in terms of letters of executorship no 040374/2014.”

4. Paragraphs 6 to 12 of the Particulars of claim be renumbered 8 to 14, respectively.

5. The insertion of a new paragraph 13 of the Particulars of claim to read as follows:

“13. The Second Defendant was liable in his personal capacity for any damages incurred by the estate of the late Anna Johanna Catharina Smith as a result of his aforesaid maladministration.”

6. Paragraphs 13 and 14 of the Particulars of Claim to be renumbered 14 and 15 respectively.

7. The prayers of the Plaintiff in his Particulars of Claim as follows:

7.1 The words “Wherefore the Plaintiff claims as follows from the First and Second Defendants ” to be substituted by the words: “Wherefore the Plaintiff claims as follows from the First and Fifth Defendants”;

7.2 In paragraph 2 and 4 thereof the substitution of the words “Second Defendant” with “Fifth Defendant”;

Such amendments to be effected by the Applicant by delivering the replacement pages of his Combined Summons and Particulars of Claim containing such amendments within 10 days after the date of the order.

[14] In respect of the fifth defendant it would appear to be common cause that Beatrice Linda Mills (N.O.) was joined as fifth defendant by an order of court as stated. The defences that she raises to the proposed amendments include defences of prescription, lack of *locus standi*, impermissible substitution and finally that the

amendment sought is excipiable. The fifth defendant has been joined as such (in her representative capacity) as the executor of the estate of Mr Mills as a *fait accompli*. Paragraphs 1 and 2 of the notice of application for leave to amend have to be granted. The fifth defendant has not pleaded yet and the proposed amendments mainly deals with relief originally sought against second defendant but now directed at fifth defendant in her representative capacity.

[15] In applications where an amendment is sought the general rule is that same should be allowed unless there is good cause for not allowing the amendment. This would be the case where the application to amend is *mala fide* or would cause an injustice to the other side which cannot be compensated by an appropriate costs order.

See: ***Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others 2020 (1) SA 327 (CC)*** at para [89].

[17] In my view the fifth defendant who has already been joined in this matter is therefore in a position to consider all her options in respect of pleading and from that point of view there can be no prejudice. I am therefore in the circumstances prepared to grant the plaintiff leave to amend its particulars of claim as suggested in the notice of application for leave to amend dated 13 April 2021.

[18] This matter has been ongoing for nearly a decade and I deem it prudent that it be case managed in order to bring finality, as will be reflected in the order below. I am well aware thereof that case management follows after the closing of pleadings. However, in this way directions can be given to effect the finality as envisaged.

[19] The applicant moves for an indulgence and amendment and the fifth respondent's opposition thereto most certainly was reasonable. The applicant should therefore pay the costs.

[20] I therefore make the following orders:

20.1 The notice of joinder application is dismissed with costs.

20.2 Leave is granted to amend the plaintiff's combined summons and particulars of claim under case number 4199/2013 as per the notice of application for leave to amend dated 13 April 2021, such amendment to be effected within 5 (five) days of this order.

20.3 Applicant to pay the costs of the application.

20.4 Case number 4199/2013 is postponed to the Pre-trial roll of Monday, 19 September 2022, with compliance to Practice Direction 2/2019.

C REINDERS, ADJP

On behalf of the applicant:

Instructed by:

Adv NM Phakama

Webber Wentzel

c/o Webber Attorneys Inc

BLOEMFONTEIN

On behalf of the 1st and 5th respondents:

Instructed by:

Adv JP Snijders

Mills and Groenewald Attorneys

c/o Phatshoane Henney Attorneys

BLOEMFONTEIN