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REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No: 11955/2017

**REPORTABLE: YES / NO.**

**OF INTEREST TO OTHER JUDGES: YES / NO.**

**REVISED.**

**DATE:9/6/2021**

In the matter between:

|                                     |                                  |
|-------------------------------------|----------------------------------|
| <b>F M[...]</b>                     | <b>1<sup>ST</sup> APPLICANT</b>  |
| <b>D M[...]</b>                     | <b>2<sup>ND</sup> APPLICANT</b>  |
| <b>M M[...]</b>                     | <b>3<sup>RD</sup> APPLICANT</b>  |
| <b>and</b>                          |                                  |
| <b>G M[...]</b>                     | <b>1<sup>ST</sup> RESPONDENT</b> |
| <b>M M[...]</b>                     | <b>2<sup>ND</sup> RESPONDENT</b> |
| <b>Y M[...]</b>                     | <b>3<sup>RD</sup> RESPONDENT</b> |
| <b>THE MASTER OF THE HIGH COURT</b> | <b>4<sup>TH</sup> RESPONDENT</b> |
| <b>THE REGISTRAR OF DEEDS</b>       | <b>5<sup>TH</sup>RESPONDENT</b>  |

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**JUDGMENT**

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Maumela J.

1. In this case, the applicants applied for an order towards the cancellation of a title deed over the property referred to as Erf [...] [...]Street [...], P[...]. This property is registered in favor of the First Respondent. In the order sought, the Applicant also seeks for his Attorneys of record to be appointed as liquidators who shall dispose of the property accordingly. The application is opposed.
2. The Defendant raised points *in limine*. The First Point in Limine raised is that the Applicants filed documents in their second indexed bundle to this application that do not form part of any affidavit. The Defendants also raise the issue that this includes among other items, letters of authority and a report from the Registrar of Deeds. The Defendants point out that these documents do not form part of the founding or replying affidavit of the Applicants.
3. The Defendants point out that a litigant in civil proceedings has the option of approaching a court for relief on application as opposed to an action. Should a litigant decide to proceed by way of application, Rule 6 of the Uniform Rules of Court applies. This will set out the applicable sequence and the timing for the filing of the affidavits by the respective parties. They point out that an advantage inherent to application proceedings, even if opposed, is that they can lead to a speedy and efficient adjudication and resolution of the disputes between the parties. Unlike in actions, in application proceedings, the affidavits take the place, not only of the pleadings, but also of the essential evidence which would be led at the trial.
4. It is trite that in application proceedings, evidence must be led before court, by way of affidavit. The affidavits are limited to three sets. The Defendants point out that the Rule was succinctly explained in the Supreme Court of Appeal judgment in the case of *Hano trading CC v J R 209 Investments (Pty) Ltd and Another*<sup>1</sup> where the court stated the following: “*it follows thus, that great care must be taken to fully set out the case of the party on whose behalf an affidavit is filed. It is therefore not surprising that the Rule 6 (5) (e) provides that further affidavits may only be allowed at the discretion of the court.*”

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<sup>1</sup>. 2013 (1) All SA 142 (SCA).

5. In The case of *Standard Bank of SA Ltd v Sewpersadh and Another*<sup>2</sup>, it was held: “[13] clearly, a litigant who wished to file a further affidavit must make a formal application for leave to do so. It cannot simply sign the affidavit into the court file (as appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as *pro non scripto*.” Rule 6 (5) (e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as *arbiter*, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.
6. The Defendants point out that the Applicants in this case did not even attempt to file a supplementary affidavit in order to request the court to exercise its discretion towards allowing such affidavit to be filed of record. Instead, the Respondents merely attempted to place the documents before court via the indexes they filed. The Defendants make the point that this is not compliant with the Rules of Court. On that basis, they submit that these documents ought to be deemed to be inadmissible.

#### SECOND POINT *IN LIMINE*: PRESCRIPTION:

7. The First Applicant also indicated that there is no possibility that the opposing parties in this matter may ever resolve their dispute on paper and that is why he and the other Applicants had to launch this application in order to obtain relief. The first Applicants stated that Ms. Manamela has accepted her appointment as ‘Receiver and Liquidator’ to dispose of the property. Her consent in that regard is attached as “FM5”. The First Respondent stated that from the time of the death of the deceased until now, only the First, Second and Third Respondents have benefited from possession and use of the property. He said that in that regard, he and the other Applicants reserve their rights to sue for damages to such extent as they suffered such.
8. The First, Second and Third Respondents attested to affidavits in opposition of

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<sup>2</sup>. 2005 (4) SA 148 (C).

this application. Margret Manzini, the Second Respondent, resident at No 1[...] [...] Street, [...], Gauteng, stated that she and the other two Respondents are biological children of the deceased; the late J M M[...] who died on the 20<sup>th</sup> of October 2008. She stated that at his demise, the deceased left behind the property referred to. She told court that her biological son purchased the property from her and the other beneficiaries at an amount of R 25 000-00, (Twenty-Five Thousand Rand). Accordingly, the property was transferred into the names of her son. The Second Respondent said that she was shocked to find out that the Applicants issued an application 4 years after the property had been transferred. She said that the Applicants claimed to be children of the deceased who are entitled to a portion of the property. She stated that she and her co-Respondents had never met or seen the Applicants.

9. The Respondents also point out that no documentary proof is attached to either the founding affidavit or replying affidavit in which it is averred that the Applicants are the children of the deceased. In order to be successful in their claim, the Applicants must prove on the balance of probabilities that they are in fact children of the deceased. The Respondents argue that the onus to prove that they are children of the deceased rests firmly on the Applicants however, that onus has not been discharged.
10. The Respondents submit that the application has prescribed because it was lodged more than three years after they became aware of the relevant facts. Concerning merits, it is submitted that the Applicants have failed to discharge the evidentiary burden placed upon them by neglecting to provide proof that they are children of the deceased. The Respondents submit that on that basis alone, the application stands to be dismissed with costs. The Respondents also submit that it is clear from the papers that there is a material dispute of fact and the Applicants were aware that the dispute cannot be decided solely on the papers.
11. The Respondents also submit that they have defences at their disposal which they intend to raise against the claim brought against them. They submitted that the relief sought against them is premature because no claim has been lodged

against the estate by the Applicants and should the property be transferred back to the estate; the executors are entitled to deal with the property. Based on that, the Respondents submit that this application is wholly defective and it has to be dismissed with costs on an attorney and client scale.

12. This Application was brought more than 8 years after the Applicants became aware of their claim against the estate of the deceased and more than 6 years after the property was transferred into the name of the First Respondent. Furthermore, the Applicants state that when they became aware of the transfer of the Property into the names of the First Respondent, they approached the Fourth Respondent to inform same that they are children of the deceased. More than 3 years elapsed from the time the Applicants brought this matter to the office of the Master. That is the timing at which this Application was served.
13. This application was opposed because the Fourth Respondent was still busy with investigations. It was submitted that the application is therefore premature. The First Applicant stated that since a determination has been made, and since the Applicants have become recognized as children of the deceased, he was advised to no longer pursue the application. The First Applicant was advised that it is better to proceed and cancel the First Respondents' ownership. A further advice was that at the same time, Ms. Phuthi Manamela of Phuthi Manamela Attorneys is to be appointed as 'Receiver and Liquidator' for her to dispose of the property. As such, the initial application was withdrawn. The court is to consider whether the Applicants have made their case so that the prayers they seek can be granted.

#### DEFENCES RAISED BY THE THIRD RESPONDENTS.

14. THE APPLICANT'S RIGHT TO CLAIM.

The Respondents point out that the basis on which the Applicants seek relief as per their notice of motion is that they claim to be children of the deceased and that they too deserve to be among those who deserve to inherit from the estate of the deceased. On that basis, they contend that they are therefore entitled to the property which was transferred to the First Respondent.

15. The Applicants brought this application without providing any proof that they are in reality children of the deceased. No documentary proof was attached to either their founding affidavit or their replying affidavit in which it is stated that they are children of the deceased. In order to be successful in their claim, the Applicants must prove on the balance of probabilities that they are in fact children of the deceased. They bear that onus and in order to succeed in their application, they ought to discharge it. The Respondents state in their opposing affidavit that they have never met the Applicants so that they have not engaged them where they could have denied or agreed to the claim that the Applicants are children of the deceased.
16. The Respondents point out that the only evidence provided by the Applicants to try and support their claim is a marriage certificate of the deceased. However, the marriage certificate provides no evidentiary proof of the identity of the Applicants. They point out that a mere birth certificate which is easily obtainable from the Department of Home Affairs could have shed a light about who the father of the Applicants is. Nonetheless, such documentation was not provided by the Applicants. Neither have the Applicants taken the Court into their confidence by giving an explanation about why such a document was not provided together with the Founding or Replying papers.
17. The Respondents take issue with the averment made by the Applicants where they, (the Applicants), allege that a determination was made in which they have been recognized as children of the deceased. They raise the issue that while the Applicants made this contention, they failed to provide proof regarding how and by who this determination was made.
18. It is trite law that in an application like this, it is incumbent upon the Applicant to state his or her entire case in the founding affidavit so as to enable the Respondent to be conversant with the entirety of the nature of the case he or she has to answer to. In the case of *Director of Hospital Services v Mistry*<sup>3</sup>, Diemont JA stated the following: “*When, as in this case, the proceedings are*

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<sup>3</sup>. 1979 (1) SA 626 (A), at 635H–636B

*launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas<sup>4</sup> and as has been said in many other cases: "...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny". Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, "it is not permissible to make out new grounds for the application in the replying affidavit" (per VAN WINSEN J in SA Railways Recreation Club and Another v Gordonias Liquor Licensing Board<sup>5</sup>.)" Also see Minister of Safety and Security v Mhobe<sup>6</sup>, at paragraph 9 as well as Monteoli v Woolworths (Pty) Ltd<sup>7</sup>, at paragraph 25 to 29.*

19. The Respondents also submit that the Fourth Respondent does not have inherent powers to adjudicate or to decide on matters such as paternity and the validity of a particular heir. They argue that the Applicants ought to have approached the court in order to establish a valid and credible determination on whether they are children of the deceased and are entitled to the relief sought in this application or not.

#### EVALUATION.

20. In this case, responding to the founding affidavit by the Applicants, the Respondents raised points *in limine* which they substantiated. In that regard, the first point *in limine* they raised is about the fact that the Applicants filed documents in their second indexed bundle to this application which do not form part of any affidavit. In that regard, the documents referred to are among other items, letters of authority and a report from the Registrar of Deeds.
21. The second point *in limine* raised by the Respondents is about the fact that the Applicants lodged their application outside the required time period. The

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<sup>4</sup>. 1942 WLD 67 at page 68.

<sup>5</sup>. 1953 (3) SA 256 (C) at 260

<sup>6</sup>. [2007] 4 All SA 697 (SCA).

<sup>7</sup>. 2000 (4) SA 735 (W).

application was served on the 31<sup>st</sup> of May 2017. There is no dispute about the fact that the Applicant became aware of the fact that they have a claim in October 2008. At the same time, the Fourth Respondent issued a letter of executorship in 2008 in favour of the Second and Third Respondents. Subsequent to that, the Property in question was purchased by and transferred to the First Applicant in 2010.

22. This application was brought more than 8 years after the Applicants became aware of their claim against the estate of the deceased. This was more than 6 years after the property was transferred into the name of the First Respondent. The Applicants state that when they became aware of the transfer of the Property by the Fourth Respondent to the names of the First Respondent, they approached the Fourth Respondent to inform same that they are children of the deceased. This was more than 3 years after the Applicants reported this matter to the Master and from the date on which service of this Application was done.
23. This begs the question whether the Applicants were still within good time to launch this application. Where that is concerned, Section 12 of the Prescription Act comes into issue where it provides the following:
  - (1) *Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.*
  - (2) ...
  - (3) *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."*
24. It is indisputable that by the time the Applicants brought this application, their claim had prescribed. They made no attempt to explain their delay in an affidavit, neither did they apply for condonation of the delay. In fact, despite being solicited on numerous occasions, the applicants did not file heads which could have addressed the points *in limine* and the issues raised by the Respondents.
25. It is trite that the onus lies with the Applicants to prove their claim against the

Respondents. In the case of in *Selamolele v Makhado*<sup>8</sup>, on the aspect of the onus of proof in civil matters, Van der Spuy, AJ stated the following: *“The onus of proof and the legal requirements as to the discharge thereof It is common cause that plaintiff bears the overall onus of proof, i.e. he must prove his version that he was pushed from behind and did not fall fortuitously backwards after a scuffle with defendant. It may be that defendant has some duty of adducing evidence in support of the latter version but the onus of proof in the overall case never shifts and remains on plaintiff. See Pillay v Krishna*<sup>9</sup>.”

26. The question relating to whether the deceased is father to the Applicants has not been resolved. Scientific proof of paternity requires to be conducted. Valid results of such a test need to be produced for consideration by the court in order to enable the court to make a determination. Neither the Master of the High Court, (the Fourth Respondent), nor this court can decide on the paternity of the Applicants and the validity of a particular heir.
27. As a result, they Applicant have not proven that they are children of the deceased and are entitled to the relief sought in this application. Consequently, the court finds that the Applicants did not prove their case against the Respondents the application stands to be dismissed with costs.
28. In the result, the following order is made:

ORDER.

28.1. The application is dismissed with costs.

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T.A. Maumela.

Judge of the High Court of South Africa.

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<sup>8</sup>. 1988(2) SA 372 (V), at page 374.

<sup>9</sup>. 1946 AD 946 at 952-3.