



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 60621/17

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
22/03/2019..... DATE	
 SIGNATURE	

In the matter between:

DAVID MOROBI SELWANE

Applicant

and

BESSIE MOKGADI MOGALE

1st Respondent

MASTER OF THE SOUTH GAUTENG HIGH COURT

2nd Respondent

JUDGMENT

MNGQIBISA-THUSI J

[1] The applicant, Mr David Morobi Selwane, seeks an order in terms of which:

- 1.1 the first respondent, Mrs Bessie Mokgadi Mogale, is ordered to surrender to the applicant all assets, (inclusive of motor vehicles, documentation relating to the motor vehicles and any income generated through the vehicles) and identity document of the late Matsobane Piet Masemola ("the deceased");
- 1.2 in the event of the first respondent failing to surrender the assets as set out in the notice of motion, the South African Police be directed to assist the sheriff, Halfway House, in executing the order sought; and
- 1.3 Costs on an attorney and client scale.

[2] In his founding affidavit, the applicant alleges that on 13 June 2017 the Master of this court appointed him as the executor of the deceased estate. Attached to the founding affidavit is the death certificate of the deceased. However, the applicant has not attached the said letters of executorship he is relying on for his claim. In his replying affidavit the applicant claims to be the son of the deceased.

[3] The applicant further alleges that on 29 July 2017 he caused to be delivered to the first respondent a letter of demand for the surrender of the assets of the deceased estate to him.

- [4] It is the applicant's contention that as the duly appointed executor of the deceased estate, the refusal by the first respondent to release the deceased estate into his control prevents him from performing his duties as an executor as envisaged in s 26 of the Administration of Estates Act¹.
- [5] On behalf of the first respondent it was submitted that the first respondent was married to the deceased by customary marriage. Attached to the first respondent's answering affidavit, as proof of the marriage, is a copy purporting to be marriage certificate. The said copy reflects that the marriage was entered into on 13 August 1987. It is the first respondent's contention that the applicant obtained the letters of executorship through fraudulent means as he was not known to her and it was questionable where he obtained the deceased's documents in order to apply for appointment as executor of the deceased estate. Further, the first respondent contends that the applicant's appointment as executor of the deceased estate is suspicious if one takes into account the provisions of s 19 of the Act which gives the surviving spouse of a deceased person preference with regard to the appointment of an executor.
- [6] With regard to the assets sought by the applicant it is the first respondent's contention that not all motor vehicles in her possession were owned by the deceased and therefore cannot be sought to be surrendered to the applicant.
- [7] The following disputes are apparent in this matter:

¹ Act 66 of 1965.

7.1 Whether the first respondent was married to the deceased;

7.2 Whether the applicant is the deceased son;

7.3 In the event that the first respondent was married to the deceased, the basis on which the applicant was appointed an executor of the deceased estate.

[8] Motion proceedings are decided on the papers filed by the parties. In case where there is a factual dispute that can only be resolved through oral evidence,² action proceedings are appropriate unless the factual dispute is not real and genuine.³ In *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*,⁴ the court held that where there is a dispute of facts, final relief should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order.⁵

[9] This rule applies irrespective of where the *onus* lies. Where a factual dispute exists or arises during the hearing of an application and the applicant does not seek the matter to be referred either to oral evidence on a specific issue which is in dispute or to trial, the court has a discretion either to dismiss the application or direct that oral evidence be heard or that the matter goes to trial.

² *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A).

³ *Soffiantini v Mould* [1956] 4 All SA 171 (E).

⁴ 1957 (4) SA 234 ((C). See also *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428-429; *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) at 56F-57B.

⁵ At 235 E-G.

[10] Taking into account that in its answering affidavit, the first respondent had already alleged she was married to the deceased by customary law and that she was not aware of the applicant being the son of the deceased, the applicant should have foreseen the existence of a dispute of facts which cannot be resolved on the papers. It was up to the applicant at the beginning of the hearing to seek a referral to oral evidence on the issues mentioned in paragraph 7 above. Bearing in mind the undesirability of a court to *mero motu* refer an existing factual dispute to oral evidence, in view of the fact that the applicant did not seek a hearing of oral evidence in the alternative to his prayers, I am of the view that the appropriate order must be to dismiss the application. I am satisfied that the applicant has not shown sufficient cause why the relief sought should be granted.

[11] With regard to costs, the applicant had, in the event he succeeds a cost order on an attorney and client scale, I am of the view that since the first respondent is the successful party, that she is entitled to costs on the same scale as sought by the applicant.

[12] In the result the following order is granted:

'The application is dismissed with costs on an attorney and client scale'.


N P MNGQIBISA-THUSI

Judge of the High Court

For Applicant Khorombi Mabuli Attorneys and for Respondent Sibanda Bukhosi
Attorneys