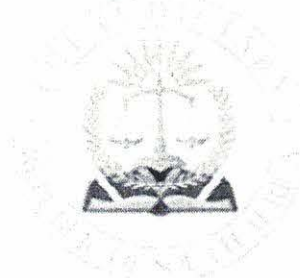
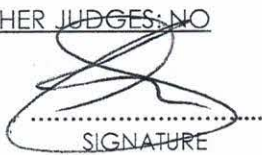


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, PRETORIA

CASE NO: 89054/2014

|               |                                                                                   |
|---------------|-----------------------------------------------------------------------------------|
| (1)           | <u>REPORTABLE: NO</u>                                                             |
| (2)           | <u>OF INTEREST TO OTHER JUDGES: NO</u>                                            |
| 16 March 2018 |  |
| DATE          | SIGNATURE                                                                         |

16/3/18

In the matter between:

**Manoko Engelina Masenya**

First Applicant

**Pheega Andrew Madiga NO**  
(in his capacity as the executor of the late  
Maisha Joseph Madiga)

Second Applicant

**Phillip Nkhure Madiga NO**  
(in his capacity as the executor of the late  
Maisha Joseph Madiga)

Third Applicant

and

**Nedbank Limited**  
(formerly known as Nedcor Bank Limited)

First Respondent

**Master of the High Court Polokwane**

Second Respondent

**Thomas Grobler Attorneys**

Third Respondent

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JUDGMENT

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**MIA, AJ**

[1] The first applicant, Engelina Masenya Manoko, is an executrix in the estate of the late Maisha Joseph Madiga (deceased) who died on 18 July 2012. The second and third applicants are co-executors in the estate of the late Maisha Joseph Madiga. The first applicant seeks various orders related to the property situated at 4 Earth Street, Polokwane, Limpopo Street, Limpopo Province namely:

1. Condoning the late filing of this application;
2. That the First Respondent be directed to stay the transfer of the immovable property known as Erf 10787 Extension 61 Township, Polokwane also known as 4 Earth Street, Polokwane, Limpopo Street, Limpopo Province, pending the finalisation of the estate of the late Maisha Joseph Madiga;
3. That judgment granted in favour of the First Respondent against the executors of the aforementioned estate of Maisha Joseph Madiga be rescinded and set-aside;
4. That the execution processes declaring Erf 10787 Polokwane Extension 61 Township, Registration Division LS, Province of Limpopo measuring 433(four hundred and thirty three) square metres held by Deed of Transfer T70005/08 be stayed until the final liquidation and distribution account is filed with the Second Respondent;
5. That the Second Respondent be ordered to avail any documents which are in its control and possession to the applicants with immediate effect;
6. That the Third Respondent be directed to furnish written reasons as to why did it fail to file the liquidation and distribution account as ordered by the court under case number 89054/2012, Estate number 794/2012 on behalf of the applicants with immediate effect;

7. That the mortgagee be ordered to make available the balance of the mortgage bond B72668/2008 with immediate effect.
8. That any party who opposes this application be ordered to pay the costs of this application at an attorney and own client scale.

[2] The matter was set down by the first respondent who sought to have the application dismissed with costs to enable it to proceed to have the property transferred into its name. The applicants were not present when the matter was argued despite a notice of set down having been served on Zamisha Shisinga Attorneys who were the last attorneys on record<sup>1</sup>. Mr Du Plessis, Counsel for the first respondent informed this court that Zamisha Shisinga Attorneys withdrew as the attorney of record on 19 February 2018. There is no record thereof on the court file. I expressed my reservations about the applicants being aware that the matter was on the roll. Mr Du Plessis submitted that it was trite that in such circumstances Zamisha Shisinga Attorneys would in the normal course have informed their clients of their withdrawal at such a late stage prior to their withdrawal and informed them of the date of the hearing.

[3] I noted further that the applicants' at the outset served the notice of motion on the first respondent and not on the second and third respondents. The first respondent also did not serve the notice of set down on either the second and third respondents. Mr Du Plessis submitted however that the matter was properly set down between the applicants and the first respondent as early as 1 November 2017. He highlighted further that the court has been ceased with this matter for five years where relief has been sought in respect of the immovable property. The applicants had been dilatory in the extreme herein.

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<sup>1</sup> First Respondent's Opposing Affidavit, p182

- [4] In considering the dispute it is useful to understand the background to the application. The first applicant was married to the deceased in community of property. The second and third applicants were born during the subsistence of the marriage.
- [5] During the marriage an amount of R430 251 was advanced to the first applicant and deceased under security of a mortgage bond over certain immovable property known as erf 3844 Zone 2, Seshego, Polokwane. The parties failed to meet their obligations under the bond. Default judgment was granted by the Registrar on 29 January 2010. The property was declared executable by the registrar of the court on 29 January 2010 and a warrant of attachment issued. In the interim the parties marriage was dissolved on 12 August 2009. In terms of the decree of divorce the joint estate was to be divided equally. This did not occur. The bank entered into a distressed restructure agreement in respect of the home loan on 17 June 2010 with both parties.
- [6] Upon the death of Mr Madiga in 2012, the Master of the High Court issued letters of authority instead of letters of executorship. The first applicant appointed the third respondent to wind up the estate and to file the liquidation and distribution account after receiving requests for same. The joint estate was not divided after the decree of divorce, and the liquidation and distribution account of the deceased, Mr Madiga was not lodged. The winding up of the estate of deceased remains unfinalised.
- [7] The first applicant had given instruction initially to Thomas Grobler attorneys and later to Zamisha Shingisa attorneys to wind up the estate and lodge the liquidation and distribution account. Neither firm of attorneys have managed to attend to same. Whilst the first applicant seeks relief that the third respondent explain why this has not occurred,

it appears that the papers were not served on the second and third respondent either by the first applicant nor was the notice of set down filed on the second and third respondent. No relief is competent in this respect consequently.

- [8] Mr Du Plessis' submission was that the deceased's estate be finally wound up. The first respondent had granted many indulgences to the applicants. A liquidation and distribution account has not been filed by the applicants' attorneys Thomas Grobler Attorneys or Zamisha Shisinga Attorneys. The first applicant raised aspects in her affidavit such as her lack of knowledge of the law and being furnished with inadequate information, however despite receiving numerous requests from Hack Stupel & Ross Attorneys, the first respondent's attorneys she failed to attend to winding up the deceased estate, she failed to lodge the liquidation and distribution account and she failed to apply to have the bond transferred to her name in terms of section 45.
- [9] He submitted that the first applicant's conduct was characterised by delaying tactics because once the liquidation and distribution account was lodged it would be the end of the matter. Further the first applicant failed to defend the summons which resulted in default judgment being granted on 29 January 2008, and the property being attached on 11 January 2010. He submitted that the first respondent had bent over backwards to accommodate first applicant and the deceased by concluding the distressed restructuring agreement on 17 June 2010. After the deceased passed away in 2012 nothing happened with finalising the deceased estate. The applicant's present ignorance as a defence but their inaction with the assistance of her attorney does not explain the lack of attending to crucial matters over a period of five years.

- [10] The first respondent's attorneys presented correspondence which span a period of five years wherein attempts were made to secure the first applicant's co-operation and to ensure the matter could be finalised. In view of the applicants' unwillingness and or refusal to finalise the winding up of the deceased's estate, the first respondent was forced to lodge an application to compel the applicants' to file the liquidation and distribution account which order was granted on 28 January 2015 by Khumalo J that the parties were to file the liquidation and distribution account within three months. The order was served upon all applicants. There can be no doubt they knew about the existence of the order.
- [11] The third respondent then provided the first respondent with letters of executorship and indicated that the first applicant wished to take over the immovable property. This required the first applicant to attend upon a branch of the first respondent to apply for a section 45 endorsement in respect of the immovable property. The first applicant failed to do so to date. A perusal of the correspondence of the third respondent indicates that the first applicant failed to furnish the third respondent with instructions over a period of time and was uncontactable. On 11 August 2016 an application in terms of Rule 46 was served on the first applicant and the second respondent. The relief was granted by Fabricius J. A warrant of execution was issued against the immovable property on 5 September 2016 and a sale in execution was scheduled for 30 November 2016. The first respondent purchased the property for an amount of R293 000. On 7 March 2017, the attorneys informed the first applicant that they were proceeding with the transfer of the immovable property. At this point the first applicant's attorneys requested the outstanding balance.
- [12] The applicant is required to show good cause for rescission in terms of Rule 31(2)(b) The applicant has had an attorney on record for five

years and on relies on a lack of knowledge. This does not constitute good cause and is an unacceptable explanation for her dilatory conduct. There is further no explanation why she failed to apply for an endorsement in terms of section 45.

[13] The applicants are in wilful default in defending both applications preceding the attachment of the immovable property as well as the sale of the immovable property. The applicants have not given a reasonable explanation for their default and delay in lodging the liquidation and distribution account, for defending the first respondent's claims, for disregarding the order of Khumalo J and the first applicant for failing to apply for an endorsement in terms of sections 45. The applicants have failed in their fiduciary obligations. The property sold for R293 000 on an outstanding loan of R400 000. There remains a deficit of R100 000.

[14] Mr Du Plessis submitted that if the applicant were to argue a lack of funds to instruct an attorney this was not accepted as a reasonable explanation in *Bowes v Pinnick* 1905 TS 156. He submitted further that the dilatory nature of the applicant is relevant. This too was not accepted as a reasonable explanation. In this regard he relied on the decision in *Scholtz v Merryweather* 2014(6) SA 90(WCC) at 94F-96C. In view of the above he submitted that the application be dismissed with costs.

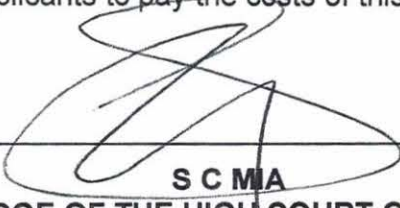
[15] I am persuaded by the submissions made on behalf of the first respondent. There is no reasonable explanation on the papers for the applicants' delay in bringing the application or for failing to defend the various applications which have been launched wherein relief was granted. There has been a delay and a disregard for the various orders handed down and there are ground on which the transfer ought to be

stayed or the rescission granted in the absence of good reasons on the part of the applicants.

**ORDER**

[16] For the above reasons the following order is made:

1. The application is dismissed.
2. The applicants to pay the costs of this application.



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**S C MIA**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

**Appearances:**

|                            |   |                                |
|----------------------------|---|--------------------------------|
| On behalf of the applicant | : | No Appearance                  |
| Instructed by              | : | No Appearance                  |
| On behalf of the Defendant | : | Adv J A Du Plessis             |
| Instructed by              | : | Hack Stupel and Ross Attorneys |
| Date of hearing            | : | 26 February 2018               |
| Date of judgment           | : | 16 March 2018                  |