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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: 1173/2018

In the matter between:

COENRAAD OTTO SCHEEPERS

Applicant

and

**THE MASTER OF THE HIGH COURT,
FREE STATE**

First Respondent

MARIECHEN ALICE MAARTENS N.O.

Second Respondent

HENRIETTE ALICE MULLER
(born **SCHEEPERS**)

Third Respondent

SUSANA HELENA BAM
(born **SCHEEPERS**)

Fourth Respondent

HEARD ON: 20 SEPTEMBER 2018

JUDGMENT BY: DANISO, AJ

DELIVERED ON: 16 NOVEMBER 2018

- [1] This is matter involves a sibling dispute over a jointly inherited property. The applicant and the respondents, third and fourth are siblings and the joint heirs in the estate of their mother, Ms Alice Lloyd Scheepers.
- [2] The pertinent facts of this matter are the following: Ms Scheepers passed away on the 04th of February 2017. In her will, she had nominated the second respondent, a cousin of the heirs as the executrix of the estate. The second respondent was subsequently appointed executrix by the first respondent, the Master of the High Court ('the Master') on 14 February 2017.
- [3] In the deceased estate there is an immovable property described as ***the remainder of Erf [...], Oesterbaai, District Humansdorp, Province Eastern Cape, also known [...] G***

Street, Oesterbaai ('the immovable property) bequeathed to the heirs in equal shares, however, there was also a cash shortfall of about R187 008.21. The heirs were requested to agree on the manner in which the shortfall could be settled. They failed to do so. The second respondent then came to the conclusion that the immovable property had to be sold in order to offset the shortfall.

- [4] The heirs were given the first option to purchase the property but only one of the heirs, the fourth respondent made an offer. On 17 November 2017 the second respondent lodged a liquidation and distribution account in which she made provision for the sale of the immovable property to the fourth respondent in the sum of R600 000.00 and also for payment of R93 259.30 in respect of her (the fourth respondent) claim against the estate.
- [5] On 05 December 2017 the applicant and the third respondent's attorneys filed an objection to the liquidation and distribution account, primarily to the sale of the immovable property and the acceptance of the claim against the estate. It was the applicant's contention that the decision of the second respondent in that regard was detrimental to the heirs of the estate in that she sold the immovable property to the fourth respondent at a less amount (R600 000.00) than it was valued (R900 000.00). The second respondent also accepted a claim against the estate despite the fact that the claim was unverified.
- [6] On 05 February 2018 the Master dismissed the objection on the basis that it was within the powers of the second respondent as an

executrix to accept the offer made to purchase the immovable property and to accept claims against the estate.

[7] The applicant aggrieved by the Master's decision, has launched these proceedings seeking an order on the following terms;-

1. That the decision of the Master of the High court of the Free State Division dismissing the Applicant's objection dated 5 December 2017 against the First and Final Liquidation and Distribution Account submitted before the Master of this Honourable Court on the 17th of November 2017, is set aside and replaced with the following:

*"1.1 That the Executrix is ordered to set aside the transfer of the property known as **the remainder of Erf [...], Oesterbaai, District Humansdorp, Province Eastern Cape**, also known [...] **G Street, Oesterbaai** to the Fourth Respondent;*

1.2 That the said property be disposed of by way of public auction; and

*1.3 That the Executrix is ordered to dismiss the Fourth Respondent's claim against the estate in the amount of **R93 259.30**.*

2. The cost of this application be paid for by the estate, alternative by any party/parties opposing the application, jointly and severally.”

3. Further and/or alternative relief.

- [8] The application is only opposed by the second and the fourth respondents. The third respondent supports the relief sought by the applicant.
- [9] The applicant's replying affidavit as contemplated in Rule 6(5) (e) of the Uniform Rules of Court was delivered out of time. The affidavit was due on 2 May 2018 but only filed on 14 May 2018. The replying affidavit was accordingly 8 days late. It was the applicant's submission that the delay was occasioned by unavailability of both counsel and the applicant's attorney. The applicant's attorney was hospitalized during the periods 08 to 10 May 2018 while counsel was only available on 11 May 2018. The affidavit was then only finalized on 14 May 2018. In light of the fact that the respondents have refused to consent to the late filing of the replying affidavit, the applicant has no alternative but to seek condonation from the court.
- [10] It is trite that that condonation cannot be had for the mere asking, it is an indulgence which a court has discretion on whether to grant it or not. The applicant must show sufficient cause entitling it to the court's indulgence by giving a full explanation for the non-compliance with the court rules. In my view the fact that the

period of delay in delivering the replying affidavit is not excessive, the explanation for the delay has been fully and sufficiently given and that no prejudice has been indicated by the respondents, constitutes sufficient cause warranting the court applying its discretion in the applicant's favour. The applicant's unintended ineptitude ought not prejudice him in exercising his rights to bring his matter before court. It is also in the interests of the respondents as well that this matter is finalized. Condonation for the late filing of the applicant's replying affidavit is granted.

[11] Before turning to the issue to be considered in this application, there is a point *in limine* raised by the respondents that needs to be addressed. It was the respondents' case that the application should have been premised on section 95 as it relates to the second respondent's decision to sell and transfer the immovable property to the fourth respondent and the Master's decision to issue a certificate in terms of section 42(2). The applicant has chosen the wrong procedure by bringing the application in terms of section 35 (10), the application is thus legally untenable and cause to be dismissed.

[12] I disagree. This is an application to review and set aside the Master's decision to dismiss an objection to the liquidation and distribution. According to section 35(10) of the Act:-

"Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an

order to set aside the Master's decision and the Court may make such order as it may think fit."

- [13] The provisions of section 35(10) must be read with sub-sections 7, 8 and 9 which provide that:-

"(7) Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons therefor, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.

- (8) The executor shall, within fourteen days after receipt by him of the copy of the objection, transmit two copies of his comments thereon to the Master.*

- (9) If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of opinion that such objection is well-founded or if, apart from any objection, he is of opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit."*

- [14] Having regard to the above-mentioned factors it is clear that where the Master's decision with regard to objections filed against the liquidation and distribution account is challenged, the provisions of section 35(10) come to play. There is accordingly no merit to the respondents' objection in this regard. The point *in limine* is dismissed.

- [15] This brings me to the merits of the application. The applicant contends that the Master's decision was unreasonable and irrational. The Master should have instructed the executrix to set aside the sale agreement of the immovable property as well as the fourth respondent's claim of R93 259.30.
- [16] It is trite that unless the will provides otherwise, section 47 permits the executrix to sell the property of the estate. What is required is that the sale must be subject to the conditions approved by the heirs in writing, alternatively, by the Master. In this matter the sale of the immovable property was approved by the Master after the fourth respondent made the offer to purchase the property while the other heirs refused to participate in the sale negotiations.
- [17] The applicant argues that it was not within the powers of the executrix to accept an offer which was R300 000.00 less than the value of the immovable property. On the facts germane to this matter, the only offer presented to the second respondent was from the fourth respondent, the applicant and the third respondent refused to participate in the sale negotiations, in fact the applicant even stated that he was not willing to purchase a property he was meant to inherit. The second respondent was therefore left with no option but to accept an offer that was less than the appraised value as it was the only offer that was forthcoming and she was also advised by the valuers that it will take time and it will also be difficult to get the value in an open market.

- [18] In respect of the claim against the estate, the applicant averred that the second respondent accepted a claim without proof. There is no truth to this submission. On the available evidence an ample number of receipts and invoices attesting to the expenses incurred by the fourth respondent in this regard were provided to the applicant upon request. It is also important to note that the fourth respondent carried out the renovations to the property pursuant to the agreement by all the heirs on the basis that she will be reimbursed for her for the costs in that regard.
- [19] In his replying affidavit the applicant traverses additional and alternative prayers by incorporating a tender to the effect that the immovable property be transferred to the heirs in equal shares. This is despite the fact that the property has already been purchased and transferred to the fourth respondent.
- [20] The applicant further requests that the issues relating to the verification of the value of the property; the circumstances relating to the conclusion of the deed of sale, including the decision to sell to the Fourth Respondent; and establishment of the claim of the Fourth Respondent, including whether the renovations were indeed necessary or useful or merely cosmetic be referred to oral evidence, or trial or back to the Master for the reconsideration of the decision regarding the two objections.
- [21] In motion proceedings the court can direct that oral evidence be heard on specified issues where there are disputed facts which cannot be resolved on affidavits. In the present case there were no

disputes which could not properly be decided on affidavits. It is accordingly not necessary to redirect the proceedings for oral evidence or trial. Similarly, I'm not persuaded that it will serve any purpose to refer the matter back to the Master. The applicant has already shunned the directives of the Master, he refused to participate in the negotiation processes.

[22] For the reasons that I have set out above, I find that the Master's decision in dismissing the objections to the liquidation and distribution account cannot be faulted. It follows therefore that the application cannot succeed.

[23] In the premises, I hereby make the following orders:

1. The application is dismissed with costs.

NS DANISO, AJ

APPEARANCES:

Counsel on behalf of Applicant:

Advocate LA Roux

Instructed by:

Lovius Block Attorneys

BLOEMFONTEIN

Counsel on behalf of Second Respondent:

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