Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 448/2017

Heard On: 27/03/2018

Delivered on: 18/05/2018

In the matter between

CECILIA KENEWANG OLIPHANT N.O. — **Applicant/Plaintiff**

(In her capacity as an estate heir of the Deceased estate of the late Rosy Oliphant With Estate No. 1647/2008

And

LUCAS OLIPHANT — **First Respondent/Defendant**

DAVID OLIPHANT — **Second Respondent/Defendant**

THE MASTER OF THE NORTHERN CAPE HIGH COURT, KIMBERLEY — **Third Respondent/Defendant**

THE REGISTRAR OF DEEDS, KIMBERLEY — **Fourth Respondent/Defendant**

JUDGMEMT ON APPLICATION FOR LEAVE TO APPEAL

PAKATI ADJP

[1] The applicant/plaintiff, Ms Cecilia Oliphant, applies for leave to appeal against the whole judgment and the order I granted on 16 January 2018 upholding the special pleas of prescription and *locus standi* with costs. She filed her notice dated 06 February 2018 the same day. The first respondent/defendant, Mr Lucas Oliphant, opposes the application. For convenience, I will refer to the parties as the plaintiff and the first defendant.

[2] The plaintiff, in his notice listed three grounds that can be summarised as follows:

2.1 That I erred in upholding the special plea raised by the first defendant against her claim thereby holding that the claim was a debt in terms of s 11 (d) of the Prescription Act, 68 of 1969 ("the Prescription Act"), and also finding that her claim had prescribed;

2.2 That because I found that there was no indication that the winding up of the estate had finalised I should have concluded that the claim of the heirs remained suspended and prescription did not run. Due to the fact that property in question constituted immovable property the claim of the heirs would be extinguished by prescription after a period of 30 years had lapsed in terms of s 1 of the Act; and

2.3 That I erred in finding that the plaintiff's claim was based on liquidation of the deceased estate and not holding that the plaintiff, like the first and second defendants, were entitled to the equal distribution of the deceased estate as heirs having *locus standi* to challenge the registration of the immovable property by the first defendant into his own name.

[3] Mr Bokaba's argument is *inter alia* based on s 39 of the Administration of Estates Act, 66 of 1965 ("the Act"), and two SCA cases, namely **LEGATOR McKENNA v SHEA**[1] and **BESTERAND & OTHERS NNO v SCHMIDT BOU ONTWIKKELINGS CC**[2]. S 39 (1) of the Act provides that:

> *"An executor shall, subject to the provisions of subsections (2) and (3), the Deeds Registries Act, 1937 (Act 47 of 1937), cause immovable property (including, in the case of a massed estate, any such property forming part of the share of the survivor or survivors of that estate) to which an heir is entitled according to a distribution account, to be registered in the name of the heir, subject to any rights and conditions affecting such property."*

[4] The first defendant claimed that on 27 March 2002 he was appointed as the representative of the deceased estate and that the plaintiff was aware of this. He did not explain the circumstances surrounding the transfer of the immovable property into his own name.

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[1] 2010 91) SA 35 (SCA) para 22

[2] 2013 (1) SA 125 (SCA) para 8

[5] Regarding *locus standi* the parties are *ad idem* that only the executor has *locus standi* to liquidate and distribute the deceased estate. Mr Bokaba argues that the first respondent went further and distributed the estate thereby registering the property into his own name. This stands against the background that he represented the estate and was not the owner.

[6] I reiterate what I said in my judgment that when the first respondent registered the property into his name there was no indication that at the time the estate had already been wound up or that the liquidation and distribution account had been confirmed. Mr Bokaba asserts that the executor was expected to comply with sections 29 (1) and 35 (1) of the Act which he failed to do in terms of s 36 (1). For easy reference I will quote these sections in full. S 29 provides:

"29 Notice by executors to lodge claims

(1) <u>Every executor shall</u>, as soon as may be after letters of executorship have been granted to him, cause a notice to be published in the Gazette and in one or more newspapers circulating in the district in which the deceased ordinarily resided at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he so resided in any other district, also in one or more newspapers circulating in that other district, or if he was not ordinarily so resident in any district in the Republic, in one or more newspapers circulating in a district where the deceased owned property, calling upon all persons having claims against his estate to lodge such claims with the executor within such period (not being less than thirty days or more than three months) from the date of the latest publication of the notice as may be specified therein." My underlining

[7] S 35 dealing with the liquidation and distribution account provides:

"35 Liquidation and distribution accounts

(1). <u>An executor shall</u>, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but within –

(a) six months after letters of executorship have been granted to him; or
(b) such further period as the Master may in any case allow, submit to the Master an account in the prescribed form of the liquidation and distribution of the estate." My underlining

[8] It is important to note that both sections are peremptory. S 36 (1) deals with the executor's failure to perform his/her duties. It provides:

"36 failure by executor to lodge account or to perform duties

(1) If any executor fails to lodge any account with the Master as and when required by this Act, or lodge any voucher or vouchers in support of such account or any entry therein in accordance with a provision of or a requirement imposed under this Act or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information of proof required by him in connection with the liquidation and distribution of the estate may, after giving the executor not less than one month's notice, apply to the Court for an order directing the executor to lodge such account or voucher or vouchers in support thereof or of any entry therein or to perform such duty or to comply with such demand."

In casu there is no indication that the first defendant complied with the said provisions prior to registering the immovable property in his own name.

[9] In Besterand *supra* the Supreme Court of Appeal held:

"[8] Despite the liquidators' argument to the contrary on the papers the court a quo held that, according to the undisputed facts, there was no real agreement to transfer the remainder and therefore that, on the authority of Legator, Innova never became owner of the property. On appeal, the liquidators did not challenge the correctness of these conclusions and find them incontrovertible. From the finding that Schmidt Bou remained the owner of the remainder, it should also follow, as a matter of course, that Schmidt Bou was entitled to rectification of the deed of transfer in the records in the deeds registry so as to reflect the true ownership of that property.

"The Roman law did not know of the transfer by registration: that is an innovation of the Roman Dutch Law…The policy of our registration law with regard to fixed property requires the true contract under which the land is held to be reflected on the register.""

[10] In Legator above Brand JA stated:

"[22] In accordance with the abstract theory the requirement for the passing of ownership are two fold, namely delivery – which in the case of immovable property is effected by registration of transfer in the deeds office – coupled with a so-called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property…ownership will not pass despite registration of transfer – if there is a defect in the real right…"

[11] I reiterate what I stated in para 12 of my judgment that the deceased estate cannot be liquidated or distributed without letters of executorship or by the Master's direction.[3] This provision is peremptory.

[3] S 13 of the Administration of Estates Act, 66 of 1965

[12] Mr De Bruin, on behalf of the first defendant, argued that not all deceased estates are dealt with in terms of s 35 of the Act. In a case where the deceased died after 27 April 1994 but prior to 15 October 2004 and the estate was reported in the Magistrates' Court the Magistrate had to finalise the estate in terms of the intestate succession. He contends that the estate had already been wound up on 27 March 2002 when the first defendant was nominated as the sole beneficiary. According to the first defendant no objection was raised by the plaintiff from 27 March 2002 until 08 March 2013 when the property was transferred. He maintained that the plaintiff never became the owner of the immovable property thereby acquiring a real right subject to acquisitive prescription but a personal right which is subject to extinctive prescription.

[13] Taking into account the two judgments of the SCA herein I am of the view that another court may arrive at a different decision.

In the circumstances I grant the following order:

The application for leave to appeal is granted to the Full Bench of this Division.

BMPakati

BM PAKATI

ADJP

On Behalf of the Applicant: *ADV BOKABA*
Instructed by: *Thomas Kouter Attorneys*

On Behalf of the Respondent: *ADV DE BRUIN – 1st Respondent*
Instructed by: *Van de Wall & Partners*