

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4134/2015

In the matter between:-

MUSTAFA MOHAMED N.O.

Applicant

and

SHAMEEN HASSAN

1st Respondent

THE STANDARD BANK OF SOUTH AFRICA

2nd Respondent

THE MASTER OF THE HIGH COURT

3rd Respondent

HEARD ON: 3 DECEMBER 2015

JUDGMENT BY: KRUGER, J

DELIVERED ON: 3 DECEMBER 2015

[1] The applicant seeks an order terminating joint ownership of immovable property and authority to sell the property by public auction or private treaty.

[2] The first respondent was married to the deceased in accordance with Sharia Law as his second wife. She says that the deceased lived with his first wife, Zubeidah Hassan. The deceased and his first wife entered into a civil marriage subject to an ante-nuptial

contract. The first marriage subsisted until the date of the deceased's death.

- [3] The applicant acts herein as the executor in the estate of Yacoob Hassan who died at Cape Town on 4 November 2013. The applicant was appointed as executor by the Master of the High Court Pretoria (the third respondent) on 3 June 2015. The letter of appointment states that the applicant is appointed in his capacity as nominee of Vezi and De Beer attorneys. In a letter written by Vezi and De Beer attorneys attached to the replying affidavit dated 9 February 2015 it is stated that Vezi and De Beer act for the Standard Bank of South Africa, being a secured creditor in the estate of the deceased. The letter appears to have been written by the applicant. The executor of a deceased estate is legally vested with the administration of the estate (**Meyerowitz on Administration of Estates and Estate Duty**, 2004 Edition par 12.20). The executor holds a fiduciary duty which he must exercise with the utmost good faith. See **Lindenberg v Giess N.O. and Another** 1957 (3) SA 30 (SWA) at 33F-H. An executor must not abuse his position of trust (APJ Boucher, **Die Bereddingsproses van Bestorwe Boedels** (1967) 50). It is difficult to see how there is not a conflict between the applicant's role as attorney of a major creditor as opposed to being executor in the deceased estate.
- [4] In the founding affidavit the applicant says the purpose of the application is to obtain an order that the joint ownership of the property be terminated by an "equitable method".

- [5] The property was owned in undivided half-shares by the deceased and the first respondent. They bought the property on 18 May 2007 for R760 000. The property is 940 square metres. According to the title-deed the property was bonded for R760 000. At present R1 322 233.93 is outstanding on the bond.
- [6] The applicant, in his capacity as attorney of the second respondent, the Standard Bank, the bondholder asked the first respondent to either purchase the deceased's half share or to allow the applicant to sell the property as a whole, which she declined to do.
- [7] The applicant says in the founding affidavit that to the best of his knowledge there are no minor beneficiaries or heirs. That belief appeared to be incorrect after the first respondent's answering affidavit was filed, wherein she states she is living in the property with a minor child. A more important fact mentioned in the answering affidavit is that deceased was living with his first wife, Zubeidah Hassan in Cape Town. She also mentions a number of business interests the deceased had, and says she intends to lodge a claim for maintenance against the estate. She says the first duty of the executor is to trace all the assets belonging to the estate. That is the first duty of the executor.
- [8] In the replying affidavit the applicant admits that Muslim marriages are recognised for purposes of inheritance and maintenance. He also confirms that the deceased was married to his first wife by a civil marriage with ante-nuptial contract. All that the applicant did was to obtain a Consumer Profile Bureau Search in respect of the

deceased. That report revealed no assets, according to the applicant. It does not appear that the applicant ever spoke to the deceased's first wife or physically made any effort to trace assets, save for the internet searches.

- [9] The application is ill-founded. The first task of an executor is to search for assets and to advertise the estate in terms of section 29 of the Administration of Estates Act 66 of 1965. He must prepare an inventory in terms of section 9 of Act 66 of 1965.

- [10] Another serious problem is that it appears that the deceased died intestate and had two wives and at least four children. According to Islam law the wives get one quarter of the property and the children have the other three quarters. (**Introduction to Legal Pluralism** (2014) 4th Ed. by C. Rautenbach 390). The first wife and the children have rights and are necessary parties.

- [11] Applicant attaches to the founding affidavit a death notice dated 8 February 2015 wherein he states that the deceased resided in Pretoria (HAS8, p 55). In the answering affidavit the first respondent says the deceased lived with his first wife in Cape Town and was killed in a robbery at the place where he lived in Cape Town (AA par 14.5 and 14.6). These allegations are not disputed by the applicant in the replying affidavit (p 104 par 18). Thus it appears that the appointment of the applicant as executor was based on wrong information.

- [12] The applicant refers to emails, between first respondent's daughter and the applicant's firm. Apart for the fact that those documents

constitute hearsay evidence raised in reply, there is reference to “the property in Cape Town”.

[13] Mr Berry appeared for first respondent on the request of a judge of this court, and charged no fees. He requests that the applicant be dismissed, and that an order should be made that the applicant can recover no fees from the estate.

[14] There is doubt about the appointment of applicant. Further, applicant does not appear to be acting in the interest of the estate heirs. There is non-joinder of heirs. The assets have not been properly investigated.

ORDER

1. The application is dismissed.
2. The applicant may recover no costs from the estate or the bond account with the second respondent in respect of the fees incurred for this application.
3. I request that the registrar of this court send a copy of this judgment to the Master of the High Court Pretoria to consider whether the applicant is a proper person to be the executor in this estate and whether the Master should not request his colleague the Master in Cape Town to arrange for the appointment of an executor in that area. That is of course entirely in the discretion of the Masters and falls outside my province.

A. KRUGER, J

On behalf of First Respondent: Adv A Roux
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of Applicant: Adv AP Berry
Instructed by:
Blair Attorneys
BLOEMFONTEIN

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