

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

Case No: 13796/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

14 November 2024

In the matter between:

ESIE MOKGADI CATHERINE MASINGA

First Applicant

JACOBUS ROI MOKGETHI SELEMATSELA

Second Applicant

LYDIA CLARA MAODI

Third Applicant

and

TSHEPISO JOHN SELEMATSELA

First Respondent

ANNAH MAZIBUKO

Second Respondent

**THE MASTER OF THE HIGH COURT
PRETORIA**

Third Respondent

JUDGMENT

SK HASSIM J

The characterisation of this application

[1] This is an application to amongst others condone the late delivery of a Declaration.

Salient facts

[2] The applicants, and the first to third respondents are descendants of the late Mr Segope John Selematsela (“the deceased”). The applicants and the second respondent are his children. The first respondent is the deceased’s grandson and the second applicant’s son. The third respondent is described as a descendant of the deceased.

[3] The deceased, who died on 12 July 2019, was the owner of Erf No. 1[...] in Mamelodi (“the property”). According to the Windeed Property Search the first respondent seemingly purchased the property on 5 July 2018. It was transferred to him on 17 October 2018. The applicants allege that the sale was tainted by fraud.

The main application

[4] During February - March 2020, the applicants brought an application (“the main application”) against the first and second respondents (in this application) and the Registrar of Deeds (“the Registrar”) the third respondent, for the cancellation of Title Deed No. T[...] for the property, and for the Registrar to effect the cancellation. The application was opposed by the first and second respondents.

The referral of the main application to trial and the late delivery of the Declaration

[5] The main application was referred to trial on 25 April 2023, and the applicants were ordered to deliver a Declaration within twenty days. They failed to do so.

[6] The Declaration, which is dated 21 August 2023, was served on the respondents’ attorneys by e-mail on 22 August 2023. While signed by an attorney, it was not signed by counsel nor by a person with right of appearance in the High Court. The defendants were the following:

(a) Tshepiso John Selematsela, the first defendant. (The first respondent in the main application and this application).

- (b) Annah Mazibuko, the second defendant. (The second respondent in the main application and in this application).
- (c) The Registrar of Deeds, the third defendant. (The third respondent in the main application). The Registrar is not a party to this application.
- (d) Suzan Maratletle Masuku, the fourth defendant. She was not a party to the main application.
- (e) The Master of the High Court (“the Master”), fifth defendant. The Master too had not been a party to the main application.

[7] The Declaration contained two claims: Claim A was based on an alleged fraud on the part of the first respondent which resulted in the property being transferred to him. The applicants seek to declare the transfer to the first respondent invalid and for the property to be transferred to the deceased estate. Claim B was for the Master to issue to the first applicant letters of authority to administer the deceased estate on the basis that the first applicant as an heir of the deceased is entitled to be appointed as executrix by reason of section 19 of the Administration of Estates Act, Act No 66 of 1965. As appears hereunder, I am not prepared to decide the relief claimed in Claim B. It is therefore not necessary for me to consider whether the first applicant has a right to seek appointment as executrix or whether the Master is obliged to appoint her.

The first notice of intention to amend the Declaration

[8] On 5 September 2023, the respondents’ attorneys served a notice in terms of rule 30(2)(b) identifying three irregular steps. The first concerned the addition of Ms Suzan Maratletle Masuku and the Master of the High Court, Pretoria as the fourth and fifth defendants respectively when they had not been parties to the main application. The second that the Declaration was not signed by an advocate or a person with right of appearance in the High Court. The third being the late delivery of the Declaration without an application for the extension of time for the delivery of the Declaration, or for an application condoning the late delivery thereof.

The service of this application and the relief claimed

[9] On 29 September 2023, at 10h07 the applicant's attorney served on the first and second respondents' attorney a notice of motion, dated and signed on the same day, together with a founding affidavit ("this application") under the same case number as the main application. Apart from citing the first and second respondents in the main application as respondents in this application, they added and cited Ms Suzan Maratletle Masuku as the third respondent and the Master of the High Court as the fourth respondent. Whilst these two respondents had been cited as the third and fourth defendants in the Declaration, they were not respondents in the main application.

[10] The applicants seek the following relief in the notice of motion in this application:

- "1[condonation for] the late delivery of the first to third applicant's Declaration.
2. directing the fourth respondent to issue a letter of authority, authorising the first applicant to administer the deceased estate of the late Segope John Selematsela.
3. No costs order."

[11] An application for condonation is an interlocutory application (or incidental to the main proceedings) and in terms of the provisions of rule 6 (11) should be brought on notice, as opposed to a notice of motion. This application against the Master of the High Court constitutes an "application" as defined in rule 1 of the Court Rules. In my view, while the condonation application is incidental to the action. The relief claimed against the Master is not. The applicants claim substantive relief and plead a cause of action not pleaded in the main application. In my view, the relief against the Master should have been claimed in a new application issued by the Registrar under a new case number.

The second notice of intention to amend the Declaration

[12] At 12h42 on 29 September 2023, being approximately two hours after the notice of motion was served on the respondents' attorneys, the applicants' attorneys served a notice of intention to amend the Declaration ("the first notice of amendment"). The first notice of intention of amendment effectively withdrew the action against the third defendant, Ms Suzan Maratletle Masuku and the fifth defendant, the Master by deleting:

- (a) their names in the heading to the Declaration;
- (b) paragraphs 9 and 10 of the Declaration which contained their citation; and
- (c) claim B which contained the relief against the Master.

[13] The first notice of amendment was not served on the Master.

[14] What remained of the Declaration was the claim for the agreement of sale between the deceased and the first respondent to be declared invalid, for the title deed for the property to be cancelled by the Registrar of Deeds, and for the property to be transferred to the deceased estate, alternatively for the payment of R422 484.00 by the first and second respondents (the first and second defendants in the action).

[15] Essentially, the relief claimed in this application is the relief claimed under Claim B in the Declaration, and it is claimed together with an order condoning the late delivery of the Declaration or the extension of time for the delivery thereof.

The withdrawal of the first notice of intention to amend the Declaration and the service of a second notice of intention to amend the Declaration

[16] On 1 November 2023, the applicants withdrew the first notice of intention to amend. On the same day, and probably simultaneously therewith, they served a notice of amendment ("the second notice of amendment") with the identical content as the first notice of intention to amend. The amended pages to the Declaration were served on 27 November 2023.

The failure to serve the notices of intention to amend on the Master and the failure to timeously service this application and the notice of set down on the Master

[17] Neither the first notice of amendment nor the second notice of amendment appears to have been served on the Master. And whilst this application was served on the first to third respondents' attorney on 29 September 2023, it was not served on the Master of the High Court until 7 May 2024, which was five court days before the application was set down for hearing on the unopposed motion court roll of 14 May 2024.

[18] The notice of set down was served by email on the respondents' attorneys on 24 April 2024. However, the notice of set down, and this application, were served on the Master on 7 May 2024, with the result that the application was enrolled for hearing on the fifth day after the application was served. Accordingly, as far as the relief claimed against the Master is concerned the application was prematurely enrolled. Consequently, I am not inclined to grant the relief sought against the Master in paragraph 2 of the notice of motion in this application.

The condonation application

[19] The relief in paragraph 1 of the notice of motion is for the late delivery of the Declaration to be condoned. The respondents have not opposed this application. The requirements for condonation or an extension of time are trite, and I do not intend repeating them here.

[20] The Declaration was served three months late due to a lack of funds. The applicants' attorneys were placed in funds during August 2023. The Declaration was drafted during the week commencing 19 August 2023 and served on the respondents' attorneys on 21 August 2023. In my view the applicants have given a satisfactory explanation for the delay.

[21] The applicants' case for the cancellation of the transfer of the property to the first respondent is fraud. I am satisfied that the applicants' action is not unfounded and that there are reasonable prospects of success on the merits. After all, the court

hearing the main application did not dismiss it for lack of merit. The main application appears to have been referred to trial because there were disputes of fact on the papers. The applicants have established good cause for the late delivery of the Declaration. Furthermore, in my view the interests of justice dictate that condonation should be granted. It does not appear from the papers whether the deceased left a will; the indications are that he did not. If this is the case, then the deceased's children are the intestate heirs. In my view, it is in the interests of justice that the first respondent's rights to the property and the rights, if any, of the deceased's heirs are established.

[22] Consequently, I am inclined to condone the applicants' failure to timeously deliver the Declaration.

[23] In the result I make the following order:

- (a) The applicants' failure to deliver the Declaration within 20 days of the court order of 25 April 2023 is condoned.
- (b) Prayer 2 of the notice of motion signed and dated 29 September 2023 is postponed sine die.
- (c) There shall be no order as to costs.

S K Hassim
Judge of the High Court
Gauteng Division, Pretoria

Applicant's Counsel: Adv L Lebona

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 November 2024