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

Case Number: **063600-2023**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
DATE	SIGNATURE

In the matter between:

NAJAM MOEGAMAT RASHIED

First Applicant

SIERRA MANDISA NGCAMU

Second Applicant

and

CLIOV 6 (PTY) LTD (Reg no: 2021/110188/07)

First Respondent

TASNEEM KARA

Second Respondent

(In her capacity as the executrix in the estate Harron Rashied Kurtha)

SWEET WATERS PROPERTIES 233 CC

Third Respondent

GLONAZ TRADERS CC

Fourth Respondent

GALIEB EBRAHIM ESSOP

Fifth Respondent

MQINGWANA ZAZI

Sixth Respondent

DENFREE ESTATE (PTY) LTD

Seventh Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Eighth Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

Ninth Respondent

JUDGMENT

Johann Gautschi AJ

[1] In this application the Applicant seeks the following relief: an order directing the Registrar of Deeds to set aside the transfer and registration of immovable property described as Erf 4[...] situated at N[...] I[...] T[...], presently registered in the name of the First Respondent and to declare that transfer and registration to be invalid; an order declaring invalid and setting aside “*any sale agreement entered into between the first and third and/or second respondent*” of Erf 4[...] as well as “*any sale agreement entered into between the third and fourth respondent for the sale of*” Erf 4[...]; an order that “*the transfer registration of*” Erf 4[...] into the names of the third and fourth respondents be declared invalid and set aside; an order directing the “*Deed of Registrar (sic) to register transfer of the property described as erf 4[...] situated at N[...] I[...] T[...] and erf 3[...] situated at no [...] S[...] S[...], N[...] into the name of the Applicant after granting of this court order*”; an order directing the first respondent to sign any documentation or take all steps necessary to give effect to the foregoing and for the Sheriff to do so in the event of the First Respondent failing to comply.

[2] The application is opposed by the First Respondent. Its answering affidavit raised two points *in limine* and then dealt extensively with the merits. Its first point *in*

limine alleged non-joinder of the Seventh Respondent's liquidator. In support thereof it attached a court order citing the Seventh Respondent as being in liquidation. Its second point in *limine* objected to the fact that the Applicant sought final relief in application proceedings instead of by way of action. The Applicant submitted that prior to the institution of this application the Applicant was fully aware of the existence of the foreseeable factual disputes, but nevertheless proceeded with application proceedings.

[3] The Applicant's founding affidavit is most unsatisfactory. It is replete with vague and generalised allegations of insolvency and fraudulent conduct, formulated minimalistically, most of it plainly hearsay and without any supporting detail, but instead relying on to a variety of documents most of which are not properly proved. Consequently, at the outset I invited counsel for the Applicant to address me on how such an application could ever be brought in the light of the many obviously serious factual disputes relating to events over many years and why, in the light of the many material disputes of fact, which should have been anticipated, I should not order the Applicant to pay the costs of the application on a punitive attorney and client scale.

[4] Counsel for the Applicant did no more than to submit that the First Respondent acknowledged in its answering affidavit that Ms Howard had been fraudulently appointed as executor of the late Mr Hughes (the original owner of the properties in issue) who died in 1992 and that Erf 4[...] could not be sold and transferred separately from Erf 3[...] because the erven were "*connected*" to each other. For the latter submission he relied on a diagram (annexure MN05 to the founding affidavit) which, according to its contents, appears to have been downloaded from the City of Johannesburg website. That diagram, he submitted, shows that only a right of way separates Erf 4[...] from Erf 3[...]. For the rest, counsel for the Applicant submitted that his submissions rested with the contents of the application and his heads of argument.

[5] Those submissions do not, in my view, justify the final relief sought by way of motion proceedings. In my view it would have been obvious that the relief sought should have been brought by way of trial action and that application proceedings were entirely inappropriate.

[6] Counsel for the First Respondent then submitted that I should grant an order for the removal as executor of the Second Applicant who was (inexplicably) also appointed by the Master of High Court, Johannesburg as executor of the deceased estate of the late Mr Hughes. He pointed out that as attorney of record of the First Applicant he cannot be regarded as independent and, consequently, is not suitable for appointment as executor.

[7] However, the prayer for such relief was only contained in the First Respondent's contingent counter application supported by paragraphs 89 to 94 of the First Respondent's answering affidavit filed in this application. In those paragraphs the First Respondent refers to a previous application which the First Respondent launched on 15 March 2023 in which the First Respondent sought to interdict the Master of the High Court from appointing the Second Applicant in this application as executor of the estate of the late Mr Hughes because it he also the attorney representing the First Applicant and is therefore not independent. However, the First Respondent then learned from the contents of the 24 April 2023 answering affidavit filed by the Applicant in response to that application, that the Master had, unbeknown to the First Respondent, already the previous week, on 7 March 2023, appointed the Second Applicant as an executor of the estate of the late Mr Hughes, but, inexplicably, without having removed previously pointed executrix, Ms Howard. In the result, counsel explained that the previous application was not proceeded with and, instead, the First Respondent sought in its conditional counter application an order removing the Second Applicant as executor.

[8] This relief can also clearly not be granted in the present proceedings. The facts and issues relating to the Second Claimant's removal of the Second Applicant as executor are interrelated with the facts and issues in the Applicants' application. In any event, a separate substantive application would have to be brought for removal of the Second Applicant as executor. Such an application would have to be properly motivated in terms of the requirements of section 54 (1) (a) of the Administration of Estates Act 66 of 1965 as amended and I would have thought that in such an application the Court would have to be provided with a report from the Master of the High Court.

[9] In the result I conclude that this application should be dismissed. Moreover, where this matter should so plainly have been brought by way of a trial action and not by way of application proceedings, the First Respondent should not have been put to the costs and expenses of having to deal with such an application should not be out of pocket as a result. In the circumstances I am of the view that this is an appropriate case in which the costs of this application should be paid by the First and Second Applicants jointly and severally on the scale as between attorney and client.

[10] The First Respondent's contingent counter application includes a prayer for condonation of the late filing of the First Respondent's answering affidavit which is also its founding affidavit to its contingent counter application. No separate argument was addressed to me in opposition. On the contrary, in argument the Applicant's counsel referred to that answering affidavit. Consequently, no prejudice having been contended for, there is no reason why the condonation sought should not be granted. Furthermore, given that the contingent counterclaim and all relief sought therein was dealt with as part and parcel of the First Respondent countering the present application, the costs involved therein should in my view be recoverable by the First Respondent as part of the costs of opposing the application.

Order

[11] The application is dismissed.

[12] The First and Second Applicants are ordered to pay the First Respondent's costs of this application jointly and severally and on the scale as between attorney and client.

[13] The First Respondent's late filing of its contingent counter application and its answering to this application and combined founding affidavit to its contingent counter application is condoned.

[14] The First Respondent's claim for removal of the Second Applicant as executor of the Estate of the late Mr Hughes as contained in the First Respondent's contingent counterclaim is dismissed.

[15] The costs relating to the First Respondent's contingent counterclaim are to be dealt with as included in the costs incurred by the First Respondent in opposing the First and Second Applicants' application.

Johann Gautschi AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the First and Second Applicants:

Adv A Khosa instructed by SMN Attorneys

For the First Respondent:

Adv H van der Vyver instructed by Shaheed Dollie Inc Attorneys