

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)**

CASE NO: 3874/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE 25/11/2024

SIGNATURE

In the matter between:

JOHANNAH NOMSA MANKGE

APPLICANT

AND

EY STUART N.O.

FIRST RESPONDENT

THE REGISTRAR OF DEEDS

SECOND RESPONDENT

JUDGMENT

Introduction and Facts

[1] This application concerns the immovable property situated at 4[...] B[...] Street, Erf 2[...] E[...], Kriel, Mpumalanga, and held under Title Deed T79404/2004 (“the Kriel Property”). The Applicant, Mrs Johannah Nomsa Mankge, seeks an order interdicting the Respondents from alienating or passing transfer of the property, including all movable property in the deceased estate of the late Sam Mankge. Alternatively, if the property is sold then an order that the sale be declared null and void.

The Parties

[2] The Applicant was married to the deceased Mr Sam Mankge in community of property on 21 November 2005, which marriage subsisted until the demise of her spouse

in 2020. The First Respondent is the duly appointed executor of the estate of the Late Sam Mankge. The Second Respondent is the Registrar of Deeds.

Concise Background Facts

[3] The Applicant was married to the deceased Mr Sam Mankge in community of property on 21 November 2005 and although they had children from their previous marriages, no children were born out of their marriage. Before her marriage to the deceased, The Applicant owned the property which is the subject matter of this litigation. The couple however never stayed at this property as they had their primary residence at Erf 5[...] L[...], Emalahleni, Mpumalanga where they lived until the deceased passed away.

Common Cause Facts

[4] As stated above it is common cause that the Applicant and the deceased were married in community of property which marriage subsisted until the deceased's death. It is further common cause that the heirs of the deceased are the deceased's three children as nominated in paragraph 2 of the Last Will of the deceased. In the Will the deceased disposes 50% of his estate, which include the Kriel property, to his heirs. It is not in dispute that the property at Kriel property, which is now apparently the primary residence of the Applicant also forms part of the joint estate of the parties. It is also not disputed that the First Respondent is the duly appointed executor in the deceased estate.

Issue in dispute

[5] In my understanding of the papers and submissions made, the issue in dispute appears to be whether the First Respondent, as an executor of the estate, is statutorily obliged and entitled to dispose of the property in order to satisfy the claims against the estate and to distribute in accordance with the will.

[6] The Applicant argues in the heads of argument that the application was instituted because the deceased Sam Mankge left a will in terms of which he disposes his 50% share of the estate to his three children. The primary reason for the interdict appears to be that the Applicant is an old person who stands to be homeless if her 50% of the Kriel property is sold. The Applicant further contends that as a result of her being a joint owner in the property, her consent is required before the deceased estates property can be sold.

[7] The First Respondent contends that as the Kriel property also forms part of the estate, he is entitled to dispose of it in order to satisfy the claims of the creditors against

the estate and to distribute the estate according to the will executed by the late Sam Mankge.

[8] The First Respondent further contends that the Applicant does not have the financial means to effect payment to the estate of an amount of approximately R599 062.91 in order to enter into a redistribution agreement with the heirs of the estate for her to retain some assets of the joint estate. He states that according to the Recapitulation Statement, there is already a cash shortfall of R218 123.82 in the estate, to be paid in by the Applicant as surviving spouse if she wishes to retain the moveable assets of the joint estate.

[9] The First Respondent further asserts that it was in fact agreed with the Applicant through her erstwhile attorney that the immoveable property will be sold, and that this was also confirmed by the Applicant's erstwhile attorneys, Lizelle Roos, in an e-mail dated the 19 December 2022 addressed to Bianca van Wyk of EYS Inc. The Applicant however reneged on the agreement.

[10] The First Respondent further challenges the Applicant's contention of a prima facie right and states that the Applicant does not have the right to seek an order interdicting the sale and transfer of the immoveable property nor to seek the setting aside of a sale agreement for the property. The First Respondent further alleges that the application completely disregards his statutory obligations and attempts to inhibit him from complying with his statutory obligations. He maintains that he is empowered and obligated to take all such steps as are necessary to ensure that he fulfils his statutory obligation as executor in the estate and these obligations include the selling of the immoveable property in order to distribute the proceeds therefrom in executing the provisions of the deceased's will.

The Applicable Legal Principles and Case Law

[11] In *Segal and Another v Segal and Others* 1976 (2) SA 531 (C), the court stated the following in respect of the rights of executors:

"In our law the executor is the person in whom, for administrative purposes, the deceased's estate vests. It is his function to take all such steps as may be necessary to ensure that the heirs in the estate to which he is appointed receive what in law is due to them."

[12] In the Deeds Registries Act 47 of 1937 an owner in relation to immoveable property, is defined as “... *the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, a liquidator or trustee elected or appointed under the Agricultural Credit Act, 1966 (Act 28 of 1996), liquidator of a company or a close corporation which is an owner and the executor of any owner who has died or the representative recognised by law of any owner who is a minor or of an unsound min or is otherwise under disability, provided such trustee, liquidator, executor or legal representative is acting within the authority conferred on him or her by law.*”

[13] In terms of section 26(1) of the Administration of Estate Act 66 of 1965 (“the Act”), once issued with the letters of executorship, an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.

[14] Further, section 47 of the Act provides as follows:

“Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that-

(a) In the case where an absentee, a minor or a person under curatorship is heir to the property; or

(b) If the said heirs are unable to agree on the manner and conditions of the sale, the executor shall sell the property in such manner and subject to such conditions as the Master may approve.”

[15] In Wille’s *Principles of South African Law* 9th ed, at p673, under the heading “*Title of Beneficiaries*”, the following is said concerning the administration of estates:

“However, in the light of the modern system of administration of estates that replaced the common law system of universal succession, the right of the beneficiaries to inherit is no longer absolute nor an assured on: If the deceased estate, after confirmation of the liquidation and distribution account, is found to be

*insolvent, none of the beneficiaries will obtain any property or assets at all. In the case of a legacy the legatee will only obtain the property bequeathed to him if, first, the property belonged to the testator, for the will of one person cannot confer a real right in favour of another person over property belonging to a third person; and if, secondly, the assets of the deceased not left as legacies are sufficient to pay his debts. In any event, an heir cannot vindicate from a third person property which the heir alleges forms part of the deceased estate; only the executor has that power. It follows from the above considerations that an heir does not upon the death of the testator acquire the ownership of the assets of the deceased, but merely has a vested claim against the executor for payment, delivery or transfer of the property comprising the inheritance; and this claim is enforceable only when the liquidation and distribution account has been confirmed. The heir, in fact, becomes owner of moveable property only on the delivery of it, or of immoveable property upon registration. The same rules apply to a legatee. The modern position is therefore that a beneficiary has merely a personal right, *jus in personam ad rem acquirendam*, against the executor and does not acquire ownership by virtue of a will. The heir obtains ownership or a lesser real right, such as a usufruct, only upon delivery of transfer in pursuance of testamentary disposition or intestate succession; consequently, succession is merely a *causa habilis*-, or appropriate reason, for transfer of ownership.”*

[16] In Corbett, *The Law of Succession in South Africa*, 2nd ed, the Learned Author states:

“The heir no longer succeeds automatically to the assets and liabilities of the estate. Though the inheritance vests in the heir, he or she does not acquire dominium in individual assets nor become personally liable for the debts of the deceased. Instead, the heir acquires against executor to his or her share in the residue after the liquidation and distribution account has been settled.”

“And where a man or woman who was married to his or her spouse in community of property dies, the heirs of the pre-deceased spouse do not acquire co-ownership in individual assets of the joint estate, but merely the right to claim from the executor half of the net balance of the joint estate. Nor is the survivor, despite having been during the lifetime of the pre-deceased spouse co-owner of half of the joint estate, vested with dominium of half of the assets. Like the heirs of the pre-

deceased's spouse, the survivor is restricted to a right against the executor of half of the net balance.” (my emphasis)

Discussion and analysis

[17] It is against these authorities that the Applicant's challenge to the First Respondent's rights and duties as executor must be measured. It is trite that while the Master of the High Court holds jurisdiction over the estate of a deceased person in terms of section 4 of the Act, the executor of a deceased also derives his authority from the same Act. In terms of section 26(1) of the Act, once appointed as such by the Master, an executor of the estate is entitled to take into his custody and control all the property, books, and documents in the estate.

[18] Furthermore, an executor is vested with the authority and powers to deal with the assets of a deceased estate in a representative capacity and this includes to the property in the manner and subject to the conditions which the heirs who have an interest therein approve and subject to the approval of the Master.

[19] The Applicant in this matter contends that as a result of her being a joint owner in the property, her consent is required to sell the deceased estates property. This assertion clearly impugns the executor's rights and obligation conferred on him in terms of the Act. Considering the law as espoused above, this contention is specious and doomed to fail. The legal position regarding the executor's position in relation to the estate property was restated in *Mills NO v Hoosen* 2010 (2) SA 316 (W). In this case it was held that the deceased estate has no legal persona and consists of an aggregate of assets and obligations. The estate vests in the executor in the sense that dominium of the assets passes to the executor, and he singly has the power to deal with the totality of the deceased estate's rights and obligations. Further to that, in terms of the Act, the executor is required to administer and distribute the estate according to the law and under the letters of executorship granted by the Master of the High Court. (my emphasis)

[20] In Corbett, *The Law of Succession in South Africa, supra*, the position is made crystal clear in respect of the powers of the surviving spouse and it is necessary to repeat this here for emphasis. “... where a man or woman who was married to his or her spouse is community of property dies, the heirs of the pre-deceased spouse do not acquire co-ownership in individual assets of the joint estate, but merely the right to claim from the executor half of the net balance of the joint estate. Nor is the survivor, despite having

been during the lifetime of the pre-deceased spouse co-owner of half of the joint estate, vested with dominium of half of the assets. Like the heirs of the pre-deceased's spouse, the survivor is restricted to a right against the executor for half of the net balance." (my emphasis).

[21] It is clear that the Applicant as the surviving spouse does not become the owner of half of the assets of the estate but merely has a right against the executor in respect of half of the net balance. The Applicant does not make any specific allegations to justify the basis for the interdict. The contention by the Applicant suggest that the provisions of the Administration of Estates Act and the law thereon be ignored without any justification.

Conclusion

[22] In the light of the vast and unambiguous body of legal principles on this subject, there is in my view no justification for the statutory obligations and duties bestowed on an executor to be taken away or ignored. The Applicant has not succeeded in establishing that she has any prima facie right based on which the executor's rights and duties can be excluded. The law is very certain on the issues at play in this matter. Despite being the surviving spouse, the Applicant has no legal standing to interfere with the First Respondent's statutory obligations.

[23] While one can understand the emotive submission that the Applicant is an older person and likely to be rendered homeless by the sale of the Kriel property, that is unfortunately not sufficient to short circuit the legal principles. The marriage regime the Applicant chose has the consequences that she is now facing.

[24] When the matter is objectively considered, it is clear that the Applicant has simply not made out a prima facie case on its papers. The application is fatally flawed and clearly without merit, legally or factually and accordingly stands to be dismissed with costs.

[25] Concerning costs, the First Respondent contends that the application constitutes a clear abuse of process and that costs should be on a punitive scale. The First Respondents points out that despite the agreement with the Applicant's erstwhile attorney that the immovable property will be sold, as confirmed in an e-mail dated the 19 December 2022 by her attorneys, the Applicant reneged on the agreement. The First Respondent argues that the application constitutes a material abuse of the process of court.

[26] In *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments Pt Ltd and Others* 1979 (3) SA 1331 (W) the following was stated in regard to the abuse of court process:

"It is well established that the Court has an inherent right to prevent the abuse of its process in the form of frivolous or vexatious litigation (Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 271,' Corderoy v Union Government 1918 AD 512 to 517). And, when the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the Court to prevent such abuse (Hudson v Hudson and Another 1927 AD 259 at 268),"

[27] After considering the issues raised, I am not satisfied that any meritorious factual or legal dispute was raised by the Applicant in this case. While the Applicant does not impugn the First Respondent's statutory rights conferred on him by virtue of his appointment, the Applicant even suggests at this point of the hearing that the court should consider directing that the matter be mediated.

[28] Considering that that the First Respondent is the duly appointed executor in the deceased estate; that the Applicant and the deceased were married in community of property; that the property is an asset of the joint estate; that the Applicant agreed to the sale of the property before instituting this application; and that she does not have the financial means to effect the required payment into the estate in order to enter into a redistribution agreement with the heirs in the estate in order to retain some assets of the joint estate, this application is clearly frivolous. The Applicant clearly has no case. While one sympathises with the Applicant for the situation she is in, the application could and should have been avoided. I consequently find that there is a compelling case for the consideration of a punitive costs order against the Applicant.

Order

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

The application is dismissed with costs on a scale as between attorney and client on Scale B.

MBG LANGA
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	Ms N Shabangu-Mdawe
For First Respondent:	Advocate BD Steven
For the Second Respondent:	No Appearance
Date Heard:	21 November 2024
Date Delivered:	25 November 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 25 November 2024 at 14h00.