

REPUBLIC OF SOUTH AFRICA



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

Case Number: 32377/2018

- | | |
|-------------------------------------|--|
| (1) REPORTABLE: NO | |
| (2) OF INTEREST TO OTHER JUDGES: NO | |
| (3) REVISED: NO | |

DATE

SIGNATURE

In the matter between:

MOKOENA MAMORAKE SOPHIA

APPLICANT

And

MASTER OF THE HIGH COURT GAUTENG

FIRST RESPONDENT

MAREESE JOSEPH

SECOND RESPONDENT

ABSA BANK TRUST (LTD)
RESPONDENT

THIRD

MOKOENA DIKELEDI JACOBETH
RESPONDENT

FOURTH

THE REGISTRAR OF DEEDS PRETORIA
RESPONDENT

FIFTH

JUDGMENT

MAHALELO J

INTRODUCTION

- [1] The applicant has brought this application seeking an order in terms of which the decision of the Master of the High Court, Johannesburg taken on 28 April 2018 is reviewed and set aside. The Master's decision dismissed the applicant's objection dated 18 July 2016 to the first and final liquidation and distribution account in the estate of the late Rogers Sello Mokoena (the deceased) lodged in terms of section 35(7) of the Administration of Estates Act¹. The applicant also seeks ancillary orders. The review application was served late, and the applicant first seeks condonation.
- [2] Both applications are opposed by the fourth respondent only. All other respondents have not filed opposing affidavits.

THE PARTIES

- [3] The applicant is the surviving spouse of the late Rogers Sello Mokoena to whom she was married in community of property. The first respondent is the Master of the High Court. The second respondent is ABSA Trust and the third respondent is in the employ of the second respondent and is the executor of

¹ 68 of 1968

the estate of the deceased. The fourth respondent is the ex-wife of the deceased to whom she was married in community of property. The fifth respondent is the Registrar of Deeds Pretoria.

CONDONATION APPLICATION: EXPLANATION FOR THE DELAY.

- [4] Section 35(10) of the Administration of Estates Act provides that a review application under the section must be brought within 30 days or within such longer period as the court may allow.
- [5] The Master's decision was made on 28 April 2018. It was communicated to the applicant on 8 May 2018. The review application was supposed to have been launched on or before 19 June 2018. The applicant requested and was granted extension until 11 July 2018. She filed the review application on 3 September 2018. She was less than two months late.
- [6] The applicant provided the following explanation for the late filing of the review application: The Master's decision dated 28 April 2018 was firstly communicated to the second and third respondents who conveyed the decision to her on 8 May 2018. Her attorneys of record then called her during the following week to set up an appointment to consult with her. At that point in time she was sick and could not avail herself for the appointment. She was only able to consult with her attorneys at the end of May 2018. It was on that day that the Master's decision was explained to her and was advised that in the event she wanted to challenge the decision a review application would have to be filed. She was further advised on the issue of costs. She then had to raise funds in order for her attorneys to file a review application.
- [7] On 28 May 2018 a letter was sent to the fourth respondent's attorneys namely Maja Attorneys, enquiring if they would accept service on behalf of the fourth respondent. They did not respond to the letter. Around August 2018 she

managed to secure funds to pay a deposit and the application was finalised. It had to be served and the fourth respondent's address was unknown. She further suffered a bereavement in her family which contributed to the delay in the matter. Her attorneys requested and were formally granted extension until 11 July 2018. The review application was filed on 3 September 2018.

- [8] Having regard to the timeline the applicant was only in default for filing its review application for a short period of time. The applicant contends that it has good prospects success in the application and extensively dealt with the issue.
- [9] The court may on good cause shown grant condonation. In *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and others*², the Constitutional Court held that in determining whether condonation may be granted, lateness is not the only consideration.
- [10] The test for condonation is whether it is in the interest of justice to grant condonation. In *Melaine v Santam Insurance Co Ltd*³ the court held:

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the factors and, in essence, is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily these facts are inter-related, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion".

- [11] This matter has a very long history. Although the applicant did not set out in more detail the steps and the period it took for her to secure funds and to trace the whereabouts of the fourth respondent, I do not think that lack of detail

² 2010 (2) SA 181 (CC)

³ 1962 (4) SA 531 (A) at 532 C-F

amounted to failure to give a satisfactory explanation for the delay. I am of the view that the applicant has shown good cause for her delay in launching these proceedings to be condoned.

[12] I now turn to the merits of the review.

THE GROUNDS FOR REVIEW

[13] The applicant raised the following as grounds for review:

(a) Prescription

(b) Mortgage Bond

(c) Conflict of interest

[13] At the hearing of the application the applicant abandoned the third ground of review.

[14] Before I deal with each individual ground of review it is necessary that I give a brief background of the facts giving rise to the application.

[15] The fourth respondent and the deceased were married in community of property on 3 August 1984. Two children were born of the marriage. In 1986 the fourth respondent and the deceased acquired an immovable property which is the subject matter of this review application. On 10 September 1987 their marriage was dissolved by a decree of divorce. The decree was silent about division of their joint estate. It only catered for the interest of the deceased with regard to contact with the minor children and their maintenance. It is however trite that division of the joint estate is a consequence of marriage in community of property upon dissolution. In *D v D*⁴ Miltz AJ stated the following:

⁴ 15402/2010) [2013] ZAGPJHC 194 (10 May 2013)

"Marriage in community of property carries major implications for ownership of the parties' assets, liability for their debts as well as their capacity to enter into legal transactions. Community of property entails the pooling of all assets and liabilities of the spouses immediately on marriage, automatically and by operation of law. The same regime applies to assets and liabilities which either spouse acquires or incurs after entering into the marriage. The joint estate created by marriage in community is held by the spouses in co-ownership, in equal, undivided shares."

[16] Boberg's Law of Persons and the Family (2nd ed) at page 185 and also HR Hahlo, The South African Law of Husband and Wife (5th ed) at 157 to 158) state that.

"The natural consequence of holding the parties to their marriage agreement is that on divorce the joint estate will be divided equally between them unless a forfeiture order is made. In such event the value of the assets in the joint estate that must be divided will be determined at the date of the divorce."

[17] On 26 July 1989 the deceased married the applicant in community of property and lived with her in the immovable property.

[18] The fourth respondent alleged that she had on numerous occasions tried to finalise the division of the joint estate but the deceased did not co-operate with her efforts. On 5 October 2000 she obtained an order of court for the appointment of Mr Nonyongo as receiver and liquidator to attend to the distribution of the joint estate. Mr Nonyongo passed away before he could execute his duties.

[19] On 28 September 2014 the deceased died leaving his last Will and Testament wherein he bequeathed his estate to his surviving spouse, the applicant, and appointed ABSA Trust as the executor of his estate.

[20] Following the deceased's death, the fourth respondent, through her attorneys lodged a claim against the estate since their joint estate was never divided. She claimed her half share in the value of the immovable property.

[21] The fourth respondent's claim was accepted by the executor and the liquidation and distribution account was amended to include the claim. The applicant raised an objection to the amended liquidation and distribution account however, on 28 April 2018 the Master accepted the executor's decision to admit the fourth respondent's claim and dismissed the applicant's objection hence the present application.

THE APPLICANT'S CASE

[22] The applicant contended that since the marriage between the fourth respondent and the deceased was terminated by divorce on 10 September 1987, any matrimonial claims in relation to their joint estate should have been made within a period of three years from the date of divorce. According to the applicant, matrimonial claims are debts as contemplated in the Prescription Act and as such the fourth respondent's claim prescribed on 10 September 1990. The applicant argued that the Master should have upheld its objection on that ground alone. The applicant further contended that the Master lost sight of the basis of her objection and recorded that the objection related to the value of the immovable property. I do not agree that the Master lost sight of the applicant's objection. Fact of the matter is that the Master accepted the executor's decision to allow the fourth respondent's claim and dismissed the applicant's objection.

[23] With regard to the second ground of review, the applicant contended that the Master, in accepting the executor's decision, failed to take into account that the immovable property was acquired by the deceased and the fourth respondent for a short period of time before they divorced and more than 18 years were still

outstanding for the bond to be fully paid. Therefore, the fourth respondent walked away from a debt and not an asset.

FOURTH RESPONDENT'S CASE

[24] The fourth respondent contended that as she was married in community of property to the deceased and the immovable property was acquired during the subsistence of their marriage in community of property she is entitled to half share of the property. She argued that her claim had not prescribed as she co-owned the property with the deceased by virtue of their marriage in community of property. In 2000 when the deceased was still alive she obtained an order of court appointing a liquidator and receiver to deal with the division of the joint estate.

PRESCRIPTION

[25] It is common cause that the marriage between the deceased and the fourth respondent terminated in 1987.

[26] Section 10(1) read with section 11(d) of the Prescription Act (the Act) provides as follows:

"10(1) Subject to the provisions of this Chapter and Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt."

"11. The periods of prescription of debt shall be the following:

'...

(d) *Save where an act of Parliament provides otherwise, three years in respect of any other debt."*

[27] Section 12 of the Act provides that:

"(1) *subject to the provisions of subsections (2) and (3) prescription shall commence to run as soon as the debt is due;*

(2) ...

(3) *a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."*

[28] The principle of extinguitive prescription was dealt with by the Supreme Court of Appeal (SCA) in the matter of *KLD Residential CC v Empire Earth Investment 17 (Pty) Ltd*⁵ where the following was stated:

"[13] *One of the principal reasons for extinguitive prescription is to provide certainty to a debtor - after a period of time when the creditor has been inert, the debtor should have certainty as to whether or not a debt is still owed. The three-year period over which prescription runs is regarded as being enough time for the creditor to enforce the obligation, and conversely, if it is not enforced within that time, the debtor may be certain that the obligation has ended. The debtor is protected save where the*

⁵ 2017(6) 55 SCA

reasons for the principles underlying prescription fall away and the protection of a creditor is justified.

[14] *This is clearly explained in Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality 1994(1)SA 571 (A) at 578 F-H where Grosskopf AJA said:*

'Although many philosophical explanations have been suggested for the principles of extinguitive prescription ... its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or if it did, whether it has been discharged. . . . The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc.

These sources of uncertainty are reduced by imposing a time limit on the existence of a debt, and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject (s 11 of the Act).'

[15] *The justifications for extinguitive prescription are also to be found in Road Accident Fund v Mdeyide [2010] ZACC 18; 2011 (2) SA 26 (CC) and Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus & others [2016] ZACC 49 paras 28 to 30. In Mdeyide, Van der Westhuizen J said (para 8):*

'This Court has repeatedly emphasized the vital role time limits plays in bringing certainty and stability to social and legal affairs and maintaining the quality of adjudication. Without prescription periods, legal disputes would have the potential to be drawn out for indefinite periods of time bringing about prolonged uncertainty to the parties to the dispute. The quality of adjudication by courts is likely to suffer

as time passes, because evidence may have become lost, witnesses may no longer be able to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law.' have become lost, witnesses may no longer be able to testify, or their recollection of events may have faded. The quality of adjudication is central to the rule of law."

[29] Although the term "debt" is not defined in the Act, it has been held that it refers to anything that is owed or due such as money, goods or services that a debtor is under an obligation to pay or render to a creditor. See *CGU Insurance Limited v Rumdel Construction (Pty) Limited*.⁶

[30] In *Desai NO v Desai and Others*⁷ the SCA held that the word "debt" is assigned and wide and general meaning which includes an obligation to do something or refrain from doing something. The word "debt" denotes whatever is due from any obligation.

[31] In *Khan v Shaik*⁸ Sutherland AJA(as he then was) held as follows;

*[16] The scope of the term 'debt' in the Prescription Act has been the subject of clarification. Most recently, in *Off Beat Holiday Club & another v Sanbonani Holiday Spa Shareblock Ltd*, the Constitutional Court affirmed the dictum in *Makate v Vodacom Ltd* that the scope of a 'debt' is that as formulated by Holmes JA in *Escom v Stewarts and Lloyds of South Africa*' ...a debt is - that which is owed or due; anything (as money, goods or services) which one person is under an obligation to pay or render to another'*

[32] The fourth respondent submits that her claim is based on a right subject to acquisitive prescription as opposed to extinctive prescription. Her claim, it was

⁶ [2003] 2 All SA 597 (SCA)

⁷ 1996 (1) SA 141 (SCA)

⁸ 2020(6) SA 375 (SCA)

contended, was one for ownership and is a real right subject to acquisitive prescription and not a debt for the purposes of extinctive prescription. She claims, according to the submissions of her counsel, a real right to the property that she and the deceased acquired during the subsistence of their marriage in community of property, which claim is based on a real right as co-owner with the deceased of the joint assets and therefore extinctive prescriptive cannot arise.

[33] In *Salaman v Salaman*⁹ where the parties who were married in community of property had divorced. It was held that when the joint estate was dissolved by the court in 1997, the decree of divorce which dissolved the parties' marriage did not dissolve co-ownership over the property.

[34] In my view the fourth respondent's claim on the common cause facts has not prescribed.

[36] The applicant alleges that when the fourth respondent left her common home the bond still had close to 18 years to full payment. She further states that she and the deceased effected improvements on the property, therefore the fourth respondent is being opportunistic in claiming against the deceased's estate. Fact of the matter is that the fourth respondent is still a joint owner of the immovable property. She is entitled to her half share of the value of the immovable property as at the date of divorce. The second ground of review also stands to fail.

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

1. Application for review is dismissed with costs.

⁹ (9058/2007) [2008] ZAKZHC 61

**MB MAHALELO
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

This judgment was electronically handed down by emailing to the parties' legal representatives and uploading onto CaseLines.

APPEARANCES:

Counsel for the applicant : Adv Ralikhuvana

Instructed by: Mudzusi Molobela

Counsel the fourth respondent: Adv Maja

Instructed by: Maja Attorneys

Date of Judgment: 21 November 2022

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