IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED No

DATE: 26 MARCH 2019.....

SIGNATURE:.....

Case No. 22159/2017

In the matter between:

BOBBY SAXTON MERE **APPLICANT**

And

ELIZABETH MERE **FIRST RESPONDENT**

MICHAEL MERE **SECOND RESPONDENT**

MASTER OF THE HIGH COURT - PRETORIA **THIRD RESPONDENT**

REASONS FOR JUDGMENT

MILLAR, A J

1. This application was heard on 28 January 2019. After hearing the parties, I made an Order. On the same day that the Order was made, the Applicant applied for reasons. Inexplicably the court file became misplaced and it was only when a duplicate file was opened on 22 March 2019 that I was placed in a position to prepare this reasons.

2. This is an application in which the Applicant sought orders in the following terms:

   2.1 An order directing the 3rd Respondent to re-open the estate of the late Itumeleng John Mere, under the Master Estate reference number 959/2000.

   2.2 An order declaring any liquidation and distribution account and the certificate thereof in respect of the estate late Itumeleng John Mere, with identity number 280816 5185 087, null and void and be set aside.

   2.3 An order removing the 1st Respondent from office as an executor of the estate late Itumeleng John Mere and be ordered to return her Letters of Executorship to the 3rd Respondent with immediate effect.

   2.4 An order directing that the 3rd Respondent appointment and grant Letters of Executorship to any person whom it deems fit and proper to be the executor of the estate of the deceased.

2.5 An order directing that the 1st and 2nd Respondents pay the costs of this application.

3. When the matter was called, I raised a number of issues that arose on the Applicant's papers. These were the following:

3.1 The failure to join all the heirs in the estate of the deceased as well as persons who were alleged to be the current owners of some of the disputed immovable property.

3.2 Whether it was possible to adjudicate the matter and in particular the allegations in regard to the under of the properties in the estate in 2002 when the evidence upon which such alleged under valuations was premised were valuations as at 2010.

4. I indicated after having heard counsel that that having regard to these issues, the application could not be properly adjudicated and that it was appropriate to postpone it so that the outstanding matters could be addressed. Counsel for the Respondents did not seriously oppose this but argued that the Applicant should pay the wasted costs.

5. The present matter has as its genesis the marriage of the Applicant's late father, the deceased, to the 1st Respondent in 1965. This was a civil marriage in community of property – the parties being of different racial classification in accordance with the apartheid laws applied at that time. The deceased had divorced his first wife in 1961 and had obtained custody of the Applicant and his two sisters born of that marriage.

From the marriage of the deceased and the 1st Respondent, seven further children were born. They are the half siblings biologically speaking of the Applicant. By the time the deceased passed away on 26 March 2000, he was survived by the 1st Respondent, his wife of thirty -five years, and a total of 10 children.

6. When the deceased's estate was reported, and the 1st Respondent appointed as the representative in his estate on 5 April 2000, the total value of the assets in the estate was recorded as being R120 000.00.

7. This was the initial valuation of the assets in the estate. The letters of authority were subsequently replaced by Letters of Executorship and the valuations of the property in the estate was subsequently amended and increased to R270 000.00 in the liquidation and distribution account which was submitted on 12 March 2002. The gross assets being R270 000.00, in excess of the threshold of R125 000.00 applicable at the time is what necessitated the withdrawal of the letters of authority. The liabilities in the estate totaled R55 363.14 and this left an amount for distribution of R214 636.86.

8. The liquidation and distribution account correctly reflects the 1st Respondent as being entitled to a half share of the amount for distribution i.e. R107 318.43 by virtue of the marriage in community of property and furthermore and by virtue of the fact that the deceased died intestate, that the 1st Respondent was entitled to R125 000.00 or a child's share whichever was the lessor. The Applicant and his 9 siblings are all recorded in the liquidation and distribution account as being the children of the deceased who survived him.

9. The unhappiness of the Applicant stems from his belief that the 1st Respondent deliberately undervalued properties so as to ensure that he was effectively disinherited. He did not wait to raise his concerns but started litigating the issue at an early stage. As early as March 2002 the Applicant had already consulted an attorney to raise his concerns regarding the valuation of the property in the estate. It suffices to say that the Applicant has attempted on a number of occasions to have the estate re-opened. The Applicant has been unsuccessful during the first 9 years of his endeavor.

10. The Applicant's current attorney of record was appointed *pro bono* at the beginning of 2011. In paragraph 21 of the Founding Affidavit, the Applicant states

> *"I respectfully submit that I was advised, which advice I accepted, the critical point of the contestation between the 1st Respondent, her son and us as the heirs in the late Itumeleng John Mere, was incorrect evaluation of the 4 immovable properties of the deceased estate, which the 1st Respondent had been under evaluating them in order to secure the whole estate assets for her own and the 2nd Respondent. In the circumstances, my current attorneys of record, then sought the assistance of qualified evaluators called Dlava Auctioners CC, a close corporation that deals with evaluation and in providing qualified report (sic) of the correct market value of the immovable properties, to do evaluation of the immovable properties of the estate. "*

11. The current application was issued on 28 March 2017, almost 17 years to the day after the death of the deceased. Paragraph 21 of the Founding Affidavit, leaving aside the issue of the failure to join any of the other 8 persons (the 8 siblings who are not cited besides the Applicant and 2nd Respondent) who would have a material interest in the

reopening of the estate, sets out the crux of the Applicant's case. The Applicant asserts that the 4 immovable properties were under-valued in 2002.

12. The valuations obtained are singularly unhelpful. The valuations are all dated 25 February 2016 and each reflects the value of the particular property as at the date of the valuation. In other words it took the Applicant and his attorneys some 5 years to obtain valuations of the properties and when those valuations were obtained, they reflected the values as at 25 February 2016, 16 years after the original valuations. Furthermore, the valuations all reflect the state of the properties as at 2016 and contain no reference to their state in 2002 when they were valued by the 1st Respondent and whether there were any improvements over the 16-year period between the death of the deceased and the valuations. The valuations as they stand are unfortunately of no assistance whatsoever in deciding the dispute.

13. While the Applicant has been represented *pro bono* by his attorneys of record, the 1st and 2nd Respondents have not. They have been put to the expense of having to defend themselves against the relentless pursuit by the Applicant of the re-opening of the estate of the deceased. They have not had the privilege of *pro bono* legal assistance.

14. By the time the application was heard, the Applicant himself recognized that there had been a non-joinder – at least in respect of the current owners of some of the properties and took the view in paragraph 36 of his replying affidavit dated 31 August 2017 that "*my attorney of record and advocate Mashita after properly considering the merits as*

contained in the replying affidavit, decided that the best option would be to in fact join the current owners of the respective properties".

15. Notwithstanding a recognition on the part of the Applicant and his attorney of record that there was a material non-joinder of parties as at 31 August 2017, they nevertheless proceeded to set the application down for hearing on 28 October 2018.

16. In circumstances where the Applicant knew that the matter could not and would not be ripe for hearing, he and his attorney nevertheless proceeded to set the matter down and put the 1st and 2nd Respondents to the expense of having to brief their attorney and counsel to settle heads of argument and appear to argue the application.

17. It is for this reason that in my view, the Applicant was to bear the wasted costs. Having regard to the length of time that the Applicant has pursued this application, the fact that the application is subject to the short comings that it is and that the Respondents were needlessly brought to Court and caused to incur the expenses for doing so, I formed the view that the Applicant ought not to be permitted to re-enroll this particular application until such time as the wasted costs have been paid. In this regard I was mindful of not only the right of the Applicant to have his case heard but also the right of the 1st and 2nd Respondents not to be put to unnecessary and avoidable expense.

18. I put it no higher than to state my concern for the manner in which the Applicant's attorney prepared this application and then knowing that it was not ripe for hearing, proceeded to set it down. Acting for a client *pro bono* as Applicant's attorneys do for him in this matter does not absolve them of the obligation to provide a professional service to

the Applicant and to ensure that their conduct in providing that service does not amount to an abuse of any other party or for that matter the Court.

19. In the circumstances, I made the following order:

19.1 The application is postponed sine die.

19.2 The Applicant is to pay the wasted costs.

19.3 The matter cannot be re-enrolled before proof is provided to the Registrar that the costs referred to in paragraph 2 have been paid.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	28 JANUARY 2019
ORDER MADE ON:	28 JANUARY 2019
REASONS:	26 MARCH 2019

COUNSEL FOR THE APPLICANT:	ADV T MASHITOA
INSTRUCTED BY:	CREMER & STRYDOM INC.
REFERENCE:	MR L CREMER

COUNSEL FOR THE FIRST & SECOND RESONDENTS :	ADV J DE SWARDT
INSTRUCTED BY:	AMOS KHUMALO INC.
REFERENCE:	MR A KHUMALO

NO APPEARANCE FOR THE THIRD RESPONDENT