CIV/APN/151/18

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the Matter Between:-

SAKI DU PREEZ	**APPLICANT**
AND	
NTHATI 'MAMMAKO PHEKO	**1ST RESPONDENT**
RAMOHAU PHEKO	**2ND RESPONDENT**
FAROOQUE ABDUL MAJID SOLKAR	**3RD RESPONDENT**
SIDDIQUA FAROOQUEN SOLKAR	**4TH RESPONDENT**
THE MASTER OF THE HIGH COURT	**5TH RESPONDENT**
THE ATTORNEY GENERAL	**6TH RESPONDENT**

JUDGMENT

CORAM	**:**	**HON. ACTING JUSTICE M. MOKHESI**
DATE OF HEARING	**:**	**12 DECEMBER 2018**
DATE OF JUDGMENT	**:**	**14 FEBRUARY 2019**

SUMMARY:

Practice: *Dispute about inheritance of landed property – points of law relating to locus standi and dispute of fact raised – Held: Applicant has locus standi,*

Held further, that dispute of fact is not a point in limine and should not be raised as such.

Fraud allegations levelled against the 1st respondent – held the applicant bears the onus of proving fraud.

Application dismissed with costs.

ANNOTATIONS:

CASES: *Gilbey Distillers and Vintners (PTY)Ltd v Morris NO 1990 (2) SA 217*

Mineworkers' Union of Namibia v Rossing Uraniam Limited 1991 NR 299 ; Tamarillo (Pty) v B.N Aiken (Pty) Ltd 1982 (1) SA 398 (A)

Peterson v Cuthbert and Co. Ltd v Stellenvale Winery (PTY) Ltd1945 AD 420

Plascon – Evans Paints Ltd v Van Riebeeck Paints (PTY) Ltd [1984] CASCA 51

Standard Bank v Du Plooy and Another; Standard Bank v Coetzee and Another 1899 (16) SC 161

Stellenbosch Farmers' Winery (PTY) Ltd v Stellenvale Winery (PTY) Ltd 1957 (4) SA 234

NDPP V Zuma (573/2008) [2009] ZASCA 104

Sandton Civil Precinct (Pty) Ltd v City of Johannesburg and Another (458/2007) [2008] ZASCA 104

Makoala v Makoala C of A (civ) 04/2009 [2009] LSCA 3

PER MOKHESI AJ

[1] INTRODUCTION

This case concerns inheritance to site No. 112 situated at Ha-Hoohlo. In terms of this application, the applicant seeks relief in the following terms:

> "a) That the purported inheritance of estate and or of site No. 112 belonging to the late Saki Abrams Du Preez by the 1st respondent be declared null and void.
>
> b) That the applicant be declared as the customary heir to the estate of late Saki Abrams Du Preez.
>
> c) That the 1st respondent to 4th respondents and or their agents be ejected from site No. 112 now lease No. 12281 – 588.
>
> d) The 1st to 4th respondents to pay costs of suit on an attorney and client scale."

This application is opposed.

[2] Factual Background

The applicant is the son of Thabo Du Preez. Thabo Du Preez's father Muccara Du Preez, had two brothers, one Saki Abrams who was the eldest (who is the original owner of the property in question) and a youngest brother by the name of Matlosa who is the 1st respondent' father. The 1st respondent's siblings predeceased her. Saki Abrams Du Preez never got married, while his two siblings, Muccara and Matlosa got married and bore children. Muccara (applicant's grandfather) begot applicant's father Thabo and three other children. Matlosa begot the 1st respondent and four other children, who predeceased her. Saki Abrams, as already said never got married and had no issues.

[3] During his lifetime, the late Saki Abrams acquired site No.112 situated at Ha-Hoohlo where he stayed with Matlosa and his children, except applicant's father who relocated to Teyateyaneng.

[4] Saki Abrams Du Preez died intestate. It is also common cause that even after his death, Matlosa's family continued to stay on the property in issue. The site was ultimately sold by the 1st respondent to other individuals who in turn transferred it to the 3rd and 4th respondents. As to how the 1st respondent got to inherit the site is hotly disputed as will emerge in the ensuing discussion. The applicant alleges fraud in the manner in which the 1st respondent inherited the site, an assertion which is vehemently denied by the 1st respondent.

[5] When the respondents filed their opposing papers, they raised certain points in *limine*. The 1st and 2nd respondents raised a point in *limine* termed "A case involves disputes of facts." When a point in *limine* is raised, the founding affidavit alone is considered to determine whether it makes out a *prima facie* case. The averments contained in the founding affidavit are taken as true for purposes of determining the validity of the point in *limine* so raised. (**Makoala v Makoala C of A 04/ 2009 [2009] LSCA 3 at para. 4).** Material dispute of facts cannot be raised as point in *limine* (see **Makoala v Makoala ibid)** as the point might not necessarily entail the dismissal of the application in the light of the options which are available to the litigants and the court in terms the provisions of rule 8(14) of the Rules of this court. In the same breadth 3rd and 4th respondents raised a number of preliminary points which were later abandoned but for one point, viz, *Locus standi* in *Judicio*. In terms of this point, the 3rd and 4th respondents argued that the applicant has failed to indicate that his father was ever appointed and confirmed as the heir to Saki's estate after the latter's death. They argued that the applicant cannot inherit what his predecessors did not have before they passed on.

[6] While the question of *locus standi* is a procedural one it touches on the substance of the dispute, requiring the applicant to establish the legal nexus between himself and the entitlement to come to court. This point was aptly stated in **Sandton Civil Precinct (PTY) Ltd v City of Johannesburg and Another (458/2007) [2008] ZASCA 104 at para. 19 where Cameron JA (as he then was**) said:

> "19. As Harms JA has pointed out, while procedural, it also bears on substance. It concerns the sufficiency and directness

> of a litigant's interest in the proceedings which warrants his or her title to prosecute the claim asserted. This case illustrates the point. The applicant must establish the legal lineage between itself and the rights – acquiring entity the resolution mentions. That it has not done. While in a sense this is technical, and procedural, it also goes to the substance of the applicant's entitlement to come to court. It has failed to show that it is the rights- acquiring entity, or is acting on the authority of the entity, or has acquired its rights".

[7] It is apposite to highlight that in his founding affidavit, the applicant (at para. 4.4) avers that "in his lifetime Saki wanted to pass his legacy to my father Thabo Du Preez who was his younger brother's son but Matlosa for unknown reason blocked that and it never materialised." The applicant's directness and nexus to the property in question is made out in para 7.2 of his founding affidavit where he states:

> "7.2 It follows therefore that since Saki Abrams Du Preez had no children his legacy passes to his brother. In this instance the legacy ought to have passed on to first younger brother Muccara Du Preez then to Thabo Du Preez's heir since Thabo is also deceased. There is no way that the legacy of Saki Abrams Du Preez could pass the family of Muccara and go to his younger brother –Matlosa's, married daughter for that matter who has brothers."

[8] Based on the above except it is my considered view that the applicant has established a direct and substantial interest in the site No. 112 which was owned by his grandfather who died interstate. Given that Matlosa was the youngest of the three brothers, it follows that the property of Saki Abrams, who died intestate, would ordinarily have devolved to his second younger brother, Muccara and to his children. It follows that the point in *limine* ought to be dismissed, as the applicant has managed to show a direct and substantial interest in the property in issue.

[9] Material Disputes of facts

This application is riddled with material dispute of facts as will be seen in the ensuing discussion. Critical disputes relates to the following issues:

a) Whether indeed the Du Preez family council resolved to pass on the site in question to the 1st respondent's mother in the year 2008 after the death of Sake Abrams as alleged by the 1st respondent.
b) Whether the 1st respondent was bequeathed the property by Du Preez family council in 2014 as alleged by the 1st respondent.

[10] These disputes go to the root of the *lis* between the applicant and the respondents. Where dispute of facts arise on papers the court has a variety of options available to it in terms of the provisions of **Rule 8(14) of the Rules of this Court**. The said Rule provides that:

> "If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems appropriate with a view to ensuring a just and expeditions decision. In particular, but without limiting its discretion, the court may direct that oral evidence be heard on specified issued with a view to resolving any dispute of fact… or definition of issues, or otherwise as the court may deem fit."

[11] It is common cause that the applicant did not apply that the application be converted into trial to resolve these disputes. It is trite that application procedure is designed for the resolution of legal issues based on common cause facts. It follows therefore that because applications are not meant for resolution of factual issues they cannot be used to determine probabilities. **(NDPP v Zuma (573/2008) [2009] ZASCA 1 at para. 26**) It is indeed true that application procedure provides an expeditions way of resolving disputes between litigants, however, where the litigant, (applicant) chooses to proceed by way of notice of motion when the issues could be resolvable through action proceedings, such a litigant takes a huge risk. The risk attendant in the wrong choice of proceedings is that where the applicant, as in the present case, should have reasonably foreseen in advance that a dispute of fact will arise, but nevertheless proceeds by way of motion proceedings, he runs the risk of his application being dismissed with costs (**Mineworkers' Union of**

Namibia v Rossing Uraniam Limited, 1991 NR 299; Tamarillo (PTY) Ltd v B.N Aitken (PTY) Ltd 1982 (1) SA 398(A)).

[12] Where dispute of facts arise in affidavits, the general rule is that relief should only be granted if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order (**see Stellenbosch Farmers' winery (PTY) Ltd v Stellenvale Winery (PTY) Ltd 1957 (4) SA 234 (c) 235 E – G and Plascon – Evans Paints Ltd v Van Riebeeck Paints (PTY) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) 634 E – I).**

[13] In *casu* there is a dispute of fact as to whether the estate of the late Saki Abrams was ever distributed. The 1st respondent argue that Saki Abrams passed away in 1995 and that in 2008, the Du Preez family council sat and resolved that the site in issue be passed on to Mrs 'Maletlatsa Abrams Du Preez (1st respondent's mother who is also deceased). The 1st respondent has attached a resolution to this effect (marked Annexure MPI). The said Annexure MPI provides (in relevant parts) that:

> "TO THE RESERVE CHIEF
>
> LAND AND SURVEY
>
> THE DECISION of Du Preez family after the death of Mr. Saki Abrams Du Preez who died on the 22nd August 1995.
>
> The family came to a decision to pass the site to 'Maletlatsa Abrams to inherit the site that belonged to Mr. Saki Abrams Du Preez which is situated at Ha-Hoohlo site No. 112 Ha- Hoohlo Maseru.
>
> Mrs Mary 'Malethola Du Preez
>
> Mr. Tatu John Du Preez (signature)
>
> Mr. John Buti Du Preez (signature)
>
> Stamp of the office of the Reserve Headman."

The 1st respondent further avered that following the demise of her mother, Mrs 'Maletlatsa Du Preez, the Du Preez family council met again and resolved to pass the site on to the 1st respondent as the only surviving child in the Matlosa family. The minutes of the said family council meeting (annexure MP3) provides (in relevant parts)

"

Ha- Hoohlo

Maseru 100

18-08-2014

Reserve Chief

Maseru

The Chief

On our sitting as the family of Du Preez we arrived at the decision that 'Mammako Agnes Pheko is to inherit the estate of the late Mr. Saki Abrams on the site No. 112 which is situated at Ha Hoohlo which the family had passed on to 'Maletlatsa Abrams who is now late. We therefore pass the same site to her only surviving daughter 'Mammako Agnes Pheko.

Thanking your service in advance.

Members of the family

1. Tatu John Du Preez RA 511963 (signature)
2. Rethabile Du Preez RC 071166 (signature)
3. Maria Du Preez 001065789634
4. 'Mako Zakaria Pheko RA 608867 (signature)

Although the applicant disputes these assertions it cannot be said that the 1st respondent's assertions are so manifestly untrue and unconvincing that they can be disregarded in view of the fact that she has attached the resolutions of Du Preez Family Council to pass the site in question on to the 1st respondent and her mother respectively **(Peterson v Cuthbert and Co. Ltd 1945 AD 420 at 428).** The applicant has nothing to show for his stance other than saying that the Du Preez family council has never made the decision as alleged by the 1st respondent. The site in question having been passed on to the 1st respondent's mother following the demise of Saki Abrams, it follows that it was probable that after 'Maletlatsa's death, the Du Preeez family council would have sat to distribute her property to her children,and in this case, to the 1st respondent as her only surviving child. In the light of the above discussion, I am satisfied as to the inherent credibility of the 1st respondent's factual averment that I proceed on the basis of its correctness (**Plascon – Evans Paints above at p. 635 A – C).**

[14] Fraud Allegations

Before I conclude it is apposite to deal with allegations of fraud levelled against the 1st respondent by the applicant. In para. 6.1 of his founding affidavit, the applicant avers that:

> "6.1 It has come to the attention of the Du Preez family that the 1st respondent, daughter of the late Matlosa Du Preez who was the younger brother of Saki Du Preez, has fraudulently transferred the site to himself and the 2nd respondent under the guise that she has inherited the site yet there has never been any inheritance either through custom or nomination to them and even more so when she is married to the Pheko family."

[15] The principles in terms of which an averment of fraud should comply were stated a century ago in **Standard Bank v Du Plooy and Another ; Standard Bank v Coetzee and Another 1899 (16) SC 161 at 166** where De Villiers CJ said:

> "There is no principle more clearly established in the administration of justice than that fraud must not only be alleged, but that it must be clearly and distinctly proved."

The applicant bears the *onus* of proving fraud, and that fraud will not lightly be inferred (**Gilbey Distillers and Vintners (PTY) Ltd v Morris NO 1990 (2) SA 217 at 225 J – 226 A).**

[16] It is clear that the averments of fraud captured above fall far short of the requisite standard. The applicant is merely making bald statement which does not prove fraud on the part of the 1st respondent at all. The applicant merely contents with asserting, without more, that the respondent was allocated the site in question fraudulently. In the result this court finds that fraud has not been established. In consequence thereto the following order is made.

[**17] Order**

a) The application is dismissed with costs.

_____

M.A. MOKHESI AJ (MR)

FOR APPLICANT : ADV. MOKONYANA

FOR 1ST AND 2ND RESPONDENTS: ADV. HLAKAMETSA

FOR 3RD AND 4TH RESPONDENTS: ADV. R. SETLOJOANE