



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

Mthembu v Mlamba and Others

Case NO: 17373/2019

Date of Judgment: 07 March 2025

JUDGMENT SUMMARY

In this matter, an order was granted on the 19 February 2025. The applicant's application was dismissed with costs, only against first, second and third respondents (the respondents), on party and party, scale B. This judgment now constituted as written reasons as contemplated by paragraph 3 of that order.

The applicant sought a declaratory order that the sale of the property to the second and third respondents (the Thabits) be declared to be null and void, and the subsequent registration of ownership be reversed. Furthermore, he sought an order that the property be transferred into her name as a registered owner. The respondents opposed the application.

It was common cause that, on the 19 August 2015, the first respondent (Mlamba), sold the property to the Thabits, relying on the letter of executorship, which was valid at that time. It was also common cause that the applicant herself was only issued with a letter of executorship by the Master on 22 August 2016, which was long after the sale transaction had been concluded. In fact, the applicant was evicted from the property, by way of an order granted by the honourable Tuchten J on 29 December 2015.

The applicant believed that Mlamba had no authority to sell the property, as it belonged to her in terms of a will. This, then, led to the lodging of this application. However, this application was never served on the Master and it was not disputed by the applicant.

This court held that failure to serve the application on the Master effectively meant that there was a non-joinder of the Master and that failure was fatal. Nonetheless, this court dealt with the merits of the applicant's application, to illustrate that the case, in any event, had no merit.

In this matter, there were several material factual disputes that have arisen. The court remarked that, this was a typical case that was very difficult to resolve in motion proceedings. The applicant should have anticipated the eventuality of material factual disputes, therefore, must stand and fall on how, these kinds of factual disputes are ordinarily resolved in motion proceedings. This court held that, there was no reason why this matter should not be decided on the basis of the admitted facts, together with the version as contained in the answering affidavit of Mlamba.

The court held that when the estate was reported by Mlamba, in August 2015, on the basis that the deceased died intestate, the Master clearly exercised his discretion in terms of section 18(1) of the Administration of Estate Act¹ (the Act) to appoint Mlamba as executor. Then, he became *functus officio*.

The applicant did not approach the Chief Master under section 95 of the Act to review the appointment of Mlamba as an executor, nor apply to this court, in terms of section 54(1)(v), to remove Mlamba as executor based on a misrepresentation the applicant alleged that Mlamba made when obtaining the letter of executorship from the Master and in which event compliance with *audi alteram partem* rule as prescribed by section 54(2) was essential. Furthermore, it cannot be proved that Mlamba was removed by the Master for the purposes of replacing him with an executor appointed under the will of the deceased.

After all the above was considered, this court held that, only one conclusion could follow, which was to confirm the validity of the appointment of Mlamba, as an executor, on 19 August 2015, by the Master. The applicant's application was dismissed with costs.

¹ Act 66 of 1965 (as amended).