IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 30268/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

24/06/2019

DATE SIGNATURE

In the matter between:

POSTHUMUS, MICHAEL CLAYTON	First Applicant
POSTHUMUS, JOHNATHAN BRIAN	Second Applicant
and	
THE MASTER OF THE HIGH COURT, JOHANNESBURG	First Respondent
MARIA POSTHUMUS	Second Respondent
ANNALISE NEYT	Third Respondent

JUDGMENT

YACOOB J:

INTRODUCTION AND FACTUAL BACKGROUND

1. The applicants are the sons of Gerhardus Roedolf Posthumus, who passed away on 18 February 2016 ("the deceased"). The second respondent, who is the only respondent who opposes this application, is the widow of the deceased, and the third respondent is the step daughter of the deceased.
2. The applicants seek an order directing the first respondent ("the Master") to consider the nomination of the first applicant to be appointed as executor in the deceased's estate, and to issue letters of executorship in that regard.
3. This application came about in the following way.
4. In terms of the deceased's will, the two applicants and a trust (the Maria Posthumus Trust) are beneficiaries. The two applicants receive specific bequests, and the Trust is the residuary legatee. The Trust was set up, during the deceased's lifetime, for the benefit of the second respondent and any children of her and the deceased. The second respondent is a trustee of the Trust. The applicants are beneficiaries but not trustees of the Trust.
5. The deceased nominated Capital Legacy Fiduciary Services (Pty) Ltd ("Capital") as the executor of his estate. The executor renounced its appointment, it is not clear at what stage or for what reason. According to the first applicant there is a Provisional Liquidation and Distribution Account, but the applicant does not disclose when that was produced, nor is it annexed to the papers.
6. At some point, it is not clear when, the second respondent apparently wished to be appointed as executor. However, the first applicant also wished to be appointed, and wrote to the Master in this regard, apparently on 23 May 2017. The second respondent did not object at the time to this appointment. The first applicant was nominated for appointment by the second applicant and the third respondent.

7. The second respondent indicated to the applicant's attorneys in March 2018 that she would approach the Master for her own appointment as executor, but she did not do so. She states that she withdrew her support for the first applicant's nomination because it became clear to her that he was only wanting to serve his own interests and those of his brother, the second applicant.
8. This application was initially brought on an urgent basis, using various issues such as the second respondent's ownership of a motor vehicle and alleged receipt of pension funds as a basis for urgency. However none of these were relied on at the hearing of this matter as grounds for the relief sought in this application. The applicant specifically disavowed reliance on any contention that the second respondent was not a fit and proper person to be the executor of the estate.
9. The applicants also relied for urgency on a letter from the Master which stated that the first applicant had 14 days in which "to approach the Court to restrain the Master from issuing letters of executorship in favour of the surviving spouse".[1]
10. There is also an allegation in the founding affidavit that there is a possibility that the estate may be insolvent, because the deceased kept his assets in Trusts, but nothing was made of this at the hearing of the matter. It transpired that the only basis of the application at the time it was heard was the first applicant's contention that he was entitled to have his nomination as executor considered by the Master.
11. At the hearing of the matter I repeatedly requested counsel for the applicants to address me on the applicant's entitlement to have his nomination considered at this stage of the Master's dealing with the estate. He declined repeatedly to do more than say "in terms of the Act", without referring to any specific section thereof.

[1] The letter refers to section 22(2)(c) of the Administration of Estates Act, 66 of 1965, but clearly means section 22(1)(c) of that Act. Nevertheless, it is worth noting that section 22 of the Act only applies to executors testamentary or by assumption, that is, executors nominated in a will or who are "assumed" (that is, the executorship is passed on to them) by executors testamentary.

He maintained that he did not have to make out his case, but simply had to show that the second respondent's defence had no merit.

12. This is clearly, and at best, a misunderstanding of the legal position. An applicant must make out its case. If the respondent's defence is bad, this does not entitle an applicant which has not made out its case to the relief it seeks.

13. Eventually, on the instructions of his attorney, counsel for the applicants requested the opportunity to file supplementary heads of argument to deal with the issue. I granted this request, requiring counsel to write down the precise wording of the question I wished him to deal with, and asking him also to include in the written argument submission on why he should be permitted to mark a fee for this additional work. I deal with this issue later in this judgment, when I deal with costs.

THE LAW AND THE ISSUES

14. There are no real factual disputes between the parties that are relevant to the relief sought. The questions of the conduct of the second respondent, her suitability to be appointed executor, and whether the first applicant should be preferred over the second respondent have not been pursued before me. In fact they were specifically abandoned. The only issues are whether the Master is obliged to consider the first applicant's nomination before making a decision about appointing an executor at this point in time, and whether the second respondent can be considered for appointment as an executor in the absence of a nomination or application for her appointment.

15. The Administration of Estates Act, 66 of 1965 ("the Act") sets out the procedures that are to be followed when, as in this case, a person nominated by the testator to be the executor (an "executor testamentary") renounces the nomination.

16. Although the applicants' affidavits are somewhat vague on the manner and timing of the "renunciation" of its nomination by Capital, it appears from the mention of the existence of a Provisional Liquidation and Distribution account that Capital took up the nomination and then renounced it.

17. This is the situation described in section 18(1)(e) of the Act. The Master "shall, ... if any person who is the sole executor... of any estate, cease for any reason to be the executor[s] thereof," appoint any person he deems fit and proper to be the executor of the estate. If the Master considers it necessary or expedient, he may instead publish a notice to call upon the surviving spouse, heirs, and persons having a claim on the estate, to "attend before him" to recommend a person to be appointed as executor.

18. If the Master publishes such a notice, section 18(2) provides that, whether or not a person is recommended, the Master may appoint any person he deems fit and proper to be the executor of the estate.

19. Section 19 applies after a notice is published, when more than one person is nominated for recommendation. In that situation the Master is to give preference to a surviving spouse, followed by an heir, a creditor or the tutor or curator of an heir or creditor, in that order.

20. Because the first respondent relied on the preference for the surviving spouse set out in section 19, in her affidavit, and because no notice has been published, the applicants initially suggested that the first applicant is entitled to be considered for appointment and that the first respondent is not because it is only after publication of the notice that a surviving spouse has preference.

21. As I mentioned earlier in this judgment, the non-applicability of the section relied upon by the first respondent in her defence does not automatically entitle the

applicants to the relief they seek. They must still make out a case for it. The authorities relied upon by the applicant's counsel regarding a defence which is not pleaded are not relevant to whether they must make out a case or not. In any event, both judgments dealt with new defences raised on appeal, which had not been considered or dealt with by the trial court. They are, on that point, entirely distinguishable from this case.

22. The notice procedure set out in the Act is clearly intended for a situation in which the Master is not aware of or in contact with the persons who may be appointed as executors in a situation such as the present. That is obviously not the case in this matter.

23. In both situations, when the Master appoints someone without publishing a notice, and when he does so after publishing a notice, the Master must appoint a person he considers to be fit and proper to be the executor.

24. When the Master appoints someone without publishing a notice, it is obvious that the Master must consider the persons available, and decide who is the most appropriate (or fit and proper) to be appointed. There is no requirement at this stage for an application or a nomination. However, there is no reason why a person may not be brought to the Master's attention as a possible executor in the form of an application or nomination.

25. In my view, the Master must, in making that decision, consider who is available for appointment, and evaluate who it would be most appropriate to appoint. There is no reason why the Master may not take into account the hierarchy set out in section 19 in making this decision, but he is not bound by it where there has been no publication of a notice. Similarly, although section 22 does not apply to executors

appointed in terms of section 18 and 19, there is no reason why the Master may not take any objections into account when making the decision.

26. The letter of the Master dated 03 August 2018 states that, if a court is not approached within fourteen days to prevent it, the Master would issue letters of executorship to the surviving spouse (the second respondent). As such, the Master appears to have made a decision that the second respondent is the person who it is fit and proper to appoint as executor.

27. I pause to note that, although the Master relied on an incorrect statutory provision (which does not apply to persons who are not executors testamentary or assumed executors), there is no reason why the applicants could not in any event approach the court to prevent the appointment of the second respondent in terms of the common law.

28. The Act does not require that, for an appointment to be made when no notice is published, any person must be nominated or must apply for appointment as executor. The applicants' contention that the second respondent may not be appointed because she has not been nominated or has not applied for appointment is therefore incorrect. The Master may simply consider and appoint her, or anyone else, in circumstances where no notice has been published. There is no prescribed procedure to be followed in the absence of the publication of a notice.

29. The Master's letter appeared well after the first applicant's nomination was submitted. It is possible that, when deciding to appoint the surviving spouse, the Master did consider the first applicant's application or nomination.

30. Unfortunately the Master chose not to participate in these proceedings, so the Court is not aware of the Master's reasoning. The fact that the second respondent does not deny the applicants' contention that the Master has not considered the

first applicant's nomination is irrelevant, as the second respondent does not have and cannot be expected to have knowledge of what the Master did or did not consider.

31. The applicants do not seek to set aside the decision of the Master. However, the decision is not complete, and not open to review, until and unless the second respondent is actually appointed and letters of executorship issued to her.

32. Nor do the applicants rely any more on the allegations that the second respondent is not fit and proper to be appointed as executor. It is difficult to know on what basis, then, the Master must consider the first applicant to be a preferable executor over the second respondent. In circumstances where all other things are equal, there is no reason why the Master should not use as a guideline the hierarchy set out in section 19 of the Act. After all the Master does not know the people involved and has no real way of evaluating potential executors. In addition there is no substantive difference between people who compete for appointment after publication, and people who compete for appointment by simply making themselves known to the Master.

33. The fact that the second respondent did not articulate any argument in her answering affidavit based on section 18 of the Act is neither here nor there. Objectively, the applicants had to make out their case in terms of the Act, and section 18 is the applicable section. Nowhere in the founding affidavit, or the replying affidavit, does the first applicant mention section 18, or any other section of the Act other than section 22 (and section 19 in reply). Even at the hearing of the matter, the applicants' counsel declined to identify any section of the Act in terms of which the applicants are entitled to the relief sought. Were I to apply the

applicants' logic against them, the application would stand to be dismissed simply for this failure.

34. Naturally no court takes such a formalistic approach, either to an applicant's case or to that of a respondent. The important question is whether the evidence supports the relief sought.

35. In this case, and although it is not included in the notice of motion, it is apparent that the applicants seek not only that the first applicant's nomination be considered, but that the second respondent not be considered for appointment as an executor.

36. Taking into account the abandonment of the contentions that the second respondent is not fit and proper, there is no basis for the second respondent not to be considered.

37. However, it appears from the terms of the Master's letter that the Master takes the position that he only has to consider other candidates for executorship if the surviving spouse does not "come forward" or accept the appointment. This cannot be correct.

38. In my view, in order to determine that a person is fit and proper for appointment, the Master must consider anyone who has made him or herself known to the Master as a possible executor.

39. I do not consider that the applicants have made out a case for the first applicant to be the only person considered by the Master for appointment. However, it is clear that the Master must consider both the first applicant and the second respondent.

COSTS

40. In addition to dealing with the costs of the application and hearing before me, I also must deal with the costs of the urgent proceedings.

41. The urgent proceedings were brought ostensibly to prevent the Master from appointing the second respondent as executor, but that is not the relief sought in the notice of motion. The founding affidavit, in making a case for urgency, relies on certain conduct of the second respondent, which she has answered in the answering affidavit, and which the applicants no longer rely on.

42. In addition, the applicants rely on the Master's letter which calls upon the applicants to "approach" a court within fourteen days to restrain the grant of letters of executorship to the second respondent.

43. It is obvious that a call to "approach" a court does not constitute a ground for urgency. The applicants did not have to obtain a court order within fourteen days, but merely had to institute proceedings. Although the Master's interpretation of the law and the applicability of section 22 of the Act is incorrect, the Master clearly considered that he would be prevented from issuing the letters on the mere "approach" to a court.

44. The applicants are therefore liable for the costs occasioned by the urgent application.

45. In this application, the relief sought by the applicants was two fold: first, they wished the first applicant to be considered for appointment as executor. Second, they wished to exclude the second respondent from being considered for appointment as executor, ultimately because she had not applied or been nominated to be appointed. Initially of course it was also because she was alleged to be unfit for appointment. The applicant was only partially successful in this regard.

46. Taking into account that a large part of the founding, answering and replying affidavits deal with the second respondent's fitness for appointment, and that that ground was raised by the applicants only to be abandoned at the hearing, it seems to me appropriate that the applicants should bear the costs of the preparation of those papers.

47. As far as the supplementary heads of argument are concerned, nothing cited or submitted by the applicants' counsel absolves the applicant from having to make out a case, founded in the law. The applicants' counsel relies on the second respondent's failure to deny that the Master did not consider the first applicant's nomination, which was not within her knowledge to admit or deny, and on her failure to deny that "there is a nomination complying with the requirements of the Master" to suggest that this entitlement to the relief sought was common cause. She could not deny that there is a nomination complying with the requirements of the Master because no such allegation is contained in the founding affidavit. There is therefore nothing common cause arising from the answering affidavit, on which the applicant could rely to avoid having to make out his own case. In any event, it is trite that a concession in law is not binding on the Court.

48. In these circumstances the applicants' counsel's refusal to address the Court on the foundation in law for the relief his clients seek is bizarre. In my view counsel ought to have done so at the outset and ought to have been prepared to do so if questioned by the court. He was not prepared to do so.

49. In addition, despite my request that he write down verbatim the issue on which I required submissions, the supplementary heads do not reflect that he in fact did so.[2]

50. However, counsel appears to have been suffering from a genuine misconception regarding the manner in which an opposed motion should be dealt with. I will make no order regarding whether he may mark a fee for the supplementary heads, but will leave that for him and his attorney to negotiate. However, I shall require the registrar to bring this judgment to the attention of the relevant professional association to consider.

51. In the circumstances I make the following order:

51.1. The Master is to consider both the first applicant, Michael Clayton Posthumus, and the second respondent, Maria Posthumus, as potential executors in the deceased estate of the late Gerhardus Roedolf Posthumus (Master's reference 006444/2016), and thereafter decide who to appoint in terms of section 18(1) of the Administration of Estates Act, 66 of 1965;

51.2. The applicants are to pay the costs of the urgent application;

51.3. The applicants are to pay the costs of the drawing of the affidavits filed in this matter;

51.4. Each party is to pay the remainder of their own costs, and

51.5. The Registrar is directed to bring this judgment to the attention of the Pretoria Bar Council and the Gauteng Provincial Office of the Legal Practice Council.

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[2] The issue on which I requested submissions was ""What in the law, at this point in the procedure, entitles first applicant to have his nomination to be appointed executor of the deceased estate considered by the Master?". The supplementary submissions on behalf of the applicants reflected the issue as "Whether the First Applicant, at the time that he was nominated to act as the Executor, was eligible to be nominated as such." The eligibility of the first applicant was never an issue. The legal right to be considered was.

S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for applicants:	Mr G Jacobs
Instructed by:	Smit Attorneys
Counsel for second respondent:	Ms C Gordon
Instructed by:	HDRS Incorporated
Date of hearing:	11 March 2019
Date of judgment:	25 June 2019