

REPUBLIC OF SOUTH AFRICA



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

**APPEAL CASE NUMBER: A5032/2019
SCA CASE NUMBER: 333/2019
COURT A QUO CASE NUMBER: 04324/2017**

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES/NO

2.OF INTEREST TO OTHER JUDGES: YES/NO

3.REVISED

16/10/2020

DATE

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SIGNATURE

In the matter between:

LEVINSON SUSAN N.O.

Appellant

And

THE MASTER OF THE HIGH COURT
(Gauteng Local Division, Johannesburg)

First Respondent

LEVINSON JANE N.O.

Second Respondent

SALANT JEFFREY STEWART

Third Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 15h00 on the 16th of October 2020.

Dippenaar J:

[1] This is an appeal against the judgment and order of Mokose AJ (as she then was) ("the court a quo") granted on 17 September 2018 in terms of which she dismissed the appellant's application for her reinstatement as executor of the estate of Mr Ralph Morris Levinson ("the deceased") together with an order that the appellant pay the costs in her personal capacity. This appeal is with leave granted by the Supreme Court of Appeal on 1 July 2019.

[2] In the court a quo, the appellant sought to review the decision of the first respondent ("the Master") to remove her as executor of the deceased's estate under s95 of the Administration of Estates Act¹("the Act"). She further sought to set aside the appointment of the second respondent as executor and that of the third respondent as her agent and an order reinstating her as executor to distribute the deceased's estate in terms of a liquidation and distribution account dated 23 August 2016. In turn, the second and third respondents launched a conditional counter application to remove the appellant as executor in the event that her application was successful. Given the order granted, no order was made on the conditional counter application.

[3] The appellant sought an order upholding the appeal, granting the application in her favour and dismissing the respondent's counter application with costs. The second and third respondents sought the dismissal of the appeal, and in the alternative the granting

¹ 66 of 1965, as amended

of their counter application for the removal of the appellant as executrix of the deceased's estate. In light of the findings and order of the court a quo, it did not make any determination of the conditional counter application.

[4] At the initial hearing before the court a quo, the Master opposed the application and made submissions at the hearing. Its answering papers were deposed to by Mr Sephaka, a deputy Master, who authored the correspondence in terms of which the appellant was removed as executor. In the present proceedings, no heads of argument were delivered by the Master. The Master's case is discernable from the papers and the judgment of the court a quo. On the morning of the hearing, counsel for the Master appeared and sought a postponement from the bar, without any substantive postponement application being launched. The appellant abided the court's decision whilst the second and third respondents opposed any postponement, claiming prejudice as a result. The Court dismissed the application for a postponement, whereupon the appeal proceeded. Counsel for the Master made no submissions on the merits of the matter and abided the Court's decision.

[5] The facts are mostly uncontentious and are set out in some detail in the judgment of the court a quo². The deceased nominated the appellant as executrix in his will. He died on 17 April 2012 and on 20 November 2012, the Master issued the appellant with letters of executorship. The appellant appointed her attorney, Mr Ellis, as her representative in order to assist her with the administration of the deceased's estate and furnished him with a power of attorney in wide terms authorising him to take all steps in relation to the administration on her behalf. It was not disputed that at all times, Mr Ellis acted as appellant's representative and that the correspondence between the Master and the appellant was addressed to Mr Ellis. Mr Ellis was also the main deponent to the appellant's affidavits.

² (2017/4324)[2018] ZAGPJHC 503 (19 September 2018)

[6] The first liquidation and distribution account was lodged on 16 October 2013, pursuant to which the Master raised certain queries. Almost four years after the appointment of the appellant, the deceased's estate had still not been wound up. The second and third respondent further raised various complaints with the Master regarding the way in which the appellant and Mr Ellis were administering the estate, which was escalated to the Chief Master. Various amended liquidation and distribution accounts were filed, to which the second and third respondents objected. For purposes of this appeal it is not necessary to traverse the substantial amount of correspondence which passed between the parties in any detail. It is necessary only to refer to certain of the correspondence.

[7] On 2 December 2015, the third respondent, the representative of the second respondent addressed a letter to the Master raising numerous queries and objections, pursuant to a meeting held at the Master's offices on 30 November 2015 to deal with the second and third respondents complaints. The evidence established that many of these queries have still not been adequately addressed by the appellant or Mr Ellis.

[8] On 11 July 2016, the Master addressed a letter to Mr Ellis in his capacity as the appellant's agent, the relevant portion of which provided as follows:

"I wish to draw your attention to the account of your administration dated 24 March 2014 lodged with me in your capacity as executrix. The account has been examined by me, but I cannot for the reasons set out in Annexure "A" hereto accept it as an adequate and correct account for your administration of the above estate. Be good enough therefore to take notice that having failed to comply with my requirements and the provisions of Act 66 of 1965 as set out in Annexure "A" hereto, you in your aforesaid capacity are hereby required to furnish me with adequate and correct account of your administration of the above estate on or before 29th of July 2016 by complying with the abovementioned requirements or to furnish me with satisfactory proof or reasons why they should not or cannot be complied with. Failing punctually to comply with this notice you may be removed from office in terms of section 54(1)(b)(v) of the abovementioned Act. Your attention is also directed to section 51(3)(b) (disallowance of remuneration)."

[9] Appellant responded and indicated she that was still awaiting a capital gains tax certificate from SARS. On her version, the Master's representative Mr Mphanama, was satisfied with the explanation proffered. However, on the Master's version, the appellant and Mr Ellis failed to comply with his demand.

[10] Consequently, on 4 August 2016, the Master, via Mr Sephaka sent a letter to Mr Ellis via registered post in the following terms:

“You have failed to perform your duties as executor/executrix in a satisfactory manner as required in my final demand of 7 July 2016 and 11 July 2016 respectively, copies whereof are attached for ease of reference. Please take notice in terms of Section 54(2) of the Administration of Estates Act of 1965 (Act 66 of 1965) as amended, that I intend removing you from office as executor/executrix in terms of Section 54(1)(b)(v) of the aforementioned Act unless you apply to Court within 30 days from date of this notice for an order restraining me from removing you as executor/executrix. Should you be removed as executor/executrix the remuneration to which you would have been entitled may be disallowed by me in terms of Section 51(3) of the aforementioned Act. Your removal will not affect your liability for any acts or omissions which may have taken place during the administration of the estate.

[11] The letter indicated that it was sent by registered post. In correspondence addressed to the third respondent, the Master confirmed that the said letter was sent via registered mail although he did not expressly address the issue in his answering affidavit.

[12] In the appellant's founding affidavit, Mr Ellis averred that he received the 4 August 2016 letter on 22 August 2016 when he was in the Master's office. Simultaneously, he also averred that the Master “dispatched the notice on 4 August 2016”. In broad terms he alleged in his affidavit that “the executrix was not informed of her removal via registered post as required”.

[13] In their answering affidavit, the second and third respondents pointed out that Mr Ellis did not explain why he did not receive the 4 August 2016 letter in the post, considering that it was sent by registered mail ex facie the letter. In reply, Mr Ellis did not dispute that he had received both the 4 August 2016 and the 5 September 2016 letter

and did not respond to the second and third respondent's challenge regarding receipt of the letter via registered post.

[14] The appellant and Mr Ellis did not launch any proceedings to interdict her removal as executrix. Instead, the appellant and Mr Ellis sought to comply with the Master's query sheet which raised issues dating back to 2013 and finalise the estate account. The evidence established that various issues remained outstanding and still remain outstanding.

[15] On 23 August 2016 the appellant's attorney addressed a letter to the Master attaching a further amended liquidation and distribution account with certain vouchers, requesting the Master's confirmation that the account could be published in terms of s35(5) of the Act.

[16] On 29 August 2016, an assistant Master, Mr Mphanama sent a letter to Mr Ellis, the relevant portion of which provided:

"We refer to the above matter and our letter of 4 August 2016. We hereby request yourselves to disregard the letter as you have since lodged the Redrawn liquidation account and same has already been examined. We hope you find the above in order".

[17] In its papers, the Master contended that the aforesaid letter withdrawing the removal notice was invalid as the person who sent it was not authorised to do so. His view was that the appellant and her agent, Mr Ellis, were in patent contempt of his instructions to attend to queries ranging back to 2013 and up to August 2016 and that the appellant failed to perform her duties satisfactorily.

[18] On 1 September 2016, Mr Ellis addressed a further letter to the Master attaching the First and Final Distribution account which would lie for inspection for a period of 21 days from 16 September 2016.

[19] 5 September 2016, the Master, via Mr Sephaka addressed a letter (“the removal letter”) to the appellant and Mr Ellis, advising:

“My first removal notice dated 04 August 2016, a copy whereof is attached refers. Please take notice that in terms Section 54(2) of the Administration of Estates Act 65 of 1965 as amended, you are hereby removed from office as executrix in terms of section 54(1)(b)(v) of the aforementioned Act. In terms of section 54(5) you must forthwith return your letter of Executorship as well as all certified copies to the Master. As an Executrix the remuneration to which you would have been entitled to is partially disallowed by me in terms of 51(3) of the aforementioned Act. Your removal will not affect your liability for any acts or omissions which may have taken place during the administration of the estate”.

[20] Pursuant to proper notice being given of the proposed meeting on 30 September 2016, a meeting was held at the Master’s office on 19 October 2016, at which the appellant, a legal advisor from Mr Ellis’ offices and two other individuals was present. The second and third respondents were also present at the meeting. The purpose of the meeting was the appointment of a new executor to the estate. The appellant objected to the holding of the meeting which was overruled by the Master. The appellant did not at that meeting object to the appointment of the second respondent as executor. The Master appointed the second respondent as executrix to the estate. Letters of executorship was issued in her favour on 26 October 2016.

[21] Pursuant thereto, during January 2017, the second respondent launched proceedings in the Johannesburg magistrate’s court for a search warrant authorising the sheriff to search, seize and take into custody the books and records relating to the deceased’s estate in possession of the applicant. These proceedings remain pending. This in turn triggered the application launched by the appellant.

[22] The court a quo correctly articulated the issues to be determined in the application thus:

“The issue to be determined by this court is whether the Master’s decision to remove the applicant as executrix in the estate of the deceased and to appoint the second

respondent in her stead was unlawful and falls to be set aside. If the court finds that the decision by the Master was indeed unlawful, then a further issue to be determined is whether the applicant ought to be removed from her office as executrix by this court in terms of Section 54(1)(a)(v) of the Act.”

[23] In short, the court a quo found that the applicant that the appellant was dilatory in the finalisation of the estate and failed to execute her duties as executor timeously and that the Master was entitled to remove her in terms of s54(1)(b) (v) of the Act. Implicit in this finding is that the Master’s decision to remove the appellant was not unlawful. As dealt with below, considering the facts, this conclusion of the court a quo cannot be faulted and it did not misdirect itself on this issue.

[24] Under s54(1)(b)(v), an executor may at any time be removed by the Master from his office “ *if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master...*” .

[25] The court a quo found that the Master’s conduct was not without reproach and that the conflicting messages conveyed the letters of 4 August 2016, 29 August 2016 and 5 September 2016 would confuse a reasonable person. The court a quo pointed out that such correspondence and the certificate issued by the Master on 13 October 2016 (confirming the liquidation and distribution account had lain for inspection free of objection), was sent by different people who failed to consult with one another as to what should be done in the circumstances.

[26] The court a quo’s criticism of the conduct of the Master’s representatives cannot be faulted. Their conduct and correspondence was conflicting and inconsistent as found by the court a quo. But it was only inconsistent in one material respect – i.e. the content of letter from Mr Mphanama contradicts the content of the letter from Mr Sephaka.

[27] In argument, the appellant contended that the letter of 29 August 2016 amounted to a cancellation of the letter of 4 August 2016, and thus the Master could no longer rely on the 4 August 2016 letter to remove her as executrix.

[28] This argument lacks merit. As correctly found by the court a quo, once the Master issued the letter of 4 August 2016, he was functus officio and unable to reverse or reconsider the decision to remove her as executrix.³ The appellant's reliance on the 29 August 2016 letter is therefore misplaced.

[29] In her notice of appeal and heads of argument, the appellant raised four main grounds in which it was contended the court a quo misdirected itself. First; it was contended that the delays which occurred were not the fault of the appellant, but rather were caused by the second respondent's conduct. This is not correct. The appellant took four years to attend to the Master's queries and even then she did not do so satisfactorily. The contention also contradicts her version that she was awaiting the response from SARS regarding the issue of the Capital Gains Tax.

[30] Second; it was contended that all queries and objections have been addressed and the liquidation and distribution account has been finalised. All that is left is the implementation thereof, i.e. the surplus in the estate needs to be distributed amongst the heirs. Considering the facts, this contention lacks merit for the following reasons: (i) the objections and queries raised by the second and third respondents as well as the Master were not addressed. By way of example the request for documents and bank statements sought by the second and third respondents from as early as 2 December 2015 has not been provided. Further certain particulars sought by them were never provided. The appellant did not dispute this; (ii) there is the issue of estate monies which deposited into the appellant's personal bank account and into Ellis' trust account. These have not been returned to the deceased's estate; and (iii) by the time appellant sought to lodge the account, she and Ellis were aware of the Master's decision to remove her as executor. On 5 September 2016, the Master had further notified the appellant and Ellis that the decision to remove her had been implemented and that she was required to return her letters of executorship. Thus, Appellant's reliance on a liquidation and distribution account lodged by Ellis with the Master during September 2016, which she contended constitutes

³ Coetzee and Another v De Kock NNO and Others 1976 (1) SA 351 (O) at 359C-H

finalisation of the estate (as the account lay open for inspection for 21 days without objection) does not pass muster.

[31] The facts illustrated inordinate delays and failures in the performance of her fiduciary duties on the part of the appellant and her agent, Mr Ellis. The bald allegation that all the Master's queries and the second and third respondents' objections have been dealt with, is belied by the factual evidence put up by the Master and the second and third respondents. The appellant's administration of the deceased estate has clearly prejudiced the estate and the beneficiaries under the deceased's will.

[32] Third; it was contended that the removal letter was irregular as it (i) was addressed to Mr Ellis and not to the appellant, (ii) was not sent by registered post as required by s54(2) and (iii) did not give reasons for the appellant's removal.

[33] Considering Mr Ellis' involvement as authorised representative of the appellant throughout her appointment, the challenge to the letter being addressed to Mr Ellis rather than to the appellant, lacks merit. It was clear that all correspondence between the appellant and the Master's office was sent by Mr Ellis and that he was the person who attended to the administration of the estate, rather than the appellant personally. The fact that the letter was sent to Mr Ellis and not to her is of no moment.

[34] Ex facie the removal letter and the facts, it appears that it was sent by registered post as required by s54(2). Moreover, Mr Ellis in his correspondence to the Master dated 16 October 2016, confirmed that the letter was sent by registered post and that he had received it on 22 August 2016.

[35] Upon a proper construction of the removal letter of 5 September 2016, the appellant's contention that the Master did not provide reasons for the removal, lacks merit. That letter must not be seen in isolation but in the context of the correspondence which preceded it and which accompanied the removal letter. The Master's letters confirmed

that the correspondence referred to was attached. In its letter of 4 August 2016, the Master indicated that he intended removing the appellant from office because she *“failed to perform [her] duties as executor/executrix in a satisfactory manner as required in the final demand of 7 July 2016 and 11 July 2016 respectively”*. The letter of 11 July 2016 set out in detail the respects in which the appellant had failed to comply with the Master’s requirements.

[36] Fourth; it was contended that since s54(2)⁴ provides that the executor *may* apply to court within 30 days for an order restraining the Master from removing her, it was not peremptory for her to do so. This challenge lacks merit as the section provides a remedy which the appellant must enforce if she wished to avoid her removal. The appellant elected not to launch any such proceedings. Instead she sought to, belatedly, comply with her obligations and even then she did so without attending to the concerns of the second and third respondents and without ensuring that the estate was refunded in full for the monies paid into her and Mr Elliis’ account.

[37] Finally, while it is important to bear in mind that the appellant was the chosen executrix in terms of the Will, it cannot be overlooked that she has failed in her duties as an executrix. In the circumstances, her removal was a result of her failings.

[38] In this regard the dictum in *Olivier*⁵ is apposite:

“It is trite, that there is freedom of attestation in our law. In terms of the last will and testament of the deceased, she appointed the applicant and the second respondent

⁴ Section 54(2) of the Act provides:

Before removing an executor from his office under subparagraph (i), (ii) (iii), (iv) or (v) of paragraph (b) of subsection (1), the master shall forward to him by registered post a notice setting forth the reasons for such removal, and informing him that he may apply to the court within thirty days from that date of such notice for an order restraining the Master from removing him from his office”

⁵ Supra para 41

as the executors of her will. This wish or desire should as far as is reasonably possible be considered.

In Port Elizabeth Assurance Agency & Trust Co. Ltd v Estate Richardson 1965 (2) SA 936 (C) Van Winsen J at 940 stated:

" I have no doubt that in the exercise of its powers to appoint or remove an administrator the Court will pay close attention to the wishes of the testator as expressed in or implied from the terms of the will. The Court cannot, however, necessarily be bound by these wishes even to the detriment of the beneficiaries to whose interest it must equally clearly have regard."

[39] Considering all the relevant facts it would not be just and equitable to set aside the Master's decision to remove the appellant as executrix. The court a quo's finding that *"it would not be in the best interests of the estate and the beneficiaries of the estate for the appellant to finalise the estate"* does not constitute a misdirection.

[40] Lastly, the appellant contended that the appointment of the second respondent fell to be set aside and that the court a quo misdirected itself in finding that the second respondent's appointment was not irregular in any respect. The appellant made out no proper case on her papers for such relief and the court a quo correctly found that there was no irregularity in the appointment of the second respondent as executor. There was no misdirection on the facts or the law on this issue.

[41] The Master's decision to remove the appellant as executor stands until set aside. At the time the second respondent was appointed as executor, the removal of the appellant had not been set aside and, in terms of this judgment, will not be set aside. The evidence established that the jurisdictional prerequisite for appointing the second respondent, being where a sole executor ceases for any reason to be an executor as envisaged by s18(1)(e) of the Act.⁶

⁶ *Mlunguza and Another v The Master of the High Court and Another* (21755/2018) [2020] ZAWCHC 6 (11 February 2020) paras 57-58 and the authorities cited therein

[42] For the reasons stated, it cannot be concluded that the court a quo misdirected itself in dismissing the application or in concluding that the appellant should bear the costs in her personal capacity. It follows that the appeal must fail.

[43] The normal principle is that costs follow the result. There is no reason to deviate from this principle. There is merit in the second and third respondent's contention that the appellant should be directed to pay the costs in her personal capacity. Counsel for the Master confirmed that it would not be seeking a costs order in light of the inconvenience caused by its failure to deliver heads of argument. It further did not seek any costs order for the appearance at the hearing.

[44] In the result, the following order is granted:

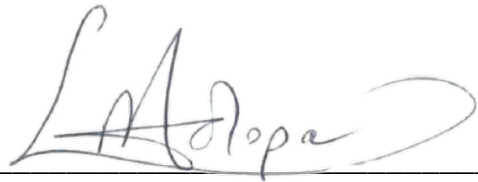
[1] The appeal is dismissed.

[2] The appellant, in her personal capacity, is directed to pay the second and third respondents' costs.



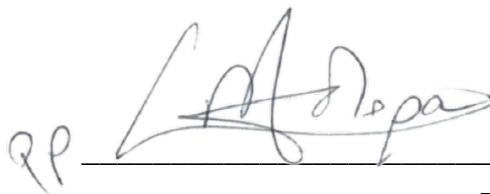
EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG

I agree



LM MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT
GAUTENG

I agree

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B VALLY
JUDGE OF THE HIGH COURT
GAUTENG

APPEARANCES

DATE OF HEARING	: 19 August 2020
DATE OF JUDGMENT	: 16 October 2020
APPELLANT'S COUNSEL	: Adv.GH Meyer Adv MD Köhn
APPELLANT'S ATTORNEY	: AM Ellis Attorneys Mr Ellis
1st and 2nd RESPONDENT'S COUNSEL	: Adv. Bokako
1st and 2nd RESPONDENT'S ATTORNEY	: State Attorney Ms M. Mathe
2nd and 3rd RESPONDENT'S COUNSEL	: Adv. MTA Costa
2nd and 3rd RESPONDENT'S ATTORNEY	: Salant Attorneys Mr Salant