

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 40377/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

24 JANUARY 2020

JUDGE L.T. MODIBA

In the matter between:

ELEFTERIOS PIAGALIS

Applicant

And

BERNARD APHANE N.O.

First Respondent

THE MASTER OF THE SOUTH GAUTENG HIGH COURT

Second Respondent

GEORGIOS PIAGALIS

Third Respondent

STAVROS PIAGALIS

Fourth Respondent

PENELOPE-ANN GRIFFITHS N.O.

Fifth Respondent

J U D G M E N T

MODIBA J

INTRODUCTION

[1] This is a review application, brought on the ground of procedural unfairness.

The applicant, Elefterios Piagalis (“Elefterios”), seeks an order setting aside the decision of the first respondent, the Master of the South Gauteng High Court, (“the Master”) to re-appoint the third respondent, Georgios Piagalis (“Georgios”) as executor of the deceased estate of the late Avgerinos Piagalis (“the deceased”). Further, he requests this court to assume the administrative function of the Master, by appointing attorney Stanley Brasg (“Brasg”), as the executor in terms of section 95 of the Administration of Estates Act¹ and sections 6 (2) (d), (e) (i) and (iii), (f)(ii)(cc) and (h) of the Promotion of Justice Administration Act (“PAJA”)².

BACKGROUND FACTS

[2] The background facts to this application are largely common cause. Elefterios, Georgios and the fourth respondent, Stavros Piagalis (“Stavros”) are brothers. I refer to them individually by their names and collectively as the Piagalis brothers. The deceased was their father. The deceased passed away on 8 June 2010 not leaving a will. Therefore, the Piagalis brothers are the intestate heirs of his deceased estate. The deceased estate is yet to be wound up. It is currently being administered by the fifth respondent, Penelope-Ann Griffiths

¹ 66 of 1965

² 3 of 2000

(“Griffiths”) in her capacity as an interim curator. Georgios and Stavros are the only respondents who are opposing the application.

[3] The assets in the deceased estate primarily comprises of members’ interests in three Close Corporations; namely, Holding 16 Properties CC (“Holding Properties”), Piagalis Property Investments CC (“Property Investments”) and Piagalis Group Investments CC (“Group Investments”), collectively, “the Close Corporations”. Holding Properties and Property Investments are property holding entities. They derive income from the residential and commercial properties that are registered in their respective names. The deceased estate holds 100% membership interest in Holding Properties, and 50% in the other close corporations. The other 50% is held by Elefterios. Property Investments is the trading entity responsible for the management of all the properties held by the Close Corporations. Elefterios has been the property manager for all the properties for many years and continues to be. Apart from his entitlement to share in the profits of the close corporations by virtue of his member’s interest, for his role as the property manager as described, he draws a salary from Holding Properties and Property Investments.

[4] Elefterios and Georgios disagree on various aspects of the management of the close corporations. I do not deem it necessary to delve into their disagreements for the present purposes, save to state that Georgios accuses Elefterios of mismanagement, maladministration and unauthorised conduct, while Elefterios accuses Georgios of interfering with the management of the business and seeking to wind up the deceased estate contrary to the interest of the business

of the close corporations, mainly to square up with and to deprive him of the management of the Close Corporations' business.

[5] Elefterios alleges that these differences have a detrimental effect on the business of the Close Corporations, resulting in the truncation of their income. He contends that given that the assets in the estate are not the assets in the businesses, but the member's interests in the Close Corporations, the estate ought to be wound-up without further delay to allow the members' interests to be vested in each of the brothers. Any remaining disputes relating to the Close Corporations will then be dealt with in accordance with the Close Corporations Act and good corporate governance. He further contends that attempting to resolve these family disputes through the laws relating to deceased estates and their administration, is inappropriate.

[6] Furthermore, Elefterios contends that expeditious winding up of the estate can only be achieved by the appointment of an executor who is objective and independent and who is not motivated by personal vendettas, perceived wrongs and subjective prejudice. According to Elefterios, Brasg is such a person. He is also experienced in the administration of deceased estates.

[7] Elefterios alleges that since Georgios was appointed as the executor of the deceased estate, he interferes with the running of the business of the close corporations to their detriment. Georgios does not dispute the basis on which Elefterios alleges that he interferes with the running of the business of the close corporations. He justifies it on the basis of allegation of impropriety by

Elefterios, and contends that for that reason, his actions are in the interests of the beneficiaries and therefore, consistent with his role as the executor of the deceased estate. Elefterios denies the allegations of impropriety on his part and complains about the unfair manner in which Georgios made the allegations.

[8] The Master initially appointed Georgios as the Executor. Elefterios successfully challenged Georgios's appointment, resulting in the appointment being set aside by Ismail J on the basis of administrative defects. In an order handed down on 30 August 2018, Ismail J, directed the Master to re-appoint the Executor. On 18 October 2018, the Master re-appointed Georgios as the executor of the estate, pursuant to Ismail J's order.

[9] Elefterios is also discontent with Georgios's re-appointment. He contends that his appointment has a negative impact on the administration of the estate. He further contends that, owing to conflict between the Piagalis brothers, the administration of the estate is dysfunctional. For that reason, he is of the view that the Master was remiss to have re-appointed Georgios as the executor. He alleges that the Master was aware of the conflict between Georgios and him as it was set out in the papers that served before Ismail J. Further, the conflict was apparent during the meeting the Master convened to appoint an executor as directed by Ismail J. Hence he contends that the Master would not have appointed Georgios, had he properly applied his mind as required by the Act.

[10] On 12 October 2018, pursuant to Ismail J's order, the Master convened a meeting in terms of section 18(1) of the Administration of Estates Act ("the

Act"),³ for the purpose of - to use the Master's parlance 'electing an executor'. He did not attend personally. Assistant Master Mcanyana ("the Assistant Master") presided over the meeting. Elefterios attended that meeting accompanied by his legal representatives. Georgios also attended, accompanied by his business partner Barry van Wyk, Griffiths and the accountant of the businesses of the Close Corporations, Linda Claer.

[11] When the Assistant Master called for nominations, Georgios and Stavros nominated Georgios as Executor while Elefterios nominated Brasg, and himself in the event that Brasg is not appointed. Griffiths nominated herself.

[13] Georgios objected to the nomination of Brasg on the basis that a bond of security will be required if he is appointed. The meeting closed without the Assistant Master making a decision. As already mentioned, the Master re-appointed Georgios as the Executor. Due to the review, his appointment remains unresolved. Pending the outcome of the review, the Master has not issued Letters of Executorship to him. Griffiths remains the interim curator.

[16] The question to be decided is whether the Master properly applied his mind when he re-appointed Georgios as the executor. If found that he did not, whether exceptional circumstances exists, that warrant that the court assumes the administrative role of the Master, by appointing the Executor, rather than referring the matter back to the Master.

³ 66 of 1965

APPLICABLE LEGAL PRINCIPLES

[17] The Master's decision is reviewable in terms of section 95 of the Act as well as section 6 of PAJA.

[18] In terms of section 18 of the Act, the Master may appoint any person whom he may deem fit and proper to be executor or executors of the estate of the deceased. Section 18 provides:

"(1) The Master shall, subject to the provisions of subsections (3), (5) and (6) —

*(a) if any person has died without having by will nominated any person to be his executor;
...*

[19] Where more than one person is nominated as an executor to an estate, in terms of section 19 of the Act, when making an appointment in terms of section 18, the Master shall give preference to:

*"(a) The surviving spouse or his nominee; or
(b) If no surviving spouse is so nominated, or the surviving nominated any person, an heir or his nominee; or
(c) If no heir is so nominated, or no heir has nominated any person, a creditor or his nominee; or
(d) The tutor or curator of any heir or creditor so nominated who is a minor or a person under curatorship, in the place of such heir or creditor*

Provided that the Master may-

*(i) Join any of the said persons as executor with any other of them; or
(ii) If there is any good reason there are any or all of the persons."*

[20] I find that the Master's decision to re-appoint Georgios, is procedurally unfair for the reasons set out below.

[21] The use of "deem" in section 18, requires that the Master ought to apply his mind to the appointment of an executor. So is the proviso in section 19(1)(d).

[22] In his record filed in terms of Rule 53 (1) of the Uniform Rules of Court, the Master did not include the minutes of the meeting at which nominations were made, presided over by the Assistant Master. He justifies this omission as follows:

"(i) the applicant have privy of the reasons for the reasons (ii) The reasons for the decisions forms crux of the applicants prayers and the reasons are fully discussed and or adjudicated in their application (iii) Moreover, the reasons of the applications forms part of the applicant 's annexure "FA21 " at page 16316(sic) and are already before the Court (iv) The First respondent has applied his mind when taking the decision taking into account the history of the matter, the laws of intestate succession and mainly the majority nomination made during the meeting for appointment of executor"

[23] The above paragraph, set out in paragraph 9 on page 222 of the Master's report, suggests that he conflates the facts and reasons. Essentially, he did not provide reasons because in his view, they are fully canvassed in the papers before court. The facts are indeed canvassed in the papers before court. As to the reasons, that cannot be. The Master ought to set out his reasons for the decision in his report as required by Rule 53 (1). This he clearly failed to do. More so when one has regard to what I make of the contents of his report, which I deal with below.

[24] Although in his report, he states that he applied his mind when re-appointing Georgios by taking into account the history of the matter, the laws of intestate succession and mainly the majority nomination made during the meeting for appointment of executor, he fails to state what he made of the factors that he took into account and specifically, how these factors influenced his decision to re-appoint Georgios.

[25] He states that the purpose of the meeting held on 12 October 2018 was for “election of executor as directed by court order dated 28 April 2018.” Ismail J’s order is rather, dated 30 August 2018. More importantly, section 18 does not provide for the appointment of an executor by election. Neither does Ismail J’s order.

[25.1] Ismail J’s order directs:

*“(1) the appointment of the third respondent as executor of the estate in terms of letters of executorship dated 14 March 2018 is set aside’
 (2) the second respondent is ordered to convene a meeting of the beneficiaries in order to appoint an executor;
 (3) this process should be resolved within 90 days of this order;
 (4) the costs of this application should be the costs of the deceased estate.”*

[25.2] Appointment and election are completely different processes. The ordinary meaning of these words, without the need for interpretation, is clear.

Dictionary.com defines these words as follows:

*“**Appointment**” - the act of [appointing](https://www.dictionary.com/browse/appointing), designating, or placing in office: to fill a vacancy by appointment.”⁴
 “**Election**” - the selection of a person or persons for office by vote.”⁵*

[25.3] While section 19 envisages the nomination of the executor, when read with section 18, particularly the provisos thereto, the Master is required to apply his mind to the appointment and not to accept a nominee by virtue of being the majority nominee. Where there are circumstances that renders the majority nominee unsuitable, the Master has the power to by-pass him.

[26] In his report, the Master concludes:

⁴ <https://www.dictionary.com/browse/appointment?s=t>

⁵ <https://www.dictionary.com/browse/election?s=t>

"The decision is based on section 19 Provision (ii) which provides that: 'if there is any good reason therefore, pass by any or all of the persons and in this regard I hereby pass the nomination of (the Applicant) in that his nomination is for himself or Stanley which amounts to One (1) nomination while (the Third Respondent) has two nominations by himself and (the Fourth Respondent) which makes Two (2) nominations and as a result make the majority of the nominations'".

[27] He correctly confirms that Georgios and Brags are eligible to be appointed as they were nominated by the heirs in accordance with section 19(b) of the Act. He notes that Brags has one nomination, while Georgios has two. Yet he fails to provide substantive reasons why by-passed by Brags and preferred Georgios over him. This, together with his reference to Ismail J's order as directing him to *elect* an Executor, considering the meaning of this word, the process that the Assistant Master followed at the meeting, the Master's subsequent substantive decision to re-appoint Georgios and the scant reasons he provides for it, justify a conclusion that he re-appointed Georgios by election and that he failed to apply his mind to his suitability. This procedure is *ultra vires* as he is not empowered by section 19 of the Act to appoint an Executor by election. Further, by so doing, he failed to comply with Ismail J's order.

[28] His statement that he took into account the history of the matter, says nothing about what he made of it, particularly because he was party to the litigation that led to Ismail J's order and the fact that the Assistant Master personally observed the state of mistrust and hostility between the Applicant and Georgios regarding the deceased estate and the management of the business of the Close Corporations at the 12 October 2018 meeting. If the Master did indeed take the history of the matter into consideration as he contends that he did, his decision to re-appoint Georgios is not rationally connected to the information before him, as no reasonable Master with this

knowledge could have reached a decision to re-appoint Georgios as the Executor of the estate comprised primarily of the business managed by Elefterios, given the acrimony and mistrust between Georgios and him.

[29] The contention by the opposing respondent's Counsel, that Ismail J found that the acrimony was not incapable of resolution is also not demonstrably considered by the Master.

[30] I therefore find that:

[30.1] the Master's decision to appoint Georgios by election violates the principle of legality in that, by deciding Georgios re-appointment by election, the Master exceeded his powers under section 19 of the Act.

[30.2] the Master's decision to re-appoint Georgios is based on a factual error in that he fails to take into account the acrimony between the Piagalis brothers and its bearing on the administration of the estate given that the deceased estate assets mainly comprises member's interests in Close Corporations whose business is managed by Elefterios, but applied irrelevant considerations under the circumstances, namely the fact that Georgios is the majority nominee and for incorrectly, arbitrarily and capriciously excluding Mr Brasg as a potential executor

[30.3] His decision to re-appoint Georgios:

[30.3.1] fails to apply the proviso in section 19;

[30.3.3] is not rationally connected to the information before him when he made the appointment;

[30.3.3] is unreasonable, in that no reasonable Master in his position could have so exercised the power in the manner that he did.

[31] For the above reasons, his decision stands to be set aside.

THE APPOINTMENT OF AN INDEPENDENT EXECUTOR BY THE COURT

[32] Rather than referring the decision back to the Master, Elefterios seeks an order appointing an executor to the Estate. He contends that Brasg is a suitable candidate for appointment. He relies on Section 95 of the Act. It provides that on review, the court may confirm, set aside or vary the decision of the Master appointing an executor. The Court accordingly has the power to appoint.

[33] He further contends that referral of the decision back to the Master will further delay the winding up of the estate, to the detriment of the businesses of the Close Corporations, some of which are already in fragile state. The Master has twice failed to correctly apply the Act and exercise his powers when appointing the executor. It is in the interests of justice that the Estate be placed in the hands of an independent

executor without further delay. Georgios' only objection to Brasg's appointment at the 12 October meeting, was that he will require a bond of security. It is not unusual for the Master to appoint a person from whom the Master requires a bond of security in circumstances where the person is the only suitable nominee. In this case, Brasg fits this prism due to his independence, given the acrimony between the Piagalis brothers and its impact on the deceased estate as aforesaid.

[34] In the answering affidavit Georgios adds that he objected that Elefterios' nomination compromises Brasg's independence. Elefterios contends that this is not a valid objection to Brasg's appointment.

[35] Given the role of an executor, I have difficulty with understanding this ground of objection. Brasg independence will only be compromised if he fails to act independently once appointed. Georgios has not advanced any shred of evidence to sustain this allegation. As an officer of this court, Brasg is bound by professional ethics to act independently and with integrity. In the absence of evidence to the contrary, the court is entitled to rely on his professional ethical duties not to doubt Brasg's suitability for appointment.

[36] The present circumstances, as contended by Elefterios, warrant that the court assumes the administrative functions of the Master by appointing an executor. Further, Brasg is found to be suitable for appointment.

COSTS

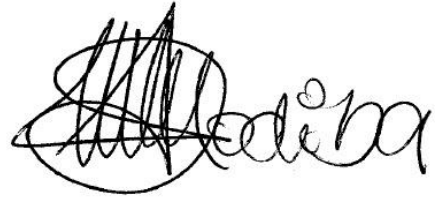
[37] Elefterios seeks costs against the opposing respondents. Such a prayer is not justifiable under these circumstances, as any party is entitled to oppose any relief in which he has a substantial interest. Georgios and Stavros's opposition is not malicious or vexatious. The general principle that costs follow the cause, which I find applicable here, already hits them hard, as they will be liable for their own legal costs. No further purpose would be served by strengthening the court's hand against them by saddling them with Elefterios' legal costs.

[38] I, therefore find that, the appropriate costs order in these circumstances is that the costs of the successful party should lie against the deceased estate.

[39] In the premises, the following order is made:

ORDER

1. The decision of the Master of the High Court, Gauteng Local Division, Johannesburg, taken on 18 October 2018, re-appointing Georgios Piagalis as the executor of the Estate Late Avgerinos Piagalis, is reviewed and set aside.
2. Mr Brasg is appointed as executor to the Estate Late Avgerinos Piagalis.
3. Costs are costs in the administration of the estate.



**MADAM JUSTICE L T MODIBA
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

APPEARENCES

Counsel for applicant:

Advocate A Kemack SC

Advocate M Nieuwoudt

Attorney for applicant:

Hogan Lovells Inc

Counsel for 3rd and 4th respondent:

Advocate P Van Der Berg SC

Advocate N Lindeque

Attorney for 3rd and 4th respondent:

Mostert Skosana Inc

Date of hearing:

15 October 2019

Date of judgment:

24 January 2020