



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

CASE NO: 2020/25830

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

22.11.2021

Electronic

DATE

SIGNATURE

In the matter between:

LENNYS ANNE BENNETT

Applicant

and

ERROL TREVOR GOSS

First Respondent

MASTER OF THE HIGH COURT, JOHANNESBURG

Second Respondent

MARTIN JOHN HERR

Third Respondent

NTHABISENG MASINA

Fourth Respondent

CLIFFORD LAURENCE GORDON

Fifth Respondent

JUDGMENT

CRUTCHFIELD AJ:

[1] This is an application for leave to appeal my judgment handed down on 20 July 2021 ('leave application'). The parties are referred to as they were in the main application.

[2] The first respondent, Errol Trevor Goss ('Goss'), sought leave to appeal the judgment and order in its entirety whilst the third respondent, Martin John Herr ('Herr'), applied for leave to appeal paragraphs 3 and 4 of the order only.

[3] The applicant, Lennys Anne Bennett ('Bennett'), opposed the leave application.

[4] Goss raised six grounds for leave to appeal but referred in argument to the first two grounds only. The main ground on which Goss placed reliance was that I misapplied the correct legal test in exercising this Court's discretion to remove the appointed executor, Goss, from that position and did not apply the correct legal test to the facts of the matter.

[5] Goss relied on the common law test laid down in *Sackville West v Nourse & Another*¹ as referred to in *Van Niekerk v Van Niekerk & Another*,² to the effect that a court should exercise its discretion to remove an executor from office only when it is satisfied that allowing the executor to remain in office would detrimentally affect the proper administration and winding-up of the estate and / or the beneficiaries.

[6] Bennett applied for Goss's removal in terms of s 54(1)(a)(v) of the Administration of Estates Act ('Estates Act'). Goss submitted that the common law test articulated in *Sackville West* applied to the exercise of this Court's discretion in terms of s 54(1)(a)(v) of the Estates Act ('s 54(1)(a)(v)').

¹ *Sackville West v Nourse & Another* 1925 AD 516 ('*Sackville West*').

² *Van Niekerk v Van Niekerk & Another* 2011 (2) SA 145 (KZP) para 9 ('*Van Niekerk*').

[7] Goss relied upon *Van Niekerk*,³ which referred⁴ to *Volkwyn NO v Clark and Damant* ('*Volkwyn*'),⁵ that:

'Both the statute and the case cited indicates that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. It must therefore appear, I think, the particular circumstances of the acts complained of are such as to stamp the executor or administrator as a dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument.'

[8] In *Van Niekerk*,⁶ however, the court distinguished the above finding in *Volkwyn* on the basis that it would serve to limit the applicability of the "broad principle" approved in *Sackville West*.⁷

[9] In doing so, the court in *Van Niekerk* referred to and dealt with the common law. A proper reading of the reference in *Van Niekerk*⁷ upon which Goss relied reveals that the court referred in paragraph 9 of the judgment to the common law and not to s 54(1)(a)(v).

[10] The common law principle articulated in *Sackville West*⁸ and applied in *Volkwyn*⁹ is separate and distinguishable from the discretion that arises under s 54(1)(a)(v).

[11] Moreover, s 54(1)(a)(v), enacted after *Sackville West* was handed down, is a legislative development beyond the principles of the common law. Section 54(1)(a)(v) affords a court a discretion wider than that a court would have or be entitled to apply in terms of the common law principle referred to in *Sackville West*. A court applying s

³ Id.

⁴ Id para 8.

⁵ *Volkwyn NO v Clark and Damant* 1946 WLD 456 at 463 – 464 ('*Volkwyn*').

⁶ *Van Niekerk* note 2 above para 9.

⁷ Id.

⁸ *Sackville West* note 1 above.

⁹ *Volkwyn* note 5 above.

54(1)(a)(v) may consider factors beyond those that would warrant the removal of an executor in terms of the common law test in *Sackville West*.

[12] This is substantiated by *Die Meester v Meyer & Andere*¹⁰ to the effect that whatever the position under the common law a court now has regard to the provisions of s 54(1)(a)(v) enacted by the legislator.

[13] In the circumstances, Goss's primary submission must fail.

[14] As regards Goss's second ground of appeal, that a review was the appropriate relief pursuant to the irregularities in Goss's documentation submitted to the Master in support of his appointment, the application for Goss's removal was not founded on mere discrepancies in the documentation but on substantive matters that impacted the rule of law, the doctrine of legality and the administration of justice. Thus, Goss's second ground for leave to appeal also must fail.

[15] Herr's leave application relates to paragraphs three and four of the orders in the judgment ('orders three and four'). It is necessary to read them in conjunction with paragraph two of the orders (order two'), to which Herr did not refer. The orders provide the following:

'[2] The Master of the High Court, Johannesburg is authorised and directed to appoint one or more executors as he may decide to the estate of the late Joe-Anne Claire Herr (born Frith).

[3] The applicant is afforded fourteen (14) days from date of delivery of this judgment to deliver to the Master a notice setting out the names of persons she proposes as an executor.

[4] Should the Master timeously receive the notice referred to in paragraph 3 above, then the Master shall have due regard to the wishes of the applicant and consider such persons who have been proposed as an executor.'

¹⁰ *Die Meester v Meyer & Andere* 1975 (2) SA 1 (T) at 17E-F ('Meyer').

[16] Herr submitted, correctly, that orders 3 and 4 were not sought by the applicant, and that the parties were not afforded an opportunity to deal therewith. Furthermore, Herr argued that the impugned orders served to fetter the Master's discretion.

[17] In so far as I stated in paragraphs [69] and [70] of the judgment that I am of the view that it is desirable for the Master to appoint an appropriate executor other than Bennett, Herr or Goss, Herr argued that I excluded him, the nominated executor under the 2011 will, without him having had an opportunity to deal with that aspect, that I asked the Master to consider executors not validly appointed under the 2011 will and fettered the Master's discretion.

[18] In respect of my finding that Herr renounced his nomination under the 2011 will, Herr submitted correctly that my finding was incorrect as Herr renounced the nomination conditionally, subject to Goss being appointed as executor to the deceased estate. Nothing of any substance turns on the incorrect factual finding as will become apparent hereunder.

[19] Orders three and four are directory. They do not oblige the Master to appoint one of the persons proposed by Bennett as executor and do not exclude Goss or Herr's rights to make representations to the Master in respect of their potential appointment as executor to the deceased estate.

[20] Furthermore, notwithstanding the relief claimed by Bennett in the application, Herr abided the Court's decision and declined to counter-apply for appointment as executor in the event of Goss's removal. Nothing in my judgment prevents Herr from making the appropriate representations to the Master or prevents the Master from appointing Herr in the event that the Master considers his appointment appropriate.

[21] Accordingly, whilst Herr did not have an opportunity to deal with the impugned orders, they are directory in nature and do not serve to fetter the Master's discretion in any manner.

[22] In the circumstances there is no reasonable prospect that another court will reach a different conclusion and there is no basis upon which to grant leave to appeal to Herr.

[23] The grounds for leave to appeal raised by Goss and Herr lack merit and there is no reasonable prospect of success before another court. In addition, there is no 'other compelling reason why the appeal should be heard,' no important question of law or discrete issue of public importance that will have an effect on future disputes. Neither Goss nor Herr relied on the existence of any such factor.¹¹

[24] Both Goss and Herr failed to satisfy the required threshold and it follows that the leave applications stand to be dismissed with costs to be awarded against Goss and Herr jointly and severally, the one paying the other to be absolved.

[25] I grant the following order:

1. The first respondent's application for leave to appeal is dismissed;
2. The third respondent's application for leave to appeal is dismissed;
3. The first and third respondents are ordered to pay the costs of the applications for leave to appeal jointly and severally the one paying the other to be absolved.

¹¹ *Caratco (Pty) Ltd v Independent Advisory Limited* 2020 (5) SA 35 (SCA) para [2].

**A A CRUTCHFIELD SC
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 22 November 2021.

COUNSEL FOR THE APPLICANT: Mr P T Rood SC.

INSTRUCTED BY: Fluxmans Inc Attorneys.

COUNSEL FOR FIRST RESPONDENT: Mr R S Shepstone.

INSTRUCTED BY: Errol Goss Attorneys.

COUNCIL FOR THIRD RESPONDENT: Ms Read

INSTRUCTED BY Cyril Muller Attorneys.

DATE OF THE HEARING: 2 November 2021.

DATE OF JUDGMENT: 22 November 2021.