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**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 21/27360**

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

Date: ..... ..

In the matter between:

**GOVENDER N.O. PRESHNEE**

Applicant

and

**MVONGVE, DANIEL  
(ID No. [...])**

Respondent

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**JUDGMENT**

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**STRYDOM J:**

[1] This is an urgent application in which the applicant seeks the following relief:

1.1 That this matter be treated as one of urgency in terms of rule 6(12) of the Uniform Rules of Court;

1.2 That pending the finalisation of Part B hereof, the respondent be interdicted and restrained from –

1.2.1 preventing the applicant or any personnel employed and/or contracted by the applicant, including members of G3 Investigations, access to the property described as Portion [...] of the Farm Nooitgedacht [...], Registration Division JQ, Gauteng Province (“the property”);

1.2.2 removing any goods belonging to the estate of the Late Kathleen Agnes Lawrence (“the estate”) from the property;

1.2.3 approaching within 50 metres of the main house of the property;

1.2.4 handling or approaching, in any way, any of the assets in the estate in any manner that is detrimental to the estate; and

1.2.5 slaughtering or selling any livestock at the property.

[2] In Part B of the application the applicant seeks similar but final relief.

[3] The respondent opposed the application and also filed a counterclaim. In this counterclaim the respondent sought the following relief:

3.1 That the applicant be removed as executor of the deceased estate;

3.2 That the Master of the High Court, Johannesburg, be ordered to attend to the appointment of Mr Hendrik Cornelius Viljoen as executor of the deceased estate as nominated in the last will and testament of the deceased dated 13 April 2012, already accepted by the Master of the High Court, Johannesburg;

3.3 The costs of this application be costs in the main application with any party opposing it to pay the costs on a punitive scale as between attorney and client.

[4] The respondent disputed the urgency of the matter and asked that the applicant's application should be struck off the roll for lack of urgency with a costs order.

[5] The respondent further took two points *in limine* pertaining to the *locus standi* of the applicant to bring her application and alleged a non-joinder of necessary parties. Similarly, the applicant opposed the respondent's counterclaim on the basis of a non-joinder of necessary parties.

[6] In my view, the Master was a necessary party for the relief the respondent is seeking as he has a direct and substantial interest in this matter which may be affected prejudicially by a judgment made by this court in his absence. The Master has an interest in the removal of an executor and

even more so if he is ordered to appoint an executor in terms of a court order. The respondent's failure to join the Master or Mr Viljoen, who is the person the respondent wants the Master to appoint as executor, is a material non-joinder. Moreover, the Administration of Estates Act 66 of 1965 do not provide the court with the power to prescribe to the master which person should be appointed as executor. See: *Bankorp Trust Bpk v Pienaar en 'n ander* 1993 (4) SA 98 (A) at 108 H. This is fatal for the respondent's counterclaim which should be dismissed with costs.

[7] In this matter there will be reference made to three wills purportedly made by the deceased. Reference will be made to the 2011 will, the 2012 will and the 2020 will.

[8] When the deceased died on 20 June 2020, the respondent was living on the property. The applicant is seeking an order that the respondent should move from the main house to another dwelling ("the bottom house") on the property.

[9] To consider the urgency of this matter as well as the points *in limine* and the merits, the factual background circumstances should be stated. I intend doing it chronologically.

[10] On 6 September 2011, the deceased was placed under the curatorship of Robert Kitching ("Kitching").

[11] On 14 November 2011, the 2011 will was signed by the deceased.

[12] On 13 April 2012, the 2012 will was signed by the deceased.

- [13] During or about 2017, the respondent alleges that he moved from the bottom house to the main house. According to the applicant the respondent moved thereto only after deceased passed away.
- [14] On 29 April 2020, the 2020 will was signed in terms of which the entire estate of the deceased was bequeathed by the deceased to the respondent.
- [15] On or about 20 June 2020, the deceased passed away.
- [16] On or about 15 September 2020, the respondent was appointed as executor of the estate of the deceased.
- [17] On or about 16 September 2020, the respondent signed a power of attorney in terms of which the respondent was appointed as the applicant's agent in the administration of the estate.
- [18] On or about 11 November 2020, the applicant became aware of the existence of the 2020 Will. Absa Bank informed her about this.
- [19] On or about 29 January 2021, the applicant terminated her mandate with the respondent as the respondent's agent.
- [20] On or about 5 February 2021, the Master declared the 2020 will invalid as it was signed by the curator and not by the deceased.
- [21] On or about 16 February 2021, the applicant was now appointed as executrix at the stage when the 2011 will was assumed to be the valid will of the deceased. Letters of executorship were issued in her name.

- [22] On or about 18 February 2021, the applicant appointed the firm G3 Investigations to ensure that the moveable property was not removed from the property.
- [23] On 3 March 2021, Absa advised the applicant that the safety deposit box held in the name of the deceased was emptied by the respondent.
- [24] On 5 March 2021, the respondent obtained an *ex parte* spoliation order in terms of which the respondent was granted undisturbed occupation and possession of the property.
- [25] On or about 28 April 2021, the applicant received a letter in terms of section 54(1)(b) of Act 66 of 1965 notifying the applicant that the Master intends removing her from office as executor since an executor has been nominated in terms of the 2012 will and that the Master intends to appoint the said executor in terms of this will. The applicant was further informed that she may apply to court within 30 days from the date of the notice for an order restraining the Master from removing her from office of executor in this matter.
- [26] On 4 May 2021, a meeting took place at the offices of the Master. Present at this meeting was the Master, Mr Aphane the Assistant Master, Mrs Nerina Wessels representing an intestate heir, Mr Henk Viljoen who has submitted the 2012 will that was registered and accepted by the Master and wherein he was nominated as executor, and Zahir O'Brien representing the applicant, at that stage the executrix, on a proxy.

- [27] During this meeting it became clear that the Master acknowledged that it should not have accepted the 2020 will as it did not meet the requirements of the Act. The will was not signed by the deceased but was signed by the curator. Therefore, this will was invalid. As the Master previously made a decision to accept this will, it had to approach the High Court to review its own decision before it could appoint Mr Viljoen as the nominated executor in terms of the 2012 will. All parties present acknowledged that should the applicant be removed as executrix before the appointment of Mr Viljoen, there will be a period during which there will be no appointed executor.
- [28] On or about 6 May 2021, the applicant's attorneys wrote to the Master submitting that despite the notice of removal that the applicant should continue with the administration of the estate provided that no assets be liquidated or disposed of.
- [29] On or about 21 May 2021, the applicant's attorney again wrote to the Master asking for an extension of time to apply to court (presumably the extension of the 30 day period to contest her removal).
- [30] On or about 31 May 2021, Mr Aphane, the Assistant Master, replied to the applicant's attorney's letters dated 6 and 21 May 2021 and informed the applicant that "*you are the executor in the estate charged with the custody and control of the property in the estate in terms of section 26(1) of the Act 66 of 1965 (as amended).*" Further the applicant was advised that she should take necessary steps and/or action to secure the assets of the deceased estate.

- [31] On 4 June 2021, the South African Police Services attended at the property and removed the locks placed on the entrance gates by G3 Security and allowed the respondent to place his own locks on the gate.
- [32] On 10 June 2021, the applicant filed the urgent application informing the respondent that if he wants to oppose this application he should notify the applicant's attorneys by 09h00 on Friday 11 June 2021 and further to serve his answering affidavit by 09h00 on Monday 14 June 2021. The matter was set down to be heard at 10am on Tuesday 15 June 2021.
- [33] On 17 June 2021, the respondent asked for a postponement of the hearing of the urgent application.
- [34] On 22 June 2021, the applicant set the matter down in the urgent court to be heard on 29 June 2021.

#### Urgency

- [35] The applicant afforded the respondent limited time to file an answering affidavit and this led to a re-set down of the application. The urgency of the matter according to the applicant is underpinned by the respondent's continued damaged caused by the respondent. She is prevented to perform her duties to establish exactly which assets belong to the estate and to secure these assets, more particularly as since 4 June 2021 she and her agents were locked out of the property.
- [36] In my view, a situation could not prevail where an appointed executor is not allowed access to the property of the estate. This situation should be corrected as soon as possible and therefor the applicant in my view has



made out a case on urgency but only pertaining to the prayers giving the applicant access to the property and preventing selling and dealing with the property of the estate.

[37] No case of urgency was made out preventing respondent from approaching within 50 metres of the main house. This will amount to an eviction from this house where, according to respondent, he was residing since 2017. Applicant states that he moved there after the deceased has died. A factual dispute has arisen but besides this it is not so urgent that respondent must be ordered to forthwith vacate the main house.

[38] The same apply as far as the livestock is concerned. The applicant has failed to prove that the estate is the owner of the livestock. It was not indicated when the livestock was allegedly slaughtered or sold. The prayer dealing with the livestock has not been shown as urgent.

[39] The same applies to the general allegations that respondent removed goods from the property. Limited particularity is provided as to which items were removed by respondent and when.

[40] The court finds that the locking out of the executor is semi-urgent and it should be considered whether the applicant has made out a case for an interim interdict. For this purpose, the applicant had to show only a *prima facie* right which may be open to some doubt.

Locus standi of the applicant

[41] On behalf of the respondent it was argued that the applicant has been informed of her removal as executor appointed in terms of an intestate

nomination. Such notice was in fact given to the applicant. In terms of s 54 (1) (b) and (2) of the Act the master intended to remove applicant from office as executor since an executor has now been nominated in terms of the 2012 will and the master intends to appoint the said nominated person. The applicant was informed that she could apply to court within 30 days from the 28<sup>th</sup> of April restraining the master from removing her from office of the executor.

[42] It is the applicant's case that she has not yet been removed from office as only an intension was expressed by the master for her removal. Despite applicant asking for an extension of the 30 day period it is common cause that she has not approached court for an order restraining the master from removing her.

[43] The legal question for consideration is whether after the lapse of the 30 day period the appointment of the executor automatically comes to an end or whether the decision in terms of which the executor is removed should be provided to the executor after the 30 day period. Section 54 is silent on this issue. This sub-section 54(2) provides that the notice shall inform the executor "*that he may apply to the Court within thirty days from the date of such notice for an order restraining the Master from removing him from his office.*"

[44] It has been found that once the master issued a section 54 notice he was *functus officio* and unable to reverse or reconsider the decision to remove the executor. (See: *Coetzee and Another v De Kock and others* 1976 (1) SA 351 at 359 C-H and *Levinson Susan N.O. v The Master and Others* (unreported) Appeal case number A5032/2019 GLD at para [28].

- [45] These case did not deal with the issue when the removal become effective. From what can be gauged from the correspondence from the master is that he did not consider the removal as automatic. In his letter to the applicant dated 30 May 2021, a date after the 30 day period lapsed that he still considered the applicant to be the executrix. He might to be correct in this regard or wrongly came to the conclusion but for purposes of the interim relief sought by applicant this court need not make a final determination in this regard.
- [46] This court finds that on a *prima facie* basis the applicant has shown that she is still the incumbent executrix and therefore she had the necessary *locus standi* to institute these proceedings and prosecute this application in her capacity as executrix. It is common cause that the master has not appointed another executor.

#### Non-joinder

- [47] The relief sought by applicant is directly and solely aimed against the respondent. There was not necessary to join any other parties in this application by the applicant.
- [48] On the evidence before the court a finding can be made that the applicant was locked out by the actions of the respondent. An executor has the right and obligation to take control over the assets in an estate. For that reason, an order should be made to interdict the respondent who has no right to deal with assets of the estate. The applicant previously had access to the property and this right of access should be restored.

[49] The court makes the following order:

1. This matter is urgent as envisaged in terms of Rule 6(12) of the Uniform Rules of Court.
2. That, pending the finalisation of Part “B” of the Notice of Motion, alternatively, the removal of the applicant as executrix by the master, whichever event comes first, the respondent be interdicted and restrained from preventing the applicant or any of her agents’ access to the property describe a Portion [...] of The Farm Nooitgedacht [...], Registration Division JQ, Gauteng Province (“the property”).
3. That the Sheriff of the court is directed and authorised to give effect to the order contained in paragraph 2 above.
4. That the sheriff of the Court or his lawfully appointed deputy be authorised and directed to approach the South African Police Service for any assistance he/she may deem appropriate herein.
5. That the cost of this application be reserved for the hearing of Part “B” of the notice of motion.
6. That the respondent’s counterclaim be dismissed with costs.

**RÉAN STRYDOM J**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION**  
**JOHANNESBURG HIGH COURT**

Date of Hearing: 30 June 2021

Date of Judgment: 07 July 2021

**Appearances:**

On behalf of the Applicant: Adv. C.J. Van der Merwe

On behalf of the Respondents: Adv. N. J. Kapp