

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2022/10496

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

26 April 2022

Date

A handwritten signature in black ink, appearing to be "A.A.", written over a horizontal line.

Signature

In the matter of:

NGWENYA, GABISILE ESLINAH

First Applicant

MATHETSA, SETHUTSE

Second Applicant

MODIPA, THANDO

Third Applicant

and

MASANGO N.O., NANTULI LUCKY

First Respondent

MASTER OF THE HIGH COURT JOHANNESBURG

Second Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives via email and upload to the CaseLines file in this matter. The date and time of hand down is deemed to be 10:00 on 26 April 2022.

Bester AJ

[1] On 6 September 2020, Mr William Sello Tshabalala passed away, triggering a feud between two families left behind. Sadly, this is a theme too often requiring the attention of our courts. The first applicant claims to have been the deceased's first customary wife. However, the marriage was not registered in terms of the Recognition of Customary Marriages Act, 120 of 1998. Although registration is not a requirement for validity of a customary marriage,¹ a failure to do so creates the potential for challenges to the existence of the marriage, as is the case here. The first respondent contends that the deceased and the first applicant were not in a customary marriage.

[2] Ms Masango, who is cited as the first respondent in her capacity as the executrix of the deceased estate, had, by way of a court order, ensured the belated registration of her customary marriage to the deceased.² However, the first applicant contends that the order was not obtained on valid grounds, and that in fact there had not been a customary marriage between Ms Masango and the deceased.

¹ Section 4(9) of the Recognition of Customary Marriages Act.

² In terms of section 4(8) of the Recognition of Customary Marriages Act the certificate is *prima facie* proof of the existence of the customary marriage.

- [3] The second and third applicants are the deceased's and the first applicant's adult sons. The second respondent, the Master, does not oppose the application.
- [4] The applicants brought an application seeking the urgent removal of the first respondent as executrix of the deceased's estate, alternatively that she be directed to lodge a liquidation and distribution account for the estate. This relief is sought ostensibly as interim relief pending Part B of the application, to be considered in the ordinary course, for a declarator that the customary marriage between the first respondent and the deceased is invalid, alternatively that it is out of community of property. The application was formulated and pursued as if the applicants sought an interim interdict. When queried, Mr Seloane, appearing for the applicants, conceded that the relief sought was final in effect, and not interdictory in nature.
- [5] The first respondent baldly denies that the first applicant is the deceased's (first) customary wife, and that the second and third applicants are the sons of the deceased. Although motion proceedings are not designed to resolve factual disputes,³ the dispute must be real, genuine, and *bona fide*.⁴ The first respondent has not seriously and unambiguously addressed her denial of these facts. She merely states that she *"has no knowledge of the allegations contained in this paragraph, denies same and puts the applicants to the proof thereof"*.
- [6] The first applicant has set out in some detail how the marriage between her and the deceased came about. The inventory for the estate appears to record both the

³ *Plascon-Evans Paints Limited v Van Riebeek Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E – 635 C.

⁴ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paras 12 and 13.

second and third applicants as major sons of the deceased. I thus conclude that applicants, as persons with an interest in the estate, have the necessary standing to obtain the relief sought in this application.

[7] Given the allegations regarding the improper treatment of estate assets by an executor, I considered it appropriate to entertain the application on the urgent basis upon which it was brought.

[8] Section 54 of the Administration of Estates Act, 66 of 1965, provides for circumstances in which the court may remove an executrix from her office. The applicants rely on section 54(a)(v), which provides as follows:

“54 Removal from office as executor – (1) an executor may at any time be removed from his office –

(a) by the Court –

...

(v) if for any other reason the court is satisfied that it is undesirable than that he should act as executor of the estate concerned; ...”⁵

[9] The factual underpinning of the applicants claim for the removal of the first respondent as executrix, is, to say the least, sparse. The essence of that case is encapsulated in the following extract from the founding affidavit:

⁵ The sub-sections preceding this provision are indeed not relevant on the case pursued by the applicants.

“44. My current attorneys of record have addressed correspondences to the agents of the first respondent, pertaining to the administration of the estate. ...

45. The first respondent and her attorneys replied to my attorney’s correspondence dismissively and uncooperatively. ...

...

48. It is my submission that the conduct of the first respondent and her attorneys, covert conduct in failing to inform the applicants about the status of the administration of the estate, more specifically when confronted with a letter from our attorneys dated 1 December 2021 (original sentence incomplete)...

49. The aforementioned conduct is suspicious and questionable, and had created a feeling of distrust in the applicants as potential heirs or beneficiaries in the estate. There had also been an altercation between the applicants and the first respondent, these altercations gave rise to applications for a protection order being brought against the second applicant. These applications are still pending in court. The first applicant is not willing to disclose anything insofar as the estate is concerned.”

[10] These statements reveal the subjective views of the applicants, and do not set out facts to supports the relief sought. The applicants then list six alleged failures of the first respondent to comply with the provisions of the Administration of Estates Act. The complaint that the first respondent did not cause a notice to be published in the Government Gazette and newspapers, as required by section 29(1), was rebutted by her with a copy of the published notice. Similarly, the allegation that she had not opened a cheque account in the name of the estate, as required by section 28(1)(a) and (b), was rebutted by proof of the existence of the account attached to the first respondent’s answering affidavit.

[11] The applicants also complained that the first respondent failed to notify the first applicant to lodge an affidavit in support of her claim. However, no detail is provided, and it is not apparent from the application what the possible significance of this complaint is.

[12] The applicants also complain that the first respondent failed to obtain the consent of the Master before releasing money or property out of the estate, as required by section 21(1A). This section is narrow in ambit. It provides as follows:

“(1A) The executor may before the account has lain open for inspection in terms of section 35(4), with the consent of the Master release such amount of money and such property out of the estate as in the executor’s opinion are sufficient to provide for the subsistence of the deceased’s family or household.”

[13] The founding affidavit contains no evidence that the first respondent had released any money or property out of the estate. In her replying affidavit, read together with a supplementary affidavit filed thereafter, the first applicant shows that two of the three vehicles listed as assets of the estate in the inventory, are currently registered on eNATIS as owned by the first respondent. The first respondent did not seek to file an affidavit in response to these allegations. She had almost a week to respond to them. The appropriate inference must be that she has no answer to this evidence. Although registration on eNATIS is not proof of ownership of the vehicles,⁶ the change in details certainly creates the impression that the first respondent treats the vehicles as her personal property.

⁶ *Marks & Lamb Classic Cars CC v Kona* 2019 JDR 0151 (GP) in par [17].

- [14] The applicants also complain that the first respondent has to date failed to lodge a liquidation and distribution account for the estate. Section 35 of the Administration of Estates Act provides as follows:

“35. Liquidation and distribution accounts

(1) An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29(1), but within –

(a) six months after letters of executorship have been granted to him; or

(b) such further period as the Master may in any case allow,

submit to the master an account in the prescribed form of the liquidation and distribution of the estate.”

- [15] The first respondent did not answer to this allegation at all. I therefore accept that no account has been lodged, and that no extension had been requested from the Master. The first respondent received her letters of executorship on 22 April 2021, and thus had to lodge the liquidation and distribution account by the latest in October 2021.

- [16] Section 36 of the Administration of Estates Act provides as follows:

“36. Failure by executor to lodge account or to perform duties

(1) If any executor fails to lodge any account with the Master as and when required by this Act, or to lodge any voucher or vouchers in support of such account or any entry therein in accordance with a provision of or a requirement imposed under this Act or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of the estate, the Master or any

person having an interest in the liquidation and distribution of the estate may, after giving the executor not less than one month's notice, apply to the Court for an order directing the executor to lodge such account or voucher or vouchers in support thereof or of any entry therein or to perform such duty or to comply with such demand.

- (2) The costs judged by the Master or to such person shall, unless otherwise ordered by the Court, be payable by the executor, *de bonis propriis*."

[17] The applicants, through their attorney, gave the first respondent the required notice in a letter dated 1 December 2021. The applicants are at least entitled to the alternative relief for the lodging of the liquidation and distribution account.

[18] The sufficiency of the cause for removal should be tested by considering the interests of the estate.⁷ Whilst a court will not hesitate to remove an executrix where there is clear positive misconduct, not every mistake or neglect of duty or inaccuracy of conduct will sustain such an outcome.⁸ Where there is a conflict of interest between the executrix's personal interests and the interests of the estate, the court will usually remove the executrix.⁹

[19] However, given the sparsity of facts in the application, and the limited proof that the executrix had not complied with her duties, I am not satisfied that the applicants have shown that it is in the best interests of the estate to remove the executrix from the office.

⁷ *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 17 B, referring to *Volkwyn N.O. v Clarke and Damant* 1946 WLD 456 at 464.

⁸ *Die Meester supra* at 16 G - H, with reference to *Sackville-West v Nourse and Another* 1925 AD 516 at 527.

⁹ *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 724 G – 725 A; *Harris v Fisher N.O.* 1960 (4) SA 855 (A) at 861 H – 862 E.

[20] In the result I make the following order:

(1) The first respondent is directed to lodge a liquidation and distribution account for the estate of the late William Sello Tshabalala with the second respondent within 14 days of date of this order.

(2) The first respondent shall pay the applicants' costs of the application *de bonis propriis*.



Andy Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Date of hearing: 6 April 2022

Date of judgment: 26 April 2022

Appearance for the Applicants: Mr VO Seloane

Instructed by: Seloane – Vincent Attorneys

Counsel for the First Respondent: Adv F Matika

Instructed by: Nekhevha Mababo Attorneys

No appearance for the Second Respondent