

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 20/44545

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

11 JULY 2022

In the matter between:

TSHEPISO GODFREY PHANYANE N.O.

APPLICANT

and

SAM PHANYANE

FIRST RESPONDENT

MAMOTSOKOTSI ANNA PHANYANE

SECOND RESPONDENT

**THE DIRECTOR GENERAL OF
HOUSING: GAUTENG**

THIRD RESPONDENT

**THE MEC OF HUMAN SETTLEMENTS:
GAUTENG**

FOURTH RESPONDENT

MASTER OF THE HIGH COURT

FIFTH RESPONDENT

REGISTRAR OF DEEDS

SIXTH RESPONDENT

JUDGMENT

Olivier AJ:

1. The Applicant is the grandson of the late Makanono Zephoria Phanyane (“the deceased”), who died on 5 July 2016. He brings this application in his official capacity as the appointed executor of her estate.

2. The First Respondent is Sam Phanyane, the deceased’s son, and uncle of the Applicant. The Second Respondent, Mamotsokotsi Anna Phanyane, is the wife of the First Respondent. The Third Respondent is the Director-General of Housing: Gauteng. The Fourth Respondent is the MEC of Human Settlements: Gauteng. The Fifth Respondent is the Master of the High Court. The Sixth Respondent is the Registrar of Deeds. Relief is sought against the First, Second and Sixth Respondents.

3. Only the First and Second Respondents oppose the application. The First Respondent has deposed to an answering affidavit. The Second Respondent has not filed a confirmatory affidavit.

4. The relevant facts are:

4.1. The deceased passed away on 5 July 2016.

4.2. The deceased had made a last will and testament (“the will”) on 8 February 2005, in which the Applicant was nominated as the executor of her estate.

4.3. The will created a trust in favour of the family, called the Phanyane Family Trust. The Applicant was nominated as trustee, and the beneficiaries of the trust were listed as the deceased’s son (the First Respondent), her grandson (the First Applicant) and four granddaughters, two of whom have filed affidavits in support of this application.

4.4. The deceased owned ERF [...], N [...] 1 Township, also known as number [...] M [...] Street, N [...] 1, Soweto (“the N [...] 1 property”) at time of her death. She expressed the wish that after her death, ownership of the property should pass to the trust to provide accommodation for her son and grandchildren.

4.5. In accordance with the Administration of Estates Act 66 of 1965 (“the Act”), a death needs to be reported within 14 days¹ and a will should be produced as soon as the possessor thereof becomes aware of the death.²

4.6. The First Respondent first reported the estate to the Master, Bloemfontein, claiming that the deceased had died without a will. On 12 August 2016 a Letter of Authority was issued in his favour, duly authorising him to take control of the assets of the deceased estate.³

4.7. The estate was reported a second time to the Master, Bloemfontein – this time by the Applicant, more than eight months after the deceased’s passing. The Applicant produced a will, which the Master accepted and registered on 16 March 2017.

4.8. The Master withdrew the Letter of Authority issued to the First Respondent, on 4 May 2017. The First Respondent was notified telephonically and in writing. The typed letter was date-stamped 4 May 2017 and written on official letterhead. The relevant parts read as follows:

Refer to our telephonically conversation on the 04-05-2017

¹ S 7(1) of the Act.

² S 8(1) of the Act.

³ If the value of any estate does not exceed the amount determined by the Minister by notice in the Government Gazette (R 250 000), the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be administered. This involves the issuing of a Letter of Authority, as opposed to a Letter of Executorship (S 18(3) of the Act).

Please be advised that the Letter of Authority issued to you on the **12-08-2016** is hereby withdrawn. Any further use thereof will be unlawful. Kindly return the Letter of Authority by return of post.

I will proceed to appoint a new Master's representative without any further notice to you.

You can contact me at [...]

ME Mukhwantheli (sic)

4.9. A Letter of Authority was issued in favour of the Applicant, on 8 June 2017.

4.10. On 15 September 2019, more than two years after the revocation of the First Respondent's Letter of Authority, Title Deed T [...] holding the N [...] 1 property was registered in the names of the First and Second Respondents jointly.

4.11. The Applicant launched this application on 17 December 2020.

5. The Applicant submits that the registration of the title deed in the names of the First and Second Respondents was unlawful, as the Letter of Authority issued to the First Respondent on 12 August 2016 was invalid at the time of registration. He seeks cancellation of the title deed held in the names of the First and Second Respondents, and registration of a new title deed in favour of the deceased estate.

6. The Applicant resides at the N [...] 1 property. The First Respondent contradicts himself in his answering affidavit: he admits that he resides in Witsieshoek as alleged by the Applicant, but elsewhere states that he resides at the N [...] 1 property.

7. The Applicant alleges that the First Respondent intends to sell the property, which he denies.

8. In his opposing papers the First Respondent alleges the following:

8.1. The purported will is a “fraudulent document” and invalid.

8.2. The deceased had died intestate.

8.3. The Registrar had lawfully registered the N [...] 1 property in the names of the First and Second Respondents, with a valid Letter of Authority.

8.4. The Master had acted unlawfully by revoking his Letter of Authority, due to a lack of authority and because the First Respondent had not been given an opportunity to be heard.

9. The First Respondent alleges in amplification that:

9.1. the Applicant had failed to produce the will within the required 14-day period.

9.2. the Applicant had failed to present the will to family members at the funeral.

9.3. the Applicant had forged the signature on the will, as it was different to the deceased’s “common signatures” around the time of signing of the will.

9.4. the alleged will does not state the place of signing of the will.

9.5. the use of the male form “testator”, and not the female form “testatrix”, shows that the will is a forgery.

9.6. it is “common knowledge” that the deceased was in Witsieshoek on the date of signing of the will.

10. The First Respondent submits that the Applicant should lead evidence to prove that the will is valid. This is wrong in law. A will which is regular and complete

on the face of it is presumed to be valid until its invalidity has been established. The onus is on the person alleging invalidity to prove such allegation.⁴ The standard of proof is the same as that which applies in all civil cases – proof on a balance of probabilities. In other words, he who alleges invalidity must prove it. It is clear to me that the First Respondent has failed to discharge this onus.

11. The place of signature is clearly stated in the will as Johannesburg. There is no requirement in law that a female testator should be referred to as testatrix. There is no evidence to show that the deceased was in fact in Witsieshoek on the day that the will was signed.

12. In cases where a testator's signature is challenged, it has become common (although not necessary if other forms of proof are available) to adduce the evidence of a handwriting expert.⁵ No such evidence has been placed before the court. The allegation that the signature on the will is different from the deceased's "common signature" around that time is without proof.

13. It cannot be inferred from the Applicant's failure to comply with the reporting requirements timeously that the will is a forgery. At most, it shows that the Applicant was tardy in reporting the estate and producing the will.

14. The First Respondent claims further that the deceased had died intestate. This is linked to the allegation that the will is invalid. As concluded above, the First Respondent has failed to discharge the onus. The allegation that the deceased had died without a will, therefore, is without foundation. In any event, even if the deceased had died without a will, the First Respondent would not have become the sole heir as the deceased had other children who would have qualified to inherit in accordance with the rules of intestate succession.

15. The First Respondent's Letter of Authority was withdrawn on 4 May 2017. It is clear that any purported act of the First Respondent in respect of the deceased

⁴ *Kunzs v Swart and Others* 1924 AD 618.

⁵ See e.g., *Molefi v Nhlapo and Others* [2013] JOL 30227 (GSJ) where the court accepted the evidence of a handwriting expert to find that the signature had been forged.

estate after this date would have been unlawful and invalid; the Master's letter makes this clear. This includes the transfer of any immovable estate property and registration of a title deed in respect thereof. The First Respondent's insistence that the N [...] 1 property was lawfully registered in his and his wife's names with a valid Letter of Authority is not supported by the facts.

16. The First Respondent is correct that the Master ordinarily becomes *functus officio* once Letters of Authority or Executorship have been issued.⁶ However, this is subject to the powers of removal which the Master has in terms of Section 54 of the Act, titled *Removal from office of executor*.⁷

17. Section 54(1)(b)(v) of the Act provides that the Master may at any time remove an executor from 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." If the Master intends to remove an executor on this ground or any of the other grounds listed in 54(1)(b), a specific procedure applies (s 54(2)):

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 30 days from the date of such notice for an order restraining the Master from removing him from his office.

18. The First Respondent argues that the Master had to follow this procedure and should also have granted him a hearing before removing him. He avers that the Master violated the *audi alterem partem* rule, and also his right to administrative justice in terms of section 33 of the Constitution of the Republic of South Africa, 1996.

⁶ *Welgemoed NNO v The Master* 1976 (1) SA 513 (T); also, *Transair (Pty) Ltd v National Transport Commission* 1977 (3) SA 784 (A).

⁷ See *Kekana v Master of the High Court* [2016] ZAGPPHC 771 (26 August 2016) at para 21.

19. Was the Master required to observe subsection (2) and if so, did non-compliance violate the First Respondent's rights?

20. In my view the answer is no. The procedure prescribed by section 54(2) applies only to removals in terms of subsection (1). It seems clear to me the First Respondent was removed in terms of section 54(3):

(3) An executor who has not been nominated by will may at any time be removed from his office by the Master if it appears that there is a will by which any other person who is capable of acting and consents to act as executor has been nominated as executor to the estate which he has been appointed to liquidate and distribute ...

(4) ...

(5) Any person who ceases to be an executor shall forthwith return his letters of executorship to the Master.

21. It is clear from the quoted subsection that the Master has the authority to replace an executor who was not nominated by will, with one who was nominated by will and who is willing and able to act as executor. In the present case the First Respondent was removed following the registration of the deceased's will, which nominated the Applicant as executor. The Master therefore did not act unlawfully or exceed his powers by withdrawing the First Respondent's Letter of Authority.

22. Subsection (5) provides further that the cancelled Letter of Authority should be returned to the Master forthwith. It is clear that the First Respondent failed to comply. Instead, he held on to the Letter of Authority and used it to register the N [...] 1 property in his and his wife's names.

23. This does not mean, however, that the First Respondent was deprived of a remedy. There is recourse available to anyone who feels aggrieved by any appointment made by the Master, or any other decision by the Master under the Act. Section 95 of the Act states:

Every appointment by the Master of an executor, tutor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master under this Act shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby, and the Court may on any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be. (My emphasis.)

24. The First Respondent did not avail himself of any of the available pathways to challenge either the termination of his Letter of Authority or the appointment of the Applicant. Had the First Respondent been serious about his claims of unlawfulness, he should have brought a counterapplication in these proceedings to review the Master's decisions.⁸

25. The First Respondent alleges further that the cancellation was unlawful because it failed to come to his attention: "the letter of the alleged cancellation did not reach me at all". He also denies receiving a call from the Master's office informing him of the withdrawal of his Letter of Authority.

26. There is no onus on the Applicant to prove that the First Respondent had received the call or that the letter had reached him. There is no statutory requirement that the letter should have been sent by registered mail, or that the Master should have checked with the First Respondent that he had in fact received the letter. This would place an unnecessary burden on the Master's Office. The letter from the Master's Office is clearly addressed to the First Respondent and refers to a conversation earlier that day between the First Respondent and the writer of the letter, in which the First Respondent was informed of the cancellation. The letter bears the date stamp of the Master's Office and is typed on official Master's Office letterhead. It is signed by an official in the Master's Office. There has been no

⁸ See *Kekana supra* where the court, in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000, set aside a decision of the Master to appoint an executor, for failure to apply his/her mind.

allegation that the letter is a forgery. It is therefore a valid cancellation of the First Respondent's Letter of Authority.

27. Whatever the First Respondent maintains, the fact remains that at the time of the registration of the title deed, the First Respondent's Letter of Authority had been validly withdrawn by the Master. The First Respondent had no authority to deal with the estate property from the moment of withdrawal.⁹

28. It follows that the title deed held over the N [...] 1 property in the names of the First and Second Respondents should be declared invalid, and cancelled.

29. Section 6(1) of the Deeds Registries Act 47 of 1937 empowers the Registrar of Deeds to cancel a deed, but only in terms of an order of court. Section 6(2) provides that upon cancellation, the deed under which the land (property) was held immediately prior to the registration of the cancelled deed, shall be revived to the extent of such cancellation. This means that the title deed registered in the name of the deceased, under which the N [...] 1 property was previously held, will be revived and reinstated. It is unnecessary for me to order that the Registrar registers the title deed to the N [...] 1 property in the name of the deceased estate specifically.

30. It has been five years since the estate was first reported to the Master. No doubt the finalisation of the estate has been delayed by this application, which was necessary to accomplish the return of a primary asset to the estate. It is unclear whether the family trust has been registered. Certain steps will need to be taken to transfer the N [...] 1 property to the trust. The Applicant must now act diligently and with necessary haste to finalise the estate in order to give effect to the wishes of the deceased.

31. It is trite that in awarding costs, a court has a discretion, which must be exercised judicially upon a consideration of all the facts. This discretion is broad but not unlimited. Established principles should be considered. As a rule of thumb, a

⁹ S 13 of the Act: "No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section 15, or in pursuance of a direction by a Master."

successful party is entitled to his or her costs. It is also trite that an award of attorney and client costs is the exception, not the rule. As the successful party the Applicant is entitled to his costs. However, I do not think the facts and circumstances of the case justify costs on a punitive scale, which is what the Applicant seeks. The Applicant is therefore awarded costs on a party and party scale.

32. In the result I make the following order:

32.1. Title Deed T [....], which holds the property known as ERF [....] N [....] 1 Township, Soweto, Gauteng, also known as number [....] M [....] Street, N [....] 1, Soweto, registered in the names of Sam Phanyane and Mamotsokotsi Anna Phanyane, is declared invalid.

32.2. The Registrar of Deeds, Johannesburg, is directed to cancel Title Deed T [....] accordingly.

32.3. The Registrar of Deeds, Johannesburg, is directed further to revive the title deed under which the property known as ERF [....], N [....] 1 Township, Soweto, Gauteng, also known as number [....] M [....] Street, N [....] 1, Soweto, was held immediately prior to the registration of Title Deed T [....].

32.4. The First and Second Respondents shall pay the costs of this application on a party and party scale.

M Olivier

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 14h00 on 11 July 2022.

Date of hearing: 25 May 2022

Date of judgment: 11 July 2022

On behalf of Applicant: B B Ntsimane (Ms)

Instructed by: Masina Attorneys

On behalf of First and Second Respondents: M D Hlatshwayo of Hlatshwayo
Mhayise Inc.