

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**

**[REPUBLIC OF SOUTH AFRICA]**

**CASE NUMBER: 28518/2011**

**DATE: 11 JULY 2014**

**In the matter between:**

**P[...] M[...] N[...]**

**APPLICANT**

**And**

**A[...] C[...] N[...]**

**FIRST RESPONDENT**

**S[...] K[...]**

**SECOND RESPONDENT**

**MASTER OF HIGH COURT**

**THIRD RESPONDENT**

**(NORTH GAUTENG)**

**JUDGMENT**

**MAVUNDLA J;**

[1] The applicant seeks an order in terms of s54 of the *Administration of Estate Act 66* of 1965 removing second respondent as the executor of the estate of the late J[...] M[...] and ordering the third respondent to appoint, in his stead, the applicant as the executrix of the said deceased's estate. The application is being opposed by the first and second respondents.

[2] It is common cause that the applicant is the mother of the deceased. The applicant contends that the first respondent and the deceased were not married and that the second respondent is not the biological son of the deceased. The first respondent, with the connivance of the second respondent, falsely presented to the third respondent that the second respondent is the son of the deceased.

[3] The first respondent completed under oath the "Particulars of Next of Kin" form and presented the second

respondent as the son of the of the deceased<sup>1</sup>. It is common cause that the second respondent is neither the biological, nor legally adopted son of the deceased.<sup>2</sup> In my view, the first respondent misstated the true facts. It is irresistible not to conclude that she was not *bona fide* in presenting the second respondent as the son of the deceased. In my view, the first respondent misstated facts with a singular intention to beneficiate her son, the second respondent, as an heir of the deceased. By so doing, the first respondent was, in my view, disingenuous and not *bona fide*. The second respondent in his confirmatory affidavit stated that he has read the first respondent's affidavit and confirm the correctness thereof. He therefore associated himself with the misstated facts and I therefore find that he too was not *bona fide*.

[4] The third respondent, in appointing the second respondent as the executor of the estate of the deceased, must have done so as the result of the misstated facts placed before him by the first respondent that the second respondent was the son of the deceased. There was no legal basis upon which the second respondent could have been appointed as the executor of the deceased's estate.. Consequently I find that the second respondent should for the aforesaid reasons be removed from the office of the executorships of the deceased.

[5] The first respondent contended that she was the customary wife of the deceased. She alleged that part of lobola was paid by the family of the deceased for her hand in marriage. She has, however, failed to attach affidavits of people who negotiated and paid lobolo for her hand. She has failed to state, when and by whom was she handed over to the family of the deceased, and whether she was accordingly so accepted. Although the first respondent has alleged that part of lobolo was paid for her and that she and the deceased stayed together for a considerable period of time that does not necessarily prove that there was a customary marriage between her and the deceased<sup>3</sup>.

[6] The first respondent bears the *onus* of proving that there was a customary marriage entered into between herself and the deceased; *vide Baadjies v Mathebula*<sup>4</sup> In this regard the first responded failed, in my view, to prove that the customary marriage was negotiated and entered into.<sup>5</sup>

[7] The deceased passed away on the 26<sup>th</sup> July 2010. The first respondent has to date not caused the alleged customary marriage to be registered.

[8] Section 4 of the Act deals with the registration of customary marriage and provides that spouses of a customary marriage have a duty to ensure that their marriage is registered. Either spouse may apply to the registering officer in the prescribed form for the registration of his or her customary marriage and must furnish the registering official with the prescribed information and any additional information that the registering officer may require in order to satisfy him or her as to the existence of the marriage.<sup>6</sup>

[9] In the circumstances, I conclude that the first respondent has failed to prove that there was a customary marriage between her and the deceased. She cannot therefore be regarded as the next of kin of the deceased. She cannot therefore, in the absence of a valid will, inherit from the estate of the deceased, and I accordingly find as such.

[10] The court has the power to remove an executor in terms of:

“s54 (1) An Executor may at any time be removed from his office by the Court:

(a) “(iii) if *he* <sup>has</sup> by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as executor or to effect or assist in effecting such recommendation.”

[11] An executrix is expected to act *bona fide* at all times in winding the estate of the deceased. Where the executor demonstrates tendencies that are contrary to what is expected of him, then the court is at large to have such executor removed from the office of executor.<sup>7</sup>

[12] For the reasons stated herein above, I find that both the first and second respondent is disqualified from being appointed as executrix/ tor in the estate of the deceased. I find that that the applicant, as the mother of the deceased, is the only person qualified to be appointed as the next of kin of the deceased and should therefore be appointed as the executrix in the estate of the deceased.

[13] I therefore conclude that the application must succeed and that the first and second respondents, the one paying the other to be absolved, be mulcted with the costs of this application in their personal capacity.

[14] In the premises the following order is made:

i That the existing Letters of Authority that were issued to the Second respondent, marked “PAD1” are hereby revoked;

ii That the applicant is declared as the Executor of the deceased estate of the late J[...] M[...], ID number 5[...] who died on 2010/07/26;

iii. That the third respondent is ordered to issue the Letters of Authority of the said deceased estate to the applicant;

iv. That the first respondent and the second respondent in their personal capacity, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of this application.

**Date of Hearing: 24 / 04 / 2014**

**Date of Judgment: 11 /07/2014**

**Applicant's Attorneys: NUNIVERSITY OF PRETORIA LAW CLINIC**

**Applicant's Advocate: Adv. H. NELL**

**Respondent's Attorney: SHAPIRO & SHAPIRO INC.**

**Respondent's Advocate: Adv. N. ERASMUS**

<sup>1</sup>Paginated pages 16-17 "1192); paginated page 18 Death Notice "J294"form.

<sup>2</sup>Vide paginated pages 28- 34 paragraph respectively paragraphs 2.4.4 and 3.11 answering affidavit of the first respondent.

<sup>3</sup>Fanti v Boto and Others 2008 (5) SA 405; *Mabuza v Mbatha* 2003 (4) SA 218 (C) at 223

<sup>4</sup>2002 (3) SA 427 (WLD) at para [15]-[22]; *Motsoatsoa v Roro* 329 2011 (2) ALL SA 324 (GSJ).

<sup>5</sup>Fanti v Boto and Others 2008 (5) SA 405; *Mabuza v Mbatha* 2003 (4) SA 218 (C) at 223.

<sup>6</sup>Section 4(3) '(a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after that commencement or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*.

<sup>7</sup>vide Von Niekerk 2011 (2) SA 145 (KZP) at par [12].