

## REPUBLIC OF SOUTH AFRICA



## IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

15/9/2014  
CASE NO: 13759/12

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

SARAH ESTHER NKOSI

APPLICANT

and

ALBERT MOGANE

1<sup>ST</sup> RESPONDENT

THE DEPARTMENT OF HOME AFFAIRS

2<sup>ND</sup> RESPONDENT

## JUDGMENT - LEAVE TO APPEAL

KHUMALO J

[1] Applicant is seeking leave to appeal against the *ex tempore* judgment this court delivered on 15 March 2014, dismissing an Application that Applicant brought against the Respondents claiming to be bringing it in her capacity as the executrix of the estate late Gloria Thalitha Vimba.

[2] In considering the Application I am enjoined by the Applicant to have due regard to whether there are prospects of another court coming to a different conclusion.

[3] In 2011, the Master of the High Court Pretoria issued the Applicant with letters of executorship of her late sister's (the deceased) estate who passed away in 2010. The Master later, in 2011, revoked Applicant's letters and in her stead issued the Respondent with the letters of appointment. That is how things stand currently.

[4] One of the reliefs Applicant seeks in her Application is an order declaring the Respondent's letters as issued by the master invalid. There is no application for an order for the review of the decision of the master revoking her letters of appointment and setting



aside his decision to issue the letters to the Respondent. There is also no reference to whether there is a pending action where she is reclaiming her status as an executrix.

[5] As long as an administrative decision has not been set aside on review, it exists in fact and has legal consequences; *Hira and Another v Booysen* 1992 (4) SA 69 AD. The Applicant therefore is in effect not an executrix of her late sister's estate and cannot approach the court in that capacity.

[6] In terms of s 8 (1) of PAJA a court may grant just and equitable relief that the Applicant seeks, including the setting aside of an administrative action in proceedings for judicial review in terms of s 6 (1) of PAJA. The institution of proper legal proceedings is set out as a precondition to a court's exercise of its power of judicial review of an administrative action. See *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a as Eye and Laser Institute* 2014 (3) SA 219 (SCA). Applicant had instead sought declarator instead of a review.

[7] The court can only preside over due process. *Locus standi* is fundamental to such due process and lack thereof invalidates the proceedings. See *Ex parte Johannesburg Congregation of the Apostolic Church* 1968 (3) SA 377 (W); *Rapotsonyane v Sekhukhu Syndicate* 2006 (2) BLR 607 CA; *Morenane Syndicate and Others v Loeto* {2005} 2 B.L.R.

[8] Applicant's assertion that she is the executor is incorrect and the court cannot decide a case on an incorrect legal basis. *Locus standi* being a matter of law.

[9] On the aforementioned key point there are no prospects of another court arriving at a different conclusion.

[10] The delivery of Applicant's Notice for leave to appeal was delayed by over a month. There was no Application for condonation filed by the Applicant nor was such Application mentioned during submissions in chief by her Counsel. Only in reply, after the Respondent's Counsel has argued for the Application to be either dismissed or struck off the roll was condonation addressed and an Application made on the basis that the filing of the Application was done on 10 April 2014 within the period prescribed by the rules even though the service on the Respondent was effected a month later. The procedure followed does not comply with the rules that require that the Notice be delivered within 15 days of the judgment (meaning service and filing thereof) the court would however in the interest of justice condone the delayed Notice to appeal.

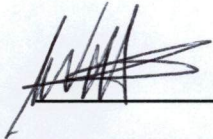
[9] I under the circumstances make the following order :

[9.1] Condonation is granted to the Applicant for its late filing of the Application for leave to appeal.

[10] However, due to absence of any prospects of another court arriving at a different conclusion as aforementioned

[10.2] Application for leave to appeal is dismissed with costs





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**N V KHUMALO J**

**JUDGE OF THE HIGH COURT**