IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 52878/21
DATE: 21 JUNE 2022

REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES / NO
REVISED

In the matter between:-

POTSISO DAVID MATSETELA	First Applicant
P[....] S[....]2 M[....]1 obo S[....] L[....]	Second Applicant
Z[....] S[....]3 M[....]2 obo M[....]3 L[....]	Third Applicant

VS

ESTATE L[....]2 J[....] L[....]	First Respondent
(ESTATE NUMBER 0100/94/2018)	
M[....]4 P[....] L[....] N.O.	Second Respondent
MASTER OF THE HIGH COURT, PRETORIA	Third Respondent
SHABANGU B ATTORNEYS N.O.	Fourth Respondent
LEGAL PRACTICE COUNCIL, GAUTENG	Fifth Respondent

JUDGMENT

KOOVERJIE J

[1] The first applicant, Mr Potsiso David Matsetela, instituted this application for the removal of Shabangu B Attorneys N.O. as the administrator of the first respondent and does so in his capacity as heir of the first respondent (the estate). The parties in this matter are family members of the deceased, Mr L[....]2 J[....] L[....]. The first applicant is the eldest son of the deceased. The second respondent is the surviving spouse of the deceased and the appointed executrix to act on behalf of the first respondent. The second and third applicants act on behalf of their minor children, who are also beneficiaries of the estate.

[2] The respondent raised two points *in limine*, namely:

(i) the first issue is that the first applicant does not have *locus standi* to institute this application; and

(ii) secondly, the Administration of Deceased Estates Act 66 of 1965 ("the Act") does not make provision for the appointment or the removal of the administrator appointed by the executrix.

A BACKGROUND

[3] Before I deal with the legal points, I find it apt to set out the context in which the dispute between the parties arose. The deceased, Mr L[....]2 J[....] L[....] passed away on 27 August 2018 intestate. It was alleged that he was survived by nine children and the second respondent to whom he was married in community of property at the time. The second respondent, Ms M[....]4 P[....] L[....] N.O. was appointed as the executrix. In order to assist her in the finalisation of the estate she appointed Shabangu attorneys as the administrator of the deceased estate (fourth respondent). Mr Shabangu represented the firm.

[4] It is common cause that at the time the deceased passed away he owned several movable and immovable properties, including his legal practice. This legal practice was sold to the daughter and the nephew of the fourth respondent. It was

alleged that a valuation of the legal practice was not conducted in order to determine its fair value.

[5] The respondents have in their papers not only challenged the *locus standi* of the applicant but have demonstrated that the first applicant interfered with the administration of the estate. The answering affidavit was filed by the second respondent and was supported by Ms Nkosi, Ms Makgoba and Mr Shabangu. It appears that these individuals were not only employed by the deceased in the legal practice, but they were family members of the deceased as well.

[6] It was argued that the first applicant had no *locus standi* to institute this application on behalf of the beneficiaries of the deceased estate. The beneficiaries were entitled to do so in their own capacity as heirs to the estate. In this instance, the second and third applicants represented the minor children who are also heirs in the deceased's estate.

[7] It was also submitted that this application is premature. The applicants are entitled to exercise their rights in terms of the Act once the liquidation and distribution account is submitted to the Master. The applicants at that point, together with the other beneficiaries are entitled to object to such liquidation and distribution account. This is where their remedy lies.

B **POINTS *IN LIMINE***

[8] In addressing the *locus standi* issue, I have considered the arguments as well as the further written submissions of both counsel. The salient contention of the respondents is that only the executrix is vested with the authority to terminate the services of Mr Shabangu (the administrator).

[9] Argument was proffered that the relationship between Mrs L[....] and Mr Shabangu is one based on a contract of mandate. It is based on the relationship between an attorney and client[1]. I am in agreement with this proposition.

[10] It has also been settled by our courts that although an executor can appoint an administrator to assist him/her, such person does not replace the executor[2]. In the ***Bramwell*** matter the court further held:

> *"An executor, as I see the matter, may not appoint someone to act instead of himself, so as to relieve himself of responsibility; but he may appoint someone, for whose acts he will be responsible, to act on his behalf, and that is what, in my judgment, the second plaintiff did in the present case."*

[11] On the papers the applicants' case was based on the conflict of interest issue. It was alleged:

> *"The Second Respondent appointed the Fourth Respondent to be the administrator of the deceased estate once she was appointed as Executrix. The Fourth Respondent started its work as administrator of the estate. It is therefore expected to follow the provisions of the Administration of Estates Act 6 of 1965."*[3]
>
> And further:
>
> *"It is clear that the Fourth Respondent "Mr Shabangu" is conflicted and should have not accepted the mandate to administer the estate of my late father considering their unresolved issues."*[4].

[12] The applicants proffered an argument that Mr Shabangu, as the agent, was vested with actual and/or ostensible authority. The agent's actions are therefore binding

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[1] Mort N.O. v Chiat 2001 (1) SA 464 (C)

[2] In ***Bramwell and Lazar, NNO v Laub, 1978 (1) S.A. 380 (WLD), [1978] 1 All SA 295 (W)***, **at page 298** the court dealt with the situation where the executor appointed someone else to: *"generally to administer, liquidate, distribute and manage the affairs of the said estate and to do and perform all such acts and sign all such documents as may be necessary or expedient to that end."*

[3] Par 20 Founding Affidavit – Caselines p 001-12

[4] Par 29 Founding Affidavit – Caselines p 001-16

on the principal (Mrs L[....]). Consequently, the agent owes the same fiduciary duties to the third parties as he does to the executrix (the principal). It was explained that the agent is effectively interacting with third parties for the benefit of the principal. Hence the court was requested to infer that an executor or an administrator can be removed at the behest of the beneficiaries. Based on the reasoning, the first applicant's case is that it has authority to remove Mr Shabangu as the administrator.

[13] To bolster the said proposition, the applicants relied on the ***Brimble-Hannath*** matter[5]. However, upon the reading of the said authority, I find that it is distinguishable on the facts. The matter concerned the removal of the executor.

[14] It is necessary to distinguish the role and authority of the executor to that of the beneficiaries. The issue at hand here, is whether the beneficiaries have the authority to request the court to remove the administrator, Mr Shabangu. It is common cause that this is not a matter where the removal of the executrix was sought.

[15] It is common cause that Mr Shabangu has a fiduciary duty towards his client, Mrs L[....], in the administration of the estate[6].

[16] Our authorities have distinguished the status of beneficiaries against that of executors, particularly regarding their authority to institute legal proceedings. In ***Cumes v Estate Cumes***[7] it was held that if an heir or other interested person maintains that an executor should take steps for the recovery of assets in the estate, then his proper remedy, if such action is not instituted, is to request the court for the removal of the executor for breach of duty, since it is only the executor who is vested with the authority to vindicate the assets of the estate.

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[5] Brimble-Hannath v Hannath and Others [2021] ZAWCHC 102
[6] Law Society of the Cape of Good Hope v Randell [2015] 4 All SA 173 ECG a par 44C
[7] 1950 (2) SA 15(C)

[17] More recently, the Supreme Court of Appeal has affirmed this principle and which I find has relevance to this matter insofar as the authority of beneficiaries are concerned. In ***Gross and Others v Pentz 1996 (4) SA 617 (SCA)***[8] the court held:

> *"In my view, it should be accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the executor thereof and that normally a beneficiary in the estate does not have locus standi to do so."*[9]

[18] Beneficiaries, however, can be clothed with the *locus standi* in exceptional circumstances only. Exceptional circumstances arise in instances when the executor is delinquent and can therefore not challenge his/her own conduct. In these circumstances, the beneficiaries can institute proceedings on the basis that they have a vested right in the proper administration of the estate. These are exceptional circumstances and when the executor is conflicted in challenging his own decision (known as the Benningfield principle) [10].

[19] In addition, I echo the sentiments expressed in ***Segal and Another v Segal and Others***[11] where the court held:

> *"In our law the executor is the person in whom, for administrative purposes, the deceased's estate vests. It is his function to take all such steps as may be necessary to ensure that the heirs in the estate to which he is appointed receive what in law is due to them. It is an aspect of this function to remove whatever obstacles exist to the achievement of this end. If the actions of an executor in another estate are such as to prevent the receipt by the estate which he administers of assets due to such latter estate, it is he who should take all appropriate steps to remedy the position. If these steps involve the removal of the executor in such other estate it falls within the competence of the executor*

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[8] At page 19
[9] my emphasis
[10] Benningfield v Baxter (1886) 12 AC 67 (PC)
[11] 1976 (2) SA 531 (C) at 535 A-B

in the creditor estate, and not of an heir in the estate, to take the necessary action."

[20] Having regard to the aforesaid authorities, I am of the view that the applicants (as prospective heirs) did not have *locus standi* to apply for the removal of the fourth respondent. If any such application was necessitated, the executrix (second respondent) remains vested with the authority to remove the administrator, as she is the designated person to act on behalf of the deceased estate and is required to ensure that the heirs receive their benefits in accordance with the law.

[21] I further agree with the proposition that the relationship between the attorney and client is based on a contract of mandate[12]. The executrix is entitled to the legal representation of her choice and the applicant has no authority to interfere with such appointment. Hence the executrix may terminate the fourth respondent's mandate to act on her behalf in the administration of the deceased estate[13].

[22] I am mindful that the applicants raised no issue with the second respondent's capacity as the executrix of the deceased's estate. The applicants could, however, based on the ***Gross*** principle, have approached the executrix for the removal of Mr Shabangu.

C DISPUTE OF FACT

[23] Mr Shabangu, in his supporting affidavit, raised the point that a dispute of fact pertaining to his relationship with the deceased was evident on the papers. The applicants alleged that due to an estranged relationship between Mr Shabangu and the deceased, Mr Shabangu was not acting in the best interests of the deceased's estate.

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[12] Maud N.O. v Chiat (2001) (1) SA 464 C

[13] Clarkson N.O. v Gelb & Others 1981 (1) SA 288 W at 295 C-D the court stated:

> "The executor is the only person who can sue on behalf of the estate to recover damages for harm caused to estate assets and for vindication." See Meyerowitz, the Law and Practice of the Administration of Estates 5th Edition at 124; Du Toit v Vermeulen 1972 (3) SA 848 A at 855-6

[24] The respondents, however, painted a different picture. All the respondents, in their respective affidavits, denied that the relationship between the deceased and Mr Shabangu was estranged or had become estranged. In fact, it was pointed out that Mr L[....], in the earlier years, worked with Mr Shabangu. When the deceased went on to open his own practice, the parties maintained a friendly and collegial relationship.

[25] The version of the respondents remained undisputed. Hence, this issue does not warrant a referral to oral evidence.

D CONFLICT OF INTEREST

[26] It is common cause that the motive behind the removal of Mr Shabangu was due to the sale of the deceased's legal practice to the daughter and nephew of Mr Shabangu.

[27] The contention raised is that the fourth respondent failed in his duty in that he did not act impartially when he caused the members of his family to benefit from the estate, in my view, has no merit.

[28] I have, particularly, noted that the second and fourth respondents "Report" set out the basis upon which the practice was sold to the consortium of attorneys in the amount of R6 million (the progress report dated 13 February 2020)[14].

[29] It was also pointed out that the master may, if not satisfied with the valuation, order that the legal practice be appraised. The court's attention was drawn to the various unsubstantiated allegations made on this aspect.

[30] The first applicant did not dispute the fact that he was aware of the negotiations involved regarding the sale of the practice. The applicants' legal representative was duly

[14] Founding affidavit par 24 p. 8

informed of all the steps taken. At no point were any objections raised when the sale took place.

[31] I also find the first applicant's submission that the Act is applicable to Mr Shabangu in his capacity as an administrator, to be misplaced. It was correctly contended that Sections 49 and 81 of the Act are not applicable.

[32] The applicants relied on Section 49 where it was argued that Mr Shabangu could not sell "to his children" any property in the estate which he has been appointed to administer, liquidate and distribute. Section 49 of the Act states:

> *"(1) If any executor or his spouse, parent, child, partner, employer or employee or agent purchases any property in the estate which he has been appointed to liquidate and distribute, the purchase shall, subject to the terms of the law (if any) of the deceased and in the case of the executor who is the surviving spouse of the deceased, to the provisions of Section 38, be void unless it has been consented to and is confirmed by the master of the court, or curator, purchases any properties which he has been appointed to administer, the purchase be void unless it has been consented to or is confirmed by the master of the court."*

[33] The respondents directed this court to the wording of the said provision, more particularly, that no reference is made to the "child of the agent. "Child" in this context refers to the executor's "child". The relevant portion reads:

> *"If any executor or <u>his</u> child, or any executor or <u>his</u> agent, purchases any property in the estate …"*.

It does not make reference to Mr Shabangu's child. Therefore, consent or confirmation by the Master or by the Court was not required.

[34] The matter of Tung'ande[15] is also distinguishable on this very point. It related to the sale of the property to daughter of the executrix. In the said matter, the applicants

[15] Tung'ande and Others v Tung'ande and Others 67369/15 [2017] ZAGPPHC 49 (14 February 2017)

argued that the executrix and her agent had in fact accepted an offer from her daughter to purchase the property of the deceased estate and as such there was a conflict of interest.

[35] Furthermore, the first applicant fails to explain why he belatedly takes issue with the sale of the legal practice. The first applicant raised no concern at that time the practice was sold, which was a while ago.

[36] Despite this, in his papers, he persisted with various contentions, namely:

(i) at paragraph 26 of the founding papers:

"I have stated above, Shabangu sold the legal practice to his daughter, I dispute the following:

20.6.1 that the value of the legal practice wasn't near R6 million only;

20.6.2 that the legal practice had no financial capital of any value;

20.6.3 that there are movable properties that has been disposed of by the respondents when there has been no accounting; and

20.6.4 that there were no case or matter handled by the legal practice wherein payments were outstanding and due to the legal practice.";

(ii) at paragraph [30] the first applicant continues:

"Shabangu is conflicted in the whole process as he determines the value of the legal practice without conducting a proper valuation, so that he can sell it to his daughter and as I was informed the buyer has not paid the full purchase price. It is not clear how much has been paid so far and what is done with the money. I find his conduct so unprofessional and unethical."

However, these allegations remain unsubstantiated.

[37] In fact, he does not address the facts set out in the progress report. The said allegations are contrary to the progress report dated 13 February 2022. At paragraph 5.8 the following is stated:

> *"It was also our commitment that for the proper handling of the estate he wanted to avoid the creation of artificial insolvency of the estate through half-bake solution, sloppy work and/or hasty push for finalisation. We indeed committed ourselves that for thorough and rigorous approach in the stages that are still unfolding and, in the injustice as to prevail in the manner of the handling of the estate and the distribution of whatever assets that will constitute the residue. Trust beneficiaries were identified as per the instruction of the Law Society and monies were paid to them as directed by the Legal Practice Council. A trust audit was done by Mr late L[....]'s auditors and the audit report was forwarded to the Legal Practice Council for their assessment and directive. Further claims against the trust were registered but there were no funds to meet those claims and a significant trust shortfall is suspected. The monies that are supposed to have been paid to the Guardian's Fund at the master's office before the death of Mr L[....] but records have not yet been traced and an investigation by the Guardian's Fund is continuing."*

[38] More particularly, with regard to the sale of the legal practice, the report reads:

> *"The value of the legal practice was settled at R6 million which is made up of the combination of prospective income, assets of the company and the debtors book.*
>
> *The above is the highest value which a prospective buyer was prepared to pay. It was the executrix's wish for the new owners to rehire most of the deceased's employees who happened to be hers and the deceased's family and extended family members.*
>
> *The legal practice had no financial capital of any note, that is, there was no cash investment and insurance etcetera of any value. The legal practice was owing municipality, trust clients, employees, creditors, advocates, costs consultants etcetera …"*

[39] The further allegations also remain unsubstantiated, namely that:

(i) the report was silent on the payments by the Road Accident Fund in relation to matter handled by the legal practice in the deceased's lifetime;

(ii)the properties of the deceased, particularly the pub, as well as the homes were not managed and/or sold to realise funds in the estate. There were four homes, one of which was occupied by the executrix and her daughter, the other by the extended family;

(iii) there is the delay in the winding up of the estate. The final account has yet not been submitted to the master. These delays are prejudicing the beneficiaries;

(iv) the beneficiaries are not receiving their benefits in the form of maintenance; and

(v) the fourth respondent is alienating assets in the estate in a reckless manner without giving proper evaluations for his conduct *"as if he is trying to get back at my father by getting rid of all his assets and have his children to suffer"*.

[40] It became evident and remains undisputed that there exists a hostile relationship between the first applicant and the second respondent. The respondents pointed out that the applicant interfered and attempted to take over the administration of the estate. The deceased's assets/business in the M[....]4 Club was not dealt with responsibly by the applicant. Moreover, the applicant claimed to be a creditor in the estate, in amount of R258,057.15, but failed to provide proof of such debt. This claim remains in dispute.

[41] I have noted and it appears to be common cause that the second respondent had at all relevant times acted in good faith. Mrs L[....] has ensured that the beneficiaries were not excluded. She made the necessary enquiries to ascertain who the beneficiaries were and that they be included in the estate. From her affidavit, I have noted that:

(i) she set out to explain the previous offers received regarding the sale of the practice and which is unsuccessful;

(ii) she confirmed the relationship with Mr Shabangu and the deceased were very collegial and of a friendly nature;

(iii) furthermore, that the trust beneficiaries have indeed been paid through the curator department of the Legal Practice Council;

(iv) she further provided an explanation in respect of each of the properties and demonstrated that the applicant was obstructive regarding the sale of the Kilner Park home. The applicant refused to consent to the sale when a reasonable offer was made;

(v) the second respondent was mindful of the extended family home and proposed that the house be given to them;

(vi) the second respondent also illustrated how the R6 million value of the law practice was determined. It was also pointed out that the estate could not be finalised earlier due to the fact that the estate was not solvent at the time;

(vii) The second respondent indicated that the estate was being administered in a manner where there would be an orderly realisation of the available assets and there will be meaningful residue for the beneficiaries;

(viii) she further confirmed that the children are receiving maintenance of at least R5,000.00 a month, and particularly with regard to the newly introduced children, they too are receiving a contribution despite there being no concrete proof that they are in fact the children of the deceased.

[42] The second respondent's evidence was corroborated by Mr Shabangu, the fourth respondent. He clarified that his relationship with the deceased was collegial, friendly and that they built up a good relationship over the years.

[43] A second confirmatory affidavit was also filed by Josephine Makgoba, who is the eldest sister of the deceased. She confirmed that she was one of several family members who were employed by the deceased. She also confirmed that the second respondent took it upon herself to save the jobs of the respective family members. She negotiated that their jobs be retained with the new buyer. She stated that she was not aware of any hostility between the deceased and Mr Shabangu.

[44] A third supporting affidavit was attested to by the sister of the executrix, Ms Nkosi wherein she highlighted that the manner in which the first applicant was obstructive and the fact that a hostile relationship existed between the executrix and the first applicant. The executrix indicated that the applicant was included in seeking a buyer for the legal practice. She concluded that the first applicant has always been disrespectful to the executrix.

[45] Notably, during the hearing, counsel on behalf of the applicants conceded that the explanations proffered by the respondents in the answering papers remain uncontested. The replying affidavit mainly addresses the issue of the estranged relationship between the deceased and Mr Shabangu. The rest of the reply constitute bare denials.

[46] In response to the said answering papers, the first applicant's reply constituted bare denials. At paragraph [6] he stated:

> *"I have read the unsubstantiated and speculative allegations made against me and deny each and every allegation where the second respondent and the confirmatory affidavits intend the above honourable court to make negative findings against me."*

(i) Then he goes on at paragraph [7] to state:

> *"I do not intend to reply to the allegations herein contained … I have been advised that there exists no reason to deal with any of the false allegations made against me for the following reasons:*
>
> *(1) they are of no relevance to this court and would only have become relevant if I take an issue with the second respondent's capacity as executrix to the deceased's estate …";*

(ii) at par 7.3:

> *"The allegation herein contained are in any event false and based upon speculation. The second respondent would prefer me to be dismissed as*

a petulant child seeking to assert mine and my siblings' interests in our father's own estate.";

(iii) at paragraph [8]:

"I deny that this application is in furtherance of malicious intents towards the second respondent and that I mainly hope that if the fourth respondent is not involved, I will be able to do as I please to the second respondent and her family interest in the estate."

[47] Having considered the facts before me and the aforesaid principles pronounced by our courts, I find no merit in this application.

[48] In the premises I make the following order:

1. The application is dismissed with costs.

H KOOVERJIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant:	*Adv S Maziba*
Instructed by:	*Sibanda Bukhosi Attorneys Inc.*
Counsel for the First, Second & Fourth Respondents:	*Adv HM Barnardt*
Instructed by:	*Nkuna Attorneys*
Date heard:	*6 June 2022*
Date of Judgment:	*21 June 2022*