THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 21755/2018

In the matter between

SIYAKUDUMISA MLUNGUZA	**FIRST APPLICANT**
ANDILE BOOI	**SECOND APPLICANT**

and

MASTER OF THE HIGH COURT	**FIRST RESPONDENT**
NADIA MOUTON	**SECOND RESPONDENT**

Coram: Rogers J

Heard: 8 May 2020

Delivered: 12 May 2020

This judgment was handed down electronically at approximately 10h00 on Tuesday, 12 May 2020, by circulation to the parties' legal representatives by email. On the same morning it was released to SAFLII.

JUDGMENT

Rogers J

[1] This is an application for leave to appeal against my judgment of 11 February 2020. The delay in hearing this application is attributable to the Covid-19 lockdown. I shall use the same abbreviations as in the main judgment.

[2] Although the application is brought in the names of Mr Mlunguza and Mr Booi, reasonable doubt persists as to whether this application is brought with Mr Booi's knowledge and authority. In addition to paras 59-63 of the main judgment, there are the following further circumstances relevant to this question. Although the application for leave to appeal purports to have been filed by a firm of attorneys, Venfolo Attorneys, the application is signed by Mr Mlunguza. I asked Mr Mlunguza whether he was an attorney at this firm. He said he was not. He claimed, however, that a Mr Linjini at that firm was aware of the application. Mr Mlunguza should not have signed the petition as if he were an attorney at Venfolo Attorneys.

[3] Counsel for Ms Mouton (the second respondent) informed me that on his advice his attorneys (ABA) tried to make sure that the papers in this case came to Mr Booi's attention. They tried to serve the papers at the address of Venfolo Attorneys recorded in the application for leave to appeal. Nobody was found at this address, and there was no signage to indicate that a firm by that name had its offices there. They also tried to serve on Venfolo Attorneys by email, but the email bounced back.

[4] Ms Mouton's counsel then advised ABA to obtain such particulars as they could for Mr Booi, allegedly an attorney, from the LPC. They got a physical

address and telephone number. The telephone went unanswered despite various attempts. An attempt to serve at the physical address failed; nobody was present, and a neighbour stated that he had no knowledge of a Mr Booi, and that the occupants of the house were two women.

[5] On 7 May 2020 ABA emailed Mr Mlunguza and asked him to furnish them with Mr Booi's updated contact details in the form of an address, telephone number and email. Mr Mlunguza's reply was that documents for Mr Booi should be served on him as he was Mr Booi's attorney.

[6] At the hearing on 8 May 2020, after these matters had been canvassed, I asked Mr Mlunguza what contact information he had for Mr Booi. He said that Mr Booi was an attorney but that he did not know his physical address. He gave a mobile telephone number which was, he said, his means of communicating with Mr Booi. I adjourned proceedings for a few minutes to enable Mr Mlunguza to phone Mr Booi to get his contact details. When we resumed, Mr Mlunguza told me that Mr Booi's phone was on voicemail.

[7] In the circumstances, I treat the present application as one by Mr Mlunguza. If Mr Booi in his own right wishes to pursue an application for leave to appeal, proper evidence will need to be furnished that he has authorised such a step.

[8] The application for leave to appeal is a 31-page document in which the criticisms of my judgment are grouped under ten 'grounds'. I will endeavour to deal with the main points Mr Mlunguza has made in this document.

[9] Mr Mlunguza submits that I erred in not setting aside Ms Lamberty's decision to remove him as an executor. He appears to consider that setting aside should have followed as a matter of course from the declaration of invalidity, and

that my failure to make such an order was 'illogical and illegal and unconstitutional'. I explained the course I took in paras 48-55 of my judgment. The applicant's contention that a setting aside must always follow upon a declaration of invalidity is plainly wrong; it is contrary to s 172(1)(*b*) of the Constitution, s 8 of PAJA and decisions of the Constitutional Court, one of which I cited in para 49. The applicant has not engaged with these matters.

[10] Mr Mlunguza complains that his application was a simple one based on the terms of ss 54(1)(*b*)(iv) and 54(2) of the Act, and that I should not have treated the case as a 'constitutional matter' engaging s 172. That submission is untenable. His complaint on the merits was that a public official, Ms Lamberty, acted outside the powers conferred on her by statute. That is a constitutional matter. What he was seeking was a review. As I explained in para 48, s 8(1) of PAJA mirrors s 172(1)(*b*) of the Constitution in empowering the review court to grant any order that is 'just and equitable'.

[11] Mr Mlunguza contends that the grounds on which I found it not to be just and equitable to set aside his removal were flawed. The first of those grounds was that he was absolutely incapacitated from being appointed as an executor testamentary (para 50 read with paras 40-42 of my judgment). Mr Mlunguza contends that he was one of three witnesses, and that the will was thus valid. However, I did not find that the will was invalid; I found only that the applicant, as a witness to the will, was absolutely incapacitated from benefiting from his testamentary nomination as an executor. Section 4A(1) of the Wills Act applies to him.

[12] I asked Mr Mlunguza what he meant by his statement that the will was witnessed by three persons, since on its face the will was witnessed by only two persons. He replied that three persons in all signed the will, namely the testator,

himself and another person. Mr Mlunguza seemed not to understand that the function of the two witnesses was to witness the signature of the testator, and that the testator himself was not a 'witness' for purposes of the Wills Act.

[13] Mr Mlunguza complains that the court did not observe natural justice in concluding that he was incapacitated from benefiting from the testamentary nomination. That complaint has no merit. In paras 36.4-36.5 of Ms Lamberty's first answering affidavit (record 51-52) she stated that she had examined the will and that it now appeared that it was witnessed and signed by Mr Mlunguza himself, and that his nomination as executor might thus be invalid in terms of s 4A(1) of the Wills Act. In his reply to this paragraph (para 45, record 336-337), Mr Mlunguza did not deny having witnessed the will, and did not respond to the question of the validity of his appointment in terms of s 4A(1). The invalidity of his appointment, with reference to s 4A(1), was repeated in para 27 of the heads of argument filed on behalf of the Master in the main case.

[14] Furthermore, it was manifest from the will, which Mr Mlunguza attached to his founding papers, that he was a witness to it (this could be seen by comparing his signature on the will to his signature on his various affidavits). As recorded in para 41 of my judgment, I raised the issue with him in court, and he confirmed that he witnessed the will.

[15] The second ground for not setting aside Mr Mlunguza's removal lay in the damning findings made against him by this court when he was struck off the roll of attorneys. Mr Mlunguza contends that the judgment in question was suspended by his petition for leave to appeal. Although, in para 51 of my judgment, I said that I was by no means satisfied that the judgment had been suspended, para 52 shows that my reasoning was not dependent on the question of suspension. Although the striking-off order may have been suspended, the court's factual

findings against Mr Mlunguza were not matters I could properly disregard. And as I observed in para 53, Mr Mlunguza's conduct in the litigation only exacerbated these concerns.

[16] Contrary to Mr Mlunguza's contention, I did not find that he was nominated as an executor in his capacity as an attorney or that he had to be an attorney in order to be an executor testamentary. What I held was that the scathing findings which led this court to conclude that he was not fit to remain on the roll of attorneys were findings which equally disbarred him from being an executor. Both positions are fiduciary in nature, and call for a high level of probity.

[17] I do not consider, in the circumstances, that there are any reasonable prospect of another court finding that Mr Mlunguza's removal as an executor should have been set aside (ie that he should in effect have been reinstated as the executor).

[18] Mr Mlunguza contends that I erred in failing to set aside Ms Mouton's appointment as an executor dative. He has not, however, engaged with my reasoning in paras 56-58. If he has no reasonable prospects of upsetting my refusal to set aside his removal, he has no reasonable prospects of upsetting my decision to allow Ms Mouton's appointment to stand. I may add that it is not clear to me what *locus standi* Mr Mlunguza has to complain about Ms Mouton's appointment once it is established that he himself has no right to be reinstated as the executor.

[19] Mr Mlunguza alleges that Ms Mouton could not be appointed as executor dative because she did not give any security, immediately adding that she gave a surety bond of R300 000 from Safire Insurance but that one does not know the insurer's financial soundness. He also says that security in the amount of

R300 000 is insufficient, because the estate is worth R4,5 million, this being his view of the value of the deceased's claim against the RAF.

[20] In the founding papers, Mr Mlunguza's sole basis for having Ms Mouton removed as executor was that his own removal as executor was unlawful (para 23, record 12). In para 27.8 he alleged that Ms Mouton had given security of R300 000 but that this was far less than the value of the claim. Para 27.8 was one of several circumstances said to justify the urgency of the matter; it was not put up as a ground of review. It thus did not receive any particular attention in the answering papers. In his replying affidavits Mr Mlunguza drew the inference that Ms Mouton was intent on under-settling the deceased's claim because she had only furnished security of R300 000.

[21] Apart from the fact that the absence or inadequacy of security was not a basis on which Ms Mouton's removal was sought, Mr Mlunguza did not allege in the main case that Safire Insurance was of doubtful financial soundness. As to the amount of the security, this is determined by the Master (s 23). Ms Lamberty would not have issued letters of executorship to Ms Mouton if security to the Master's satisfaction was not supplied.

[22] Mr Mlunguza complains that Ms Mouton's appointment was done without knowledge of the deceased's mother or of the primary heir (presumably meaning the minor child who is to inherit 80 per cent of the estate) or the creditor (presumably meaning himself). As I pointed out in para 23 of my judgment, the main application was launched about 18 months before I heard it, yet there was no evidence before me from the child's mother. If the deceased's mother or the mother of the child considers that it was wrong for Ms Lamberty to have appointed Ms Mouton (ie that she failed properly to follow the procedure laid down in s 18), it will be open to them to launch proceedings in their own name for

the review of the appointment. Mr Mlunguza does not have *locus standi* to complain.

[23] Since Mr Mlunguza has referred to s 19 of the Act, I note that the said section, which deals with competition for the office of executor, applies only where more than one person has been nominated as an executor dative. There is no evidence that anyone apart from Ms Mouton was nominated (her nomination was by the deceased's father, who in his capacity as a parent of the deceased is an heir in the estate).

[24] The final criticism, on the merits of my judgment, is that, if I was not willing to reinstate Mr Mlunguza as the executor, I should have honoured the testator's alternative nomination of Mr Booi as the executor testamentary. I explained my reasons in paras 59-64, indicating what action Mr Booi could take if he truly wished to pursue his own appointment. Once again, Mr Mlunguza has not engaged with my reasoning, instead repeating contentions he made when arguing the original application.

[25] The other criticisms of my judgment concern costs. Contrary to Mr Mlunguza's complaint, I did not ignore the *Biowatch* principle. In paras 65-67 I expressly identified the general principle established by that case and the qualifications to which it is subject, referring to several other Constitutional Court judgments. Once again, Mr Mlunguza has not directed his criticisms at my reasoning, only at the outcome. It does not help for him to identify judgments in which the Constitutional Court has criticised lower courts for failing to give effect to *Biowatch*, since those cases were not concerned with the admitted exceptions to the *Biowatch* principle.

[26] In the circumstances, I do not think there is any reasonable prospect that another court will find that I exercised my discretion on costs on a wrong

principle. I guided myself with reference to the qualifications to the general principle identified in para 66 and 67 of my judgment, and Mr Mlunguza does not say that those are not established by Constitutional Court jurisprudence.

[27] Accordingly, if Mr Mlunguza is to succeed in upsetting my ruling on costs, he will need to satisfy an appellate court that my decision was so unreasonable, arbitrary or capricious as to show that I failed to apply my mind properly to the just and equitable costs order. That is a high hurdle, and I do not think Mr Mlunguza has reasonable prospects of surmounting it. My reasoning was based on two essential considerations, viewed cumulatively: (a) that Mr Mlunguza had failed to achieve what he really wanted and what the respondents really resisted, and that he had had no realistic prospect of obtaining his reinstatement as executor; (b) that he conducted the litigation for mercenary ends and in a reprehensible way, in particular by repeatedly making highly defamatory statements against Ms Lamberty, Mr Abel, Ms Mouton and the attorneys of ABA.

[28] As to the wasted costs of 28 December 2018, Mr Mlunguza has not taken issue with the statement of the facts contained in para 18 of my judgment. That wasted costs were incurred is clear.

[29] Mr Mlunguza makes the remarkable assertion that I criticised the way in which he conducted the litigation without providing particulars. That assertion is without merit, as will be apparent from paras 69-71 of my judgment. Regrettably Mr Mlunguza has still not heeded the warning to refrain from making scandalous allegations; his written submissions in support of the application for leave to appeal continue the barrage of accusations against Mr Abel and ABA (see, in particular, lines 6-11 on page 5, lines 3-4 on page 6, the last eight lines of para 2.3, lines 10-15 on page 10 and lines 5-8 on page 11). In addition, the court itself is now accused of actual bias, the accusation being printed in bold (see the

concluding lines of paras 4.2 and 4.4). Mr Mlunguza seems to be incorrigible, and he will again have to pay the price.

[30] I make the following order:

(a) The application for leave to appeal is dismissed.

(b) The first applicant must pay the respondents' costs of the application for leave to appeal, such costs to be taxed on the scale as between attorney and client.

(c) There is reserved to the respondents the right, on reasonable notice to the second applicant, to approach the court for an order that he be directed to pay some or all of the above costs jointly and severally with the first applicant.

O L Rogers
Judge of the High Court
Western Cape Division

APPEARANCES

For applicants	The first applicant in person
For first respondent	M L Davis Instructed by State Attorney 4th Floor, 22 Long Street Cape Town
For second respondent	N J Louw Instructed by A Batchelor & Associates 4th Floor, 56 Shortmarket Street Cape Town