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: 4 February 2020

Delivered: 11 February 2020

JUDGMENT

Rogers J

[1] The first applicant, Mr Siyakudumisa Mlunguza, who was and claims still to be an admitted attorney, seeks the reviewing and setting aside of a decision, taken on 21 August 2018 by an Assistant Master in the office of the first respondent, the Master of the Western Cape High Court, to remove him as an executor in the estate of the late Mr Viriato Carlos Sauane and to appoint the second respondent, Ms Nadia Mouton, in his stead. He asks that he be reinstated as executor, alternatively that the second applicant, Mr Andile Booi, be appointed as executor.

[2] Mr Mlunguza was admitted as an attorney in 2007 and was enrolled in February 2009 to practise as an attorney in this division. He says that the late Mr Sauane instructed him in 2014 to pursue a claim against the Road Accident Fund ('RAF').

[3] In October 2016, and while the said case against the RAF was ongoing, the Cape Law Society ('CLS') launched an application to have Mr Mlunguza struck from the roll. In late May 2018 this court made an order interdicting him from operating on his trust account and ordering him to surrender his certificate of enrolment to the registrar. (Although the order was, I think, granted on 25 May 2018, it is date-stamped 31 May 2018. In subsequent documentation the order is said to have been made on the latter date, and I shall follow suit.) The interdict was discharged on 15 August 2018, seemingly because there was no appearance for the CLS. At that time the application for Mr Mlunguza's striking-off was pending.

[4] In the meanwhile, Mr Sauane's case against the RAF was progressing. Mr Mlunguza says that the RAF made an offer in September 2017 which he rejected on Mr Sauane's instructions. Mr Mlunguza then briefed a member of the Cape Bar, Mr John Abel, to assist with an application to obtain an interim payment and to achieve a better settlement.

[5] Also in September 2017, Mr Mlunguza drafted a will for Mr Sauane which he says was in accordance with his client's instructions. Mr Sauane purportedly signed the will on 14 September 2017. Mr Mlunguza was one of the witnesses. In clause 1.4 Mr Sauane nominated Mr Mlunguza, and in his absence Mr Booi, as his executor. Mr Sauane's son and parents were respectively to receive 80% and 20% of the estate, but clause 1.4.3 recorded that the executor would be entitled to receive 25% of the gross proceeds of the assets in the estate as remuneration. It appears that the sole asset in the estate is likely to be Mr Sauane's claim against the RAF. The will did not state that the executor's remuneration of 25% would be in lieu of any fees Mr Mlunguza could charge in the litigation against the RAF.

[6] Mr Sauane, who was a Mozambican national, died in that country in January 2018. The quantum trial of his claim against the RAF was scheduled to start on 18 June 2018. Mr Abel was still on brief. On 12 June 2018 Mr Mlunguza told Mr Abel that the client had died in January. Mr Mlunguza says that he himself had only learnt this a few days earlier. According to Mr Abel, Mr Mlunguza did not want him to convey this information to the RAF's counsel, but he (Mr Abel) regarded it as his duty to do so, which he did the next day. Presumably the trial was then postponed.

[7] On 24 July 2018 Mr Mlunguza applied for letters of executorship as Mr Sauane's testamentary executor. He did not disclose the existence of the interdict or the pending striking-off application or the fact that he had witnessed the will.

The will was accepted by the Master's office, and on 27 July 2018 letters of executorship were issued to Mr Mlunguza.

[8] Although there is some dispute between Mr Mlunguza and Mr Abel on this score, it seems that a meeting with the deceased's father was scheduled for 2 August 2018 in order to plot the way ahead. On that very day, and before the father's arrival at Mr Abel's chambers, Mr Mlunguza withdrew the latter's brief and declined to attend the meeting. Mr Mlunguza has taken umbrage at the fact that Mr Abel nevertheless met with the father, who had specially travelled from Mozambique for the purpose. Mr Abel was aware that the RAF had made an interim payment, yet according to the father the deceased and his family had not received a cent.

[9] Mr Abel referred the father to A Batchelor & Associates ('ABA'), a firm of attorneys specialising in RAF litigation. On 6 August 2018 Mr Abel lodged a complaint against Mr Mlunguza with the CLS. In the meanwhile, ABA recommended to the deceased's father that he approach the second respondent, Ms Mouton, who is a practising attorney, for assistance in the estate. Ms Mouton in turn approached the Master's office, drawing to its attention the interdict of 31 May 2018 and furnishing to it a copy of Mr Abel's complaint.

[10] On 21 August 2018 an Assistant Master, Ms Lamberty, wrote to Mr Mlunguza as follows:

'1. I refer to the Order of Court dated 31 May 2018 (case no: 19868/2016).

2. You are hereby removed from office as executor in terms of Section 54(1)(*b*)(iv) of the Administration of Estates Act of 1965 (as amended).

3. In terms of Section 54(5) you must forthwith return your Letters of Executorship to me.

4. In terms of section 51(1)(*b*) the Master assess [*sic*] and tax the remuneration to which any executor/executrix may be entitled to. Your remuneration will be taxed on receipt of a fully

motivated account for duties discharged in your capacity as executor/executrix and after appointment of a new executor/executrix.'

[11] Ms Lamberty was unaware, when she wrote this letter, that the interdict had been discharged a few days earlier. The letter does not provide reasons for the removal, though it may be inferred, from her reference to the order of 31 May 2018, that it was the existence of that order which moved her to remove Mr Mlunguza.

[12] In her opposing affidavit on behalf of the first respondent, Ms Lamberty states that the ongoing proceedings between the CLS and Mr Mlunguza, and the serious allegations of misconduct and misappropriation against him, were of concern to the Master's office, particularly since the primary beneficiary in the estate is a minor child. She considered that the interests of the heirs in the estate would be compromised if Mr Mlunguza continued to act as executor. She had also noted that Mr Mlunguza was nominated in the will in his capacity as a practising attorney. She also gave consideration to the fact that the proceeds of the claim against the RAF would have to be paid into a trust account, whereas the order of 31 May 2018 prohibited Mr Mlunguza from operating such an account.

[13] The deceased's father signed a form nominating Ms Mouton as an executor dative, and letters of executorship were issued to her on 23 October 2018.

[14] Mr Mlunguza has stated that he learnt of Ms Lamberty's letter on 30 October 2018 when he inspected the estate file at the Master's office. In a letter of 2 November 2018 he challenged his removal and Ms Mouton's appointment. He told Ms Lamberty that he was not interdicted from practising as an attorney. Ms Lamberty in reply said that the Master was *functus officio*.

[15] After further fruitless correspondence, Mr Mlunguza on 26 November 2018 launched the present application, initially as one of urgency. In support of urgency, Mr Mlunguza made the remarkable allegation that he had invested a lot of money in the deceased's claim against the RAF 'and now I want my investment to pay'. Various service providers in relation to the claim had issued summons against him. It was Christmas time, and he needed to buy clothes for his family. He also needed money to buy books and pay school fees for his children.

[16] His founding affidavit did not disclose that the striking-off application had been argued on 12 October 2018 and that judgment was awaited. Such judgment (per Allie and Sher JJ) was handed down on 29 November 2018. Mr Mlunguza was struck from the roll and ordered to pay costs on the attorney and client scale. The judgment contained a damning indictment of his conduct in nine RAF matters in which he had been guilty of gross overreaching and, in one instance, of theft. He failed to take any responsibility for his actions. He had demonstrated a serious lack of responsibility, ethics, integrity and maturity. Paras 24 and 25 of the judgment included the following passages:

'He failed to admit that he had behaved unethically and unscrupulously even in the face of overwhelming evidence. On every occasion he was confronted he sought to legitimise his rapacious plundering of the awards which were made in favour of his clients, many of whom were poor and vulnerable people who trusted him and who needed the monies he had received on their behalf in order to sustain themselves. He prepared contrived bills of costs which were aimed at making up the balance between what he received and what he paid his clients. He had absolutely no qualms abusing his clients and in doing so one can only conclude that he was motivated solely by greed and his own interests and not by the honourable duty of rendering a professional service to them. By effectively plundering Road Accident Fund monies he was the archetypical self-serving lawyer who has so often been blamed for the demise of the current RAF system…

[W]e are satisfied that his misconduct is egregious and is not attributable to a moral lapse but is in fact indicative of a serious character flaw, and he is incorrigible. In our view the public needs

to be protected against a practitioner like him. He has effectively misappropriated monies from the poorest and most vulnerable members of society, without shame.'

[17] Mr Mlunguza applied for leave to appeal this judgment, which this court dismissed on 31 January 2019. During March 2019 he tried to lodge an application for leave to appeal with the registrar of the Supreme Court of Appeal ('SCA'), which the registrar refused to receive. According to the Legal Practice Council, which has succeeded the CLS, proper applications for condonation and leave to appeal were eventually lodged with the SCA on 24 October 2019. The outcome of those applications is unknown. Although Mr Mlunguza told me that condonation was granted, no proof of that fact was furnished. I think he made the statement on the grounds that the registrar had agreed to accept his applications.

[18] But to return to the review application, which both respondents opposed, Mr Mlunguza notified the parties on 19 December 2018 that he was setting it down for hearing on 28 December. On 24 December the first respondent furnished the rule 53 record. On 27 December Mr Mlunguza emailed the first respondent's counsel to say that he had removed the matter from the roll and would set it down for an early date in January. Both respondents had briefed counsel to be in court on 28 December.

[19] On 30 January 2019 Mr Mlunguza delivered an amended notice of motion and supplementary founding affidavit. The amended notice of motion asked for a series of contradictory costs orders: that both respondents be ordered to pay the costs on an attorney and client scale; that the second respondent be ordered to pay costs in her personal capacity, not from the deceased estate; and that the respondents' attorneys be ordered to pay costs *de bonis propriis* on an attorney and client scale.

[20] The application was not pursued as an urgent one. Answering and replying papers were filed, and in September 2019 a notice of set down for 4 February 2020 issued. In terms of this court's practice directives, the applicants' heads of argument should have been delivered by 21 January 2020. They were in fact delivered on 27 January together with a wholly inadequate index. The respondents' attorneys requested an audience with the Judge-President to ascertain whether in the circumstances a judge would be allocated. This meeting, of which Mr Mlunguza was notified but which he did not attend, took place on the morning of 29 January. The Judge-President said that he would allocate a judge, and allowed the respondents' legal representatives to uplift the file in order to prepare a proper index. The first respondent's heads were delivered on 31 January. The second respondent's heads are dated 31 January, but Mr Mlunguza said he only received them on 3 February.

Postponement

[21] At the outset of the hearing Mr Mlunguza, who appeared for himself and purportedly for Mr Booi, asked for a postponement. Although there was no written application supported by affidavit, I allowed him to explain why he needed a postponement. In summary his reasons were the following:

(a) It was the applicants' responsibility to prepare the index, which was done. ABA (the second respondent's attorneys) were not satisfied with the index, but only supplied its version of the index together with the second respondent's heads by email on 3 February. He visited ABA's offices to request a hardcopy, which was refused. He needed time to organise his papers in accordance with the new index and to study the heads, including the list of authorities.

(b) He was in contact with the child's mother, who wanted to attend the hearing and give an affidavit regarding Ms Mouton's appointment.

(c) He wanted to appoint counsel but did not have financial means. There were several advocates willing to act for him without charge, but they were not available to appear on 4 February.

[22] The respondents' counsel addressed me in opposition to the request of the postponement, and there was a brief reply. At the conclusion of the submissions, I refused the postponement. My reasons were the following. I had read the heads of argument, from which it appeared to me that the case was likely to turn on legal issues rather than a detailed assessment of the facts. I indicated that if it appeared, as argument progressed, that I or counsel were being seriously inconvenienced by any confusion over pagination, I might reconsider my refusal of the postponement. In the event there was no such confusion.

[23] As to the position of the mother of the deceased's child, the application was issued more than 18 months ago. Mr Mlunguza had sufficient time to put before me any relevant evidence which the mother might have.

[24] As to his desire to brief counsel, there is no indication as to when he first approached counsel to find out whether they would act for him *pro amico*. If he had done this in good time (shortly after receiving the notice of set down in September 2019), he would not have been placed in the position he found himself.

[25] As to his need to study the second respondent's heads of argument, he had only himself to blame for the fact that he received such heads late. If he had filed his own heads on time, and produced a proper index, the problem would not have arisen.

[26] Finally, and as the respondents' counsel pointed out, an order for wasted costs against Mr Mlunguza would be futile, since on his own version he is impecunious. If a postponement were granted, the public (in the case of the first

respondent) and the estate (in the case of the second respondent) would be financially prejudiced by wasted costs.

Validity of Mr Mlunguza's removal as executor

The substantive aspect

[27] There is a substantive and a procedural aspect to the validity of Ms Lamberty's decision to remove Mr Mlunguza as executor. As to the substantive aspect, s 54(1)(*b*)(iv) of the Administration of Estates Act 66 of 1965 ('the Act') empowers the Master to remove an executor 'if at the time of his appointment he was incapacitated, or if he becomes incapacitated to act as executor of the estate of the deceased'.

[28] The Master's counsel submitted that in terms of s 18(1) the Master must, in the event of the absence of or failure in the appointment of testamentary executors, appoint (ie as an executor dative) a person whom he or she deems to be 'fit and proper'. If a person is not 'fit and proper' to hold the office of executor, such person is 'incapacitated' within the meaning of s 54(1)(*b*)(iv). Mr Mlunguza was not a 'fit and proper' person, and therefore Ms Lamberty was entitled to remove him.

[29] This argument must be rejected for two reasons. First, although in a general sense one would only want a fit and proper person to hold the office of executor, the requirement in s 18(1) that an executor dative be 'fit and proper' does not, I consider, go to capacity for purposes of s 54(1)(*b*)(iv). The Master's opinion as to whether a person is fit and proper is a relative moral judgment which is too subjective to serve as a basis for incapacity. It will be seen from s 18(1) that one of the circumstances in which a testamentary executorship may fail is where the testamentary executor is 'incapacitated'. If the lawmaker considered that the 'fit and proper' requirement went to capacity, it would have sufficed to say that

the Master should appoint a person who is not 'incapacitated'. The contrast in wording suggests that the concepts are not coextensive.

[30] In any event, we are not here dealing with an executor dative but with an executor testamentary. Section 14(1) sets out the limited circumstances in which the Master may refuse to issue letters of executorship to an executor testamentary. The only requirement is that such person not be 'incapacitated from being an executor of the estate of the deceased' and that he or she should have complied with the provisions of the Act. This should be read with s 13(2), which states that no letters of executorship shall be granted to any person 'who is by any law prohibited from liquidating or distributing the estate of any deceased person'. Legislative prohibitions are to be found in the regulations (as amended) originally promulgated in terms of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934.[1]

[31] In terms of s 22(2)(*b*) the Master may refuse to issue letters of executorship to an executor testamentary if such person, if he or she were appointed, could be removed from office on various of the grounds specified in s 54(1). Section 54(1)(*a*)(v), which empowers a court to remove an executor if satisfied that it is undesirable for such person to act as such, is not one of the specified grounds. In other words, the Master is not empowered to withhold letters of executorship to an executor testamentary whose appointment the Master regards as undesirable.

[32] In *Thomas & another v Clover NO & others* 2002 (3) SA 85 (N) Southwood AJ held that the effect of these statutory provisions was that the Master could not withhold letters of executorship from somebody who was alleged not to be a fit and proper person to hold office (and see also the decision

[1] No R910, *Government Gazette* 2080, 22 May 1968 (as amended). The regulations are reproduced in *Meyerowitz Administration of Estates and Estate Duty* 2007 ed at A-64-66.

in *Hoofar Investments (Pty) Ltd v Loonat & another* 1991 (2) SA 222 (N)). In other words, the fact that a nominated executor testamentary is thought not to be a fit and proper person to hold office is not in itself a circumstance which renders such person incapacitated within the meaning of s 14(1).

[33] If the lawmaker had intended to give the Master the power to make a value judgment as to whether an executor testamentary is a 'fit and proper' person, this would surely have been expressly stated. This view of the matter is fortified by the division of removal powers between the court and the Master in s 54(1). The grounds on which a court may remove an executor are set out in para (*a*) of the subsection. The grounds listed in sub-paras (ii), (iii) and (iv) are concerned with misconduct of various kinds, while sub-para (v) empowers the court to remove an executor 'if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned'. This would obviously include a complaint that the executor is not a fit and proper person.

[34] By contrast, and leaving aside administrative non-compliance (in respect of which matters the Master has oversight), the only ground of misconduct for which the Master may remove an executor under para (*b*) is where the executor has been convicted of certain offences (sub-para (iii)). And in such cases, it is a determination of wrongdoing by a court which triggers the Master's power; the Master himself or herself does not have the power to investigate and determine whether the executor has committed one of the specified offences.

[35] The second reason why the first respondent's reliance on s 54(1)(*b*)(iv) must fail is this. Even if the Master has the power under that provision to remove an executor because such person is not in the Master's opinion 'fit and proper', it would not suffice that there were complaints which, if true, would render the executor not fit and proper. The Master would need to determine whether the

allegations of misconduct are true. Ms Lamberty did not investigate the facts before removing Mr Mlunguza. She regarded the mere existence of serious complaints as sufficient.

[36] Ms Lamberty says that she took into account, when removing Mr Mlunguza, that he was nominated in the will as 'Siyakudumisa Mlunguza of Mlunguza & Associates'. Even if this were interpreted to mean that the testator only intended Mr Mlunguza to be qualified to act as executor for as long as he was an attorney, the fact is that Mr Mlunguza had not been struck off as an attorney at the time the Master removed him. But in any event, I do not think that the will can be interpreted as laying down the suggested qualification. The reference to the firm is merely a way of identifying the nominated person.

[37] Ms Lamberty says, further, that she took into account that an award from the RAF would have to be paid into an attorney's trust account, which Mr Mlunguza was interdicted from operating. In the event, albeit unknown to Ms Lamberty, the interdict had been discharged by the time she removed him. In any event, a judicial interdict against Mr Mlunguza from operating his trust account as an attorney would not have incapacitated him from functioning as an executor. He could have appointed a firm of attorneys to finalise the litigation and to receive the award. The said attorneys could then have transferred the net amount to an estate account opened by Mr Mlunguza in terms of s 28 of the Act.

[38] In my view, the proper course for Ms Lamberty to have followed, if she thought it unsafe to leave Mr Mlunguza in office, was to bring an application to court for Mr Mlunguza's removal in terms of s 54(1)(*a*)(v).

[39] This disposes of the bases on which Ms Lamberty took her decision. Substantively, her decision was based on an erroneous view as to what incapacity was.

[40] It turns out that Mr Mlunguza was undoubtedly incapacitated for another reason. In terms of s 4A(3) of the Wills Act 7 of 1953, the nomination in a will of a person as an executor is, save in one instance not here applicable, regarded as a benefit to be received by the nominated person. Section 4A(1) provides that a person who witnesses a will is disqualified from receiving any benefit under that will. This indeed goes to Mr Mlunguza's capacity to receive the benefit of a testamentary nomination as executor.

[41] Mr Mlunguza seemed surprised, during argument, to hear that this was so. As an attorney who drafted and oversaw the execution of Mr Sauane's will, he should have been aware of the provisions of the Wills Act. And with such knowledge, he should not have applied to the Master to be appointed as an executor testamentary. It is clear that the Master issued letters of executorship to him in ignorance of the fact that he witnessed the will.

[42] A person who is incapacitated by s 4A from claiming appointment as a testamentary executor is not necessarily incapacitated from being appointed as an executor dative (*Meyerowitz on Administration of Estates and Estate Duty* 2007 ed para 8.13). I need not consider whether Mr Mlunguza would be qualified to be appointed as an executor dative (cf *Meyerowitz* para 8.4) because that is not the basis on which he applied to be, or was, appointed. I simply observe that his capacity to be appointed as an executor dative would probably turn on his status as an attorney (see the regulations cited in fn 1).

The procedural issue

[43] Section 54(2) of the Act provides, in peremptory language, that before removing in executor in terms of, *inter alia*, s 54(1)(*b*)(iv), 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 thirty days from the date of such notice for an order restraining the Master from removing him from his office.'

[44] Ms Lamberty did not give Mr Mlunguza such a notice. The first respondent's counsel submitted that, in terms of s 3(4) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), it was reasonable and justifiable for Ms Lamberty to depart from the provisions of s 54(2), given the need for urgent action.

[45] I do not agree that s 3(4) of PAJA is applicable to s 54(2) of the Administration of Estates Act. Section 3(4) of PAJA applies to the requirements of procedural fairness laid down in s 3 of that Act. Section 54(2) is a self-contained jurisdictional prerequisite for the removal of an executor by the Master. Furthermore, although the 30-day waiting period specified in that section could be used by an executor to persuade the Master not to remove him or her, the primary – and only express – purpose of the section is to give the executor an opportunity to apply to court to restrain the Master before the actual removal decision is taken. The section is not, in terms, one which obliges the Master to give the executor hearing.

[46] In any event, I do not agree that a departure from the notice requirement was reasonable and justifiable. As I have said, Ms Lamberty's remedy, if urgent action was needed, was to bring an urgent application to the court to have Mr Mlunguza removed in terms of s 54(1)(*a*)(v). In such proceedings, Mr Mlunguza would have had an opportunity to be heard before an order was made removing him as an executor.

Conclusion on validity of Mr Mlunguza's removal

[47] Although substantively Mr Mlunguza was incapacitated from serving as an executor testamentary by virtue of his having witnessed the will, this was not the basis on which Ms Lamberty removed him. Her actual reason or reasons were vitiated by errors of law, and the removal was for that reason invalid. Her decision

was in any event invalid for failure to follow the mandatory procedure specified in s 54(2).

Remedy flowing from invalidity of Mr Mlunguza's removal

[48] Before I consider the attack on Ms Mouton's appointment, it is convenient to consider whether, in consequence of the invalidity of Ms Lamberty's decision to remove Mr Mlunguza, the latter should in effect be reinstated as the executor. Section 172(1)(*a*) of the Constitution provides that when deciding a constitutional matter within its power, a court must declare any conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(*b*) provides that the court may then make 'any order that is just and equitable', including certain types of orders specified. This remedial jurisdiction is echoed in s 8(1) of PAJA, which empowers a review court to grant 'any order that is just and equitable', including certain specified orders.

[49] Since Ms Lamberty, a public official, acted beyond her powers, her conduct is inconsistent with the Constitution and must be declared invalid. It does not follow that her decision to remove Mr Mlunguza must actually be set aside, with the result that he continues to occupy the position of executor. A court may declare an official's conduct invalid but nevertheless allow it to stand *de facto*. It all depends on what order would be 'just and equitable'. (See *Bengwenyama Minerals (Pty) Ltd & others v Genorah Resources (Pty) Ltd & others* 2011 (4) SA 113 (CC) paras 81-85.)

[50] It would not be just and equitable to set aside Mr Mlunguza's removal and so allow him to resume his position as executor. First, it is beyond question that he is incapacitated from serving as a testamentary executor to the estate of the late Mr Sauane. If he were reinstated, the Master would not only be entitled but under a duty to remove him in terms of s 54(1)(*b*)(iv). This would not be a matter of

judgment or discretion; the prohibition upon Mr Mlunguza acting as a testamentary executor is absolute. His reinstatement would thus be an exercise in futility.

[51] Second, damning findings have been made against him by two judges of this division. Mr Mlunguza says that the judgment in question has been suspended by virtue of the application for leave to appeal lodged with the SCA. I am by no means satisfied that this is so. In terms of s 18(5) of the Superior Courts Act 10 of 2013, a decision becomes the subject of an application for leave to appeal (with the resultant suspension of the challenged judgment) 'as soon as an application for leave to appeal . . . is lodged with the registrar in terms of the rules' (my underlining). Rule 6(1) of the SCA's rules provides that where leave to appeal is by law required from the SCA, an application for such leave shall be lodged with the registrar 'within the time limits prescribed by that law'. Section 17(2)(*b*) of the Superior Courts Act applied here, and specified a period of one month after this court's refusal of leave. The SCA may condone a late application (see rules 11 and 12 of its rules), but it may well be that until such condonation is granted the application for leave to appeal cannot be regarded as one lodged with the registrar in terms of the SCA's rules.

[52] However, and even if this court's striking-off order has been suspended, so that Mr Mlunguza is still an admitted attorney, I cannot close my eyes to the grave findings which have been made against him and which have not yet been found by another court to be unjustified. Those findings make it quite impossible to consider allowing Mr Mlunguza to occupy the position of an executor in the deceased's estate.

[53] Mr Mlunguza's conduct in the present application only makes his position worse. He has not only shown himself to be ignorant about the provisions of the

Wills Act, but has demonstrated a complete lack of insight into the duties of an executor. He seems to regard that office as the means by which he can ensure payment of large sums of money to himself, whether as an executor or through his control of any award paid by the RAF to the estate or both.

[54] If in due course Mr Mlunguza is cleared by an appellate court of wrongdoing, and if he were able to overcome the seemingly insurmountable obstacle to his capacity to benefit as a testamentary executor, he could approach the Master in terms of s 54(3) to be appointed (or reappointed) as executor.

[55] For these reasons, I decline to set aside Ms Lamberty's decision to remove Mr Mlunguza as the executor.

The validity of Ms Mouton's appointment

[56] Ms Lamberty appointed Ms Mouton as executor more than two months after removing Mr Mlunguza. There was not, in effect, a single decision to remove Mr Mlunguza and appoint Ms Mouton. The two decisions are obviously linked, in the sense that if Ms Lamberty had not removed Mr Mlunguza she would not have appointed Ms Mouton. However, I do not think that the validity of her decision to appoint Ms Mouton depends on the validity of her decision to remove Mr Mlunguza.

[57] In terms of s 18(1)(*e*) of the Administration of Estates Act, one of the circumstances in which the Master can grant letters of executorship to an executor dative is if a sole executor ceases for any reason to be the executor. That would be the case if, for example, the Master removed a testamentary executor. A removal decision stands until set aside. At the time Ms Lamberty appointed Ms Mouton, the removal of Mr Mlunguza had not been set aside, and in terms of my judgment the removal will not be set aside. It thus seems to me that the jurisdictional prerequisite for appointing Ms Mouton, namely the absence of an executor, was

satisfied. (See *Seale v Van Rooyen NO & others; Provincial Government, North West Province v Van Rooyen NO & others* 2008 (4) SA 43 (SCA) paras 13-14, referring *inter alia* to para 31 of *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA); *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC), majority judgment paras 100-105 and fn 74.)

[58] There is no other legitimate objection to Ms Mouton as an executor. I thus do not find any basis for declaring her appointment invalid. However, the debate about the validity of her appointment is perhaps sterile. Even if her appointment were invalid, it would not be just and equitable to set aside her appointment unless it were just and equitable (which it is not) to reinstate Mr Mlunguza.

Mr Booi's position

[59] Mr Mlunguza submitted that if he is not reinstated, Mr Booi, as the alternative testamentary executor, should be appointed. The respondents question whether Mr Booi is properly before court. His 'affidavit' in the papers initially served on 5 December 2018 was unsigned. Only at a later stage was an affidavit, purporting to have been signed by Mr Booi on 26 November 2018, produced.

[60] On 27 November 2018 the Master's office received an undated letter purporting to be from Mr Booi, stating that he was available to be appointed as the executor and asking the Master to remove Ms Mouton and arrange a date and time that he and the Master could meet so that he could sign the necessary documentation. This letter was not, however, signed by Mr Booi personally. It was signed 'pp' by an unknown person. It was delivered on the same date as a letter from Mr Mlunguza, and the style and font strongly suggest that the two letters were produced by the same author and typed on the same machine.

[61] Mr Booi was not present in court. I am not satisfied that Mr Mlunguza was authorised to speak for him. I do not know whether Mr Booi is aware that Mr Mlunguza has been struck from the roll of attorneys. There is nothing to show the connection between the deceased and Mr Booi. I regret to say, based on this court's judgment in the striking-off application and on Mr Mlunguza's conduct in the present case, that I cannot take what Mr Mlunguza says at face value.

[62] Ms Lamberty has alleged that despite a search of Mr Booi's particulars on the CLS's database, the Master has not been able to find a physical address, only a cellular number. She remarks on the fact that the letter of 27 November 2018 did not purport to have been signed by Mr Booi personally, and goes on to say that her office has not had any communication from him despite its efforts to engage him regarding his nomination as executor testamentary.

[63] Mr Mlunguza in his replying affidavit defended the signing of the letter 'pp', alleging that it was written on Mr Booi's instructions. Mr Mlunguza claims that Mr Booi has not received any feedback from the Master's office. Notably lacking from Mr Mlunguza's replying papers is an affidavit from Mr Booi himself to confirm what Mr Mlunguza says or to confirm that he wishes to take up the appointment.

[64] I have already alluded to the provisions of s 54(3). If Mr Booi wishes to pursue the removal of Ms Mouton as executor, he will be at liberty to approach the Master in terms of that section. The Master could not have been expected to act on the suspicious letter of 27 November 2018. If Mr Booi regards the will as valid and wants to take up the appointment, he can make the written application to the Master contemplated in s 14(1).

Costs

[65] This leaves the question of costs. Mr Mlunguza's challenge to the lawfulness of his removal and the lawfulness of Ms Mouton's appointment raised constitutional issues. I must be guided by the principles laid down in *Biowatch Trust v Registrar Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC). In general, a private party who succeeds in constitutional litigation against the State should be awarded his costs. If he fails, he should not be penalised in costs. This general approach applies not only between the private applicant and the State respondent but also as between the private applicant and any private respondents who have an interest in upholding the challenged act.

[66] The general principle is not unqualified. In para 24 of *Biowatch* Sachs J said the following:

'If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs order. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach . . .'

[67] The Constitutional Court has in several cases upheld costs orders against private applicants, even costs orders granted on a punitive scale. Examples include *Limpopo Legal Solutions and Another v Eskom Holdings Soc Limited* [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) and *S S v V V S* [2018] ZACC 5; 2018 (6) BCLR 671 (CC). In the former case a unanimous court said this (paras 33 and 41):

'Here, the first applicant's conduct in launching and pursuing the litigation was vexatious, frivolous, and manifestly inappropriate. The litigation was initiated without good cause. It served no serious purpose or value. And it was entirely unreasonable. All this fell without grip through the *Biowatch* safety net. The High Court was therefore justified in awarding a costs order against the applicants.

. . .

Although *Biowatch* changed the costs landscape for constitutional litigants, it gives no free pass to cost-free, ill-considered, irresponsible constitutional litigation. An applicant seeking to vindicate constitutional rights must respect court processes. . .'

[68] Mr Mlunguza has succeeded in getting a declaration that his removal was invalid, but for the rest his application has failed. He has failed to achieve what he really wanted and what the respondents really resisted. If the declaration of invalidity were an important vindication of Mr Mlunguza's constitutional rights, I might have considered granting a costs order in his favour against the first respondent. However, I am only making the declaration because s 172(1)(*a*) compels me to do so. Mr Mlunguza is not a person deserving of the court's sympathy, and there are no equities in his favour. If he had any insight into the duties of an executor and the obvious weight which a court would attach to the findings made against him in the striking-off judgment, he would not have tried to have himself reinstated as an executor.

[69] More to the point is whether I should make a costs order against him, given that he has failed to obtain any relief of substance. In deciding this question, it is not only such failure but also the way he has conducted the litigation that I take into account. Given the findings made in the striking-off judgment, and given that Mr Mlunguza was absolutely incapacitated from obtaining appointment as an executor testamentary in view of his having witnessed the will, his application could serve no serious purpose, and was entirely inappropriate and unreasonable. If he had confined himself to the question of technical invalidity, and not asserted a right to consequential relief, the matter may have had a different complexion. But then again, Mr Mlunguza would almost certainly not have instituted proceedings at all if all he could get was a declaration of invalidity.

[70] The unreasonableness of his conduct does not end there. In his founding papers he clearly revealed his mercenary aims, his desire to 'cash in on his

investment', and displayed scant regard for the proper duties of an executor. In an application which he hoped to have adjudicated urgently, he failed to disclose that six weeks earlier an application to have him struck from the roll had been argued and that judgment was awaited. He was cavalier about enrolling the application for hearing on 28 December 2019 and then removing it, with resultant cost and inconvenience to the respondents.

[71] He made highly defamatory statements in his supplementary founding papers and in his replying affidavits (of which there were three). In the answering papers Mr Mlunguza was warned that the second respondent would not tolerate the making of unfounded accusations, but this did not deter him. The egregious material includes allegations of serious misconduct against Ms Lamberty, Mr Abel, Ms Mouton and the attorneys of ABA. Mr Abel, Ms Mouton and ABA are accused of desiring to benefit unfairly from the deceased's estate, of 'wanting to harvest when they did not plant', of being driven by material gain, and of being intent on under-settling the deceased's RAF claim in their haste to lay their hands on the estate's money. He accuses Ms Lamberty of colluding with the others, and of acting in their interests rather than those of the estate. He voices a suspicion that the Master is corrupt and might be accepting bribes. He claims that Ms Mouton's appointment was done fraudulently, and that Ms Lamberty and Ms Mouton should be criminally charged. The Master's opposition to his application is described as malicious and an abuse of process. She is accused of conducting her office's affairs as her 'personal fiefdom'.[2]

[72] Understandably, the second respondent sought to have some of this material struck out. I do not think that much will be achieved by adjudicating the

[2] The scandalous allegations I have summarised are to be found in the following places: paras 5.15, 11.3 and 11.5 of Mr Mlunguza's supplementary founding affidavit of 30 January 2019; paras 7, 18, 23-25, 33, 36, 39, 47, 52 and 57 of his first replying affidavit (record 313 ff); paras 12, 18, 22, 23 and 29 of his second replying affidavit (record 364 ff); and paras 5, 12, 18, 22.2 and 24 of his third replying affidavit (record 379 ff).

striking-out application. It is enough to record that the allegations lack factual foundation, and that it was wholly improper for Mr Mlunguza to have made them.

[73] In my opinion, it would give just recognition to the extent of Mr Mlunguza's defeat, of the unmeritorious nature of the substance of his application, and of the court's disapproval of his conduct, if I were to order him to pay 50% of the first respondent's costs and all of the second respondent's costs, and to do so on a punitive scale, as sought by the respondents. In regard to the wasted costs of 28 December 2018, the second respondent did not seek payment of those costs on a punitive scale, perhaps because Mr Mlunguza had not yet embarked upon his campaign of vilification. Pragmatically, therefore, I shall order those wasted costs – in the case of both respondents – to be paid on the ordinary scale.

[74] Given my approach to Mr Booi's position and my doubts as to whether he is properly before court, I do not think that I should make a costs order against him at this stage. I shall, however, reserve to the respondents the right, on notice to Mr Booi, to seek an order making him jointly and severally liable for some or all of the costs ordered against Mr Mlunguza.

[75] I make the following order:

(a) It is declared that the first respondent's decision, notified by way of a letter dated 21 August 2018, to remove the first applicant as executor in the estate of the late Mr Viriato Carlos Sauane ('the removal decision'), was inconsistent with the Constitution and invalid.

(b) The prayers in which the applicants ask to have the removal decision set aside and to have the first applicant reinstated as executor, and in the alternative to have the second applicant appointed as executor, are refused.

(c) The prayers in which the applicants ask to have the appointment of the second respondent as executor declared invalid, and to have it set aside, are refused.

(d) The first applicant must pay the wasted costs of the respondents arising from the enrolment of the application on 28 December 2018 and the subsequent removal of the matter from the roll on that date.

(e) As to the remaining costs (ie other than those contemplated in (d)), the first applicant must pay 50% of the first respondent's costs, and 100% of the second respondent's costs, in both instances the costs to be taxed on the scale as between attorney and client.

(f) 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, and they are granted leave to supplement their papers insofar as needs to be in that respect.

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