

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

Case number: 16526/2020

In the matter between:

PAULUS BERNHARDUS KOCH

Plaintiff

and

MICHELE WEILAND N.O.

First defendant

THE MASTER OF THE HIGH COURT, CAPE TOWN

Second defendant

JUDGMENT DELIVERED ON 18 MARCH 2022

VAN ZYL AJ:

Introduction

1. The plaintiff sues the first defendant on the basis of a contract for services rendered in the administration and liquidation of the estate of the late Priscilla le Roux. The first defendant is the duly appointed executor of the estate, having received letters of executorship from the second defendant on 13 September 2020. The first defendant is the deceased's daughter, and was nominated in the deceased's will as executor.

2. The plaintiff's claim is for the amount of R1 296 622,96, based on the prescribed rate for the remuneration of executors in terms of section 51(b) of the Administration of Estates Act, 1965, read with regulation 8(a) to that Act, which is calculated at 3,5% of the gross value of the assets of the estate.

3. The plaintiff seeks, in addition, an order that the first and second defendants be prohibited from finalizing the estate pending the final determination of the action.

4. The first defendant excepts to the plaintiff's particulars of claim on the basis that they fail to disclose a cause of action. This is because, so the first defendant argues, in terms of the *Regulations prohibiting the liquidation or distribution of the estates of deceased persons by any person other than an attorney, notary, conveyancer or law agent* ("the regulations") (discussed below), the plaintiff is prohibited from administering and liquidating deceased estates unless he falls into one of the categories of persons and institutions that are allowed to do such work, or within the category of persons and institutions exempted from the ambit of the regulations. There are no allegations in the particulars of claim that indicate whether the plaintiff is either so allowed or so exempted.

5. In the circumstances, the first defendant argues that the plaintiff has not disclosed a cause of action entitling him to claim fees for the services rendered as well as the prohibition against the finalization of the estate by the defendants.

The legal principles underpinning exceptions

6. An exception is a legal objection to the opponent's pleading, complaining of a defect inherent in such pleading. Admitting for the moment that all the allegations in the particulars of claim are true, exceptions assert that even with such admission the particulars do not disclose a cause of action¹ in that, for example, they do not justify the conclusions drawn therein, or that they are vague and embarrassing to such an extent that the excipient is unable to plead to them

7. The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs even of an exception. Thus, an exception founded on the contention that particulars of claim disclose no cause of action (such as the present case) is designed to obtain a decision on a point of law that will dispose of

¹ *Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) 143I-J.

² *Miller v Muller* 1965 (4) SA 458 (C) 468D-G.

the case in whole or in part, and avoid the leading of unnecessary evidence at the trial.³

8. To succeed, an excipient must persuade the Court that, upon every reasonable interpretation of the particulars of claim, no cause of action is disclosed.⁴ The Court must look at the pleading excepted to as it stands.⁵ No facts outside those stated in the pleading may be brought into issue (except in the case of inconsistency) and no reference may be made to any other document.⁶

9. It is against this backdrop that the first defendant's exception should be considered.

The regulations

10. The regulations were originally promulgated in terms of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, as R910 in *Government Gazette* 2080 of 22 May 1968 (as amended by R1030 in *Government Gazette* 2439 of 20 June 1969 and R1376 in *Government Gazette* 3227 of 13 August 1971). They are reproduced in Meyerowitz *The Law and Practice of Administration of Estates and their taxation* (2010 edition) ("Meyerowitz").

11. Regulation 1 contains definitions of the institutions mentioned in the rest of the regulations.

12. In terms of regulation 2, subject to the provisions of regulations 3 and 4, no person other than an attorney, notary or conveyances as defined in section 1 of the Attorneys, Notaries and Conveyancers Admission Act, 1934, or an agent in terms of the section 22 of the Magistrates' Courts Act, 1944 (a so-called law agent) may liquidate or distribute a deceased estate. In terms of regulation 1(1)(iv), liquidation or distribution in relation to a deceased estate includes the performance of any act relating to the liquidation or distribution of the estate other than the realisation,

³ *Lampert-Zakiewicz v Marine and Trade Insurance Co Ltd* 1975 (4) SA 597 (C) 599G-600A.

⁴ *First National Bank of Southern Africa Ltd v Perry* NO 2001 (3) SA 960 (SCA) 965C-D.

⁵ *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) 32D-E.

⁶ *Pretorius v Transport Pension Fund* 2019 (2) SA 37 (CC) 44F-G.

transfer or valuation of estate assets or of any right in or to such assets.

13. The exemptions provided for in the regulations are a *numerus clausus*. Regulation 3 exempts the following persons permanently from the provisions of regulation 2:

13.1. Any board of executors as defined.

13.2. Any trust company as defined.

13.3. Any public accountant defined in the prevailing legislation regulating accountants and auditors.

13.4. Any person licensed as a broker or agent under the Licences Act, 1962, and carrying on a business predominantly consisting in the liquidation or distribution of deceased estates.

14. Regulation 4 provides that the classes of persons or institutions permanently exempt from the prohibition in regulation 2 are:

14.1. Any natural person nominated as executor by any deceased person by a will registered and accepted into the office of the Master, in so far as he or she is personally liquidating or distributing the estate of such deceased person.

14.2. The surviving spouse of or any person related by consanguinity or affinity up to and including the second degree to a deceased person, in so far as he or she is liquidating or distributing the estate of such deceased person.

14.3. Banking institutions under certain conditions.

14.4. Any person who is in the full-time service of any other person who is lawfully liquidating and distributing the estate of a deceased person, in so far

as he is assisting such other person with or is acting on his or her behalf in any matter relating to the liquidation and distribution of the estate.

14.5. Any person in the full-time service of a trade union under certain conditions.

14.6. Any person liquidating or distributing an estate on the instructions of an attorney, notary, conveyancer or law agent.

14.7. Any person liquidating or distributing an estate under the direction of the Master in terms of section 18(3) of the Administration of Estates Act, 1965.

The issues for determination

15. The issues to be determined are, firstly, whether the regulations are still in force, given that they had been promulgated under an Act repealed a long time ago. If the regulations are in force, then the second issue is whether they apply to the plaintiff's case. The final question that flows from this is whether the particulars of claim disclose a cause of action.

16. I deal with each of these issues in turn.

Are the regulations still in force?

17. The regulations were originally promulgated by the Minister of Justice by virtue of the powers vested in him by section 30 of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934. That Act was repealed in its entirety by the Attorneys Act 53 of 1979, with effect from 1 June 1979.

18. The Attorneys Act catered for the continuance of regulations made under an Act repealed by it, stating in broad terms in section 86(3) that "*anything done or deemed to have been done*" under any provision of a law repealed by the Attorneys Act would remain in force as if done under the Attorneys Act. The regulations

therefore remained in force as if promulgated under the Attorneys Act.

19. The Attorneys Act was, in turn, repealed by the Legal Practice Act 28 of 2014 with effect from 1 November 2018. The Legal Practice Act provides, in section 119(2), that any regulation made under any law which is repealed by it and in force immediately before 1 November 2018 remains in force, except insofar as it is inconsistent with the provisions of the Legal Practice Act or until it is amended or revoked in terms of the Act. The Legal Practice Act provides, in addition, in section 119(3) that “*anything done in terms of a law repealed by this Act remains valid if it is consistent with this Act*”.

20. It seems that the regulations are consistent with the Legal Practice Act inasmuch as the Act (in section 94) empowers the Minister of Justice to make regulations regarding many aspects of legal practice. The Minister is also given a general catch-all regulatory power in that he or she may make regulations relating to “*any other matter in respect of which regulations may or must be made in terms of this Act*” (section 94(1)(o)). The plaintiff in any event did not argue that the regulations are inconsistent with the Legal Practice Act.

21. The regulations, having been retained under the Attorneys Act and being consistent with the provisions of the Legal Practice Act, therefore continue to remain valid under the Legal Practice Act.⁷

Do the regulations apply to the plaintiff’s case and, if so, are the particulars of claim excipiable?

22. The next question is whether the regulations apply to the plaintiff, given the nature of the agreement between the parties. I deal with this question, as well as the final question (the excipiability or otherwise of the particulars of claim), under one heading, as they are conveniently considered together.

⁷ See, for example, the reference to the regulations in the recent case of *Mlunguza and another v Master of the High Court and another* (21755/2018) [2020] ZAWCHC 6 (11 February 2020) at para [30].

23. Meyerowitz states, at paragraph 12.23, that an executor cannot substitute another person to act in his place,⁸ but he or she can appoint an agent under power of attorney to administer the estate on his or her behalf.⁹ An irrevocable power of attorney may not be granted.¹⁰

24. The plaintiff is well aware of the prohibition against substitution, as it is expressly alleged in the particulars of claim that *“the purpose of the agreement was not to substitute or surrogate the First Defendant with the Plaintiff to act as executor in her place, is [sic] was to render services to the First Defendant against the fee similar to and/or equivalent to the fee which the First Defendant will receive upon the successful liquidation and distribution of the estate. The Defendant [sic] therefor [sic] did not abdicate from her responsibilities and duties regarding the administration of the estate but delegated these to the Plaintiff”*.

25. The agreement between the plaintiff and the first defendant stipulates that the first defendant, in her capacity as duly authorised executrix to the estate, nominate and appoint (*“benoem and stel hiermee aan”*) the plaintiff:

“... as my gevolmagtigde Agent om die Boedel te administreer, beredder en af te handel volgens geldende landswette en teen die vasgestelde Eksekuteursloon of sodanige ander loon as deur ons onderling ooreengekom. Sonder om in enige mate my Agent se algemene magte te beperk, magtig ek hom in besonder om:

- (1) Alle dokumente, opgawes, Likwidasie en Distribusierekenings, Belastingopgawes e.d.m. te voltooi en te teken*
- (2) Bankrekenings in die naam van die Boedel te open daarop te opereer en te sluit*
- (3) Die Boedel te verteenwoordig in enige aksies en/of gedinge aanhangig gemaak deur of teen die boedel*
- (4) Alle dokumente met betrekking tot die oordrag, sessie en/of vervreemding van enige boedelbates aan erfgename, kopers, en/of eisers to*

⁸ Section 52 of the Administration of Estates Act, 1965.

⁹ *Bramwell and Lazar NNO v Laub* 1978 (1) SA 380 (W) 384A.

¹⁰ *Soofie v Hajee Shah Goolam Mahomed Trust and others* 1985 (3) SA 322 (N) 328B-F.

voltooi en te onderteken

My Agent se wettige aksies in verband met die boedel en verwante sake word hiermee geratifiseer asof ek persoonlik hierin opgetree het en sal hierdie Volmag van krag bly totdat die Boedel gefinaliseer is en alle gelde verskuldig aan my Agent ten volle vereffen is.”

[“...as my authorised Agent to administer, distribute and finalise the Estate in accordance with prevailing legislation and against payment of the prescribed executors’ fee or such other fee as we agree upon between us. Without limiting in any way my Agent’s general powers, I authorise him in particular to:

- (1) Complete and sign any documents, returns Liquidation and Distribution accounts, tax returns and so forth*
- (2) Open bank accounts in the name of the Estate, operate thereon and close them*
- (3) Represent the Estate in any actions and/or suits instituted by or against the estate*
- (4) To complete and sign all documents regarding the transfer, cession and/or alienation of any estate assets to heirs, purchasers and/or claimants*

My Agent’s lawful actions in respect of the estate and related matters are ratified herewith as if I personally acted herein and this power of attorney will remain in force until the Estate has been finalised and all monies owing to my Agent have been paid in full.”¹¹

26. According to Shand *The Administration of Deceased Estates in South Africa* (3ed, 1973) at 95, an executor cannot authorise a person, natural or legal, to assist him in the liquidation or distribution of an estate if such person is prohibited from taking part in such liquidation or distribution (see).

¹¹ My translation. As an aside, this appears to me to be an irrevocable power of attorney, which renders it unenforceable on the authority referred to earlier. The exception was however not taken on this basis, and I say nothing more about it.

27. I have referred above to what the regulations say as regards persons prohibited from liquidating or distributing an estate. The plaintiff describes himself as “an *adult male sole proprietor, conducting his business under the name and style of Bejo Trustees*”. Despite the name of his business, there is no indication that he is a trust company as contemplated in the regulation 1(1)(iv), namely “a *trust company which was, on 27 October 1967, licenced as such under the Licences Act, 1962, and carrying on a business of which a substantial part consisted of the liquidation and distributions of deceased estates, but does not include a trust company in which a banking institution acquired or acquires, after that date, financial interest otherwise than in exchange or substitution for any such interest held by such banking institution on that date*”.

28. There is no indication on the particulars of claim or on his letterhead (upon which the agreement between him and the first defendant is recorded) that he fulfils the requirements for being a person either allowed to distribute and liquidate estates under regulation 2, or that he is exempted under regulation 3.

29. The first defendant’s counsel reminded me that courts are reluctant to decide questions as to the interpretation of an agreement by way of exception.¹² This reluctance relates, however, to questions as to the validity of an agreement and the question whether a purported contract may be void for vagueness. This is not such a case.

30. The agreement concluded between the parties is quite clearly, on the plain language thereof, a power of attorney granted by a principal (the first defendant) to an agent (the plaintiff). The plaintiff argues that, as his actions under the power of attorney are attributed to the first defendant,¹³ the regulations do not apply to him. Even with the assistance of the plaintiff under the agreement, it is the first defendant who is regarded as having acted, and therefore - since the first defendant is exempt from the regulations by regulation 4(1), in so far as she is effectively “personally” liquidating or distributing the estate – the plaintiff does not have to make any allegation in relation to his capacity under the regulations. He merely has to plead

¹² *Francis v Sharp* 2004 (3) SA 230 (C).

¹³ As to the nature of agency see Kerr *The Law of Agency* (4ed, LexisNexis) at pp 3-4.

the *facta probanda* of an agreement of agency, which he has done.

31. In any event, so the plaintiff argues, on a construction of the particulars of claim as a whole he is claiming purely contractual damages for “loss of income” due to the first defendant’s alleged repudiation of the agreement. In this regard, the plaintiff (having pleaded the terms of the agreement) alleges as follows:

“8. On about 31 March 2021, prior to the Plaintiff’s finalization of the liquidation distribution (sic) of the estate, the Defendant (sic) repudiated the agreement by terminating it before the Plaintiff was able to fulfil his mandate, alternatively, materially breached the agreement by terminating before the Plaintiff was able to fulfil his mandate.

9. Have (sic) it not been for the First Defendant’s repudiation, alternatively breach, the Plaintiff would have been in a position to complete his performance in terms of the agreement and earn his remuneration upon the completion thereof.

10. As a result of the First Defendant’s repudiation, alternatively, breach, the Plaintiff was prevented from fulfilling his mandate and earning his commission and sustained damages, due to the potential loss of income, in an amount of R1 440 692,19.

11. At the time of the early termination of the agreement, the Plaintiff has completed about 90% of the administration of the estate on behalf of the First Defendant.

12. The Defendant (sic) claims payment of R1 296 622,96, calculated at 90% of the loss of income due to the repudiation, alternatively, breach of the agreement by the First Defendant, which amount is due and payable, alternatively will be due and payable as soon as the estate has been finalized.

13. The above amount is calculated at 90% of the commission the Plaintiff would have received, calculated at 3,5% (excluding VAT) of the on the (sic) gross value of the assets in the deceased estate in terms of Section 51(b) of the Administration of Estates Act, 66 of 1965, and the regulations thereto.”

32. I do not think that the plaintiff can evade the implications of the regulations in

this way.

33. I am of the view that, on a proper interpretation of the regulations having regard to the approach set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹⁴ one of the reasons for their promulgation must have been to protect the public and to ensure that the administration of deceased estates was done in an orderly and lawful manner. Notably, the regulations do not say that no person, save as provided for in the regulations, shall be appointed as executor.¹⁵ They specifically say that no such person “*shall liquidate or distribute*” a deceased estate. This (sensibly so, given the purpose of the regulations) refers to the acts involved in liquidating and distributing an estate, rather than to where the responsibility lies for those actions. This is consistent with Shand’s interpretation to which I have referred earlier.

34. It is clear from what has been pleaded that it was the plaintiff who undertook the liquidation and distribution of the account, albeit that it was done in the name of the first defendant. He emphasises his position by seeking an order that the first and second defendants (respectively, the duly appointed executor and the Master) be prohibited from finalising the administration of the estate prior to the final determination of the action. The first defendant patently did not administer the estate “personally”, as is required by regulation 4(1). To interpret the requirement of “personally” in the regulations as to include liquidation and distribution via an agent would undermine the essence of the regulations.

35. I agree with the submission by the first defendant’s counsel that the grant of a power of attorney without any regard to the regulations allows the regulations to be sidestepped, and enables a disqualified person to administer an estate. If the plaintiff could sue on the power of attorney for an executor’s fee, then the plaintiff would effectively be allowed to step into the shoes of a layperson executor, while perhaps (it is not known what the plaintiff’s position is in this respect) being

¹⁴ 2012 (4) SA 593 (SCA) para [18].

¹⁵ The Administration of Estates Act deals with this in section 13(2): “*No letters of executorship shall be granted or signed and sealed and no endorsement under section fifteen shall be made to or at the instance or in favour of any person who is by any law prohibited from liquidating or distributing the estate of any deceased person.*”

disqualified from liquidating or distributing an estate. This would be anomalous and would defeat the purpose of the regulations. The mere use of a power of attorney would enable anyone to administer an estate, regardless of what the regulations provide.

36. I conclude that the regulations therefore do apply to the plaintiff.

37. This is not merely an issue so interwoven with evidence that it should stand over for deliberation at a trial in due course.¹⁶ It is an issue that goes to the root of the plaintiff's claim, and therefore the plaintiff's status under the regulations as a person who may liquidate or distribute an estate is a necessary element of his claim against the first defendant.

38. The regulations create a situation akin to that applying to an estate agent. In terms of section 56 of the Property Practitioners Act, 2019 (which repealed the Estate Agency Affairs Act, 1976, with effect from 1 February 2022), an estate agent is not entitled to claim remuneration unless he or she is in possession of a fidelity fund certificate or has access to the required insurance. The allegation in a claim for remuneration that the plaintiff agent fulfils these requirements is one of the core elements upon which the entitlement to remuneration rests. I am of the view that the same applies in the present case.

39. The plaintiff has, apart from pleading the agreement between him and the first defendant, made no allegation to indicate that he is, in fact, statutorily allowed to administer a deceased estate. It does not matter that he was doing it on the first defendant's behalf, and that she bore the ultimate responsibility for the winding-up of the estate under the applicable legislation. In the circumstances, the particulars of claim disclose no cause of action against the first defendant, and the exception must be upheld.

Order

¹⁶ *Versluis v Greenblatt* 1973 (2) SA 271 (NC) 278.

40. In the circumstances, it is ordered as follows:

40.1. The first defendant's exception is upheld.

40.2. The plaintiff is given leave to amend his particulars of claim so as to remove the cause of complaint as set out in the first defendant's notice of exception, within 10 (ten) days of the date of this order, failing which the first defendant is given leave to apply, on notice to the plaintiff, for the dismissal of the plaintiff's claim.

40.3. The plaintiff shall bear the costs occasioned by the exception.

P. S. VAN ZYL
Acting judge of the High Court

HEARING DATE: 7 March 2022

Appearances:

For the plaintiff: S. J. du Plessis, instructed by Gerrit Moller
Attorneys

For the first defendant (excipient): Z. Joubert, instructed by Walkers
Incorporated