



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MTHATHA)**

Case No:

1481/2020

In the matter between:

**PUMEZA INNOCENTIA NCELEKAZI**

**APPLICANT**

and

**MASTER OF THE HIGH COURT, MTHATHA**

**FIRST RESPONDENT**

**BUSISWA BEAUTY FUTSHANE N.O.**

**SECOND RESPONDENT**

**NMELI PROGRESS MHAULI**

**THIRD RESPONDENT**

**SIVUYILE KNOWLEDGE NCELEKAZI**

**FOURTH RESPONDENT**

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**JUDGMENT**

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**BANDS J:**

[1] By letters of executorship granted by the assistant master of the High Court, Mthatha, on 6 June 2019, the applicant was appointed as the executor in the estate of Dora Mhlauli (“*the deceased*”). This is a review application in which the applicant, acting in the aforesaid capacity, seeks to review and set aside the Master’s decision, acting through the Assistant Master, to appoint the second respondent as co-executor in the deceased’s estate on 16 March 2020.

[2] The application was brought in two parts. Only part B of the application was before me for determination. The relief originally sought in part A of the notice of motion was an order interdicting and restraining the: (i) first respondent from implementing or otherwise giving effect to the decision to appoint the second respondent as a co-executor; and (ii) the second respondent from carrying out any act of administration and/or winding up of the deceased estate, pending the determination of the relief sought in Part B of the notice of motion. Although it appears to be common cause that an order in accordance with Part A of the notice of motion was previously granted, this is neither apparent from the papers before me, nor from the court file. In respect of the relief sought in Part B, whilst the relief initially sought was considerably more comprehensive in nature, the applicant limited its ambit to the issue set out in paragraph 1 of this judgment.<sup>1</sup> The fourth respondent makes common cause with the applicant.

[3] The application was opposed by the second and third respondents, whom I shall refer to as the respondents in this judgment, unless the context dictates

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<sup>1</sup> As conceded in paragraph 2 of the applicant’s heads of argument.

otherwise. In addition to opposing the application,<sup>2</sup> the respondents launched a counter application<sup>3</sup> in which they sought *inter alia* that:

*“The appointment of the executrix including that of the Applicant in the said deceased estate be reviewed and set aside as invalid, alternatively stayed, pending the appointment of the late Goodman Mhlauli, deceased’s husband herein, and finalisation of its winding up. As a further alternative thereto, that the appointment of the 2<sup>nd</sup> Respondent as the co-executrix in the deceased estate be declared as lawful”,*

the aforesaid being the only relief on their papers, which they elected to pursue when the matter was argued. In addition, the respondents’ counsel, from the bar, sought further alternative relief, to the effect that the first respondent be directed to appoint a neutral executor to the deceased estate. I return to the relief sought in the counter application later.

[4] The first respondent filed a notice to abide the decision of this court.

[5] This application initially came before me on the opposed motion court roll on 2 February 2023, having previously been postponed to such date in terms of an order of court, dated 28 July 2022, which order recorded the attendance of the legal representatives on behalf of the both the applicant and respondents (“*the parties*”). Notwithstanding the aforesaid, there was no appearance on behalf of the applicant on 2 February 2023. After having stood the matter down to the end of the opposed motion court roll, and having been satisfied that the applicant was aware of the date

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<sup>2</sup> Seeking its dismissal with costs on a *de bonis propriis* scale and the discharge of the *rule nisi*.

<sup>3</sup> Placing reliance on their answering affidavit.

of hearing,<sup>4</sup> I proceeded to hear argument on behalf of the respondents in the absence of the applicant.

[6] Following argument and prior to judgment being delivered, the legal representative on behalf of the applicant approached my offices, through my clerk, advising that, to his knowledge, the matter had been postponed to 3 February 2023, by agreement between the parties, in terms of a draft order of court. Accordingly, he was of the view that the matter had erroneously been enrolled on the motion court roll and heard on 2 February 2023. At the time of the query, the draft order to which reference was made, was not contained in the court file and accordingly a copy thereof was supplied by the applicant's legal representative depicting the date, 3 February 2023, this being at variance to the order of court contained in the court file.

[7] As I was performing judicial duties in Gqeberha at the time, I was unable to engage personally with the respective legal representatives to enquire into the apparent dichotomy. The matter was accordingly referred to the Acting Deputy Judge President of this court. Following a meeting between the parties' legal representatives and the Acting Deputy Judge President, the parties agreed to the matter being disposed of without the need to advance further oral argument, subject to their right to supplement the submissions made in argument by way of supplementary heads of argument to be submitted by 10 and 20 March 2023, respectively, with the effective date of argument being 20 March 2023. Curiously, only the respondents availed themselves of this opportunity.

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<sup>4</sup> This being apparent from the order of court granted on 28 July 2022 as well as from the respondents' counsel who confirmed that the order had been granted by agreement between the parties.

[8] Lastly, prior to dealing with the merits of the applications, the status of the papers before court requires comment. Certain of the annexures<sup>5</sup> to the applicant's founding papers are not contained in the court file. An explanation for this anomaly is contained in an explanatory affidavit, deposed to by the respondents' attorney of record, and was further addressed in argument by the respondents' counsel in open court on 2 February 2023. The relevant portion of the affidavit reads as follows:

*"1. ... the matter was before court on the 3<sup>rd</sup> of February 2022 and was then postponed at the instance of the applicant to the 28<sup>th</sup> of July 2022 on the opposed court roll.*

*2. I attended the court thereafter on numerous occasions trying to get the court ordered dated the 3<sup>rd</sup> of February 2022 and to ensure that the court file is in order prior to it (sic) matter being enrolled on the set-date (sic) only to be advised that the file is empty.*

*3. I tried to call the applicant's attorneys to request them to email us all the annexes to their notice of motion. I have spoken to the director of the firm and he promised that he will make sure that I get the annexes as requested. I waited until I deposed to this affidavit for those annexes in vain.*

*4. I then decided to construct a temporal (sic) file as the original file could not be found or located by the clerks and its whereabouts remain unknown."*

[9] Prior to the delivery of judgment, and despite efforts, through the offices of my clerk, the missing annexures were unable to be located to supplement the court file. Having said that, and given the finding to which I have arrived, the matter can readily be disposed of on the papers, as constituted, without reference to the annexures in question.

## **Background**

<sup>5</sup> "P4"; and "P7" – "P14".

[10] The deceased died intestate on 13 September 2018 leaving behind her four children, namely, the applicant and the second to fourth respondents. Whilst the third respondent was initially appointed as the executor in the deceased estate, on 20 November 2018, his appointment was successfully challenged by the applicant on the basis that the third respondent had fraudulently misrepresented his nomination to the first respondent. Albeit that the respondents denied any fraudulent conduct on behalf of the third respondent, in their answering affidavit, this aspect was later conceded in the respondents' heads of argument.<sup>6</sup>

[11] The applicant was thereafter appointed as the sole executor of the deceased estate on 6 June 2019. Due to a divide in the family regarding the administration of the deceased estate, the assistant master convened a meeting at the Masters' Office on 25 October 2019 in an endeavour to resolve the family's differences, including the issue of whether the applicant ought to remain as executor of the deceased estate.

[12] Notwithstanding that the aforesaid issue was resolved in favour of the applicant, the assistant master issued a notice of removal to the applicant via email on 20 December 2019,<sup>7</sup> affording the applicant seven days within which to provide reasons, if any, why she should not be removed. The basis for the proposed removal was cited as the receipt of new complaints regarding the manner in which  
<sup>6</sup> Paragraph 13 of the heads of argument, where it records, in relation to the suggested reappointment of the third respondent as a co-executor:

*"Applicant is aware that the reason the Master refused the co-executorship of the 3<sup>rd</sup> respondent is that 3<sup>rd</sup> respondent could not be so re-appointed after already committed fraud."*

<sup>7</sup> Which did not comply with the provisions of the Administration of Estates Act.

the applicant had dealt with the administration of the estate. Ultimately however, the assistant master decided not to remove the applicant as executor but instead, on 16 March 2020, advised the applicant of her decision to appoint the second respondent as co-executor, advising that any person aggrieved by the decision “*must come up with a better solution*”.

[13] On the same day, the applicant’s attorney of record directed correspondence to the assistant master, requesting that the letters of authority be held in abeyance until such time as the applicant had been afforded an opportunity to consult with her attorney of record and make representations in respect of the proposed appointment. The assistant master, in the face of the aforesaid correspondence, took no cognisance of the request and proceeded to appoint the second respondent as co-executor on 17 March 2020.

[14] The events culminating in the appointment of the second respondent as co-executor are common cause on the papers. Significantly, in answer, the respondents state as follows:

*“47. The applicant should be reminded that in its wisdom the legislature in terms of the act decided to vest the administration of deceased estates to the office of the master as an objective entity to administer deceased estate, than (sic) leaving it to the whims of subjective wishes of heirs, which is exactly what the applicant pursues in this application. The decisions of the master, in the circumstances, should prevail and are supported as against those of applicant.”*

[15] Whilst the primary function of the Master is to *regulate* the administration of estates, the stance adopted by the respondents departs from the accepted legal

principles and suggests, somewhat startlingly, that heirs in an estate have no voice in relation to the appointment of executors.

### **Review**

[16] It is perhaps appropriate at this juncture to identify the grounds of review relied upon by the applicant in relation to the relief sought. The applicant alleges that the decision is reviewable in that: (i) the procedure in taking the impugned decision is procedurally unfair for want of the assistant master's failure to allow the applicant an opportunity to consult with her legal advisor and to make representations in respect of the second respondent's appointment as co-executor; and (ii) the assistant master's decision was taken arbitrarily; capriciously; and/or irrationally in that the second respondent was unsuited to be a co-executor given the untenable relationship in existence between the applicant and the second respondent.

[17] Section 95 of the Administration of Estates Act, 66 of 1965 (*"the Administration of Estates Act"*), provides that:

*"Every appointment by the Master of an executor, tutor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master under this Act shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby, and the Court may on any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be."*

[18] It is axiomatic that the right to review an appointment by the Master in terms of section 95 of the Administration of Estates Act is a statutory recordal of such right



and provides no independent grounds of review apart from those contained in the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”) or, to the extent applicable, the common law.<sup>8</sup>

[19] Accordingly, the issue to be determined herein, properly framed, is whether on the common cause facts, the applicant is entitled to the relief sought in terms of section 95 of the Administration of Estates Act read with the provisions of sections 6, 7, and 8 of PAJA.

[20] Apart from the factual basis set out herein, and for reasons which will become apparent, I do not deem it necessary to deal with every allegation relied upon by the applicant in support of the aforesaid grounds of review.<sup>9</sup> To do so would be to burden this judgment unnecessarily in the circumstances.

[21] Section 18 of the Administration of Estates Act, which deals with the appointment of executors provides, *inter alia*, as follows:

“(1) The Master shall ... -

a) if any person has died without having by will nominated any person to be his executor; or

...

e) if any person who is the sole executor ... cease(s) for any reason to be executor(s) thereof;

...

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<sup>8</sup> *Da Silva and others v Da Silva NO and Others* (2498/2007 and 4247/2007) [2007] ZAWCHC 82 at para 11. *M.J v Master of the High Court and Others* (15699/2017) [2019] ZAWCHC 8 at para 14.

<sup>9</sup> Or the responses thereto on behalf of the respondents.

*appoint and grant letters of executorship to such person or persons who he may deem fit and proper to be executor’.*

[22] Whilst the master, in accordance with section 18 of the Administration of Estates Act, enjoys a wide power to grant letters of executorship to any person he deems fit and proper to be an executor, this is not the only consideration which comes into play. If proper regard is had to the wording of section 18, and more particularly, in the context of the present dispute, subsection 18(1)(e) thereof, it presupposes that once an executor has been appointed, it is not open to the master to appoint and grant letters of executorship to any other person/s as he may deem fit and proper until such time as an event, as catered for in the section, occurs, triggering the operation of such power, for example, the cessation of the appointed executor to act in such capacity.

[23] Our courts have over time, developed harmony, in the proper approach to the interpretation of documents. As succinctly set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:<sup>10</sup>

*“[18] ... The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A*

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<sup>10</sup> 2012 (4) SA 593 (SCA).

*sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.*

...

[19] *All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Dönges NO and another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:*

*'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'*

...

[23] *... If interpretation is, as all agree it is, an exercise in ascertaining the meaning of the words used in the statute and is objective in form, it is unrelated to whatever intention those responsible for the words may have had at the time they selected them. Their purpose is something different from their intention, as is their contemplation of the problem to which the words were addressed.*

[25] *... [W]hen the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity."*

[24] In *Cool Ideas 1186 CC v Hubbard*<sup>11</sup> the court, at paragraph [28], in dealing with the interpretation of statutes said the following:

*“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*

- (a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).”*

[25] The Supreme Court of Appeal, in *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others*,<sup>12</sup> cautioned against utilising the principals enunciated in *Endumeni Municipality* as an open-ended permission to pursue undisciplined and self-serving interpretations. Unterhalter AJA went on further to state at paragraph [50] that:

*“Endumeni simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most*

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<sup>11</sup> 2014 (4) SA 474 (CC).

<sup>12</sup> (470/2020) [2021] ZASCA 99 (09 July 2021) at paragraph [49].

*compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result."*

[26] At paragraph [51] Unterhalter AJA, commented, in the context of contracts, that:

*"Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."*

[27] The same can be said regarding the drafters of legislation and the statutory interpretation.

[28] If regard is had to the wording of section 18(1), due consideration being had to the factors enunciated in the above decisions of our courts, the clear wording of the provisions under examination cannot be overlooked. It is clear that the purpose of the said section caters for situations under which the master enjoys the power afforded to him/her to appoint an executor. Nowhere in the sub-section under consideration, or in the broader context of section 18, does the legislation give the master blanket authority to grant letters of executorship in all instances, provided that they are granted to a person who the master deems to be fit and proper to be an executor. If that were the case, the specific inclusion section 18(1)(e), read in the context of the entire provision, would be non-sensical and arbitrary.

[29] I am accordingly of the view that the first respondent, in the absence of the occurrence of an event catered for under section 18(1) of the Administration of Estates Act, was not clothed with the power to appoint the second respondent as a co-executor in the circumstances of this case and accordingly, the assistant master's decision is reviewable in that he failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision as envisaged in section 6(2)(b) of PAJA.

[30] Further and in any event, I am of the considered view that there is merit in the applicant's complaints of procedural unfairness on the part of the assistant master insofar as she failed to allow the applicant an opportunity to consult with her legal advisor and to make representations in respect of the second respondent's appointment as co-executor. Section 3 of PAJA stipulates that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. It cannot be gainsaid that the appointment of the second respondent as co-executor, is administrative action which falls within the ambit of section 3. Moreover, whilst the convening of a meeting for the purposes of recommending, to the master, a person or persons for the appointment as executor/s, is no longer mandatory under the amended section 18,<sup>13</sup> the master should, in practice pay heed to the wishes of heirs, which, in turn, should prevail in the appointment of an executor.<sup>14</sup>

[31] I am accordingly of the view that the assistant master's decision is reviewable in that it was procedurally unfair as envisaged in section 6(2)(c) of PAJA.

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<sup>13</sup> As amended by section 4 of the Administration of Estates Amendment Act 86 of 1983.

<sup>14</sup> *Meyerowitz on Administration of Estates and Their Taxation*, P.H. Cilliers, Juta, 2023.

[32] In light of the conclusions to which I have arrived, I am required by section 172(1)(a) of the Constitution to declare the decision under consideration unlawful on either of the aforesaid bases.<sup>15</sup> Accordingly, it is not necessary to deal with the remaining disputes on the papers.

[33] As stated, the respondents in their counter application seek, in the main, to review and set aside the appointment of the applicant. In essence, the respondents, by way of review, erroneously seek to have the applicant removed from office in accordance with section 54(1) of the Administration of Estates Act. The cause of action relied on by the respondents in the instant application is misplaced, with no case having been made out for the relief sought.<sup>16</sup> Accordingly, the counter application must fail.

[34] In respect of costs, I see no reason to depart from the usual order in respect of both applications.

[35] In the result, the following order is issued:

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<sup>15</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* ZACC 42; 2014 (1) SA 604 (CC) at para 25.

<sup>16</sup> Insofar as the respondents rely on the alleged fraud on behalf of the applicant, in utilising estate monies, this of course, is not only insufficient to found a basis to review and set aside the assistant master's decision to appoint the applicant as an executor, but it is undisputed on the papers that the NPA has declined to prosecute the applicant as there are no reasonable prospects of success in pursuing the matter. Moreover, I am satisfied that the issue pertaining to the utilisation of the funds has been properly explained by the applicant on the papers before court, with specific reference to the minute of the meeting during October 2019.

1. The first respondent's decision to appoint the second respondent as a co-executor in the Estate Late Dorah Mhlauli on 16 March 2020, and the subsequent appointment of the second respondent as co-executor on 17 March 2020, is reviewed and set aside.
2. The second and third respondents are ordered to pay the costs of the applicant's application.
3. The second and third respondents counter application is dismissed.
4. The second and third respondents are ordered to pay the applicant's costs of the counter application.

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**I BANDS**

**JUDGE OF THE HIGH COURT**

Judgment granted: 14 September 2023

For the applicant: No appearance (on the date of hearing)  
Adv Madikizela (written submissions)

Instructed by: M Mbata Attorneys

For the 2<sup>nd</sup> and 3<sup>rd</sup> respondents: Adv Qikila (on the date of hearing)  
Adv Matyumza SC (written submissions)  
Adv Qikila (supplementary written submissions)

Instructed by: MDA Mncedane Inc.



