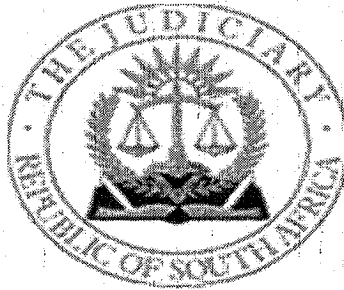


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

18/12/18

Date

ML TWALA

CASE NO: 32979/2015

In the matter between:

LINDI HEZEKEIEL MBATHA

FIRST APPLICANT

SIPHO MBATHA

SECOND APPLICANT

SIPHIWE MBATHA

THIRD APPLICANT

JULIA MALELE

FOURTH APPLICANT

MASHAKENI MALUKA

FIFTH APPLICANT

NEO MALUKA

SIXTH APPLICANT

TLOTLO MALUKA

SEVENTH APPLICANT

NELLY XABA

EIGHTH APPLICANT

INNOCENTIA MALUKA

NINTH APPLICANT

BONGIWE MAKIHIN

TENTH APPLICANT

AND

MAGARET MALUKA

FIRST RESPONDENT

BELOVED MALUKA

SECOND RESPONDENT

IRENE MALUKA

THIRD RESPONDENT

ALFRED MALUKA

FOURTH RESPONDENT

MUSA MALUKA

FIFTH RESPONDENT

SHEILA MALUKA

SIXTH RESPONDENT

NTWANANO MALUKA

SEVENTH RESPONDENT

HLULANE MALUKA

EIGHTH RESPONDENT

MASTER OF THE HIGH COURT

NINTH RESPONDENT

JUDGMENT

TWALA J

- [1] This is an opposed application wherein the applicants sought the removal of the first respondent as Executrix of the estate of her late husband, the late Rabi Sikhonyane Maluka who died on the 17th January 2012 and further sought other ancillary relief.

- [2] It appears from the record that only the first and fourth to seventh respondents are opposing the application. There is a confirmatory affidavit of Lorraine Maluka which is filed with the first respondent's answering affidavit, but she is not cited as one of the respondents. The second, third, eighth and ninth respondents did not file opposing papers. I propose to refer only to the first respondent in this judgment for the issues are about her and not the rest of the respondents.
- [3] It is common cause that the first respondent is the surviving spouse of the deceased and was issued with Letters of Executorship on the 8th of May 2012. It is further not in dispute that the first respondent has not yet been released by the Master of the High Court from her duties as the executrix of the estate since the estate has not been finalised as yet.
- [4] The issue to be determined by this Court is whether in the execution of her duties as executrix of the estate, she has acted properly and as any other reasonable executrix or executor would have acted. Put differently, whether the executrix has acted improperly and in such a manner that she should be removed or discharged from her duties as executrix.
- [5] It is contended by counsel for the applicants that the first respondent has interest in the estate as a beneficiary and an heir – hence she is conflicted and should be removed as executrix of the estate of her husband. She has, as the argument goes, not disclosed certain moveable and immovable assets belonging to the estate to the detriment of the estate and other beneficiaries. She undervalued certain movable and immovable properties and offered to pay cash to the other heirs in lieu of her taking over these properties. She has not disclosed the income due to the estate from renting out certain portions of the property belonging to the estate.

- [6] Counsel for the applicants contended further that the first respondent was reluctant to recognise other heirs and beneficiaries of the estate who are the wives and children of the deceased. She failed, so it contended, to collect debts that are due to the estate.
- [7] It is contended by counsel for the first respondent that the executrix is assisted by attorneys in the execution of her duties. She has acted and still acts, so the argument goes, in the best interest of the estate. She has collected the debts of the estate that she knew of and has no knowledge of the loan the applicants are talking about. No proof of such loan has been produced by the applicants.
- [8] Counsel for the first respondent contended further that the motor vehicles mourned about by the applicants do not belong to the estate but to a close corporation to which the deceased was a member. The close corporation is said to be insolvent by its auditors. The immovable property is on tribal land and belongs to a trust and not to the estate. The executrix engaged the services of the valuator to attend to the valuation of the immovable properties as directed by the Master. She has prepared and submitted the liquidation and distribution account in terms of the Administration of Estate Act and no objection has yet been received either from the Master or any of the applicants and beneficiaries.
- [9] It is trite that once a deceased estate is reported to the Master and an executor or executrix is appointed, the estate will be administered and liquidated in terms of the Administration of Estate Act, 66 of 1965. The executrix, in the instance of this case, is then obliged to administer the estate under the supervision and direction of the Master.

[10] For the purposes of the present case, I find it necessary to refer to the following sections of the Administration of Estate Act, 66 of 1965 (“the Act”):

“Section 9 Inventories:

(1) If any person dies within the Republic or if any person ordinarily resident in the Republic at the time of his or her death dies outside the Republic leaving any property therein, the surviving spouse of such person or more than one surviving spouse jointly, or if there is no surviving spouse, his or her nearest relative or connection residing in the district in which such person was ordinarily resident at the time of his or her death, shall, within fourteen days after the death or within such further period as the Master may allow-

I. Make an inventory in the prescribed form, in the presence of such persons having an interest in the estate as heirs as may attend, of all property known by him to have belonged, at the time of the death-

I. To the deceased; or

II. In the case of the death of one of two or more spouses married in community of property, to the joint estate of the deceased and such surviving spouse; or

III.

[11] *Section 19 Competition for office of executor*

If more than one person is nominated for recommendation to the Master, the Master shall, in making any appointment, give preference to-

a. The surviving spouse of his nominee; or

b. If no surviving spouse is so nominated or the surviving spouse has not nominated any person, an heir or his nominee; or

c.

[12] *Section 27 Inventories by executors and valuation at instance of Master:*

- 1).....
- 2) *If an inventory lodged with the Master in terms of section or subsection (1) of this section, any estimate has been made of the value of any property which the Master has reason to believe is not a reasonably correct estimate thereof, the Master may, at the expense of the estate, order that property to be appraised by an appraiser or any other person approved by the Master.*

[13] *Section 35 Liquidation and distribution accounts:*

- (1) *An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29(1), but within –*
 - a) *Six months after letters of executorship have been granted to him;*
 - or*
 - b)

Submit to the Master an account in the prescribed form of the liquidation and distribution of the estate.

- (1A) *If at any time after the account contemplated in subsection (1) was submitted to the Master, additional assets are found in the estate and the account is not amended in terms of this section so as to provide for the application or distribution of the proceeds of those assets, the executor shall in respect of those assets submit to the Master a supplementary account in the prescribed form.*

(2).....

(3).....

- (7) *Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons therefor, to any such account and the*

Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.

(8)

(9) *If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of opinion that such objection is well-founded or if, apart from any objection he is of opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit.*

(10)

[14] *Section 38 Taking over by surviving spouse of estate or portion thereof:*

1) *The Master may, if-*

- a. One of two spouses, whether they were married in or out of community property, has died; and*
- b. The deceased has made no provision to the contrary in any will; and*
- c. The major heirs and any claimants against the estate consent; and*
- d. It appears to him that no person interested would be prejudiced thereby,*

Authorize the executor, subject to security being given mutatis mutandis as provided in subsection (2) of section forty-three for the payment of any minor's share, and to such conditions as the Master may determine, to make over any property or all the property of the deceased, or the whole or any part of that portion of his property in respect of which he has made no testamentary provision to the contrary, to the surviving spouse at a valuation

to be made by an appraiser or any other person approved by the Master and to frame his distribution account on the basis of such valuation.

2)

[15] *Section 54 Removal from office of executor:*

(1) An executor may at any time be removed from his office –

a) By the Court –

I.

II. If he has at any time been a party to an agreement or arrangement whereby he has undertaken that he will, in his capacity as executor, grant or endeavour to grant to, or obtain or endeavour to obtain for any heir, debtor or creditor of the estate, any benefit to which he is not entitled; or

III. If he has by means of any misrepresentation or any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as executor or to effect or to assist in effecting such recommendation; or

IV. If he has accepted or expressed his willingness to accept from any person any benefit whatsoever in consideration of such person being engaged to perform any work on behalf of such person being engaged to perform any work on behalf of the estate; or

V. If, for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned; and

b)

[16] I am unable to agree with counsel for the applicants that it would serve no purpose to lodge objection after objection with the Master with regard to the liquidation and distribution account. Section 35 of the Act empowers the Master to demand that the executrix lodge the liquidation and distribution account. If certain assets do not appear in the liquidation and distribution or if such assets only became known after the liquidation and distribution account has been submitted to the Master, the Master has the power to demand that a supplementary liquidation and distribution account be submitted to him. The applicants complained of the property which is said to belonging to a trust as it is situated on tribal land and the motor vehicles that belonged to the close corporation. However, the applicants have failed to produce proof that these properties are registered in the name of the deceased and were deliberately left out from the liquidation and distribution account in order to benefit the first respondent.

[17] I am respectfully in disagreement with counsel for the applicants that since the values of the properties provided on the inventory differ materially with those provided by the valuers, the first respondent was deliberately misleading with a dominant intent to benefit herself at the expense of the other beneficiaries. The inventory completed in terms of section 9 is an estimate – hence the Master has the power to call for appraised valuations should he deem it fit. Counsel for the applicants has insisted that the valuation should be made by sworn valuers and/or appraisers. However, the executrix who is not a sworn appraiser is vilified for an estimate she placed on the properties of the estate as being deliberate in under valuing the properties for her gain. The irresistible conclusion is that the first respondent was not dishonest in providing the values of the properties when she completed the inventory in terms of section 9 of the Act.

- [18] There is nothing untoward with an executrix proposing a redistribution agreement amongst the heirs or beneficiaries. It is my considered view that the executrix in this case was acting within the prescripts of section 38 of the Act when she proposed to pay cash to the other heirs or beneficiaries of the estate and take over the remaining immovable assets in the estate. It cannot be said that such a proposal was loaded with an intention to deprive the other beneficiaries of what they were entitled to in the estate.
- [19] I am in agreement with counsel for the first respondent that the first respondent was entitled to demand proof of locu standi from the applicants when they lodged their claims against the estate. It is the duty of the executor to protect the assets of the estate. I am of the view therefore that in the circumstances she acted accordingly and diligently in demanding proof of paternity for the children she did not know of and marriage certificates from those who claimed to be wives of the deceased. It is on record that after proof of paternity was produced, she accepted their claims against the estate. In my view she acted as a reasonable executrix would have acted under the circumstances and that does not qualify her for removal as the executrix of this estate.
- [20] It is on record that the executrix has submitted the liquidation and distribution account to the Master. It is my respectful view therefore that the applicants should have lodged an objection in terms of section 35 with the Master and submit proof of the properties they allege to form part of the estate of the deceased for consideration by the Master. Similarly, the applicants should have lodged an objection with the Master with regard to the loan they claim the executrix has failed to entertain and collect.

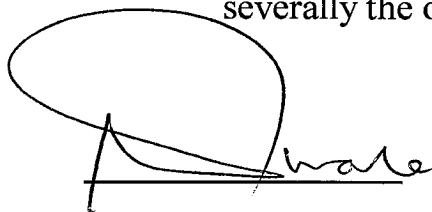
- [21] I find myself in agreement with counsel for the first respondent that the Master is not a passive observer in the administration of deceased estate as portrayed by the applicants. The Act provides its own remedies where interested parties including the Master are aggrieved by the conduct of the executor in the liquidation and distribution of the assets of the estate. The Act empowers the Master to appoint and to remove an executor if he deems it fit.
- [22] Counsel for the applicants referred me to the case of *Reichman v Reichman and Others 2012 (4) SA 432 (GSJ)*. I fully agree that it is undesirable for an executor to act in such a capacity if it is established that there is a conflict of interest between him, as a beneficiary, and the other beneficiaries or that there is a dispute between him and other beneficiaries. However, that is not the case in the present matter. I have already made a finding that the applicants have failed to provide proof that the assets alleged not to have been disclosed in the liquidation and distribution account belonged to the deceased and that there was nothing wrong with the proposal for a redistribution agreement amongst the beneficiaries. Further, that the applicants failed to produce proof of the alleged loan to one of the beneficiaries by the deceased. The ineluctable conclusion is that there is no conflict of interest on the part of the executrix or a dispute between the beneficiaries and the executrix which necessitates her removal. It is merely a ruse created by the applicants.
- [23] I am alive to the provisions of section 54 of the Act. However, I am of the view that the intention of the legislature is that deceased estates should be administered or liquidated and distributed under the supervision and direction of the Master. The Act provides for internal remedies if interested parties feel aggrieved in any way in the handling of the estate. In my view,

the provisions of section 54 can only be invoked after having exhausted all the internal remedies as provided by the Act or if there is gross maladministration of the estate. In this case, the applicants have failed to establish any basis that the first respondent has, in the execution of her duties as executrix, acted in such a manner that she deserves to be removed or released from her duties.

[24] In the circumstances, I make the following order:

A. The application is dismissed.

B. The applicants are to pay the costs of the respondents, jointly and severally the one paying the other to be absolved.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 3rd December 2018

Date of Judgment: 13th December 2018

For the Applicants: Adv. S.L. Ress
Instructed by: Suleman's Inc
TEL: 016 422 0333

For the Respondents: Adv. M Phukubje
Instructed by: Matela Sibanyoni & Associates
Tel: 011 331 0755