IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVIs10N, JOHANNESBURG

Case No: 003981/2022

(1)	REPORTABLE: ¥ES / NO
(2)	OF INTEREST TO OTHER JUDGES: ¥ES/NO
(3)	REVISED: NO
5 October 2023	
DATE	SIGNATURE

In the matter between:

OUMA ROSINAH MOSHOESHOE	Applicant
and	
THE MASTER OF HIGH COURT	1 st Respondent
PRESHNEE GOVENDER NO.	2nd Respondent
BEN MOHAPINYANE DOCTOR MAKUME NO.	3 rd Respondent

JUDGMENT

Coram NOKO J

Introduction[1]

1 The criminal investigation of the person who caused his death appears not been finalised yet.

[l] The applicant brought a review application seeking an order to set aside decisions taken by the first respondent to remove her as an executrix and to be substituted by the second respondent. The applicant contended that the decisions offend both the provisions of the Administration of Estates Act 66 of 1995 (Estate Act) and Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[2] The second respondent is the only party opposing the application and has also raised, inter alia, some points in limine.

Background.

[3] The factual matrix of the matter is in general, uncontested between the parties. The late Mpho Gived Makume (Mpho Makume) died on 1 September 2021 allegedly because of gun shot. [1] The deceased was survived by a grandson, Moeketsi Tankiso Makume (Moeketsi Makume).[2] Moeketsi Makume was the son of the Dorah Makume, who was the only daughter of the late Mpho Makume, who predeceased her father. The applicant was

appointed an executrix by the first respondent on 26 November 2021, pursuant to the nomination by Letsie Ben Makume and Khasiane Dorah Makume (both being half

siblings of the deceased). [3]

[4] On 14 December 2022, the official in the office of the first respondent dispatched a letter[4] to the attorneys of the applicant contents of which are summarised as follows, first, that there was complaint from the heir about the appointment by the first

2 This was the information which served before the administrator at the tüne when the impugn decisions were taken and it subsequently transpired that there is another heir to the estate, Roberta Relebohile Sybil Kheswa, see Liquidation and Distribution Account, CaseLines 03-220. See also para 38 of the Respondent's Answering affidavit, CaseLines 003-98 where she stated that "[I] determined that Roberta is the deceased's daughter.„

3 The respondent having asserted that both Letsie Makume and Khaisane Makume misrepresented themselves before the first respondent as brother and sister ofthe deceased and not half siblings. See para 21 of the Respondent's Answering Affidavit, CaseLines 03-92.

respondent. Secondly, that there will be a meeting of the family (convened in terms of section 18 of the Estates Act) to resolve the dispute to which an invitation was extended. Thirdly, that the letter serves as a notification that the letter of appointment is cancelled and reference was made to the provisions of section 102[5] of the Estates Act. Lastly that in the event of non-attendance the Master will have no option but to take a decision without the addressee' s participation.

[5] A meeting was scheduled for 20 January 2023 and was attended by several individuals, namely, Deputy Master, Ms Beatrice de Klerk, Thabo Mofokeng (Cousin), Adeline Moshoeshoe (Niece), Innocentia Moshoeshoe (Niece), Rosinah Moshoeshoe (Sister), Simon Moshoeshoe (Brother-in-aw), Dorah Makume (Sister), Benie Makume (Brother), Favour Agbugba (attorneys for the applicants), Fikile Mbatha (Attorney from

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[4] The contents of the letter are as follows:
To FC Nwanezi A Attorneys.

"By hand.
Kindly be informed that a complaint was launched by the grandson of the deceased Tankiso Moeketsi on your appointment by the Master's, the Master representative in this matter.

You as a result, hereby called for a family meeting in terms of section 1 8 of Act 66 of 1965, as amended to resolve the disputes.

Please note that the letter of appointment issued to you is hereby cancelled and is no longer valid for all purposes and any attempt to use the letter would be invalid, preferred. The Provisions of section One or two of Act 66 of 19 Ninety 1965.

Please note that should you fail to avail yourself: the Master would have no option but to take a decision without the involvement.

The meeting schedule as follows:
Time 9:00.
Date 20 January 2022.
Venue 66 Mitchell St, Johannesburg. Master of the High Court."

5 Section 102 of the Administration of Estate Act sets out penalties for contraventions of certain sections of the Administration of Estate Act which makes no reference to section 18 of the Estate Act.,

PGA Inc); Ben Makume (Uncle), A Makume; Moeketsi Makume and Mpho Makume Gift. [6] At that meeting the office of the Master conveyed to those present, inter alia, first, that. [A] complaint was lodged by the grandson of the deceased TANK[SO MOEKETSI MAKUME, minor child, that he was not involved in the process of nomination and or

appointment of the applicant as the executor of the estate. " And that meeting was called to resolve the dispute in terms of section 18 [7] of the Estates Act.

[6] In addition, the deputy Master conveyed to those present at the meeting that the applicant would be removed as executrix since she was not exempted to furnish bond of security in terms of section 23(2)[8] of the Estates Act and as such a new executor would be appointed. The deputy Master nominated Fikile Mbatha from PGA Inc for the appointment9.

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[6] See minutes filed by the First Respondent, CaseLines 03-208.

[7] See quotation of the section from the First Respondent's report at para 8.3 on CaseLines 03 -173 "Section ofthe Act reads as follows:

The Master shall, subject to the provisions of subsection (3), (5) and (6). If he deems it necessary or expedient, by notice in the government Gazette, and in such other manner, as in his opinion, is best calculated to bring to the attention of the person concerned, call upon the surviving spouse, if any, the heirs of the deceased and all persons having claims against the estate to attend before him, or if more expedient for any other master or magistrate at the time and place in the notice for the papers of recommending to the master for appointment as executor or executors... ".

[8] Subject to the provisions of section twenty-five, every person nominated who has not been nominated by will to be an executor and every person to be appointed assumed executor shall be under like obligation of finding security unless: (a) he is the parent, child, or surviving spouse of the testator, or has been assumed by such parent, child, or spouse or

(b) he has been nominated by Will, executed before the first day of October 1913, or assumed by the person so nominated, and has not been directed by the will to find security; or

(c) he has been nominated by Will, executed after the first day of October, 1913, or assumed by the person so nominated., and the Master has in such well-being directed to dispense with such security; or

(d) the court shall otherwise direct:

Provided that if the estate of any such person has been sequestrated or if he has committed an act of insolvency or resides, or is about to reside outside the Republic, or, if there is any good reason, therefore, the master may, notwithstanding the provisions of paragraph (a)(b) or (c) refused to grant or sign and seal letters of executorship or to make any endorsement under section fifteen until he finds such security.

[9] See First Respondent's report, CaseLines 03-211 at para 6. "I request Fikile Mbatha from PGA Inc to take up the appointment as a fit ad proper person in her capacity as nominee of PGA in terms of Section I)".

[7] Being aggrieved by the master's decisions to remove her as executrix and her substitution by Fikile Mbatha[45] the applicant launched this application for an order reviewing and setting aside the said decisions. The first respondent is not opposing the

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4 A nominee by the deputy master though not appointed.

5 CaseLines 03-170.

application but has filed a report and the minutes [6] of the meeting of 20 January 2023, signed only by the office of the first respondent and not any of the attendees. The second respondent served and filed both notices to oppose and the answering affidavit. The third respondent is not opposing the application.

[8] The applicant contends that the second respondent has served her papers out of time without requesting condonation. [7] In addition, that the second respondent should not be accorded audience to defend the impugned decisions taken by the first respondent.

Issues for determination

[9] The issues identified for determination are as follows:

9.1. Failure by the second respondent to apply for condonation for late service of the opposing papers.

9.2. Implications of the first respondent's lack of participation in the lis.

9.3. Determination of the respondent's point in limine,

9.4. Whether the removal of the applicant and the appointment of the second respondent offended the Estates Act and PAJA.

Technical points.

Failure to apply for condonation.

[10] The applicant contends that the second respondent has filed her opposing papers late and has failed to apply for condonation for late filing of the said apers. Further that in the absence of the condonation application the court does not have the jurisdiction to

6 CaseLines 03-208.

7 See para 8 of the Applicant's Replying Affidavit, Caselines 03-121

consider the said opposing papers. [8] This contention was generally met with silence from the second respondent.

[11] I have noted that the applicant has raised the question of late service of the opposing papers in her replying affidavit as early as September 2022. The second respondent had opportunity to serve and file the application for condonation for the late filing of the opposing papers immediately thereafter. The first respondent has filed her heads of argument in October 2022 and has made no submission regarding condonation for the late filing of the opposing papers. The first respondent has further delivered her additional submissions in September 2023 and has still failed to address the question of condonation for the late filing of her papers.

[12] To the extent that the respondent has decided not to request condonation for the later filing of the papers I find such conduct to amount flagrant disregard of the rules [9] and cannot be countenanced by this court. To this end I decide that the said opposing papers should be struck off. That notwithstanding I will where appropriate, consider certain aspects or issues raised by the second respondent and more particularly if my conclusion is found wanting.

Non-participation of the first respondent.

[13] The applicant contended that the second respondent has not secured authorisation to defend the impugned decisions taken by the first respondent. Section 5 of PAJA, so it

8 Ibid.

9 Madlanga J having stated that in Turnbull-Jackson v Hibiscus Coast Municipality and Others 2014 (6) SA 592 (CC) (Turnbull-Jackson judgment) at para [24] that "[Tlhis court has in the past cautioned against non-compliance with its rules and directions. The words of Bosielo AJ bear repetition: I need to remind practitioners and litigants that the rules serve a necessary purpose. Their primary aim is to ensure that business of courts is run effectively and efficiently. Invariable this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive."

was submitted, envisages that the administrator who has personal knowledge of the facts upon which the impugned decisions are predicated should be a party opposing the review application and not a third party whose evidence will be based on hearsay. The application should therefore proceed on an unopposed basis. The respondent on the other hand contended that the application is being opposed and cannot proceed on the basis that it is unopposed.

[14] The second respondent contended further that she has a direct and substantial interest in the relief sought. In support hereof she made reference to the judgment in SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others and Nelson Mandela Metropolitan Municipality v Greyvenouw CC, [16] both which crystalised the importance of the party to be enjoined where the relief being sought would affect such a party. The applicant has indeed conceded this point that the second respondent was cited as she has direct and substantial interest in the outcome of the application. [17] But her participation, so goes the argument, is of a limited extent and should be relevant to the issues at hand.

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[16] 2004 (2) SA 81 (SE)

[17] See Caselines 03-122 at para 13.

[15] I find that whilst the above authorities by the second respondent, do countenance the importance ofjoining a party who will be affected by the order granted I find that such participation should and would not amount to usurping the powers and the duties of another party without such party's authorisation. In addition, the party would not be permitted to ride on the argument predicated on joinder as a ploy to introduce issues which are detached to the subject matters, or which are not directly relevant to the issues serving before the court.

[16] To the benefit of the second respondent there appears to be no attempt by the second respondent to usurp the powers of the first respondent or attempt to defend the impugned decisions of the first respondent. Instead, the second respondent advances arguments which suggest that the applicant should not have been appointed as an executrix from the beginning. This trajectory presents a new dimension before me and bear no relation with case launched by the applicant for the review of the impugned decisions of the first respondent. On a closer scrutiny the second respondent is challenging the initial decision of the first respondent in terms of which the applicant was appointed as an executrix. At this juncture no such decision/s exist, and the purported challenge is ill conceived and still born. In the alternative, the submissions by the second respondent will be well placed if presented to the first respondent to discourage Master from considering appointing the applicant.

Compliance with PAJA

[17] The points of law are raised by the second respondent received my attention as they would have been interrogated with or without the second respondent's submissions.
[18] Section $7(1)$ read with section 5(1) of PAJA enjoins a party intending to

challenge the decision of the administrator to institute judicial review proceedings without unreasonable delay and not later than 180 days after such a party becoming aware of the decision/action and reasons for it. Bearing in mind that giving reasons as echoed in PAJA is the fundamental feature of good public administration. The second respondent contends that the impugned decision was taken on 14 December 2021 when the first respondent conveyed to the applicant's attorneys that the letter of appointment is cancelled.

[19] The applicant in retort contends that the impugned decisions were taken on 20 January 2022 and the launching of the process was in July 2022 which was within 180 days as contemplated in section 7(1) of PAJA. The counsel for the applicant contends that the usage of the word cancellation may have been a typing error because it is inconsistent with the remainder of what the essence of the letter is, as the import of the letter relates to the complaint and the invitation to attend a meeting where decision will be taken. In any event, and as it is noted above, the letter refers to cancellation of the letter appointment and not letters of executorship and it further does not refer to the removal of the executrix.

[20] The first respondent's letter is characterised by paucity of details of the complaint submitted by the heir but invites the applicant to attend a meeting to discuss same. The fact that a decision will be taken at that meeting appears to be inconsistent with the statement that the letter of appointment is cancelled. Without the benefit of the first respondent filing papers and presenting submissions, it is left for me to interpret the

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[18] Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date.
(a) Subject to subsection 2(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection 2(a) have been concluded; or.
(b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected. To become aware of the action and the reasons.

essence of the apparent inconsistencies and/or ambiguity in the letter dated 14 December 2021

[21] The celebrated locus classicus judgment apropos interpretation of, inter alia, documents is Natal Joint Municipal Pension Fund v Endumeni Municipality[19] tells us that "[I]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. J There 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 sensible or unbusiness like results undermines the apparent purpose of the document.„

[22] There is confusion and or contradiction in the letter of 14 December 2021. First it is addressed to the applicant's attorneys and makes no reference to the applicant. Secondly it relates to the cancellation of appointment of the applicant's attorneys on behalf of the first respondent and not of the applicant. It further makes no reference to letters of executorship. There is no reference to the removal of the applicant. The draftmanship deployed in this letter did not brandish the traditional standard expected from the office of the Master. On a contextual interpretation the cancellation in the letter should have meant the suspension of the letters of executrix and not cancellation of appointment. It is

[19] 2012 (4) SA 593 (SCA).
[20] Ibid at para [18].

assumed that there is not letter of appointment issued to the applicant's attorneys where they were to act on behalf of the Master of the high court.

2 [23] The comfort in the above assumption[10] finds resonance with the reading of what transpired in the meeting of 20 January 2022. First, there is no reference to

10 Without such assumption one would forever be hard at work twing to decipher the objective which was intended to be conveyed in the letter.

2"Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action, may, within 90 days after the date on which that person became aware of the action, or might reasonably have been expected to have become aware of the action,

cancellation of the letter of appointment in terms of section 18 of the Estates Act which is quoted in that letter. In fact, section 18 is applicable before an executor is appointed and not after the appointment. Second, it does not appear exfacie the letter itself as to what are the basis of the complaint by the heir who was still a minor. The invitation for a discussion would have been a place where reasons for the intended cancellation would have to be considered. This would have followed section of PAJA in terms of which the reviewable decision should be accompanied by the reasons.

[24] Thirdly, the letter invites the applicant to attend the meeting where a decision will be taken. It is ineluctable that though the first respondent had the intention to decide on the removal of the applicant and not cancellation of the letter of appointment, the decision was inchoate and to be finalised at the scheduled meeting. If the decision was final, there would not be a need for the applicant qua the executrix to be invited to attend the meeting where a decision would be taken in terms of section 18 of the Estates Act. [11] Consistent herewith, a decision was indeed taken at the meeting of 20 January 2022 that the applicant was removed as an executrix and Bheki Mbatha be appointed as an executor. The essence of the contents of the letter and the meeting of 20 January 2022 should be considered conjunctively and not be divorced from each other. One should not just scrutinise the letter with a blinkered eye but should interpret it with full context. To this end the interpretation asserted by the applicant appears to be rational and it is my conclusion that the impugned decisions were taken at the meeting of 20 January 2022.

[25] In addition to the aforegoing section 7 of PAJA read with section 5 of PAJA refers to the furnishing of both the decision and the reason for the decision. Where reasons are not

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request that the administrator concerned furnish written reasons for the action."

11 Although in a different context in Bhugwan v JSE Limited 2010 (3) SA 35 GSJ at para [28] it was stated that "In my view, the letter, properly construed linguistically, was to give the applicant an indication of information in possession of the respondent, which would tend to indicate he did not comply with the requisite requirements. I am fortified in this linguistic interpretation, by the fact that the letter invites further discussion of the matter. It does not purport to this to close the door after a final and determinative decision has been made."

provided, the affected party is entitled to those reasons which must be provided within a period of 90 days of the administrator's decision. The letter referred to a complaint without any details and the applicant would be entitled to reasons thereof prior instituting the review process. Section 5 of PAJA provides: That any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action, may, within 90 days after the date on which that person become aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish reasons for the action. It would have been logical to infer that reasons underpinning the complaint would be availed in the

January 2022 discussion meeting.[12]

Application became moot.

[26] The second point in limine raised by the second respondent was that the application has become moot. This is predicated on the submission that the winding up process is almost complete, the first respondent having already issued a certificate in terms of section 35 which confirms that distribution should be done. To this end it would be unreasonable to proceed and appoint a new executor only to finalise the administration of the estate. On being confronted with the possibility that the conduct of the executor amounted to contempt of court the respondent's counsel contended that the executor was executing her duties as prescribed by the statute and further that this was in the interest of the minor child who was the beneficiary of the estate.

12 This find resonance with the quote from the constitutional courtjudgment in City ofCape Town v Aurecon South Africa (Pty) Ltd2017 (4) SA 223 (CC) ' that the clock starts to run with reference to the date on which the reasons for the administrative action became known (or ought to have become known) to an applicant". Also referred to in Sasol Chevron Holdings Limited v Commissioner for South African Revenue Service [2023] ZACC 30 (3 October 2023), where the court held that "1T]hus, section 7(1) explicitly provides that the proverbial clock begins to tick from the date on which the reasons for the administrative action became known (or ought reasonably to have become known) to the applicant... ".

[27] The applicant contended that the conduct of the respondent borders on contempt of court as she continued with the winding up of the estate in face of the pending application challenging her appoint. In addition, the argument continued, the second respondent appears to have not followed the Master's directions and prescripts and this is predicated on the suspicion that the second respondent may have proceeded to advertise the L&D Account without prior authorisation by the first respondent. In any event, so it was submitted, the first respondent was instructed to stay the winding up process pending the finalisation of the adjudication process.

[28] The second respondent was further invited to submit evidence to prove that indeed she was authorised to advertise the L&D Account. On being asked by the court why the second respondent appears not to have procured the approval of the first respondent prior advertising the account counsel for the second respondent contended that it is not a requirement that the executrix requires the approval from the first respondent prior the advertisement of the L&D Account. This appears not to be correct as section 35[13] of the Estates Act in essence requires the Master to first examine the L&D Account before its advertisement.

[29] Regarding the question of mootness, the constitutional court in Solidariteit Helpende Hand NPC and Others v Minister of Cooperative Governance and Traditional Affairs[14] held that:

> [10] The general principle is that a matter is moot when a court's judgment will have no practical effect on the parties. This usually occurs where there is no longer an existing or live controversy between the parties. A court should refrain

13 Section 35(4) provides that "Every executor's account shall, after the Master has examined it, lie open at the office of the Maste., and ifthe deceased was ordinarily resident in any district other than that in which the Office of the Master situate, a duplicate thereof shall lie open at the office of the magistrate of such other district for not less than twenty-one days, for inspection by any person interested in the estate."

14 (104/2022) [2023] ZASCA 35 (3 1 March 2023)

> from making rulings on such matters, as the court's decision will merely amount to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical and have no direct effect; one of the reasons for that rule being that a court's purpose is to adjudicate existing legal disputes and its scarce resources should not be wasted away on abstract questions of law.
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> [11] In President of the Republic of South Africa v Democratic Alliance, 2020(1) SA 428 CC at para 35 the Constitutional Court cautioned that 'courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly available to them and in circumstances where no actual purpose would be served by that decision, now '.

[30] The contention that my decision may be moot is inconsistent with second respondent's submission that the winding up is <u>almost</u> complete, (emphasis added). What appears to be completed is the advertisement in terms of section 35, which appears not to have been authorised, and the distribution is still outstanding. In any event the master's office has already instructed the second respondent to stay the winding up process. This point is limine is therefore unsustainable and falls to be dismissed.

<u>Merits</u>

[31] The applicant contends that the first respondent's decisions are susceptible to be reviewed and be set aside because of irregularities as set out below.

Error of law

[32] First, the provisions of section 18 of the Estates Act do not sanction the decision taken by the first respondent. Further that section 18 of the Estates Act provides

circumstances under which the first respondent may exercise his discretionary powers to nominate and appoint an executor. [27] The decisions taken by the first respondent are not

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[27]
Proceedings on the failure of nomination of executor or on death, incapacity or refusal to act, etc

(l) The Master shall, subject to the provisions of sub-sections (3), (4), (5) and (6)-

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

(b) if the whereabouts of any person so nominated to be sole executor or of all the persons so nominated to be executors are unknown, or if such person or all such persons are dead or refuse or are incapacitated to act as executors or when called upon by the Master by notice in writing to take out letters of executorship within a period specified in the notice, fail to take out such letters within that period or within such further period as the Master may allow; or

(c) if, in the case of two or more persons being so nominated to be executors, the whereabouts of one or some of them are unknown, or one or some of them are dead or refuse or are incapacitated to act as executors or when so called upon by the Master fail so to take out letters of executorship- and in the interests of the estate, one or more executors should be joined with the remaining executor or executors; or

(d) if the executors in any estate are at any time less than the number required by the will of the testator to form a quorum; or

(e) if any person who is the sole executor or all the persons who are executors of any estate, cease for any reason to be executors thereof; or

predicated on any of those limited circumstances and the decisions were therefore vitiated by error of law and the first respondent was not authorised to do so by the said provision. In addition, so it was argued, section 18 of the Estates Act is applicable before the appointment of the executrix and in this instance the executrix was already appointed.

Procedural unfairness

[33] Secondly, the reason for the removal of the applicant as executrix is said to be based on the contention that the applicant is not exempted from providing bond of security in terms of section 23 [28] of the Estates Act. The applicant's counsel contends that it is not provided that only parties exempted to provide bond of security are eligible to be appointed as executor or executrix. Bar that, she was not requested to provide the bond of security and her refusal being the basis for the removal as executrix. In fact, so argued the executrix's counsel, the applicant made an offer to submit the bond of security and

the offer was rejected by the first respondent. This is a clear indication that the first respondent

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(f) if, in the case of two or more persons who are the executors of any estate, one or some of them cease to be executors thereof, and in the interests of the estate, one or more executors should be joined with the remaining executor or executors,

appoint and grant letters of executorship to such person or persons who he may deem fit an proper to be executor or executors of the estate of the deceased, or, if he deems it necessary or expedient. by notice published in the Gazette and in such other manner as in his opinion is best calculated to bring it to the attention of the persons concerned, call upon the surviving spouse (if any), the heirs of the deceased and all persons having claims against his estate, to attend before him or, if more expedient, before any other Master or any magistrate at a time and place specified in the notice, for the purpose of recommending to the Master for appointment as executor or executors, a person or a specified number of persons.

[28] 23 Security for liquidation and distribution

(l) "Subject to the provisions of section twenty-five, every person who has not been nom inated by will to be an executor shall. before letters of executorship are granted, or signed and sealed, and thereafter as the Master may require, find security to the satisfaction of the Master in an amount determined by the Master for the proper performance of his functions: Provided that if such person is a parent, spouse or child of the deceased, he shall not be required to furnish security unless the Master specially directs that he shall do so."

did not properly give effect to the law by requiring bond of security from the applicant and or her attorneys. The process followed was therefore replete with signs of unfairness.

Bias

[34] The substitution of the applicant, so went the argument, was also biased as there are no facts which were put before for consideration as the basis for selecting a representative from the second respondent's firm. In addition, despite the nomination of Fikile Mbatha at that meeting the letters of executorship is in respect of the second respondent who was not nominated and appointed on 20 January 2022. This is evidence of biasness on the part of the first respondent. It does not appear ex facie the report and the minutes as to the basis upon which the second respondent was appointed. In addition, so went the argument, the applicant was represented by an attorney and if the applicant

was unable to furnish bond of security her attorneys would have been able to submit same.

Empowering provision.

[35] The applicant further submitted that the removal of the executor is regulated by section 54 of the Estates Act. The provisions of section 54 are etched in peremptory terms, (not permissive) and non-compliance thereto should be visited with nullity. The said section makes provisions for both procedures to be followed and set out substantive requirements. From the procedural requirements, so went the argument, the first respondent is enjoined in terms of section 54(2) to forward by registered post a notice setting forth reasons for such removal and informing such a party to apply within 30 days for an order restraining the Master from removing him. This was not complied with and therefore the applicant was denied audi alteram partem. 29

[36] Substantively, the removal process is predicated on the provisions of section 1)(b) none of the factors listed appears to have been considered by the first respondent. In addition, the first respondent did not comply with the provisions of the section 54(2) of the Estate Act in terms of which a party is entitled to 30 days to challenge the decision and reason for the removal of the applicant.

[37] The decision was irrational as it is not clear whether the removal was based on the complaint which was raised by the heir (as per letter dated 14 December 2021) who was minor alternatively removed on the basis that the applicant could not furnish security.

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[29] Though the respondent contended in her Heads of Argument at para 27, CaseLines 04-109, that "[H]aving regard to the fact that Section 54(2) of the Act does not require any such a right to a fair hearing, but rather notice that the removed executrix (in this case the applicant) may within a period of

30 days apply to a court for an order restraining the Master from removing him/her from hie or her office, it is submitted that the Master has complied fully with the obligations imposed on him.

[30] 54 Removal from office of executor.

(1) An executor may at any time be removed from his office(a) By a court

(b) By the Master-

(i) If he has been nominated. By a will and that will has been declared to be void by the court or. Has been revoked, either wholly or insofar as it relates to his nomination, or if he has been nominated by Will and the masters of the opinion that the will is for any reason invalid; or.

(ii) if he fails to comply with a notice under section 23 (3) within the period specified in the notice or within such further period as the Master may allow; or (iii) if he or she is convicted, in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged instrument or perjury, and is sentenced to imprisonment without the option of a fine, or to a fine exceeding R2 000; or (iv) 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; or

(v) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master; or (vi) if he applies in writing to the Master to be released from his office.

(2) Before removing an executor from his office under subparagraph (i), (ii), (iii), (iv) or (v) of paragraph (b) of subsection (1), 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.

Legal analysis and evaluation

[38] The legal principles relating to adjudication of reviews in terms of PAJA enjoins me to defer to the guidance set out by the Constitutional Court in AllPay Consolidated Investments Holdings (Pty) Ltd and Others v ChiefExecutive Officer, South African Social Security Agency and Others,[31] at para 28, where it was held that "[T]he proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground ofreview under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviation from the legal requirements by linking the question of compliance to the purpose of the provision, before concluding that a review and the PAJA has been established.„

[39] The applicant adduced evidence which demonstrate that the first respondent invoked section 18 of the Estates Act as the basis for her decision which section does not sanction the decision taken. It is trite that invoking a wrong empowering provision to

locate an administrator's authority to act or decide will be visited with nullity. If reference to an incorrect empowering provision was inadvertent then the decision would not necessarily be vitiated.[33] In this case the first respondent chose not to take the court into her own confidence and adduce evidence which may unsettle or upset the ineluctable inference that the invocation of an incorrect empowering provision was not inadvertent

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[31] 2014 (1) SA 604 (CC)

[32] Though the judgment relates to a procurement dispute it is referred to on the basis of parity of reasoning. [33] See Galgut J in Latib v Administrator, Transvaal 1969 (3) SA 186 (T) where the administrator came forward and stated that the reference to the incorrect empowering provision when a notice was issued was a mistake court held that "[I]t seems clear, therefore, that, where there is no direction in the statute requiring that the section in terms ofwhich proclamation is made should be mentioned, then, even though it is desirable, nevertheless, there is no need to mention the section and, further that, provided that enabling statute grants the power to make the problem nation, the fact that it is set to be made under wrong section would not invalidated the notice. " At para190-1. In Minister of Education v Harris 2001 (4) SA 1297 at para18, the constitutional court held that where the administrator referred to an incorrect provision several times as his authority for a certain decision that it was cited with aforethought and a decision pursuant thereto is invalid.

but vitiated by a blunder on her part. In any event the first respondent has failed even to comply with the same section 18 of the Estates Act. Those who attended the meeting are not as envisaged by section 18 of the Estates Act and further procedures to convene the meeting were not complied with. The submissions by the applicant do correctly, as shown hereunder, implicates the provisions of sections 6(2)(a)(iii), 6(2)(b), 6(2)(d), 6(2)(e)(i) of

PAJA.34

[40] The correct empowering legislative provision for the removal of executors is section 54 of the Estates Act and the first respondent was derelict in her duties not to comply therewith and thereby committed reviewable actions as contemplated in subsections of section 6 referred to above.

[41] There is also a clear demonstration of bias as there are no reason advanced to justify why Bheki Mbatha and or second respondent was preferred to the applicant or the

applicant's attorneys both of whom were not afforded opportunity to furnish the bond of security.[35] Madlanga J in Turnbull-Jackson judgment[36] stated at para [30] that " ... [T]he Constitution guarantees everyone the right to administrative action that is procedurally fair. Section 6(2)(a)(iii) ofPAJA, which is legislated in terms of section 33(3) of the

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[34] 6 Judicial Review of administrative action

(2) A court or tribunal has the power to judicially review an administrative action if—
(a) The adminisfrator who too it-

(iii) Was biased or reasonably suspected of bias.
(b) A mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c)…
(d) The action was materially influence by an error of law;
(e) The action was taken-
(i) For a reason not authorised by the empowering provision;

35 The first respondent in the minutes have stated that "after deliberations, the Master requested or decided that a representative of PGA.. "35 be appointed. Further that on the basis of the decision taken in the meeting, proceeded and recalled the letter of appointment in favour of the applicant and appointed the new' executor who is a nominee of PGA Inc. ' ,36 See note 15.

Constitution to give effect to, inter alia, the right contained in section 33(1) of the Constitution, makes administrative action taken by administrator who was biased or reasonably suspected of bias " susceptible to review. Whether the administrator was bias is a question offact. On the other hand, suspicion of bias is tested against the perception ofa reasonable, objective and informed person. " The facts set out by the applicant fortifies the contention that the provisions of section 6(2)(a)(iii) are implicated.

Remedy

[42] The court is endowed with wide discretion in terms of Section 8 PAJA to order any just and equitable remedy for the violation of the right to just administrative action. Section 8(1)(c)(ii)(a) makes a provision that the court may also substitute an administrative action with its own decision. This should be done only in exceptional circumstances. The Constitutional Court in Trencon Construction (Pty) Ltd v Industrial

Development Corporation of South Africa Limited and Another[15] (Trencon 's judgment) considered the test to be applied to determine what are exceptional circumstances. [16]It was noted, however, that the remittal is always almost a prudent and proper course. [17] The court further held that it should be considered whether a court was in a good position as the administrator to make the decision and whether the decision was a foregone conclusion are two factors that had to be considered cumulatively. Other relevant factors include delay, bias, or incompetence on the part of the administrator. Further that the

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ultimate consideration is whether a substitution order is just and equitable [18]

[43] Whilst the administrator appears to have been biased in favour of the second respondent's firm it would be prudent that the matter be remitted to the administrator to make a further appointment and same to be determined, inter alia, after considering the value of the assets for the purposes of furnishing the requisite bond of security. To avoid possible conflict, the administrator may consider appointing a legal practitioner being nominated by the LPC or appoint any other person whose appointment should be impartial and objective. The evidence of bias in favour of Bheki Mbatha and absence of explanation why the second respondent was ultimately appointed demonstrates that such appointment was tainted and should therefore not be considered for the appointment. Allegations of misdemeanour or misrepresentation by the applicant prior her appointment should also weigh against her for consideration in the appointment. This also aggravated by civil proceedings which had to be launched against her. The applicant

15 20156) SA 245 CC.

16 See also e.tv (Pty) Ltd v Minister of Communications and Digital Technologies and others; Media Monitoring Africa and Another v e.tv. (Pty) Limited and Others [20221 ZACC 22 at para 90 where the court held that "[I]t is well-established principle that courts should "be reluctant to substitute that decision for that of the original decision maker", save for the appropriate or exceptional circumstances. This court has endorsed the decision in Johannesburg City Council where it was held ' [t]hat the ordinary course it to refer back because the Court is slow to assume and a discretion which has by statute been entrusted to another tribunal or functionary."

17 See Trencon's judgment at para [42].

18 Ibid at para [47].

having sought the relief that the issue of appointment should, as an alternative, be remitted to the office of the first respondent for reconsideration.

Other issues

[44] Since the minor is involved in the lis the court is enjoined to ensure that every effort is made to prioritise his interest. The following issues need to be interrogated by the new executor to be appointed without incurring unnecessary legal costs which may have to be borne by the legal representative whose service may be found to be wanting or questionable. The issues raised herein could have probably been clarified by examining the vouchers attached to the L and D Account which were not made available to this court.

[45] First, it is noted from the L and D Account that a Trust was established at a fee of R46 000.00 which appears to be exorbitant if it is for the establishment of a family trust. Second, though a Trust was established there is no reference thereto under Distribution Account in terms of which it would have been stated that the Trust will receive assets on behalf of the beneficiary. It is therefore not clear why the Trust was established. Thirdly, the applicant has complained theft of funds in the business of the deceased which the second respondent alleged to have investigated or is still investigating but the L and D account is silent with regards to what happened to the business and fails to account of the income which was generated by the business since the passing of the deceased. There is further reference to payment of R280 000.00 to a person named Mpho which is set out together with several invoices for legal services without any clarity.

[46] Though both applicant's attorney and second respondent's attorney have rendered service as attorneys for the executrices and they are entitled to payment for their services. But the new executor(s) should ensure that the invoices (past and future, if any) are

subjected to the necessary and appropriate taxation/assessment bearing in mind that the estate is intended to benefit the minor.

Costs

[47] Whilst the second respondent was entitled to participate in the lis it is perspicuous that the lis was specifically about the decisions taken by the first respondent in removing the applicant and appointing the second respondent. The second respondent's arguments implicate the decision of the first respondent in appointing the applicant which decision was withdrawn by the first respondent at the meeting of 20 January 2022. The issues raised by the second respondent were therefore in general irrelevant to the subject matter of the lis and would therefore be unjustifiable if costs associated therewith burdens the estate.[19]The second respondent was also aware well in time that the opposing papers were out of time but decided not to apply for condonation.

[48] Ordinarily blame should be attributed to the attorneys of the second respondent but litigants should not be spared especially where such a litigant is also a legal practitioner. Madlanga J[20] after observing that courts are reluctant to penalise litigants for the tardiness of their legal representative quoted with approval the Appellate Division in Saloojee and Another, MIO v Minister ofCommunity Development 1965 (2) SA 135 (A) at 138E, where it is stated that "[T]here is a limit beyond which a litigant cannot escape the results of his attorneys, lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation offailure to

19 See applicant's Heads of Argument, CaseLines 04-84 at para 16 the deceased estate should not be burdened with the cost of the unlawful opposition and the purported defence for the administrative action... ".

20 Ibid at note 15, at para 26

comply with the Rules of Court, the litigant should be absolved from the normal consequences ofsuch a relationship.„

[49] To this end the estate must therefore not be liable for the costs of opposing this application.

Order

[50] I make the following order:

1. The decision of the first respondent to remove the applicant is reviewed, declared invalid and set aside,
2. The decision of the first respondent to appoint the second respondent is reviewed, declared invalid and set aside,
3. The first respondent is ordered to appoint an executor or executrix in the estate of the Late Mpho Gived Makume.
4. The statements of fees for both applicant and second respondent for services rendered on behalf of the estate shall be considered by the relevant authority for assessment and or taxation, whichever applies.
5. The second respondent is ordered to pay the applicant's legal costs de bonis propriis.
6. The Estate of the Late Mpho Given Makume shall not be liable for any party's legal costs associated with this application.

MOKATE VICTOR NOKO
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 10:00 on 5 October 2023.

Appearances

For the Applicant: Adv M Desai
Sandton Chambers

Attorneys for the Applicant: Shamer Pather Attorneys Inc c/o
Preshnee Govender Attorneys
Johannesburg

For the Second Respondent:

Attorneys for the Respondent

Date of hearing: 5 September 2023
Date of judgment: 5 October 2023

FC Nwanezi Agbubga
Attorneys Johannesburg