

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 32145/2019

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

.....

W G LA GRANGE

10 OCTOBER 2023

In the matter between:

LERUMA EMMANUEL THOBEJANE

Applicant

and

THE MASTER OF THE HIGH COURT, JOHANNESBURG

First Respondent

DALE BARRATT N.O.

Second Respondent

JUDGMENT

LA GRANGE AJ

[1] This is an application for the review and the setting aside of what the applicant terms “*the written directive issued by the 1st respondent, the Master of the high court to the applicant, Leruma Emmanuel Thobejane on the 29th July 2019*”. Whilst the applicant frames the relief to set aside the decision of the Master as “*pending finalisation of legal proceedings to be instituted by the 1st respondent... and/or the 2nd respondent against the applicant*”, it is final in effect.

[2] The basis for the applicant's claim is encapsulated in paragraphs 69, 70, 79 and 85 to 88 of the founding affidavit in the following terms:

“69. *The 1st respondent therefore upon my removal as an executor and in the absence of an order directing me not to retain my executor's fee, does not have authority to issue the directive it issued on the 29th July 2019, ordering me to pay double the amount I retained as an executor's fee.*

70. *The 1st respondent having failed to comply with the provisions of the Act which requires the 1st respondent to assist me in the distribution of the estate by endorsing transfer of the documents, does not have authority to then issue directives that I have not distributed the estate and therefore I must refund the executor's fee in double.*

...

79 *The 1st respondent has no power to determine as to whether I am entitled to remuneration as executor or not and therefore has no authority to direct that I pay back what I have retained as an executor's fee because payment of executor's fee is not depended [sic] on the wishes of the 1st respondent but on whether I have carried [sic] my duties as an executor in compliance with the law.*

...

85. *The 1st respondent therefore is in competent to issue the directive it issued.*

86. *The 1st respondent lacks the necessary legal authority and locus standi to issue the directive that it has issued.*

87. *The 1st respondent's directive is therefore irrational and an abuse of power.*

88. *There is no alternative remedy available to me other than approaching court by way of this application to have the 1st respondent's directive reviewed and set aside." [emphasis added]*

[3] Plain from the foregoing is the fact that the applicant seeks to review and set aside the first respondent's directive to the applicant contained in the first respondent's letter of 29 July 2019 on the basis that the first respondent lacked authority to issue the directive. The directive was that the applicant pay double the amount of R405 151.34 retained by him as executors fees. Also apparent from the foregoing is the fact that the applicant considered the first respondent's directive to be rooted in what he considered to be a mistaken view held by the first respondent that she has the power to determine whether or not the applicant is entitled to remuneration as an executor.

[4] Whilst only the last two paragraphs of the letter go to the heart of the applicant's complaint of a lack of authority, it is appropriate nonetheless to quote from the letter in full; the directive at the end of the letter is emphasised:

"The above matter refers.

The following is placed on record:

1. *"Please further refer to Section 35(12) of the Administration of Estates Act 66 of 1965 that states:*

“When an account has lain open for inspection as hereinbefore provided and-

- (a) no objection has been lodged;*
- (b) an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection, if necessary, as provided in subsection (11), and no application has been made to the court within the period referred to in subsection (10) to set aside the Master's decision; or*
- (c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the court within the said period,*

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodged with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration of registration relating to such distribution, or lodge with the Master a certificate by the registration officer or a conveyance specifying the registrations which has been effected by the executor;

2. *Section 51(4) of the Act 66 of 1965 further states that:*

“An executor shall not be entitled to receive any remuneration before the estate has been distributed as provided in section 35(12), unless payment of such remuneration has been approved by the Master”

The Master has never received any written request for early payment of the remuneration from yourself and you clearly did not have the Master's consent to take the executor's fee in the amount of R405 151.34.

3. *A letter of demand was sent to yourself on 14 March 2019 by Fox & Barret Attorneys with the instruction that you should make payment of the*

full executor's remuneration in the amount of R405 151.34 to the estate late account.

4. *To date you have failed to pay over any money to the Master or to deposit this amount into the estate late banking account under section 28 under this Act. In terms of section 46 of Act 66 of 1965:*

"the executor shall pay into the estate an amount equal to double the amount which he has so failed to pay over or to deposit"

5. *In terms of section 102(1)(h) and (iv) of Act 66 of 1965 any executor who contravenes or fails to comply with the sections as mentioned above, shall be guilty of an offence and liable on conviction – to a fine or to imprisonment for a period not exceeding six months.*

You are hereby instructed to repay double the amount of R405 151.35 thus a claim for the amount of R810 302.70 in terms of Section 46 quoted above, into the Estate late bank account with details:

Account holder: Estate late VG Beetge

Bank: Standard Bank

Account number: 31 008 6280

Branch code: 001 206

Payment must be effected within 14 days from date of this letter."

- [5] The background to the directive issued by the first respondent and the application brought by the applicant is briefly as follows:

- 5.1 In late 2016 Mr Beetge passed away nominating the applicant as executor of his estate in his last will and testament; pursuant hereto the applicant was appointed as executor.

- 5.2 Certain of the late Mr Beetge's heirs objected to the applicant's appointment as executor, and this ultimately gave rise to an opposed court application for the removal of the applicant.
- 5.3 In August 2017, and prior to the hearing of the opposed application for his removal in October 2017, the applicant submitted a liquidation and distribution account in relation to the late Mr Beetge's estate, simultaneously lodging transfer documents in relation to certain of the immovable property owned by Mr Beetge.
- 5.4 In September 2017 the first respondent informed the applicant that an objection had been lodged against his liquidation and distribution account.
- 5.5 On 30 October 2017, subsequent to the hearing of the opposed application which had been set down for the week of 16 October 2017, but prior to written judgment being handed down in November 2017, the applicant paid to himself executor's fees in the amount of R405 151.34 from available funds in the estate late bank account under his control.
- 5.6 Subsequent to the removal of the applicant as executor, the applicant transferred the remaining funds in the estate late bank account in the amount of R110 336.87 (being the remaining money after the retention of his fees) to the second respondent, who was the newly appointed executor in the place of the applicant (following his removal).
- 5.7 On 16 November 2018 a letter was addressed to the applicant (which he denies receiving) seeking the following clarity from him:

“We take note that the full executor's remuneration was paid to your office on 30 October 2017, in terms of section 51(4) of the Administration of Estate Act 66 of 1965, please provide our office with written consent from the Master in this regard, as an executor is only entitled to receive remuneration after the estate has been distributed, as provided for in section 34(11) or section 35(12), after the account

has lain for inspection, unless payment of the remuneration has been approved in writing by the Master.”

5.8 On 27 November 2018 the applicant seemingly responded to the letter (a copy whereof was not included by either party in the application papers), triggering yet a further letter addressed to the applicant from Fox & Barratt Attorneys dated 14 March 2019 in which the following was said:

- “1. We refer to our letter dated 16 November 2018, and your letter dated 27 November 2018 we refer you to paragraph 3 of our letter.*
- 2. We draw your attention to the Administration of Estates Act, 66 of 1965, which states that the executor will only be entitled to take his fee once the Master approved the Liquidation and Distribution account, no objection was made against the account and the Master authorises distributions to creditors and heirs. Only after all the creditors and heirs are paid in full may the executor pay his fee.*
- 3. ... You, as the previous executor, were not entitled to take the executor's fee of R405 151.34.*
- 4. ...*
- 5. Please make payment of the full executor remuneration in the amount of R405 151.34 to the estate late account, details of which are...”*

5.9 This was followed by the letter from the first respondent of 29 July 2019, quoted in full above, referring to the provisions of the Act, the demand by Fox & Barratt Attorneys and the failure by the applicant to return the fee of R405 151.34 paid to himself.

[6] In the first respondents' answering affidavit, she refers to the same provisions of the Administration of Estates Act, 66 of 1965 (the Act) as she did in her letter of 29 July 2019 (being sections 35(12) and 51(4)) and concludes as follows at paragraph 37 of the answering affidavit:

"It is common cause between the parties that both these events triggering payment have not occurred. In other words (a) the estate of the deceased has not been distributed and (b) there has been no prior approval made by the Master authorising payment to the applicant."

[7] In court the applicant, who represented himself, conceded that the events triggering an entitlement to payment under the Act had in fact not occurred. He also conceded that the first respondent's letter of 29 July 2019 simply recorded this position, viz. that the events triggering an entitlement to payment of executor's fees had not occurred and that, in light thereof, the applicant's payment to himself of executor's remuneration was premature. The admission, correctly made, stands in contrast to the approach adopted by the applicant in his application.

[8] That an executor becomes entitled to remuneration only once the estate has been distributed as envisaged in section 35(12) of the Act, absent approval of earlier payment by the first respondent in terms of section 51(4) of the Act, was also recently confirmed by the Supreme Court of Appeal in *Jones v Pretorius N.O.* 2022 (1) SA 132 (SCA) at paragraphs [6] and [7].

[9] Since there is no dispute that the events as contemplated in sections 35(12) and 51(4) had not occurred, it is common cause that the applicant was not entitled to payment of executor's fees. Not only was the applicant not entitled to retain estate funds in respect of fees that were not due, but the applicant has not disputed that he failed to make payment (on demand by Fox & Barrett or the first respondent) into the estate late Beetge bank account of the remuneration he paid to himself. There can be no dispute that he was obliged to do so under the Act, and that his failure to do so (despite demand for payment) was (and remains) in contravention of the Act.

[10] In issue remained whether the first respondent had the legal authority to invoke section 46 of the Act in these circumstances. The applicant requested an opportunity to file further written submissions subsequent to oral argument to address this point. I granted the applicant an opportunity to do so and permitted the first respondent and opportunity to respond thereto in writing.

[11] In his supplementary written submissions the applicant advanced the proposition that the first respondent had incorrectly interpreted the provisions of section 46 of the Act as granting her powers to issue the directive of 29 July 2019 when in fact no such powers were contemplated therein. The applicant's argument was premised on two grounds:

11.1 Section 46 does not expressly make reference to the repayment of money paid from the estate account as executor's remuneration prior to the distribution of the estate in terms of section 35(12), indicating an intention to the contrary; and

11.2 It is a requirement of section 46 that the directive must be issued by the first respondent to a person who is an executor at the time when the directive is issued in terms of section 46.

[12] Section 46 of the Act provides as follows:

“Any executor who fails to pay over any money to the Master or to any other person or to deposit it in any banking account under section twenty-eight when required by or under this Act to do so ... shall pay into the estate an amount equal to double the amount which he has so failed to pay over or to deposit ... Provided that the Master may, on good cause shown, exempt any executor, in whole or in part, from any liability which he may have incurred under this section.”

[13] The purpose of the section is plainly to act as a deterrent to executor's intent on the misapplication of money or assets that fall due to the estate.

- [14] On a plain reading of the section it is triggered whenever the executor retains money (“*fails to pay over any money*”) that he is not entitled to retain under the Act (because he is “*required by or under this Act*” to pay it over to the Master or to any other person or to deposit it in the estate late bank account). The wording is broad enough to encompass any unlawful retention under the Act by an executor as indicated by the words “*when required by or under this Act to do so*”. It follows that there is no need for section 46 expressly to make reference to the repayment of executor’s remuneration unlawfully arrogated by the executor prior to the distribution of the estate in terms of section 35(12) (and without authority in terms of section 51(4)).
- [15] The argument advanced by the applicant to the effect that section 46 ought only to be applied to a person who is an executor at the time when the directive is issued imports, in my view, a reading of the provision that is not supported by the language or the intention of the legislature. The operation of the section is triggered by the unlawful retention by the executor, indicated by the language “[*an*] executor who fails to pay...”. Conversely, there is nothing in the section to suggest that it ought only to apply in the event that, at the time the directive is issued, the executor yet holds that office. Moreover, to hold otherwise would be to thwart the intention of the legislature that the section should act as a deterrent to executor’s intent on the misapplication of funds of the estate. That objective would only be achieved in the event that, section 46 can be invoked against an executor who improperly retained funds (at the time of holding that office).
- [16] Whilst I am mindful of the fact that section 46 of the Act is punitive in nature and that, in the absence of indications to the contrary, a more lenient interpretation should be favoured, the plain language of the provision does not (in my view) leave any scope for an attack on the first respondent’s authority to issue the determination in terms of section 46 of the Act. (See *Feldman v Migdin N.O.* 2006 (6) SA 12 (SCA) at paragraph [22]).
- [17] I note that the first respondent has raised a number of points regarding the reviewability of the first respondent’s decision, but in light of the findings I have made, it is not necessary for me to consider these.

[18] Accordingly I find that the applicant has failed to demonstrate that the first respondent lacked the legal authority to direct him to make payment in the amount of R810 302.70 in the estate late Beetge bank account. The applicant has not demonstrated any other ground for review and the application ought to be dismissed with costs.

[19] In the circumstances, the following order is granted:

1. The application is dismissed with costs.

W G LA GRANGE

Acting Judge of the High Court
Gauteng Division, Johannesburg.

The judgment was handed down electronically by circulation to the parties and or parties representatives by email and by being uploaded to Caselines. The date for the hand down is deemed to be the 10 October 2023.

Heard: 04 October 2023

Judgment: 10 October 2023

Appearances

For the Applicant: Mr L.E Thobejane

Instructed by: Botha Massyn & Thobejane Associated Attorneys

For the Respondent: Adv K Van Heerden

Instructed by: State Attorneys