

REPUBLIC OF SOUTH AFRICA



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

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

..... 04/12/2023
SIGNATURE DATE

CASE NO.: 037606/2022

In the matter between:

PORTIA NOMSA MTHIMUNYE

First Applicant

THEMBA MTHIMUNYE

Second Applicant

NTSOHO SHIMANGA

Third Applicant

and

EROL BONGI MTHIMUNYE

First

Respondent

MASTER OF THE HIGH COURT

Second Respondent

JUDGMENT

WANLESS AJ

Introduction

[1] This is an opposed application in terms of which Portia Nomsa Mthimunye, adult female (*"the First Applicant"*), Themba Mthimunye, adult male (*"the Second Applicant"*) and Ntsoho Shimanga, adult female (*"the Third Applicant"*) seek an order in terms of subsection 54(1)(a)(v) of the *Administration of Estates Act 66 of 1965* (*"the Act"*) that Eroll Bongi Mthimunye, adult male (*"the First Respondent"*) be removed as the executor of the estate of Mlungiswa Phillip Mthimunye (*"the deceased"*). The Master of the High Court is the Second Respondent in the application. The Second Respondent does not oppose the relief sought by the Applicants in this application. Thus, the Second Respondent has played no part in this application and, regrettably, has not come to the assistance of this Court in the resolution thereof.

[2] It is expedient in this particular matter to have regard to the applicable principles of law prior to applying the facts as set out in the application papers placed before this Court.

The law

[3] Subsection 54(1)(a)(v) of the Act reads as follows:

"54 Removal from office of executor

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

(a) by the Court:

(i) to (iv)

(v) if for any other reason the court is satisfied that it is undesirable that he should act as executor of the estate concerned."

[4] In the matter of *Van Niekerk v Van Niekerk & Another*¹ it was held,² in reference to subsection 54(1)(a)(v) of the Act, that:

¹ Unreported judgment of the KwaZulu-Natal High Court (Pietermaritzburg); case number 6361/2010; delivered on 17 December 2010

² At paragraph [4]

*"In considering an application under this section the court is vested with a discretion and in the exercise of that discretion the predominant consideration will be the interests of the estate and those of the beneficiaries."*³

[5] As also stated in *Van Niekerk*⁴ the well-established common law principle expressed in *Barnett v Estate Beattie*⁵ that the court is vested with a discretion to remove an executor from office "...if his personal interests are in entire conflict with the interests of the estate" was affirmed by the erstwhile Appellate Division in *Grobbelaar v Grobbelaar*⁶. In these two cases, as noted by Wallis J (as he then was) the executor advanced a claim in his personal capacity against the estate, which claim was disputed and the acceptance of which would have been contrary to the interests of the beneficiaries in the estate.

[6] In the matter of *Meyer (supra)*, Margo J, stated the following⁷:

"Both the statute and the case cited (Letterstedt v Broers) indicates that the sufficiency of the cause for removal is to be tested by a consideration of the interests

³ *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 17 F, a passage approved by the Constitutional Court in *Gory v Kolver NO and Others (Storke and Others Intervening)* 2007 (4) 1907 (CC) at paragraph [56]

⁴ At paragraph [5]

⁵ 1928 CPD 482 at 485

⁶ 1959 (4) SA 719 (AD) at 724 F-G. See also *Webster v Wester en Andere* 1968 (3) SA 386 (T) at 388 C-D

⁷ At paragraph 17B

of the estate. It must therefore appear, I think, that the particular circumstances of the acts complained of are such as to stamp the executor or administrator as a dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument."

Facts

- [7] The following facts are either common cause or cannot be seriously disputed by either party, namely:
- 7.1 the deceased died intestate on 24 June 2021. The deceased was survived by the following children, namely the First, Second and Third Applicants, together with the First Respondent;
 - 7.2 the deceased was married in community of property to the late Lydia Mthimunye (mother to the First and Second Applicants and the First Respondent). The late Lydia Mthimunye died on 31 July 2017 leaving behind a Last Will and Testament;
 - 7.3 in terms of their mother's will the First Applicant and the First Respondent were nominated as co-executors;
 - 7.4 at the time of the deceased's death, the estate of Lydia Mthimunye had not been finalised due to delays occasioned by the First Applicant and

- the erstwhile attorneys appointed by the First Applicant and the First Respondent having lodged the estate in the incorrect Master's office;
- 7.5 following the death of the deceased and during or about July 2021 the First Applicant and the First Respondent engaged the services of the First Respondent's current attorneys of record, MT Roselo Incorporated ("*MTRI*"). A meeting was held with MTRI in July 2021 whereat MTRI were given a mandate to assist the First Applicant and the First Respondent administer the estates of their late parents;
- 7.6 in accordance with their instructions, MTRI prepared and lodged the necessary documentation with the Second Respondent;
- 7.7 on 21 July 2021 the First Respondent was appointed as the executor of the deceased's estate; and
- 7.8 on 26 October 2021 the First Applicant and the First Respondent were officially appointed by the Second Respondent as co-executors of the estate of the late Lydia Mthimunye.

The Applicants' case

- [8] In broad summary the Applicants submit that this Court should exercise its discretion in their favour and grant them the relief sought (removal of the First Respondent as executor of the deceased's estate; appointment of the First Applicant as the executor of the deceased's estate and an order that the First

Respondent pay the costs of this application on the scale of attorney and client) for, *inter alia*, the following reasons:

- 8.1 the First Respondent has failed to disclose assets of the estate and is not willing to disclose same so as not to prejudice the other beneficiaries of the estate;
- 8.2 the First Respondent has appropriated certain motor vehicles belonging to the estate for his personal use without acknowledging same;
- 8.3 the inventory of assets compiled by the First Respondent reflects the immovable property only and no other assets; and
- 8.4 the First Respondent failed to acknowledge the existence of the Third Applicant as a beneficiary of the intestate estate and has failed to properly amend the documentation submitted to the Second Respondent in that and other material respects.

The First Respondent's case

[9] On behalf of the First Respondent, it was submitted that the Applicants had failed to discharge the onus incumbent upon them to prove, on a balance of probabilities, that this Court should grant them the relief sought for, *inter alia*, the following reasons:

- 9.1 it is clear from the foregoing facts, that are either common cause or not in dispute in this matter, that there are two estates being wound-up and that any disputes arising from the winding-up of estate late Lydia Mthimunye would affect finalising the winding-up of the deceased's estate;
- 9.2 it is further apparent from the application papers that a dispute has arisen between the First Applicant and the First Respondent in respect of their deceased's parents' home, being Erf 294 situated at 64 Tau Street, Diepkloof Phase One, Diepkloof Extension, Gauteng (*"the property"*);
- 9.3 initially the First Applicant and First Respondent had arranged to buy the property together. However, the First Respondent appears to have had a change of heart;
- 9.4 on or about 8 November 2021, MTRI received an email from the First Applicant expressing her dissatisfaction at the appointment of the First Respondent as executor in both estates. This prompted MTRI on 8 November 2021 to call for a meeting;
- 9.5 a meeting was held on 9 November 2021 which was attended by the First Applicant and the First Respondent. The First Applicant was informed that:
- 9.5.1 the First Respondent was no longer interested in buying the property with the First Applicant;

9.5.2 the First Applicant was offered the opportunity to purchase the property, failing which the property would be placed on the market for sale;

9.5.3 the First Applicant must pay rent if she wishes to occupy the property, failing which the property would be rented out to any person willing to pay the rent pending the finalisation of the administration of the two estates; and

9.5.4 the First Applicant was also reminded that she was liable for the municipal account;

9.6 the First Respondent avers that at the aforesaid meeting the existence of the Third Applicant was revealed, by the First Applicant, for the first time;

9.7 on or about 16 November 2021 the First Applicant sent an email to MTRI requesting them to remove themselves from the administration of the parents' estates;

9.8 on or about 18 November 2021 MTRI sought to withdraw from the administration of both of the estates and rendered their invoice for payment before they could release the files in respect thereof;

9.9 the First Applicant failed to settle the invoice. Instead, on or about 15 December 2021, the First Applicant queried the amount claimed on the invoice and requested the Liquidation and Distribution ("*L&D*") Account in respect of the estate late Lydia Mthimunye;

- 9.10 on or about 10 January 2022 MTRI wrote to the First Applicant informing her that unless their invoice was paid, they would proceed to administer the estates on behalf of the First Respondent as he was adamant that they should proceed;
- 9.11 on or about 10 February 2022, an email was sent to the First Applicant from MTRI attaching the following:
- 9.11.1 the full and final L&D Account of the deceased's estate signed by the First Respondent;
 - 9.11.2 the full and final L&D Account of the estate of Lydia Mthimunye signed by the First Respondent;
- 9.12 The First Applicant was also reminded that, as co-executrix in the estate of the late Lydia Mthimunye, she was required to sign the relevant L&D Account;
- 9.13 the First Applicant was also advised that should she fail or refuse to sign the same, she would be reported to the Master's office, with a request for her removal as co-executrix;
- 9.14 the First Applicant failed to sign the L&D Account as requested. On or about 24 February 2022, MTRI accordingly reported her to the Second Respondent and further requested a meeting with the Master in order to request her removal as co-executrix;
- 9.15 on or about 25 February 2022 the First Applicant was served with a notice to vacate the property which she had occupied after the mother's

death and in respect of which she has not paid any rental or the municipal account;

- 9.16 an eviction application dated 14 April 2022 followed and was duly served on the First Applicant on 19 April 2022;
- 9.17 on 18 August 2022 the Second Respondent addressed a letter to MTRI requesting the said attorneys to provide the following:
- 9.17.1 the municipal evaluation for the property;
 - 9.17.2 an explanation as to what happens to the other half-share of the property;
 - 9.17.3 an amendment to the next-of-kin affidavit to include the Third Applicant as the biological child of the deceased as per the DNA Tests Results Affidavit; and
 - 9.17.4 that the Third Applicant be reflected in the L&D Account;
- 9.18 on 20 October 2022 the First Applicant instituted the present application seeking to remove the First Respondent as the executor of the deceased's estate; and
- 9.19 on 1 December 2022 MTRI addressed a letter to the Second Respondent seeking permission to advertise the deceased's estate. Amongst the annexures included in the said letter were all the documents and information requested by the Second Respondent including the amended L&D Account and the amended next-of-kin

affidavit from the First Respondent reflecting the addition of the Third Applicant as a beneficiary of the deceased's estate.

[10] Based, *inter alia*, on the foregoing, it was submitted on behalf of the First Respondent that the application for the removal of the First Respondent by the Applicants was grounded on the disharmony which had arisen between the First Respondent and the First Applicant in respect of the property. Moreover, there was no factual basis for this Court to grant the relief sought when this Court applied the correct test to be applied in motion proceedings.⁸

The merits

[11] Before dealing with the merits of this application *per se*, it must be noted, despite the fact that the legal representative for the Applicants did not pursue the point before this Court during the course of his argument with much enthusiasm (if at all), it was submitted, in the Applicants' Heads of Argument, that the nomination of the Third Respondent as the executor of the deceased's estate was somehow "improper" or "invalid".

[12] In that regard, it was submitted that on or about 6 July 2021 the First Applicant was taken by the First Respondent to MTRI to fill in documents

⁸ *Subparagraph 19.9 ibid*

which nominated him as the executor of the deceased's estate. The First Applicant did not make the appointment freely and voluntarily. She was allegedly not in a good state as she had tested positive for Covid-19 and was still recovering. Further to that there is no nomination form that was signed by the First Applicant on the file at the Second Respondent's offices. Subsequent to that nomination the First Respondent was appointed by the Second Respondent to be the executor of the deceased's estate. The fact that the other two beneficiaries did not nominate him was not taken into consideration by the Second Respondent.

[13] At the end of the day this Court is satisfied (putting aside the question as to whether an application in terms of subsection 54(1)(a)(v) of the Act would be broad enough to even encompass such a ground for the relief sought) that the Applicants have failed to place before this Court sufficient facts, based on acceptable principles of law, to enable this Court to remove the First Respondent as the executor of the deceased's estate on the basis that somehow his appointment was either irregular and/or improper and/or invalid.

[14] Certainly, the objective facts of this matter do not support such a finding. In this regard, the First Applicant alleges that she raised an objection to the First Respondent's nomination with the Second Respondent, which objection was never responded to. This letter is dated 4 March 2022, a period of eight

months after the said nomination was made. The letter was also sent to the Second Respondent:

14.1 a few days after the First Applicant was reported to the Second Respondent for failing or refusing to sign the estate late Lydia Mthimunye's L&D Account and requesting her removal as co-executor; and

14.2 a few days after the First Applicant was served with a notice to vacate the property.

[15] Also, as correctly pointed out to this Court by the First Respondent's Counsel, a proper reading of this document reveals that it is not an objection to the First Respondent's nomination but, rather, a request for his removal as executor. In addition thereto, it is clearly stated by the First Applicant in the first paragraph thereof that she nominated the First Respondent as executor. Nowhere in the letter does the First Applicant object to the First Respondent's nomination. The letter is concerned with the conduct of the First Respondent in administering the deceased's estate and his removal as executor.

[16] In the premises, this Court holds that it should not remove the First Respondent as executor of the deceased's estate solely on the ground that his nomination is somehow invalid or improper.

[17] The Applicants place great weight on the alleged failure of the First Respondent to fail to acknowledge the existence of the Third Applicant from an earlier date and the alleged failure of the First Respondent to effect necessary amendments to certain documentation in the administration of the deceased's estate. In the opinion of this Court any potential substance these grounds had for the removal of the First Respondent as the executor of the deceased's estate have been cured by the actions of the First Respondent as dealt with earlier in this judgment⁹. As at 1 December 2022 the First Respondent has cured all requests in relation to the foregoing as emanating from the Second Respondent. It is also relevant to note that at no stage has the Second Respondent threatened to institute proceedings in terms of the Act (which the Second Respondent is quite entitled to do) to remove the First Respondent as the executor of the deceased's estate.

[18] With regard to the concerns raised by the Applicants that the First Respondent has been concealing or misappropriating assets of the deceased's estate this Court, once again, is of the opinion that the explanations provided therefor by the First Respondent are not so far-fetched or unbelievable as to be rejected out of hand. The fact that certain motor vehicles may no longer exist some four years later after the estate of the late

⁹ *Subparagraph 19.9 ibid*

Lydia Mthimunye was reported in 2017, is not unreasonable. Further, as correctly pointed out by the First Respondent's Counsel, the First Applicant makes no mention of other assets that were in the L&D Account of their late mother but did not appear in that of the deceased's estate. In addition, if the First Applicant knew of the existence of the two motor vehicles mentioned and which she queries, she ought to have brought this information to the First Respondent's attention in order that they could be included as such. The First Applicant failed to do so and has provided no reasons for such failure to do so. The First Applicant had an option to bring an objection before the Second Respondent. Subsection 35(7) of the Act provides for interested parties to lodge a formal objection with the Second Respondent if the L&D Account is not a true reflection of the facts of a particular estate. The First Applicant failed to do so and, once again, has provided no reasons for that failure.

[19] Insofar as the furniture is concerned the First Respondent explains that he did not include it because the First Applicant is currently occupying the property and had informed him that during the lifetime of the deceased the First Applicant had replaced all of the furniture since same was old and had substituted it with her own modern furniture.

[20] With regard to the firearm the explanation of the First Respondent is that he only recently had access to the bedroom of the deceased since the First

Applicant is occupying the property. Upon learning of the firearm he took same to the South African Police Services for it to be destroyed.

[21] Having regard to the foregoing, it is clear that this Court will not, in the exercise of its discretion, remove the First Respondent as executor of the deceased's estate for allegedly concealing or misappropriating assets of the deceased's estate. This is particularly so in light of the fact that, *inter alia*, the First Respondent is still assisted by MTRI in the administration of that estate; the Second Respondent has no difficulties therewith and other alternative remedies are available to the Applicants in terms of the Act.

Conclusion

[22] It is clear from the contents of this judgment that the Applicants have failed to discharge the onus incumbent upon them to prove, on a balance of probabilities, that they are entitled to the relief sought. Upon the application of the *Plascon-Evans* test, where there are disputes of fact these disputes of facts in the present matter are genuine and *bona fide*. The disputes of facts as raised by the First Respondent are not far-fetched or unbelievable so as to be rejected by this Court. If anything, they are accepted as being more probable than those placed before this Court in support of the Applicants' version. In the premises, the application must be decided on the version as

put forward by the First Respondent. On that basis, there are no grounds for this Court, in its discretion, to grant to the Applicants the relief sought and, *inter alia*, remove the First Respondent as the executor of the deceased's estate in terms of subsection 54(1)(a)(v) of the Act.

- [23] In arriving at this decision the overriding consideration in this Court declining to exercise its discretion in favour of the Applicants is that mere disagreements between heirs and the executor of a deceased's estate, or even a breakdown in the relationship between one of the heirs and the executor (as in the present case) is insufficient for the discharge of the executor in terms of subsection 54(1)(a)(v) of the Act. It must be shown that, *inter alia*, the executor has conducted himself in such a manner that it has actually affected his proper administration of the estate. Bad relations between an executor and an heir will not lead to the removal of the latter unless this will prevent the proper administration of the estate.

Costs

- [24] With regard to costs, it is trite that costs fall within the general discretion of the court. It is also trite that unless unusual circumstances exist, costs should normally follow the result. No such circumstances have been brought to the attention of this Court.

[25] In the premises, the Applicants should pay the costs of this application.

Order

[26] This Court makes the following order:

1. the application is dismissed;
2. the First Applicant; the Second Applicant and the Third Applicant are to pay the costs of this application, jointly and severally the one paying the others to be absolved.

B.C. WANLESS
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION JOHANNESBURG

Date of hearing:

28 August 2023

Date of judgment: 4 December 2023

Appearances

On behalf of the Applicant: Mr. T. Mukwani

Instructed by: T. Mukwani Attorneys

On behalf of the Defendant: Adv. I. Keatotswe-Matlou

Instructed by: M. T. Raselo Incorporated