IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5021/2022

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED.

31/05/23

…………………….. **………………………...**

Date **ML TWALA**

In the matter between:

ERROL TREVOR GOSS **APPELLANT**

And

LENNYS ANNE BENNETT **RESPONDENT**

Neutral Citation: *ERROL TREVOR GOSS v LENNYS ANNE BENNETT* (Case No. A5021/2022) [2023] ZAGPJHC 556 (31st of May 2023)

JUDGMENT

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 31st of May 2023.

Summary: *Appeal– Administration of Estates Act, 66 of 1965– Section 54(1)(a)(v) of the Act – Removal of Executor - whether the Court a quo exercised its discretion judicially and correctly when it ordered the removal of the appellant as the executor of the estate of the deceased – whether the respondent is entitled to the order removing the computer laptop from the appellant's possession and placing it in the custody of a neutral person.*

Costs - costs are in the discretion of the Court – whether the Court exercised its discretion judicially when ordering personal costs order against the executor - The appeal is dismissed with costs including the costs occasioned by the employment of two counsel which costs include the costs for the application for leave to appeal.

TWALA J with (Francis and Fisher JJ concurring)

[1] There are three issues central to this appeal: (a) whether the Court a quo exercised its discretion judicially and correctly when it ordered the removal of the appellant as the executor of the estate of the deceased in terms of section 54 of the Administration of Estates Act, 66 of 1965; (b) whether the respondent is entitled to the order removing the computer laptop from the appellant's possession and placing it in the custody of a neutral person; and (c) whether the Court a quo correctly exercised its discretion when it ordered the appellant to pay the costs in his personal capacity when he was an executor of the estate of the deceased.

[2] This is an appeal against the whole of the judgment and order of the Court a quo handed down on the 20th of July 2021 removing the appellant as the executor of the estate of the deceased and removing the laptop of the deceased from the appellant's possession and placing it in protective custody in the hands of a neutral attorney. The appeal is with the leave of the Supreme Court of Appeal and is opposed by the respondent. It is worth noting that the appellant does not persist in the appeal against paragraphs 3 and 4 of the order granted by the Court a quo since the respondent filed a notice in terms of Rule 41 (2) of the Uniform Rules of Court abandoning these orders.

[3] The genesis of this case arose when the Late Jo-Anne Claire Herr (*"the deceased")* a divorcee, died on the 19th of June 2019. The following day, on the 20th of June 2019, the parents of the deceased, Michael Frith and Lennys Bennett attended at the House of the deceased where they were met by Ms de Nobrega from the offices of the appellant and Mr Martin Herr, the former husband of the deceased. Ms de Nobrega had copies of the

Will of the deceased dated 2011 *("the 2011 Will")* which will was later accepted by the Master. Ms de Nobrega opened the laptop of the deceased and called up the unsigned will of the deceased and read only the first portion thereof. On instruction of the appellant, she closed the laptop and removed it from the premises and placed it in the possession of the appellant.

[4] It is further undisputed that under cover of its letter of the 28th of June 2019 the appellant lodged certain documents with the Master of the High Court *("the Master")* in the process of reporting the estate of the deceased and was on the same day issued with the Letters of Executorship by the Master. However, the fundamental document for reporting a deceased estate to the Master, the death notice, was not completed in a proper manner in that it was completed in the name of Ms Bennett *("the respondent")* as the next of kin but was signed by the appellant. This happened without the authority and knowledge of the respondent, and when the appellant knew full well that the respondent was challenging the validity of the 2011 will.

[5] Amongst the documents that were submitted to the Master was a copy of the death certificate that was issued on the 26th of June 2019 but was certified as a true copy of the original on the 20th of June 2020 by a commissioner of oaths. Also lodged with the Master was the next of kin and nomination affidavits. The nomination affidavit was attested to by Mr Herr who declined his testamentary nomination as the executor but thereby purportedly nominated the appellant to be appointed as the executor of the estate of the deceased. The 2011 will was also attached to the letter to the Master but the unsigned will which was contained in the laptop which was in possession of the appellant was not disclosed and or filed with the Master.

[6] It is trite that one of the duties of the Master's office is to serve the public by supervising the administration of the estates of deceased persons. The purpose is to ensure an orderly winding up of the financial affairs of the deceased, and the protection of the legal and financial interests of the heirs.

[7] At this stage, it is useful to restate the relevant sections of the Administration of Estates Act, *("the Act")* which provides as follows:

"Section 7. Death notices

(1) Whenever any person dies within the Republic leaving any property or any document being or purporting to be a will therein:-

a. 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 the death has taken place, shall within 14 days thereafter giving notice of death substantially in the prescribed form, or cause such notice to be given to the Master; and

b. The person who at or immediately after the death has the control of the premises at which the death occurs shall, unless a notice under paragraph (a) has to his knowledge already been given, within 14 days after the death, report the death or cause the death to be reported to the Master.

(2) ………………………

Section 8. Transmission or delivery of wills to Master and registration thereof

(1) Any person who has any document being or purporting to be a will in his possession at the time of or at any time after the death of any person who executed such document, shall, as soon as the death comes to his knowledge, transmit or deliver such document to the Master.

(2) …………………..

(3) Any such document which has been received by the Master, shall be registered by him in a register of estates, and he shall cause any such document which is closed to be opened for the purpose of such registration.

(4) If it appears to the Master that any such document, being or purporting to be a will, he may, notwithstanding registration thereof in terms of subsection (3), refuse to accept it for the purposes of this act until the validity thereof has been determined by the court."

[8] The Act provides the following in sections 11and 18

"Section 11 Temporary custody of property in deceased estates

(1) Any person who at or immediately after the death of any person has the possession or custody of any property, book or document, which belonged to or was in the possession or custody of such deceased person at the time of his death-

(a) shall, immediately after the death, report the particulars of such property, book or document to the master and may open any such document which is closed for the purpose of ascertaining whether it is or purports to be a will;

(b) shall, unless the Court or the Master otherwise directs, retain the possession or custody of such property, book or document, other than a document being oh purporting to be a will, until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and distribute the estate: provided that the provisions of this paragraph shall not prevent the disposal of any such property for the bona fide purpose of providing a suitable funeral for the deceased or of providing for their subsistence of his family or household or the safe custody or preservation of any part of such property;

(c) ……………………..

Section 18 Proceedings on failure of nomination of executors or on death, incapacity or refusal to act, etc.

(1) The Master shall, subject to the provisions of subsections (3), (5) and (6)-

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

(b) if the whereabouts of any person so nominated to be the 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 incapable 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)……………

Appoint and grant letters of executorship to such person or persons whom he may deem fit and 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 the estate, to attend before him or, if more expedient, before any other Master or any magistrate at a time and place specified I the notice, for the purpose of recommending to the Master for appointment as executor or executors, a person or a specified number of persons.

(2)…………………

[9] The Act provides the following in sections 54 and 102

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) ……….

(iii) ……………..

(iv) ……………..

(v) If for any other reason the court is satisfied that it is undesirable that he should act as an executor of the estate concerned; and

(b)……………..

Section 102 Penalties

(1) Any person who –

(a) Steals or wilfully destroys, conceals, falsifies, or damages any document purporting to be a will; or

(b) ………………………

Shall be guilty of an offence and liable on conviction –

(i) In the case of an offence referred to in paragraph (a), to a fine or to imprisonment for a period not exceeding seven years;

(ii) …………………………

[10] It is now well-established that an Appellate Court will not lightly interfere with the decision of a lower Court exercising a discretion when determining an issue unless the discretion was not exercised judicially and properly. Put differently, when a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an Appellate Court to interfere unless it is satisfied that this discretion was not exercised judicially, or that it had been influenced by wrong principles or a misdirection of the facts. To achieve this, the Appellate Court must investigate whether the discretion was in the true sense or in the loose sense.

[11] In *Trencon Construction v Industrial Development Corporation of South Africa Limited and Another (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC)* the Court, dealing with the issue of the Court exercising a discretion stated the following:

> *"[85]: A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This*

type of discretion has been found by this Court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of their Restitution of Land Rights Act. It is "true" in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible.

Paragraph 86: In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. Instead, as described in Knox, a discretion in the loose sense-

> *'means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision.'*

[87]: This court has, on many occasions, accepted and applied the principles enunciated in Knox and Media Workers Association. An appellate court must heed the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining that matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded."

[12] It is disconcerting that the appellant, knowing the whereabouts of the respondent would complete the death notice in her name but fail to secure

her signature instead sign it himself and say it was a mistake. The appellant further fails to demonstrate what was his mistake in signing the death notice on behalf of the respondent. The appellant was well aware at the time of reporting the estate that the respondent was challenging the validity of the 2011 will and that there was an unsigned will in the laptop which he removed from the premises of the deceased but did not find it necessary to transmit and or deliver it to the Master nor to inform the Master that there are contestations by the respondent and other parties to the validity of the 2011 will.

[13] I agree with Mr Roodt SC that the conduct of the appellant was deliberate and intended to secure his appointment as executor of the estate of the deceased at all cost for he knew if he approached the respondent, she would not have signed the death notice and not appointed him as the executor of the estate of the deceased. Had the appellant played open cards with the Master, who relies heavily on the integrity and honesty of attorneys who submit documents and signs the acceptance of trust in his office, and disclosed his error in signing the death notice, and complied with the provisions of s 8 of the Act by transmitting or submitting the unsigned will to the Master and informing him that there are contestations about the 2011 will, the Master would not have appointed him executor without calling a meeting of the heirs of the deceased.

[14] I do not agree with Mr Shepstone that it was not necessary for the appellant to transmit the unsigned will to the Master. The provisions of s 8 of the Act are plain that any person who has in his possession a document which is a will or purporting to be a will shall transmit same to the Master. The use of “shall” in the act is peremptory and therefore whether the document was signed or not the section impels the possessor of such document to transmit

and or submit same to the Master. It is the Master who will decide what to do when he has all the documents that purports to be the will of the deceased and may convene the meeting of the heirs in terms of s18 to appoint an executor.

[15] It should be recalled that Mr Herr declined his nomination as the executor of the estate of the deceased and if all these facts and documents were placed before the Master, the Master would not have relied on the recommendation and nomination of the appellant to be appointed as the executor by Mr Herr who, as contended by the appellant, is the residual heir of the estate. Mr Herr is the residual heir of the estate only if the 2011 will is accepted. However, the appellant found it convenient not to disclose to the Master that there is another unsigned will and that the 2011 will is being contested by the respondent and other parties.

[16] I agree with the appellant that there is no issue about his conduct in handling the estate of the decease since his appointment. However, the issue is how he conducted himself in securing his appointment as the executor. Section 54 (1)(a)(v) provides for the Court to remove an executor if it is satisfied that it is undesirable for him or her to continue to act as such. The conduct of the appellant before his appointment is telling and is such that the other heirs and legatees have lost confidence that he will handle and wind up the estate properly. He has clandestinely secured his appointment as executor by withholding crucial information to the Master, and by refusing any other party access to the information contained and stored in the laptop of the deceased.

[17] In *Gory v Kolver NO and Others (CCT28/06) [2006] ZACC 20; 2007 (4) SA (CC)* the Court, dealing with the application for the removal of an executor

in a deceased estate, where the heirs had lost all trust, faith and confidence in the executor, stated the following:

> *"[56]: In terms of section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965, an executor may at any time be removed from his office by the Court if for any reason other than those set out in the rest of section 54(1) (a),'the Court is satisfied that it is undesirable that he should act as executor of the estate concerned'. In Die Meester v Meyer en Andere, dealing with the approach to be followed by a court in exercising its discretion under this section, held as follows:*
>
> > *'Whatever the position may be, under the common law and according to the authorities under the old Administration of Estate Act, 24 of 1913, the Court is now empowered in terms of section 54(1)(a)(v) of the present Administration of Estates Act, 66 of 1965, to remove an executor from office if it is undesirable that he should act as executor of the estate concerned. The Court has a discretion and the predominating consideration remains the interests of the estate and the beneficiaries."*
>
> *[57]: It seems clear that there has been a complete breakdown of trust between Mr. Gory and Mr. Kolver and that the former has lost all faith in the latter as executor. On the other hand, as will be discussed in greater detail below, it cannot in my view be said that Mr Kolver has been guilty of any maladministration or any other form of misconduct in respect of Mr. Brooks' deceased estate. The question whether it is just and equitable that Mr Kolver be removed from his office as executor is a difficult one. The discretion vested in the High Court by section 54 (1)(a)(v) is a discretion in the strict sense and an appellate court will ordinarily only interfere with the exercise of that*

> *discretion in limited circumstances; for example, if it is shown that the High Court did not act judicially in exercising its discretion; or based the exercise of that discretion on a misdirection on the material facts or on wrong principles of law. Following this approach, I am of the view that this court should not interfere with the exercise by the High Court of its discretion in this regard. The estate is a small one and much of the work of administration has already been done by Mr. Kolver and would not have to be repeated. It is also quite possible that Mister Gory himself may be appointed as executor, thereby keeping the additional cost to a minimum. On the balance, therefore, it would seem that the interests of the estate and the beneficiaries will be served by the removal of Mr. Kolver as executor. This will render it necessary to reformulate paragraphs 9.1 and 9.2 of the High Court order so as to suspend the administration of the deceased estate pending the appointment of a new executor by the Master.*

[18] It should be recalled that section 54(1)(a)(v) confers a discretion on the Court to remove an executor if it is satisfied that it is just and equitable for the executor to be removed. However, the Court must exercise its discretion judicially. It is not only the interests of the estate and that of the heirs as contended by the appellant that should be considered in this case. But whether the person so appointed as executor and the manner in which he conducted himself in securing his appointment serves the interest of justice considering that the administration of estate is governed by the law. The offending conduct of disregarding the prescripts of the Act has deprived and prevented the Master from a general overview of the facts surrounding the estate of the deceased.

[19] The gravamen of the respondent's complaint is the manner in which the appellant secured his appointment as the executor of the estate of the deceased. The question that faced the Court a quo was whether it is just and equitable to allow the appellant, who has conducted himself in a dishonest and unethical manner when he secured his appointment as executor by breaching the provisions of the act which rendered him guilty of an offence, to continue with the winding up of the estate of the deceased. Put in another way, whether a person who commits an offence to secure his appointment as executor can be expected to act and produce the best results in the interest of the estate and its heirs.

[20] It is my respectful view that the Court a quo correctly answered the above question in the negative. Allowing the appellant to continue as the executor of the estate of the deceased would be rewarding him for the dishonorable and unethical conduct he has committed to secure his appointment as executor. The Court cannot countenance the flagrant disregard of the law by the appellant when he reported the estate of the deceased. The offending conduct of the appellant amounted to the flagrant disregard of the standard of complete honesty, reliability and integrity expected of an attorney. I hold the view therefore that the Court a quo cannot be faltered in the exercise of its discretion when it ordered the removal of the appellant as the executor of the estate of the deceased for his appointment was unlawful.

[21] I agree with the appellant that section 11 of the Act permits any person who at or immediately after the death of any person has possession or custody of any property which belonged to or was in the possession or custody of such deceased person to retain the possession, other than a document being a will or purporting to be a will, until an interim curator or an executor of the estate has been appointed or the Master has directed any person to liquidate and

distribute the estate. However, section 11 does not permit a person to retain such property and documents in their possession for ulterior motives. Its purpose is for the safe keeping of such property and documents until the lawful person is appointed to take control and liquidate and distribute the estate accordingly.

[22] The appellant took possession of the laptop of the deceased a day after her death and knowing that there was an unsigned will in that laptop but retained the laptop and failed to deliver it or the unsigned will contained therein to the Master. As if that was not enough, the appellant refused the other heirs of the deceased access to the laptop and chose to print out certain documents from the laptop for the respondent and other heirs. There is no reasonable explanation proffered by the appellant for not allowing the respondent access to the laptop except to say that it contained some nude pictures. He has failed to explain why he took the laptop from the premises of the deceased before he was hastily appointed as the executor when the parents of the deceased were there and could have kept the laptop safe.

[23] It is my considered view therefore that the Court a quo correctly ordered that the appellant should not possess the laptop of the deceased but it should be placed in safe custody in the hands of a neutral person who is an attorney. This is to protect the contents of the laptop until the issues between the parties regarding the validity of the will of the deceased have been determined by the Court in the pending action proceeding.

[24] It is trite that, unless expressly enacted, the award of costs is in the sole discretion of the presiding judicial officer. As a general rule, a successful party should have his or her costs. Put differently, normally, the costs follow the result.

[25] In *Zuma v Office of the Public Protector and Others (1447/2018) [2020] ZASCA 138 (30 October 2020)* the Court, dealing with a lave to appeal a costs order, stated the following:

> *"[19]: Since there is no appeal against the order dismissing the review, the only question is whether the appeal against the cost order has a reasonable prospect of success. In this regard Mr. Zuma faces a formidable hurdle: in granting a cost order, a lower court exercises a true discretion. An appellate court will not interfere with the exercise of that discretion unless there was a material misdirection by the lower court.*
>
> *[20]: Recently, in Public Protector v SARB, the Constitutional Court affirmed the principle that an appellate court will not lightly interfere with the exercise of a true discretion, which involves a choice between a number of equally permissible options. This principle applies both to an award of costs de bonis propiis and costs on a punitive scale. Interference is warranted only where the discretion was not exercised judicially; the decision was influenced by wrong principles; the decision was affected by a misdirection on the facts; or the decision could not reasonably have been reached by a court properly directing itself to the relevant facts and principles. It is not sufficient on appeal against the cost order simply to show that the lower courts order was wrong."*

[26] The appellant's discomfort is that a personal costs order awarded was against him and not against the estate of the deceased which he claims to be representing. I am in full agreement with the Court a quo's personal costs order against the appellant. The main issue in this case is not the appellant's conduct in handling the affairs of the estate of the deceased as an executor

but the manner in which he conducted himself in securing his appointment as executor. I hold the view that the appellant would not have been appointed as the executor had he acted in good faith, honestly and with integrity when he reported the estate of the deceased to the Master. It is his appointment which is an issue in these proceedings and such appointment is set aside as unlawful because he committed a misconduct to secure his appointment as executor.

[27] Even considering public policy, it is incomprehensible why an executor, when successfully sued in his or her personal capacity, although in relation to the estate of the deceased as respondent or defendant, should be exempted or indemnified from a personal costs order. The appellant was not an executor when he took possession of the laptop from the premises of the deceased and when he completed the death notice and submitting all the other documents with inaccuracies and misleading the Master to secure his appointment as executor. It is this conduct that is being challenged by the respondent against the appellant personally and not qua executor of the estate. The ineluctable conclusion is therefore that the Court a quo cannot be faulted in the exercise of its discretion in awarding a personal costs order against the appellant.

[28] In the circumstances, the following order is made:

1. The appeal is dismissed with costs including the costs occasioned by the employment of two counsel which costs include the costs of the application for leave to appeal.

TWALA M L

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

I agree

____

FRANCIS EJ

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

I agree

____

FISHER D

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Date of Hearing: **7th of May 2023**

Date of Judgment: **31st of May 2023**

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