IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 25412/22

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

SIGNATURE 06 OCTOBER 2022 **DATE**

In the matter between:

CHABELI MOLATOLI ATTORNEYS INCORPORATED **Applicant**

and

POLO SUSAN PITSO (N.O.) **First Respondent**
(IN HER CAPACITY AS EXECUTRIX
OF LATE LIKANO JOHN PITSO)

POLO SUSAN PITSO **Second Respondent**
LIPALESA PITSO **Third Respondent**
TLOTLISO PITSO **Fourth Respondent**
MASTER OF THE HIGH COURT (PRETORIA) **Fifth Respondent**
SELEKA ATTORNEYS **Sixth Respondent**

JUDGEMENT

NDLOKOVANE AJ

INTRODUCTION

[1.] This is an opposed application whereby the applicant seeks order for the removal of the Executrix of the Deceased estate of Mr Likano John Pitso in terms of Section 54(1)(a)(ii)(iii)(v) of the Administration of Estate Act 66 of 1965, and an order for a interdictory and declaratory relief launched by the applicant to have the first respondent's decision made on 28 April 2022 to terminate a mandate of agency previously made and entered into between the parties on 18 November 2021, be declared invalid

[2.] The relief sought in the present case is that the termination of applicant's mandate by the second and sixth respondents is declared invalid. That the fifth respondent be ordered not to recognize the purported termination and appointment of Seleka Attorneys as agents of first respondent.

2.1 That the first respondent be removed as Executrix of Likano John Pitso's estate in terms of Section 54(1)(a)(ii)(iii)(v) of the Administration of Estate Act 66 of 1965.

2.2 The second respondent be ordered to return the letter of executorship to the fifth respondent within 48hours of this order and fully account for her tenure as executrix within 30 days of the granting of this order.

2.3 That the first and second respondents be ordered to pay costs of this application on *de bonis popris*, at attorney and own client scale, one paying the other to be absolved.

2.4 That the first respondent be ordered to pay the applicant's fees as per mandate signed by Mr Moshesha and to which the deceased had bound himself to pay the legal fees of the applicant.

2.5 That in the event that the Honourable Court accepts that the applicant's mandate was lawfully terminated, the applicant is entitled to its full payment within 7 (seven) days of this order, in terms of the mandate and fee agreement signed by the parties, wherein the applicant will be entitled to 3.5% of the inventory amount submitted to the office of the Master. In the event of non-payment, the Sherriff of the Court should carry the above prayer, by attaching the deceased estate account and the second respondent accounts.

[3.] The application is opposed by the first to fourth respondents. The sixth respondent filed a notice to abide by the court's decision.

PARTIES

[4] The applicant is **CHABELI MOLATOLI ATTORNEYS INCORPORATED**, a legal entity, duly registered in terms of statutory and company laws within the Republic of South Africa.

[5.] The first respondent is cited in her representative capacity as the executrix of the late Likano John Pitso Estate duly appointed as such on the 30 December 2021 in terms of the letter of executorship.

[6.] The second respondent is Polo Susan Pitso, the wife of the deceased, Mr. Likano John Pitso. The third and fourth respondents are the deceased's children and heirs in his late estate.

[7.] The fifth respondent is the Master of the High court and issued the letter of executorship. The sixth respondent is a firm of attorneys conducting business at 20 Albert Street,c/o Bramfisherand in Marshalltown, Gauteng Province.

BACKROUND FACTS

[8.] In order to understand the dispute, it is necessary to set out briefly the material history thereof as succinctly summarised by the applicant in its papers:

> "*3.1 The First Respondent is the Executrix of the deceased estate of the late Mr Likano John Pitso, and duly engaged the services of the Applicant as her agent, to attend to the affairs of the estate.*
>
> *3.2 During the course of its service to the First Respondent, the First Respondent made several mala fide request of the Applicant, with which the Applicant refused to comply. Following receipt of an invoice from the Applicant and yet another refusal to comply with its mala fide instructions, the Second Respondent, in her personal capacity, unlawfully terminated the Applicant's mandate.*
>
> *3.3 Throughout her interactions with the affairs of the estate and the Applicant, the Second Respondent has failed to distinguish between herself in her personal capacity and as Executrix of the deceased estate. 3.4 Furthermore,*

the Applicant believes that without proper oversight, the First/Second Respondent continuance as Executrix will be detrimental to the rights of the creditors of the estate".

RESPONDENT'S CONTENTION

[9.] The respondent contends that it is queer for the applicant to proceed with this motion notwithstanding its concession on 24 May 2022, that a principal has a right to terminate a mandate and that you cannot force parties to be in a relationship if they do not want to.

ISSUE FOR DETERMINATION

[10.] This court is therefore called upon to determine whether the decision of the first respondent to terminate the mandate of agency executed between herself and the Applicant should be impugned by the court for lack of lawfulness.

THE LAW

[11.] It is trite that when someone dies as in the present case, the deceased's estate is reported to the Master of the High Court ("the Master") and the administration of the estate is conducted by the executor or masters' representative as the case may be. Where the executor is not performing these duties to the required standard, such person may be removed from office. In this regard sections, 54(1) and 54(2) Administration of Deceased Estates Act 66 of 1965 as amended (the "Act") sets out the substantive and procedural requirements to be followed by the Master and/or the

High Court to remove an Executor or Masters' Representative. Section 54 provides that:

"*Removal from office of executor*

(1)

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

(a) by the Court–

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

[12.] In the matter of ***Gory v Kolver NO and others 2006 (5) SA 145 (T***) [also reported at [2006] JOL 17125 (T) – Ed] in paragraph [27] Hartzenberg J said the following:

"*The applicant has the perception that the first respondent does not want to administer the estate to achieve his best interests. As must be clear, he has reason to think so. If the applicant were the heir from the outset, he would have nominated an executor. Section 54 of the Administration of Estates Act deals with circumstances under which an executor may be removed from office. In terms of s 2(b)(i) the Master may remove an executor who has been nominated by will after the will has been declared void. The first respondent was not nominated by will but he was nominated by intestate heirs who were not heirs. In my view, that is one factor pointing to his removal. Because of the way in which he treated the applicant, I am of the view that it is desirable that he be removed in terms of s 54(1)(a)(v).*"

[13.] The court found that the executor was, *inter alia*, obstructive and that he tried his best to steamroller the administration of the estate through on a basis that the

applicant's claim be negated. In this the executor was aided and abetted by the second and the third respondents who were not nominated as heirs in the will. The court also found that the executor ought not to be remunerated for his services with the administration of the estate or to be reimbursed for expenses.

[14.] The applicant in his heads of arguments submits that when it comes to deceased estates the general rule is that an executor is the only person who can represent the estate of a deceased person and augment this argument as follows:

> "*4.2. There is a clear distinction between the persona of an Executor and an heir, as the Executor is vested with authority to act on behalf of the estate, whilst heirs are beneficiaries of the estate, lacking in authority to conduct the affairs of the estate.*
>
> *4.3. Even where the Executor is an heir to the estate, the acts of one cannot been perceived as the other, and any performance as the Executor must be clearly distinguishable from the acts of an heir, this should be such to protect third parties from any possible prejudices and to assure others of the authority with which the Executor purports to act.*
>
> *4.4. The termination of the Applicant's mandate was executed by the Second Respondent, of her own volition and does not clearly express that she does so in her capacity as the Executrix of the estate.*
>
> *4.5. Therefore, the termination of the Applicants mandate must be regarded as invalid.*

4.6. The general rule regarding the revocation of a mandate is that a principal may freely terminate the authority he has conferred on his agent.' Reference was made in the case of Cape Breweries's v Hermshurg 1908 TS 134; Gatreff v Southern Life Association 1909

4.7 Finally, in the present circumstances, the Applicant does not seek to force a relationship with the First Respondent but rather to safeguard the interest of the beneficiaries of the deceased estate either through the removal of the First Respondent and his continuance as her agent, until such relationship between them is validly terminated."

[15.] On the other hand, the respondent in his heads of arguments denies that their actions are unlawful. In summation, their submission is that a principal is entitled to revoke a mandate of agency. This is so simply because, it would be against public policy, to coerce a principal into retaining an individual as his agent, when he no longer wishes to retain him as such. If the termination of the mandate has prejudiced the agent his remedy lies in a claim for damages and not in an order compelling the principal to retain him as his agent in the future- (***See Liberty Group Ltd v Mall Space Management CC t/a Mall Space Management (644/18) (2019) ZASCA 142)***.

[16.] Further, the first respondent, as principal, terminated her mandate with the applicant as she was not happy with the price of the services it rendered, especially if regard had to the fact that what the applicant charged as its legal fees, being 60% of the value of the late estate, far exceeded the 3.5% which was agreed upon or prescribed by regulations and also cited the following other reasons for termination:

"*Also, as of the date of 3 April 2022, the applicant had failed to furnish her with a schedule of claimable amounts by it detailing in full, the amounts to be claimed pertaining to the entire process until closure of the estate account- Specific reference is made in this regard to Annexure "CM 12".*

It is also submitted that whilst there was no obligation on her to give the applicant any notice to terminate the mandate of agency before doing so, she nevertheless did so on 28 April 2022.

She had a valid reason to cancel the mandate. The first respondent, as principal, was entitled to terminate her mandate when it became clear to her that the applicant was charging exorbitant agency fees (60% of the value of the estate) which were outside of the acceptable 3.5%governed by law.

The applicant failed to account to the first respondent on how its invoice had been arrived at, and how it could be reconciled back to the proposed 3.5%, and she could not be expected to wait for the worst to happen before taking action to protect her children and her own interest which was now being jeopardised by the exorbitant and illegal charge and conduct by the applicant. This is so also because, the applicant has to date failed to account and deposit an amount of R 109 609,25 which it received from Mr. Ntsikoe Mosebo on 17 March 2022 into the bank account of the late estate in settlement of the asset of the estate, instead it has chosen to unjustifiably keep the money for itself to the prejudice of the estate in total violation of section 28 and 46 of the Act".

DISPUTE OF FACTS

[17.] It is my considered view that the relief sought by the applicant being partly interdictory in nature falls to be determined on the basis of the facts stated by the applicant together with the admitted or the undenied facts in the respondent's founding affidavit. Facts which are far-fetched and clearly untenable and which can be rejected on the papers before the court, should be ignored (**cf *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (*Pty*) *Ltd* 1984 (3) SA 623 (A)). Cf also *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) [also reported at [2009] JOL 22975 (SCA) – Ed] where Harms D**P said the following in paragraph [26]:

> "[*26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*

[18.] On the totality of the facts set out in the aforesaid matter, the aforesaid authorities confirm that mere disagreement between an heir and the executor of a deceased estate, or a breakdown in the relationship between one of the heirs and the executor, is insufficient for the discharge of the executor in terms of section 54(1)(a)(v) of the Act. In order to achieve that result, it must be shown that the executor

conducted himself in such a manner that it actually imperilled his proper administration of the estate.

[19.] Bad relations between an executor and an heir cannot lead to the removal of the executor unless it is probable that the administration of the estate would be prevented as a result. But, in my view, even in such event, the respective actions of the heir and the executor must be considered, for an heir cannot be allowed to frustrate, through unreasonable and wrong conduct, the actions of an executor which is beyond reproach. A disgruntled heir cannot be allowed to circumvent the administration process by improperly pressurising the executor to accede to his demands. To remove an executor in such circumstances would not serve any purpose for the same lot would befall the next executor as well. It is not necessary to discuss this issue any further since in the present matter I hold the view that the relationship between the second to fourth respondents and the applicant is not such that it would prevent the administration of the estate. This bring me to the next issue relating to costs. The applicant in its notice of motion seeks the court to grant the following order relating to costs:

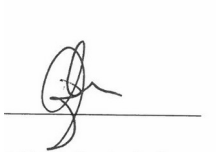
> *"2.3 That the First and Second Respondents be ordered to pay costs of this application on de bonis popriis, at attorney and own client scale, one paying the other to be absolved.*
>
> *2.4 That the First Respondent be ordered to pay the Applicant's fees as per mandate signed by Mr Moshesha and to which the deceased had bound himself to pay the legal fees of the Applicant"*

[20.] This punitive costs order is given under exceptional circumstances. Having considered the merits of the case and addresses in court by both counsel, I am not satisfied that the applicant on its papers before me has made out a case for such a relief. Having found in the manner I did as above stated, I see no reasons why costs should not follow the cause.

ORDER

[20.] In the result, the following order is made:

1. The termination of applicant's mandate is declared unlawful.
2. The first to fourth Respondents are ordered to pay the Applicant's taxed or agreed party and party costs on a High Court scale.



N NDLOKOVANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and 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 for handing down is deemed to be 06 October 2022.

APPEARANCES

FOR THE APPLICANT: ADV. MAKUME MAHLATSI

FOR THE FIRST RESPONDENTS:	ADV. MM MOODLEY
HEARD ON:	26 JULY 2022
DATE OF JUDGMENT:	06 OCTOBER 2022