

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 035698/22

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

Date: 20 March 2023 WI du

In the matter between:

**VICTOR CRAIG WILLIAMS NO**

Applicant

and

**MASTER OF THE HIGH COURT, PRETORIA**

**1<sup>ST</sup> RESPONDENT**

**INGRID HAHN**

**2<sup>ND</sup> RESPONDENT**

**RENATE HAHN-RAUTENBACH**

**3<sup>RD</sup> RESPONDENT**

**NORBERT HAHN**

**4<sup>TH</sup> RESPONDENT**

**HERMANUS JACOBUS SCHEFFER NO**

**5<sup>TH</sup> RESPONDENT**

**MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**

**6<sup>TH</sup> RESPONDENT**

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**JUDGMENT**

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**DU PLESSIS AJ**

[1] This is a review application in terms of Rule 53 to review and set aside the decision of the First Respondent regarding two addendums, to force the First Respondent to make a decision regarding one addendum, and to furnish reasons for its decision, should it be rejected. The Applicant also asks for a cost order *de bonis propriis* against the Assistant Master, Mr Masapu. This case came before me in the unopposed court, and I reserved judgement to consider the issue of costs.

## **[1] The parties**

- [2] The First Respondent is the Master of the High Court. The Second to Fourth Respondents are the children and testamentary heirs of the late Hans Helmut Hahn, and no relief is sought against them. The Fifth Respondent is joined as the executor of the late Mrs Ilse Renate Hahn. The finalisation of Mrs Hahn's estate is contingent on the finalisation of the estate of Mr Hahn. No relief is sought against the Fifth Respondent. The Sixth Respondent is the Minister of Justice and Correctional Services, as the nominal respondent and the executive authority of the First Respondent in terms of the State Liability Act 1957. While the First and Sixth Respondents initially filed a notice of intention to oppose, they later filed a notice to abide by the court's decision.

## **[2] Background**

- [3] The late Hans Helmut Hahn passed on on 28 June 2020. He executed a will dated 16 March 1962, with seven addendums to the will. Only three are important for this judgment: the addendums dated 5 September 2013 and 29 June 2014, marked as "revoked" and the addendum of 24 June 2020, to which no decision was made.
- [4] Mr Williams was appointed as the executor of the estate in terms of clause 10 of the 5 September 2013 addendum. Despite the addendum being marked as revoked, the Letters of Executorship were issued to Mr Williams by the First Respondent on 2 July 2021.
- [5] Mr Williams granted a power of attorney to Mr Botha, his attorney, to be his lawful agent for and on behalf of the estate. On 27 July 2021, Mr Botha applied for certified copies of the will of the late Hans Helmut Hahn, dated 16 March 1962, and the addendums. He needs these certified and authentic copies to close a bank account in Switzerland to enable him to finalise the estate. These documents were received on 4 November 2021.
- [6] This was when Mr Both noted that, despite being issued letters of executorship, the addendums dated 5 September 2013 and 29 January 2014 were endorsed by First Respondent as "revoked". The 24 June 2020 addendum has not been endorsed as either accepted or rejected. All these issues were brought to the attention of the First Respondent in a letter dated 10 November 2021, asking for an explanation for the revocation of the addendums and why the last addendum had not been endorsed at all. This is where the Applicants woes started, as no answer was forthcoming.
- [7] Mr Botha then asked candidate attorney Ms Goncalves, to follow up. She did so by going to the offices of the First Respondent between 24 November 2021 and 27 January 2022 a total of eight times. She was promised that the Assistant-Master, Mr Masapu, was dealing with the issue and would revert to her.
- [8] After that, Ms Goncalves sent a WhatsApp message on 3 February 2022 to Mr Masapu but got no response. On 10 February 2022, the attorney emailed Mr Masapu, but again, there was no response. On 16 February 2022, the attorney sent a WhatsApp message but did not receive a response. On 23 February 2022, the attorney wrote another message and received a response, "Good day – is for heba" (sic). This was followed by a voice note where Mr Masapu indicated that he would draw the wills on Friday morning to have a look and decide on a way forward. On 25

February 2022, the attorney followed up, and Mr Masapu replied, "OK". He was again reminded on 28 February 2022, with no response. These amount to a further six queries.

- [9] On 7 April 2022, Ms Goncalves wrote to Ms Penelope Roberts, the Master of the High Court, to get clarity on the addendums. On the same date, Ms Roberts directed Mr Masapu to attend to the issues. On 6 May 2022, Ms Goncalves followed up with Mr Masapu. On 11 May 2022, Mr Masapu replied that he asked for the file to be drawn to attend to it. On 20 May 2022, Ms Goncalves again raised the issue, asked for an update, and did not receive any feedback. These are three follow-up emails after the Master directed Mr Masapu to assist.
- [10] On 9 June 2022, the attorney applied for an extension of time to lodge the First and Final Liquidation and Distribution account until 28 February 2023. No response was received, which prompted another email to Ms Roberts. Neither Ms Roberts nor Mr Masapu replied. On 30 August 2022, the attorney called Mr Masapu, asking that he address the issues raised since 11 November 2021 and followed up with a WhatsApp message confirming the telephone conversation. No response was received. These were the last two interventions before the Applicant approached this court to intervene by applying for review.
- [11] A supplementary affidavit was filed by Ms Botha, from the Applicant's attorneys of record, after the service of the application. This affidavit states that Mr Masapu contacted her on 22 and 23 November 2022, asking about the purpose of the application and requesting a meeting to resolve the issues. On 23 November 2022, she and Mr Botha had a telephone conversation with Mr Masapu, referring him to the prayers in the Notice of Motion and stating that the matter is no longer open for discussion.
- [12] On 22 November 2022, Mr Masapu indicated via email that their request for an extension of time to lodge the liquidation and distribution account had been approved.
- [13] A week later, Mr Masapu wrote an email advising that they had now accepted all the copies of the addendum to the will. Ms Botha replied to the email requesting that the copies of the three addendums be emailed. When she did not receive the copies, she lodged a formal application with the Master on 13 December 2022. Despite following up, they have not received copies of the addendums.
- [14] Mr Botha filed a further supplementary affidavit on 19 January 2023. He stated that Mr Masapu might be under the impression that since he has advised them that he has accepted the addendums, the Applicant will not proceed to move for an order that he should pay costs *de bonis propriis*. He addressed this in an email to Mr Masapu on 13 January 2023, also informing him that he has still not provided them with copies of the three addendums previously not accepted. They told him that the case is enrolled on the unopposed roll for 15 February 2023 and that they will move for the orders set out in the motion. They have not received any communications after this.
- [15] Notice of set down was emailed on 16 January 2023. On the day of the hearing, they had not received any copies of the addendums allegedly accepted. The attorneys, therefore, saw no other way of solving this dispute than continuing with the matter.

### [3] The law

- [16] The Administration of Estates Act 1965 sets out the legal mechanism in terms of which the Master must administer estates. Section 8 of the Act places a duty on a person in possession of a document purporting to be a will, to transmit or deliver such a document to the Master at the time of the death (or any time after) of the person who executed the document. Once these documents are delivered together with any addendums, the Master must consider the validity of the will. He may refuse to accept the will until the validity of it has been determined by the court. In deciding to accept or refuse the will, the Master must consider the revocation of a will by a later will.
- [17] This exercise of power is a public power and is, as such, subject to judicial review by the courts. It must also comply with the Constitution. Section 33(2) of the Constitution makes it clear that everyone adversely affected by administrative action has the right to be given written reasons.
- [18] The Promotion of Administrative Justice Act 3 of 2000 (hereafter PAJA) was enacted to give effect to the right to just administrative action. Any administrative act must be lawful, reasonable, and procedurally fair. A decision and a failure to make a decision constitute "decisions"<sup>1</sup> of an administrative nature in terms of section 1 of PAJA,<sup>2</sup> which makes it subject to judicial review.
- [19] If a person has not been given reasons for an action, they may, within 90 days from the date on which that person became aware of the action, request the administrator to furnish them with such reasons. The administrator then has 90 days to respond, giving adequate reasons in writing for the administrative action.<sup>3</sup> Proceedings for judicial review must be instituted no later than 180 days after the date on which the executor became aware (or might reasonably have been expected to have become aware) of the action and the reasons for it.<sup>4</sup>
- [20] Section 6 of PAJA then sets out the review powers of the court. The Applicant states that the decision to revoke the addendums by the First Respondent was:
- i. Procedurally unfair as it did not comply with the provisions of section 3(2)(b)(i-v) of the Act;
  - ii. It was materially influenced by an error of law; and/or
  - iii. Took into consideration irrelevant considerations while not considering relevant considerations;
  - iv. Arbitrary or capricious;
  - v. Not rationally connected to the purpose for which it was taken, the purpose of the empowering provision; or the information that was before the administrator.

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<sup>1</sup> Section 1 definitions.

<sup>2</sup> *Noupoort Christian Care Centre v Minister of National Department of Social Development* 2004 3 All SA 475 (T).

<sup>3</sup> Section 5(1).

<sup>4</sup> Section 7(1).

[21] S 8 of PAJA provides that the court, in judicial review, may make a wide array of just and equitable remedies listed in the section. As far as the last addendum is concerned, these remedies must be read together with section 6(3) PAJA, which sets out possible remedies where the administrator failed to make a decision.

#### **[4] Discussion**

[22] Neither the estate of the deceased nor the estate of the late Mrs Hahn can be finalised until the Master has made a decision regarding the addendums. These decisions are administrative actions, as explained above, and failure to take a decision adversely affects the rights of both the estates and has a direct, external legal effect, in this case, on the particular Applicant.

[23] The fact that the Master gave no reasons despite requesting feedback more than twenty times leads to unfavourable inferences, namely, that the Applicant's right to lawful administrative action is infringed. This forced them to approach the court to ensure adherence to the principles in s 33 of the Constitution and stipulated in PAJA. This not only violates the rights of the Applicant in this case, but also the realisation of Constitutional rights, which have an impact on the bigger society.<sup>5</sup> Thus, while an individual approached the court to enforce their right of just administrative action in this particular case, it is not only the Applicant that benefits when public officials adhere to PAJA and s 33 of the Constitution, society as a whole benefits. It indicates respect for the rights and values in our Constitution and gives legitimacy and content to those rights.

[24] Based on the above, I have no problem to find that the Applicant has made out its case for relief as set out in its Notice of Motion as far as the review is concerned. That only leaves the issue of costs.

#### **[5] Costs**

[25] As for costs, the Applicant makes the following argument: Section 195 of the Constitution places certain obligations on public officials concerning the values and principles underlying public administration governance. Section 195 (a), for instance, requires a high standard of professional ethics. It requires that services are provided impartially, fairly, equitably and without bias.<sup>6</sup> Public administration must be accountable.<sup>7</sup> The public must be provided with timely, accessible and accurate information to ensure transparency.<sup>8</sup> He then states that

"I humbly submit that the time has come that the courts impose the full extent of the law upon public officials who arrogantly act in breach of the constitutional imperatives [...] This is an example for the court to grant a personal cost order which would act as a deterrent for those responsible, and for others, to act within their constitutional obligations, and to serve the country and its people, rather than to serve themselves."

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<sup>5</sup> *Fose v Minsiter of Safety and Security* 1997 (7) BCLR 851 (CC) para 95.

<sup>6</sup> S 195(d).

<sup>7</sup> S 195(f).

<sup>8</sup> S 195(g)

- [26] The frustration of the Applicant is evident in these sentences. They thus asked for a costs *de boniis propriis* on an attorney-own-client scale, including the cost of two counsels. In the alternative, they ask for a cost order against the Sixth Respondent on an attorney-client scale, including the costs of two counsel.
- [27] The Applicant is correct in stating that, based on what was presented to the court, Mr Masapu's conduct falls short of what is expected in terms of s 195 of the Constitution. The failure to provide reasons and to make a decision has caused unnecessary litigation costs and delays in finalising both estates. The court is displeased to read about the frustrations of professionals tasked with administrating estates dependent on public officials' cooperation.
- [28] Costs orders have in the past been made against public officials who acted in bad faith. In terms of the common law, an order for costs *de bonis propriis* by a person acting in a representative capacity is appropriate if their actions are motivated by malice or amount to improper conduct.<sup>9</sup>
- [29] These principles are now contained in s 1 of the Constitution: the founding values of accountability and responsibility,<sup>10</sup> with s 2 requiring that all law or conduct inconsistent with the Constitution being invalid, and that the obligations imposed by it must be fulfilled. Froneman J in *Black Sash II*<sup>11</sup> makes it clear that
- "From an institutional perspective, public officials occupying certain positions would be expected to act in a certain manner because of their expertise and dedication to that position. Where specific constitutional and statutory obligations exist the proper foundation for personal costs orders may lie in the vindication of the Constitution, but in most cases there will be an overlap."
- [30] Constitutionally such cost orders are thus permissible. In fact, it is an important mechanism to ensure that public officials act in good faith, in accordance with the law, and in line with the Constitution. These orders are granted when public officials egregiously fall short of doing their duties.<sup>12</sup>
- [31] The facts set out in this judgement undoubtedly show ineptness on the part of the Assistant Master in performing his statutory duty in line with legislation and the Constitution in this case. To make matters worse, he failed to account for his delay in giving reasons for his decisions or making a decision. He also did not take the court into his confidence to explain their side of the story. However, this is not a case so egregious that it warrants a personal cost order.<sup>13</sup> While inept, there was no indication of malice on the part of Mr Masapu. Sixth Respondent, with this order, will be alerted of Mr Masapu's transgressions of his constitutional duties.

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<sup>9</sup> *Swartbooi v Brink (2)* [2003] ZACC 25.

<sup>10</sup> *Black Sash Trust v Minister of Social Development* [2017] ZACC 20 para7.

<sup>11</sup> *Black Sash Trust v Minister of Social Development* [2017] ZACC 20 para 8.

<sup>12</sup> *Public Protector v South African Reserve Bank* [2019] ZACC 29 para 159.

<sup>13</sup> Compare for instance with *Gordhan v Public Protector* [2020] ZAGPPHC 777 and *Public Protector v Commissioner for the South African Revenue Service* [2020] ZACC 28.

[32] The Applicant did everything he could to ensure that they could get reasons for the decision or to get the First Respondent to make a decision. He should not have had to come to the Courts to force the First Respondent to do its statutory duty in line with their constitutional obligations. Therefore, a punitive cost order is warranted to indicate the extent of the court's disapproval of the First Respondent's conduct. I am of the view, however, that the case is not so complex as to warrant the cost of two counsels.

### **[6] Order**

[33] I, therefore, make the following order:

1. The prayers, as set out in paragraphs 1 to 6 in the Notice of Motion, are granted.
2. The Sixth Respondent is ordered to pay the costs on an attorney-and-client scale.

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**WJ DU PLESSIS**

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:

Adv L Kellerman SC

Instructed by:

Cornel Botha Attorneys

Date of the hearing:

15 February 2023

Date of judgment:

20 March 2023