



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No:

10484/2019

In the matter between:

ROBINDUTT RAMBALLI

FIRST APPLICANT

BRIDGERAJH RAMBALLI

SECOND APPLICANT

VINAY RAMBALLI

THIRD APPLICANT

SHARMA NAIDOO

FOURTH APPLICANT

PURSHPAVATHIE BALIPURSAD

FIFTH APPLICANT

ASHA SHYAM

SIXTH APPLICANT

and

THE MASTER OF THE HIGH COURT

KWAZULU-NATAL

FIRST RESPONDENT

RENJENI NAIDOO N.O

SECOND RESPONDENT

SHERIFF OF THE HIGH COURT,

DURBAN SOUTH

THIRD RESPONDENT

REASONS FOR JUDGMENT

Delivered on: 3 February 2022

Masipa J:

Introduction

[1] This matter came before court on 12 November 2021 as an opposed application. The applicants were represented by Mr V *Gajoo SC* and the second respondent by Ms J A *Julyan SC*.

[2] The relief sought in the applicants' notice of motion was set out as follows:

'That: -

- (a) The court order granted by Honourable Judge Lopes on 23 August 2019 under case number 9190/2017 be and is hereby set aside;
- (b) The warrant of execution against the movable property of the applicants issued under case number 9190/2017 be and is hereby stayed pending the final outcome of this application;
- (c) The first respondent is directed to forthwith remove the second respondent as the executor of the estate of the said Lakraj Ramballi (Estate No. 13852/2016 DBN);
- (d) The first respondent is directed to do all things necessary to appoint the first applicant and/or any other person as it deems fit as the Executor of the estate of the said Lakraj Ramballi, (Estate No. 13852/2016 DBN);
- (e) The second respondent is directed to pay the costs of this application;
- (f) The applicants be and are hereby given leave to supplement these papers insofar as it may be necessary; and
- (g) Further and/or alternative relief.'

[3] The issue which was before Lopes J, whose order the applicants seek to set aside, related to the validity of the deceased's Will which was found to be invalid. While the issue of the deceased's marriage to the second respondent was raised before Lopes J, it was not relevant for the determination of the validity of the Will. This was expressed by Lopes J who found that it was an issue to be determined on another day.

[4] Following the filing of all affidavits, heads of argument were prepared by both counsel. In their heads of argument, the applicant's focus was on the primary issue to be determined as being the setting aside of the order or the judgment by Lopes J. The court would only need to make a finding on the issue regarding the existence of the marriage once the primary issue had been decided. Ms *Julyan* contend that there

were disputes of fact arising from the issue in respect of the existence or otherwise of the marriage. On the basis of this, Ms *Julyan* prepared extensive heads dealing with the basis upon which a rescission application can be brought, whether it was necessary to have the matter referred to oral evidence, whether the applicants should have pursued an appeal instead of a rescission application considering the provisions of Uniform rule 31, Uniform rule 42 and the provisions of common law. Ms *Julyan* submitted that there was no basis upon which the applicants' application should succeed.

[5] During argument, Mr *Gajoo* conceded that there was no merit in respect of prayers (a) and (b) and accordingly that there was no need to determine this. He however argued that the prayers (c) and (d) could still be pursued and could be heard and determined. He submitted that the purported marriage between the deceased and the second respondent was challenged. He argued that it was this marriage which formed a basis for the appointment of the second respondent as the executor.

[6] After hearing submissions by counsel, I granted an order set out below with reasons to follow:

'Order

1. The application is dismissed with costs;
2. The applicants are to pay costs of the application on an attorney and client scale.'

What follows are my reasons.

Points in limine

[7] The second respondent raised several points in limine, the first one being that an order of the high court once granted stands unless and until it has been set aside on appeal. It was argued that while there may be circumstances where under Uniform rule 42 an order may be set aside, the applicants have not sought to rely on the circumstances contemplated in Uniform rule 42.

[8] The second respondent contends that the current application is disguised as an appeal and contends that there is no basis on which to appeal the decision by

Lopes J. Accordingly, she prayed for the application to be dismissed with costs on the scale between attorney and client.

[9] In reply to the point in limine, the applicants contend that they were entitled to request that the court order be set aside if they were able to make out a case supported by evidence.

[10] They contend that since the granting of the order, they had an opportunity to acquire the necessary expert evidence sufficient to justify the setting aside of Lopes J's order. The applicants contend that they did not have do this by way of an appeal, variation or review but that the current relief sought was competent. This evidence allegedly disproves the existence of the Hindu marriage between the deceased and the second respondent. They accordingly asked for the first point in limine to be struck off.

[11] Interestingly, the applicants accept that Lopes J correctly pointed out that the issue of the validity of marriage could be dealt with in due course. In any event, as stated earlier on in this judgment, the issue relating to the setting aside of the order was abandoned by Mr *Gajoo* during argument. Accordingly, it became unnecessary to determine this point in limine.

[12] The second point in limine is that the applicants do not dispute that the estate should be administered in terms of intestate succession and that this concession is fatal to their application. There is accordingly no basis for the relief sought by the applicants.

[13] In respect of the second point in limine, the applicants contend that they were unable to challenge the second respondent's expert finding regarding the validity of the Will without their own expert evidence and as a result they had no choice but to accept that the deceased's Will was null and void and had to be set aside. They accepted that the estate had to devolve in terms of the rules of intestate succession.

[14] The applicants contend that they subsequently obtained the services of their own expert and established from the report upon investigation of the specimen signatures that the applicants provided that the Will was valid and therefore binding.

[15] According to the applicants, this meant that the document provided by the second respondent's experts raised many questions on the issue of authenticity. Once this issue is properly ventilated before the court a plausible and logical outcome will be established. They accordingly denied that there was any basis for the second point in limine and asked for it to be struck off. However, the applicants aver that they accept that the estate may devolve intestate. They contradict themselves in this regard.

[16] In relation to this point, I agree with the second respondent that the decision by Lopes J was based on the evidence available and the concession made by the applicants at the time. The matter was opposed and parties had the opportunity to furnish relevant and necessary evidence before the order was made. The subsequent enquiry by the applicants is not cause for the setting aside of the order. In any event, this does not satisfy the requirements for the rescission of judgment dealt with below. The applicants contradict themselves as to the true position in respect of the validity issue. This point in limine succeeds but is not determinative of the matter.

[17] The third point in limine is that the applicants have no evidence to support the claim to set aside the order of Lopes J assuming this court's jurisdiction but contended that the court did not have jurisdiction as it is *functus officio*. The second respondent contends that the applicants express nothing more but an intention to instruct a handwriting expert to examine the signature on the testamentary documents but this exercise has already been undertaken by the court and it was found that the signature was not that of the deceased. This was after Lopes J considered the evidence of the forensic document examiner Michael John Irving.

[18] In respect of the third point in limine, the applicants contend that their expert evidence that was not before Lopes J raises concerns which calls for the court order to be set aside and that the third point in limine falls to be struck off.

[19] The applicants contend that neither they nor Lopes J are experts on the authenticity of the signature on the Will and that they had to rely on the expert evidence of Mr Irving which was obtained by the second respondent. A subsequent report by the applicants' experts raised material defects on Mr Irving's report.

[20] While this point was well taken, Mr *Gajoo's* withdrawal of the challenge of the relief to set aside Lopes J's order makes the determination of this point superfluous.

Setting aside or rescission of a court order

[21] While the main relief sought was the setting aside of the judgement by Lopes J, the withdrawal of this relief has made it unnecessary for the issue relating to rescission to be dealt with in this judgment. As stated above, such withdrawal was only made during argument. It is noteworthy to mention that in the applicants' heads of argument, the issue of setting aside the judgment was not addressed. Of course without any prior notification none of the respondents would not have known that the issue had been abandoned. It was accordingly reasonable that the second respondent dealt with the issue of the rescission extensively in her heads of argument.

[22] I deal with the issue regarding the setting aside of Lopes J's judgment as indicated above in the third point in limine. An order of court may be set aside under three instances. Uniform rule 31(2)(b) applies to judgments granted by default, and provides that:

'A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.'

[23] Uniform rule 42 deals with variation and rescission of orders and reads as follows:

'(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

- (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) An order or judgment granted as the result of a mistake common to the parties.
- (2) Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.'

[24] The applicants could not seek reliance on the provisions of Uniform rule 42 since there were no prospects of success in a Uniform rule 42 application. I agree that the second respondent's argument is tantamount to an appeal. Having already ruled the Will to be invalid, the court is *functus officio*.

[25] In paragraph 5 of the founding affidavit, the applicants set out the purpose of the application, being to set aside the court order granted by Lopes J, and state that flowing from the above, it would therefore be necessary that the third respondent be directed to stay the warrant of execution against the movable property. This was in respect of the cost order granted against the applicants by Lopes J pending the final outcome of this application. The applicants go further to say that as a result of the above it would be appropriate for the first respondent to be directed to forthwith remove the second respondent as the executor of estate late Lakraj Ramballi, further that the first respondent be directed to appoint the first applicant *or any other person it deems fit* as executor.

[26] The significance of what is set out above will become apparent in the course of this judgment.

[27] The applicants contend that the basis of the matter which was before Lopes J to determine the validity of the Will arose from the second respondent's claim, set out in her founding affidavit, that she was married to the deceased, their brother, on 2 August 2008 in terms of Hindu Rights and was accordingly his widow. They contend further that when the matter was before Lopes J, they did not have proper evidence to rebut the alleged marriage, hence a consent order was taken.

[28] According to the applicants this was an oversight on their part and that of the judge as they did not question the whereabouts of the marriage certificate and a copy had not been annexed to the founding affidavit.

[29] They contend further that the second respondent had engaged the services of a handwriting expert and had provided certain documents from him to vindicate the signature of the deceased on a Will dated 6 October 2016. As already stated, whether the signature was that of the deceased or not was not, and is still not, an issue in the present application as they have no objection to the estate being administered in terms of the rules of intestate succession.

[30] The applicants then deal with the issue of the alleged marriage between the second respondent and their deceased brother and the efforts that they took to disprove the existence of that marriage. They aver that the marriage does not exist and that the signature on the marriage certificate has been proven not to be that of the deceased by their expert. The issue of the validity of the marriage was raised before Lopes J and he indicated that it was not an issue for determination before him. This can therefore not be the basis for rescinding the judgment. It is a separate matter and as argued by Ms *Julyan*, the applicants should if they wish to challenge this, refer a new case.

[31] In respect of the costs order which was granted by Lopes J, a bill of costs was taxed in the amount of approximately R90 000 and a warrant of execution was then issued. This issue has been withdrawn by Mr *Gajoo* and no longer an issue for determination.

[32] The applicants contend that the onus remains on the second respondent to prove on a balance of probabilities that there exists a valid religious marriage between her and the deceased, which gives her a right to a claim in the estate as a spouse and to manage the estate as the executor. Whether or not the onus rests on the second respondent to prove the marriage is an issue to be determined by another court when a proper case has been referred for such purpose.

[33] The second respondent contends that when the matter was before Lopes J the applicants disputed that the second respondent had been married to the deceased. The applicants indicated that they appreciated that the issue of the validity of the marriage did not need to be decided at that stage and that the issue

would be ventilated fully should the second respondent pursue any claim against the deceased estate. I share the same sentiments.

[34] The applicants contend that the first respondent as a creature of statute has no power of discretion to remove the second respondent and a court order is required for such purpose. It was accordingly argued that on the evidence, this court is duty bound to grant the necessary relief.

[35] The applicants state that the second respondent was likely in the process of finalising her divorce action during the period when she contends she was married to the deceased. Further that it was abnormal that she never, in the eight years of her marriage, laid any claims to her rights as the wife of the deceased. Similarly, this and other issues are not relevant to the issues which were to be determined by Lopes J and the applicants cannot seek to introduce new issues after judgment has been granted. This is the reason why the second respondent argued that the applicants are seeking to indirectly appeal the judgment.

[36] In respect of the Will, the first applicant contends that he intends instructing a handwriting expert to assess or to investigate the Will and to verify the signature of the deceased from the specimen signature received from his bank. Should the Will be invalid then the applicants will accept the position that the second respondent is lawfully entitled to claim as beneficiary however, if the Will is valid then the matter will change and issues which require proper ventilation would arise. This contradicts what the applicants stated about their acceptance of the order by Lopes J. They accepted, as they subsequently did before this court, that the deceased died intestate. They cannot seek to approbate and reprobate.

[37] In respect of the marriage certificate, the second respondent submitted that the marriage certificate was simply evidence of a marriage and not determinative of the validity of the marriage. In view of the sentiments shared above, there is no basis to address this issue further.

[38] The applicants allege that the basis for the second respondent's locus standi in the application before Lopes J was her alleged marriage to the deceased, and

there is now evidence before this court to disprove the validity of the marriage certificate. This is a new issue which was not raised before Lopes J. It is a further issue which supports the second respondent's argument that the applicants ought to have filed an applicant instead of the current application.

[39] The applicants deny that their challenge should follow an appeal process since Lopes J had not erred in his decision. They contend that he had no alternative but to grant the relief which was sought by the second respondent. This cannot be correct since the judgment was made on the basis of the evidence presented to the judge and after considering the relevant issues.

[40] The underlying fact was that the second respondent's alleged marriage to the deceased was being challenged. When the matter was before Lopes J he made it clear that he was not deciding on any other issue but the validity of the Will. If this is accepted as correct, then the applicants cannot seek to introduce the issue of the validity of the marriage. The court performed its functions as it had been called upon to do, hence it is *functus officio*. It cannot now be said that this issue still has to be determined under the same matter.

[41] Mr *Gajoo* referred to *Govender v Ragavayah NO and Others* 2009 (3) SA 178 (D), dealing with inheritance of Hindu spouses. While the dictum in the judgment is noted, in view of my earlier remarks, it is not relevant for determining the current matter. Mr *Gajoo* submitted that the first respondent received the papers in the current application, was called upon to put up a report but elected not to do so instead electing to file a notice to abide. Further that when such election was made, the first respondent was left with no doubt, after reading the papers, that the fundamental dispute revolved around the validity of the marriage. He argued that the relief in prayer (c) was clear to all the parties. This is because the issue about the validity of the Hindu marriage was raised in the founding papers and in reply.

[42] He submitted that if the court directed the matter to be referred to oral evidence, the first respondent could be called upon to explain the basis upon which the second respondent was appointed. Further that the second respondent acknowledges that the marriage certificate served as a basis for her appointment. If

the matter is referred to trial, the issue of the validity of the marriage certificate can be determined. Should the marriage be proved not to exist then the applicants would be entitled to succeed and if it was proved to exist, then the second respondent would succeed.

[43] Mr *Gajoo* submitted that in terms of s 54(1)(a) of the Administration of Estates Act 66 of 1965 ('the Act') provision is made for the removal of an executor and made specific reference to s 54(5) which provides that '[a]ny person who ceases to be an executor shall forthwith return his letters of executorship to the Master'. Section 54(1)(b) deals with the removal of an executor where the executor has been nominated by a Will and where the Will is set aside; this is clearly not relevant to the current matter.

[44] Ms *Julyan* submitted that most of the issues raised by the applicants in argument were new issues. The first respondent was not aware that such issues would be raised neither was the second respondent. She submitted that it was Mr *Gajoo's* forensic skill that mislead this court into thinking that the case is broader than the one set out in the papers. In respect of the second respondent's appointment as executor, she referred to D Meyerowitz '*Meyerowitz on Administration of Estates and Their Taxation*' (2010) para 11.8 which deals with the procedure for the removal of an executor by court. Meyerowitz states that the application for the removal of an executor must be brought against them personally and not in their capacity as the executor. Upon considering the Meyerowitz, I conclude that in the current proceedings the second respondent has been cited in her capacity as the executor which is contrary to the procedure set out in Meyerowitz.

[45] Ms *Julyan* submitted that the case as argued by Mr *Gajoo* is completely different to the one set out in the applicants' papers. She submitted that it was correct that the first respondent was not properly appraised in view of paragraph 5 of the applicants' founding papers which set out the purpose of the application as follows:

'5.1 – the purpose of this application is to set aside the court order granted by Honourable Judge Lopes on 23 August 2019 under case number 9190/2017. A copy of the court order is annexed hereto marked annexure R1.

5.2 – flowing from the above it would therefore be necessary that the third respondent herein be directed to stay the warrant of execution against the movable property under case number 9190/2017, in respect of the cost order granted against the applicants in terms of the abovementioned court order, pending the final outcome of this application. A copy of the warrant is annexed hereto marked annexure R2;

5.3 – as a result of the above, it would be pertinent that the first respondent is directed to forthwith remove the second respondent as the executor of the estate of the said Lakraj Ramballi (Estate no. 13852/2016 DBN). A copy of the letter received from the second respondent's attorneys of records dated 18 September 2019 is annexed hereto marked annexure R3; and

5.4 – further, that the first respondent is directed to appoint the first applicant and or any other person at it deems fit as the Executor of the estate of the said Lakraj Ramballi, (Estate no. 13852/2016 DBN).'

[46] I agree with Ms Julyan. The manner in which the relief sought by the applicants is phrased can only be read to mean that para 5.3 and 5.4 were dependent on the determination of 5.1 and 5.2. The wording at the begging of each of those clauses speak volume. The phrase 'as a result of the above' in 5.3 can only mean as a result of 5.1 and 5.2 similarly, the word 'further', on 5.4 can only be read to mean in addition to meaning to add a further fact to what was said in 5.3.

[47] Ms *Julyan* argued that in respect of clause 5.2 emphasis must be placed on the words 'flowing from above' and in respect of 5.3 emphasis must be placed on the words 'as a result of the above'. She submitted that the entire case that the second respondent came to challenge and which the first respondent elected to abide by was premised on the setting aside of Lopes J's order. All other relief flows from that. The relief sought in paragraphs (b), (c) and (d) of the notice of motion are all dependant on the court granting the relief in paragraph (a).

[48] She submitted that Mr *Gajoo* wants the court to believe that paragraph (c) and (d) are stand-alone relief which was possible in another application but not in the current one since they are ancillary to the granting of the main order in paragraph

(a). Since the relief in paragraphs (a) and (b) is no longer being pursued (which was not foreshadowed in the heads of arguments and is only raised for the first time during argument) and the first respondent had no idea of this, the applicant should pay the costs of this application as they would then be unsuccessful.

[49] Ms *Julyan* submitted that there is no case made for the removal of the second respondent. While there are cases where it is appropriate for the court to remove an executor this is not the case which the second respondent came to meet. Referral to s 54 of the Act was merely in passing.

[50] She submitted that the high-water mark of the applicants' case is that if there is no valid marriage then they are entitled to seek the second respondent's removal. However, removal of an executor is set out in the Act.

[51] An executor is appointed by the Master at her discretion. The court would not find any authority that if no Hindu marriage existed then the executor can be removed.

[52] Ms *Julyan* argued that Mr *Gajoo* cannot show anywhere in the papers where it is said that the court is to exercise a discretion to remove the second respondent. He relies on the issue of the existence of the marriage and on what he says is the most probable reason for the second respondent's appointment which is pure speculation. There is nowhere in the second respondent's affidavit where she says that the marriage certificate was submitted for purposes of her appointment as an executor but she avers that it was submitted for purposes of the administration of the estate.

[53] She submitted that the dispute about the validity of the marriage is premature since the liquidation and distribution account has not been drawn and only when it leans towards the spouse inheriting, then the validity of the marriage would be relevant. I agree with this submission. In any event, as was argued by Ms *Julyan*, if the matter was referred to trial for a determination of the validity of the marriage, this does not affect the issue of the removal of the executor. This is because for the second respondent to be removed as executor, her conduct must call for this. There is no reason why a court should be saddled with this matter.

[54] Ms *Julyan* further submitted that in the applicants' replying affidavit, they still contended that the issue was about the validity of the signature of the Will. In any event, the case made in the founding affidavit was abandoned by Mr *Gajoo* in his oral submissions which was the correct move. The applicants have not made out a case for a stand-alone application in respect of the second respondent's removal as an executor.

[55] A further issue to consider on the question of whether to refer the dispute to oral evidence is whether this could have been anticipated or not. Courts have refused referrals to oral evidence where the applicant should have anticipated disputes of fact. The applicants knew that there were disputes of fact. Accordingly, Ms *Julyan* argued that they should never have come to court by way of application. They should have proceeded by way of action and should never have wasted the court's time.

[56] Consequently, the application stands to be dismissed in its entirety with costs on an attorney and client scale and the court should not allow for the deceased estate to be saddled with costs. Alternatively, para (a) and (b) stands to be dismissed with costs, and the first respondent be directed to file a report on why paragraph (c) should be granted.

[57] I agree with Ms *Julyan* that the alternative order is not ideal and the applicants should file an action where the first respondent can respond to the issue of the validity of the marriage. The relief to remove the second respondent has not been properly canvassed on the papers if the applicants feel that they have prospects of success to disprove the marriage.

[58] Ms *Julyan* submitted that it was within the first respondent's discretion to appoint whomever she deems just as an executor. There was no explanation as to what the rationale was for the appointment of the second respondent since the first respondent was not invited to provide it. This was because the founding affidavit sets out the issue as relating to the validity of the Will.

[59] Mr *Gajoo* in reply submitted that the courts must hand down judgments which are in the interest of justice. It would be unusual for the first respondent to appoint a person as an executor who has no relation to the deceased. This would be an exception to the rule. The only reasonable inference to be drawn is that the appointment was due to the purported marriage. Since it never existed, it would be appropriate for the appointment to be set aside and this can only be done once the court rules the marriage invalid.

[60] He submitted that the issue in dispute has an impact on the winding up of the deceased estate. The result therefore calls for the matter to be referred to trial so that the matter can be considered holistically.

[61] Mr *Gajoo* submitted that when considering the notice of motion, prayer (c) and (d) are self-standing and are supported by the founding papers. The applicants' case is not against the first respondent and if the court decides on the issue of the validity of the marriage then it can make the necessary order for the setting aside of the appointment.

[62] He submitted that the second respondent accepts that a dispute of fact exists and it would be a travesty of justice if the applicants were denied the opportunity to deal with the matter in the form of oral evidence. If this application is refused, the applicants would have to institute a fresh action. He submitted that it was not speculation that the appointment by the first respondent of the second respondent was based on the existence of the marriage and that one can draw inferences from the evidence being that the marriage certificate was the result of the second respondent's appointment. The appropriate order was therefore to refer the matter to trial. There was no basis to dismiss the matter but if that is done then there is no basis for a punitive cost order.

[63] In order to set aside the appointment of an executor, an application must be made before a judge in the high court and may be brought by any interested party including the Master of the High Court within whose area of jurisdiction the appointment was made.

[64] If another person other than the Master applies to set aside the appointment of an executor, this should be made on notice of motion and if the facts are in dispute by way of action for a declaratory order, otherwise the court may refer the matter for trial. See *Jamie v Adams* 1914 CPD 952, *Ex Parte The Master, in Re Pretorius* 1927 TPD 820; *Ex Parte Clear* 1937 EDL11.

[65] Regard must however be had to the real/primary issues before the court. I agree with Ms *Julyan* that the applicants make out their case in the founding papers and invite the respondents to oppose. The case set out by the applicants was the setting aside of Lopes J's order. The other relief sought was dependant on that. Arising from this, it cannot be said that the relief in paragraphs (c) and (d) are stand-alone. They were set out to depend on the primary relief. It is indeed correct that in another application, they may stand alone. This is however not the case.

[66] It is also correct that the first respondent could not have understood the case to be anything but the setting aside of the initial court order hence the notice to abide. As a consequence of this, the court is deprived of having evidence before it setting out the basis for the second respondent's appointment and the basis, if any, for her removal. The existence or otherwise of the marriage is on its own insufficient for the removal of the first respondent. It does not satisfy the requirements of the Act.

[67] As regards a referral to oral evidence or trial, the provisions of the Uniform rules and case authority are clear. Where a party seeks relief by way of an application, there is a duty to refer the matter to trial or oral evidence once a dispute or disputes of fact arise. The applicants have been aware from when the matter was before Lopes J that there are disputes of fact in respect of the validity of the marriage and elected not to bring an action. If not at that stage, it would have been at the stage when the answering affidavit was delivered. Despite this, they elected to proceed by way of application.

[678] It is correct that in making a determination whether to refer the matter for oral evidence the court exercises a discretion. This must be done judiciously and in the interest of justice. In this case, there is nothing that indicates that the first respondent appointed the second respondent as the executor due to her Hindu marriage to the

deceased. Accordingly, even if the marriage is found to be invalid, this will not lead to her removal. This is because the removal of the executor is regulated by the Act.

[69] There has been nothing placed before this court to prove that the second respondent breached the provisions of the Act. The issue of her marriage has to do with her capacity to inherit and not her appointment as an executor. Should the applicants wish to pursue this issue, they may refer an action to court.

[70] On the issue of costs, what is clear is that the applicants' case as made out in the papers was without merit from the start. This is apparent from the concession by Mr *Gajoo* that the relief sought in prayers (a) and (b) could not proceed. I agree with Ms *Julyan* that there was a last minute attempt by Mr *Gajoo* to salvage the case. It was apparent from the commencement of the case that it was misguided. It was a waste of the court's time and the second respondent incurred costs which were unnecessary. Accordingly, I agreed with Ms *Julyan* that a punitive cost order was warranted and made an order on an attorney and client scale.

Masipa J

APPEARANCE DETAILS:

For the Applicants:	Mr V Gajoo SC
Instructed by:	Simrithi Sharma & Associates
For the 2 nd Defendant:	Ms J A Julyan SC
Instructed by:	Gounden and Associates
Matter heard on:	12 November 2021
Order delivered on:	12 November 2021
Reasons for Judgment:	3 February 2022

