

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: UM228/2022

In the matter between:-

ANNA MARTHA NIEMAN

Applicant

and

THE MASTER OF THE HIGH COURT

1st Respondent

GERHARD JACOBUS OLIVIER

2nd Respondent

ANNAMART NIEMAN

3rd Respondent

NELLIE OOSTHUIZEN

4th Respondent

JOHANNES JACOBUS NIEMAN

5th Respondent

FLORA PETREA BREYTENBACH

6th Respondent

JOHANNA MAGDALENA SMITH

7th Respondent

**(Estate late WILLEM ADRIAAN NIEMAN ID: [REDACTED],
Master's Reference 7170/2022)**

JUDGMENT

FMM SNYMAN J

- [1] This is an urgent application in which the applicant seeks an order in terms of which she is authorised and empowered to conduct commercial transactions in relation to the movable and immovable property registered in the name of the applicant's late husband Mr Willem Adriaan Nieman (the late Mr Nieman). The property includes property registered in the name of both the applicant and her late husband, property forming part of the deceased estate of her late husband and subsequently their joint estate. The order sought also requests the applicant to be afforded any power associated on behalf of her late husband's members' interests registered in the name of her late husband in four (4) different Close Corporations.
- [2] The aforesaid is the relief sought on an urgent basis in Part A of the application. Part B of the application is an interdict to restrain the Master of the High Court to appoint the 2nd Respondent as the executor of the Estate of the late Mr Nieman. This application only deals with Part A.
- [3] The applicant is represented by Adv JR Peter SC with Adv HJ Scholtz and the 2nd respondent is represented by Adv JHF Pistor SC and Adv MG Hitge.
- [4] The applicant and Mr Nieman were married in community of property on 4 April 1972. Mr Nieman passed away on 6 November 2022. The joint estate of Mr Nieman and the

applicant consists of approximately 63 immovable properties which exceeds an approximate 20,000 hectares of agricultural farms. It is common cause that the joint estate is worth over R350,000,000.00 (Three Hundred and Fifty Million Rand) consisting of mostly agricultural farming and little to no debt. I will refer to the farming enterprise as the "family business". The 3rd to 7th respondents are all family members of the applicant and her late husband and they are all part of the family business. Certain respondents are members of close corporations in which some of the several farms have been registered.

- [5] The 1st Respondent is the Master of the High Court cited in its official capacity. When the applicant and her late husband got married in 1972 both had children from previous marriages. Save for the 1st and 2nd respondent, the remainder of the respondents elected to not oppose this urgent application but to abide by the decision of the Court, reserving their rights in as far as it may be necessary.
- [6] The 3rd and 4th respondents are adult children born of the marriage of the applicant and her late husband. The 5th respondent is born of the deceased's first marriage. The 6th and 7th respondents are born of the applicant's first marriage. Save for the 1st and 2nd respondents, all the respondents (and the 4th respondent's husband) are involved in the family business.
- [7] This application is opposed by the 2nd respondent who is an

attorney of profession and has been the family's legal advisor for over 40 years. The 2nd respondent has been the so-called "family attorney" for the applicant and her late husband and the 3rd to 7th respondents in personal affairs as well as in the family business. It bears mentioning that the 2nd respondent is cited in his personal capacity and opposes the application as such.

[8] The application is opposed on the following bases:

- 8.1. As a point *in limine*, that the founding affidavit is not properly commissioned and renders the urgent application fundamentally flawed. The crux of the argument is that the commissioning Officer of Oaths has an interest in the proceedings, which vitiates the application *in toto*.
- 8.2. That the matter is not urgent and should be struck from the roll with costs.
- 8.3. That the Court does not have the power to interfere with the discretion of the Master when the Master is yet to appoint an executor to the estate of the late Mr Nieman. The argument is that the urgent application is brought premature, supporting the argument that the matter should not have been brought on an urgent basis.
- 8.4. That there is no merit to the application in that the

applicant is not entitled to such an order as the relief sought is not legally tenable.

[9] During 2008 the applicant and her husband instructed the 2nd Respondent to draw a joint Last Will and Testament (the testament). For purposes of this judgment, two relevant issues arise from the testament:

9.1. Lifelong *usufruct* on most of the farms is bequeathed in favour of the applicant; and

9.2. The 2nd respondent is to be appointed as executor of the estate.

Urgency

[10] On 4 August 2022 the applicant successfully approached the Court on an *ex parte* basis for the appointment of a *curator ad litem* and thereafter a *curator bonis* report for her husband. This order was issued under case number M378/2022 and Advocate Goedhart SC has been appointed as the *curator ad litem* after his diagnosis of dementia. The death of Mr Nieman has preceded the filing of the report of the *curator ad litem*. The report became available on 22 November 2022, is very comprehensive and consist of 91 pages. The report was filed as an annexure to the application. In short, the report confirms the need to appoint a *curator bonis* and recommends that the applicant be appointed as the *curator bonis* to the estate of her late husband.

[11] Prior to the death of the late Mr Nieman and on 24 October 2022 this Court, also on an *ex parte* basis and under case number UM203/2022 made an order pending the determination of the application under case number M378/2022 and the issue of letters of curatorship (if any) that the applicant was authorised and empowered to:

11.1. Let for any lawful purpose, any immovable property belonging to the deceased or the joint estate;

11.2. Exercise any power, or give any consent required for the exercise of such power, on behalf of the deceased in relation to any policy, insurance, medical aid and claims against the estate of deceased; and

11.3. Exercise any power of the deceased in relation to any members' interest held by the deceased as a member in each of the following close corporations:

11.3.1. WA Nieman Boerdery BK;

11.3.2. Ademshoop Boerdery BK;

11.3.3. Geluksdeel Boerdery BK; and

11.3.4. Niemansland BK.

[12] The order dated 24 October 2022 mirrors the relief sought in this application, and had legal value up and until the passing of the deceased on 6 November 2022. With the passing of the deceased the court order became *void ex lege*.

- [13] The applicant now approaches the Court on an urgent basis stating that the summer rainfall for crop production has started and the agricultural land has to be leased to prospective farmers in ensuring the continuation of the agricultural family business. The seasonal planting window of the summer crop is during November and December yearly. The applicant states that the lateness at which the leases are to be concluded results in a much narrower pool of potential lessees and large-scale third party farming enterprises which have sufficient resources to be in a position to get planting done within the limited time period remaining for such seasonal agriculture.
- [14] The applicant states that the 4th respondent and her husband in cooperation with the 5th respondent intimated that they do not intend to farm on the land or cooperate in the signing of the lease agreements with potential third party lessees.
- [15] A tender for prospective lease agreements has been made and the agreements are to be signed on 28 November 2022. In the absence of lease agreements, the family business as well as the deceased estate may suffer irreparable commercial harm.
- [16] It is argued on behalf of the 2nd respondent that the matter is not urgent, since the deceased was diagnosed with dementia as long ago as 28 September 2021. The argument by Adv Pistor SC is that the applicant procrastinated by waiting to bring the application. The Notice of Motion and Founding

Affidavit has been signed on 16 November 2022, but it has been served by e-mail only on 17 November 2022. The application is heard on Thursday 24 November 2022.

- [17] It is further argued on behalf of the 2nd respondent that the applicant should have approached the 1st respondent to appoint an interim *curator* in the management of the deceased estate, which would demise the necessity of this application.
- [18] It has been held in the matter of **Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd** 1982 (3) SA 582 (W) on 585 and 586 that an undue delay may constitute a basis for refusing condonation under Rule 6(12).
- [19] The passing of the deceased occurred on 6 November 2022, the funeral took place on 12 November 2022 and the 2nd respondent unequivocally indicated to the applicant on 15 November 2022 that he does not intend to relinquish appointment as executor of the deceased estate. Having regard to these time periods, I am satisfied that the applicant has proven urgency and the matter is to be heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.
- [20] The point on urgency is thus dismissed.

Point in limine: Commissioner of Oaths

- [21] The 2nd respondent raises the point *in limine* that the founding affidavit is commissioned by one Susara Theunet Ras, who personally represented the applicant in correspondence between the parties prior to the launch of the application.
- [22] Adv Pistor SC argues on behalf of the 2nd respondent that the incorrect commissioning of the founding affidavit renders the application fatally defective and results in the vitiating of the proceedings.
- [23] The rules governing the administering of oaths and affirmations by Commissioners of Oaths are set out in the Regulations promulgated under section 10 of the **Justices of Peace and Commissioners of Oaths Act 16 of 1963**. On page 377 of **Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa 4th Edition**, de Villiers van Winsen *et al* 1997 © Juta & Co Ltd the following is said:

“As to the question whether regulation 7(1) is peremptory, both precedent and principle point to an affirmative answer, with the result that a failure to adhere to the injunction in that subregulation renders the act of attestation void and deprives the document of legal validity as an affidavit.”
(footnotes omitted)

- [24] The argument loses sight of the content of Rule 6(12) which reads as follows:

“(12)(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.”

- [25] In ruling that the matter is urgent, the Court dispenses with the forms and service provided for in the Rules of Uniform Court and the Court may proceed to dispose of the matter as the Court deems fit.
- [26] Having regard to the nature of the application the Court is satisfied that the application is properly before Court. An urgent application may even be brought orally and after hours, pending on the nature and degree of urgency. This is underscored by the wording of Rule 6(12).
- [27] Adv Peter SC indicated during argument in reply that a re-commissioned founding affidavit would be filed. To address any uncertainty to the validity of the application, the applicant has filed a re-commissioned founding affidavit, to which the 2nd respondent has reserved his rights in as far as necessary.
- [28] This point *in limine* is therefore dismissed.

Merits of the urgent application

- [29] The 2nd respondent holds the view that he is duty bound and legally entitled in terms of section 14 of the **Administration of Estates Act** 66 of 1965 (“Estates Act”) to be appointed as the executor in the deceased estate of Mr Nieman as no legal impediment exists pertaining to such appointment. The applicant requested the 2nd respondent on 15 November 2022 to not be appointed as executor in terms of the deceased estate, and in contradiction of the testament. In due course, the appointment of an executor will be dealt with in Part B of the application.
- [30] The applicant applies in paragraph 2.2 of the Notice of Motion that she be issued with a letter of executorship in favour herself in respect of the deceased estate.
- [31] The 2nd respondent questions the capability of the applicant to manage the family business, stating that she is 83 years of age, frail and needs assistance to walk. He also states that she has not been involved in the business and would as such not be suitable to be granted the powers and authority as requested in the relief sought.
- [32] The 2nd respondent distinguishes, quite correctly, between the appointment of an interim executor opposed to the appointment of an interim curator as a person authorised to manage a deceased estate pending the appointment of a permanent executor of the deceased estate. The argument of Adv Pistor SC is that the Court is not entitled to interfere

with the powers of the Master in the appointment of an executor or interim executor of a deceased estate, prior to the Master executing his discretion in appointing an executor. However, the applicant requests to be authorised and empowered to manage the estate of the deceased, pending the appointment of an executor.

[33] The 2nd respondent states that the applicant is furthermore not capable to be appointed in accordance with the relief requested as the applicant has an acrimonious relationship with the 4th respondent, the 4th respondent's husband, and the 5th respondent. He reiterates that it is the 4th respondent and her husband, as well as the 5th respondent that managed the business affairs for the past decade. He respectfully holds the view that the applicant is incapable of managing the affairs of the business and had not been able to do so for many years. In support of this view, the 2nd respondent refers to the application under case number M378/22 in which the applicant requested that “**an independent professional person**” be appointed as curator to manage her and her (now) deceased husband's affairs. As such the argument is made by Adv Pistor SC that the applicant is, on her own version, incapable of managing the family business.

[34] At the heart of this application, in my view, lies the conflict which is described by the 2nd respondent as follows:

“The conflict between the applicant on one hand and the 4th and 5th respondent on the other, is exacerbated by the fact that most of the farms in respect of which the 4th and 5th respondents are the beneficiaries in terms of the joint will, are subject to a usufruct in favour of the applicant with the concomitant competing interest brought about by this dispensation.”

- [35] The 2nd respondent further states that the letting of the farm property should be done under the control and supervision of an interim curator other than the applicant, and duly appointed in terms of section 12 of the **Estates Act**. Adv Pistor SC argues that the doctrine of separation of powers as enshrined in the **Constitution of the Republic of South Africa**, 1996 must be observed and the powers and discretion that are statutorily entrusted to the 1st respondent ought not to be usurped by the Court. Put differently, the Court would interfere with the administrative duties of the Master of the High Court in appointing a person to manage the affairs of the deceased estate prior to the Master executing his discretion in appointing an executor.
- [36] It is argued on behalf of the 2nd respondent that the public interest and administration of justice should be adhered to in observing the separation of powers. The 2nd respondent proposes that an independent person be appointed by the Master as interim *curator* of the deceased estate. To this end, the 2nd respondent attaches the consent of one Daniel Francois Malan (Mr DF Malan) to be appointed as interim *curator* who is an experienced and senior accountant and tax

practitioner under the name of “Verwes Rekeningkundige- en Sekretariële Dienste BK”. Mr DF Malan has been the accountant of the deceased and the applicant as well as the four close corporations for the past 12 years.

- [37] On behalf of the applicant, Adv Peter SC argues that the applicant despite being 83 years of age, is anything but mentally unsound and fully capable to deal with the property of the joint estate of her and her late husband. He argues that the applicant has supported her husband and their children in the family business since their marriage in 1972. Adv Peter SC argues further that the applicant is entitled to the relief sought *inter alia* by virtue of the fact that the joint will bequeaths to the longest living spouse the property of the deceased. The applicant thus becomes the “owner” of the deceased’s property both *ex lege* (being in a marriage in community of property) and *de facto* (being so bequeathed in the testament).
- [38] Adv Peter SC further argues that the applicant is not requesting a permanent appointment as the executor of the deceased estate, but requests that the Court orders the Master to appoint her as executor pending the Master’s decision on the appointment of an executor of the deceased estate.
- [39] Adv Peter SC also argues that the appointment of an interim curator in terms of section 12 of the **Estates Act** is very limited and does not include the powers to dispose of

movable assets and winding down of a business. More importantly, there is no power provided to an interim curator to enter into leases of immovable property or selling movable property.

[40] The matter is further complicated in that the farming businesses and the assets are not simply assets of the deceased estate. The deceased estate has an undivided half share in those assets, the other undivided half shares vests with the applicant.

[41] The **Estates Act** defines the terms “curator” and “executor” as follows:

*“**curator**’ means any person who is authorized to act under letters of curatorship granted or signed and sealed by a Master, or under an endorsement made under section seventy-two;*

*‘**executor**’ means any person who is authorized to act under letters of executorship granted or signed and sealed by a Master, or under an endorsement made under section fifteen”*

and the difference between “letters of curatorship” and “letters of executorship” as follows:

*“**letters of curatorship**’ includes any document issued or a copy of any such document duly certified by any competent public authority in any State by which any person named or designated therein is authorised to act as curator of any property belonging to a minor or other person;*

'letters of executorship' includes any document issued or a copy of any such document duly certified by any competent public authority in any State by which any person named or designated therein is authorised to act as the personal representative of any deceased person or as executor of the estate of any deceased person;'

[42] Section 12 of the **Estates Act** deals with the appointment of an interim curator by the 1st respondent and reads as follows:

"12 Appointment of interim curator

- (1) *The Master may appoint an interim curator to take any estate into his custody until letters of executorship have been granted or signed and sealed, or a person has been directed to liquidate and distribute the estate.*
- (2) *Every person to be so appointed shall, before a certificate of appointment is issued to him, find security to the satisfaction of the Master in an amount determined by the Master for the proper performance of his functions.*
- (3) *An interim curator may, if specially authorized thereto by the Master-*
 - (a) *collect any debt and sell or dispose of any movable property in the estate, wherever situate within the Republic;*
 - (b) *subject to any law which may be applicable, carry on any business or undertaking of the deceased; and*
 - (c) *release such money and such property out of the estate as in his opinion are sufficient to provide for the subsistence of the deceased's family or household.*
- (4) *If any interim curator is authorized under subsection*

(5) to carry on any business or undertaking he shall not, without the special authority of the Master, purchase any goods which he may require for that business or undertaking otherwise than for cash and out of the takings of that business or undertaking.”

[43] Section 14 of the **Estates Act** deals with letters of executorship issued by the 1st respondent and reads as follows:

“14 Letters of executorship to executors testamentary

(1) The Master shall, subject to subsection (2) and sections 16 and 22, on the written application of any person who-

(a) has been nominated as executor by any deceased person by a will which has been registered and accepted in the office of the Master; and

(b) is not incapacitated from being an executor of the estate of the deceased and has complied with the provisions of this Act, grant letters of executorship to such person.”

[44] There is no evidence before Court that the applicant is not capable of managing her own affairs or the affairs of the deceased's estate. It appears to be common cause that, whether the applicant was actively involved in the decision making and conducting of the business or not, she was at least aware of the manner in which the family business was conducted. Irrespective of the applicant's actual knowledge in conducting the family business, the fact remains that the applicant has become the owner of the property of the

deceased: both *ex lege* and *de facto*.

[45] The Court is also not losing sight of the fact that the 2nd respondent is the family attorney, and that none of the respondents elected to oppose this application. All of the respondents, save the 2nd respondent, has decided to abide by the decision of this Court.

[46] I do not agree with the argument of Adv Pistor SC that the Court does not have the power to make an order as requested by the applicant. The applicant approaches the Court requesting relief in ensuring that the commercial activities of the family business proceeds, pending the outcome of the decision of the Master to appoint an executor. There cannot be any usurpation of powers of the Master and the Court is not interfering with the separation of powers doctrine. The Master will make the final appointment on who the appropriate person is to be appointed as executor to the deceased estate. That is an issue to be dealt with by the Master and will be dealt with by this Court under Part B of the application. Pending this appointment as executor by the Master, the Court has the power to assist the parties in ensuring that the commercial activities of the family business continue.

[47] Given the restrictive powers of an appointed interim curator in terms of the **Estates Act**, the Court agrees with Adv Peter SC that the appointment of the applicant as an interim curator would defeat the purpose of the application.

[48] On proper analysis of the facts and legal position as set out in the **Estates Act** and applicable case law, the Court is satisfied that the applicant has made out a case to be appointed as executor of the deceased estate, pending the finalisation of Part B of the application.

Costs

[49] Both parties have employed senior counsel together with junior counsel. I hold the view that the cost of two counsel is justified having regard to the legal principles and the intricate factual position before Court.

[50] I find no reason why the normal cost order should not be followed, and the winning party should be awarded its costs.

Order

[51] In the premise I make the following order:

1. The normal forms of rules and service provided in the Rules of Court is dispensed with and the matter is dealt with as one of urgency in terms of Rule 6(12).
2. Pending Part B of the application:
 - 2.1 The applicant Anna Martha Nieman is authorised and empowered to:
 - 2.1.1 let for any lawful purpose, any immovable property registered in the name of the late

Willem Adriaan Nieman, or registered in the name of the applicant and the late Willem Adriaan Nieman;

2.1.2 Sell any farming implements, equipment and livestock falling within the estate that are no longer needed for the purpose of conducting farming operations by the estate;

2.1.3 exercise any power associated with the member's interest registered in the name of the late Willem Adriaan Nieman, in relation to any of the member's interests held by Willem Adriaan Nieman as a member in each of the following close corporations:

2.1.3.1 WA Nieman Boerdery BK;

2.1.3.2 Ademshoop Boerdery BK;

2.1.3.3 Geluksdeel Boerdery BK; and

2.1.3.4 Niemansland BK.

2.3 the first respondent is ordered and directed to issue letters of executorship in favour of the applicant in respect of the deceased estate of the late Willem Adriaan Nieman.

3. The second respondent is ordered to pay the costs of the application which includes the costs of two counsel.

FMM SNYMAN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG

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DATE OF HEARING: 24 NOVEMBER 2022

DATE OF DELIVERY OF JUDGMENT: 28 NOVEMBER 2022

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