Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 17428/2021

Before: The Hon. Ms Acting Justice Hofmeyr

Date of hearing: 24 July 2023
Date of judgment: 16 August 2023

In the matter between:

EUGENE NICO BESTER N.O
in his capacity as executor of the
ESTATE LATE DAVID HARTLEY — Applicant

and

THE MASTER OF THE HIGH COURT — First Respondent

FULYA HARTLEY — Second Respondent

JUDGMENT

Judgment handed down electronically by circulation to the parties' legal representatives on email and released to SAFLII

HOFMEYR AJ:

1 In this application, the executor of a deceased estate seeks an order authorising him to sell the main asset in the estate, an immovable property in Hout Bay, on specified terms and conditions, so that sufficient funds are realised to finalise the estate.

2 The application is opposed by the second respondent who is the widow of the deceased and his sole heir.

3 At the commencement of the hearing, the attorney representing the second respondent sought a postponement of the matter. I refused the postponement and indicated that my reasons for doing so would be set out in this judgment. The judgment therefore deals, first, with the issue of the postponement and, second, with the merits of the application.

Postponement

4 In *Psychological Society of South Africa v Qwelane* 2017 (8) BCLR 1039 (CC), the Constitutional Court set out the test for postponements as follows:

> "*Postponements are not merely for the taking. They have to be properly motivated and substantiated. And when considering an application for a postponement a court has to exercise its discretion whether to grant the application. It is a discretion in the true or narrow sense – meaning that, so long as it is judicially exercised, another court cannot substitute its decision simply because it disagrees. The decision to postpone is primarily one for the first instance court to make.*

In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly, this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest."[1]

5 In this case, the postponement request was made from the Bar. Ms Fleischer, who appeared for the second respondent and who indicated to me that she has had 32 years in practice as an attorney, explained that the reason for the postponement was her error in recording the date of the hearing as being 24 *August* 2023 rather than 24 *July* 2023. She tendered to pay the wasted costs of the postponement personally.

6 Given her experience in the law, Ms Fleischer would no doubt have been aware of the warning the courts have regularly given to practitioners briefed to move a postponement application on the day of a hearing: they come unprepared at their peril.

7 In the *Shilubana* matter before the Constitutional Court,[2] counsel had come to the hearing unprepared to present his client's case in the event that the application for postponement had been refused. Counsel appeared to have assumed that the application for postponement would be granted. But the Constitutional Court warned that it is incumbent upon legal practitioners to appear prepared to argue the matter on the

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1 *Psychological Society of South Africa v Qwelane* 2017 (8) BCLR 1039 (CC) para 30

2 *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* 2007 (5) SA 620 (CC) para 15

merits if the postponement application is refused. The Court referred to its previous decision in *National Police Service Union*, in which it held as follows:

> "*Ordinarily . . . if an application for a postponement is to be made on the day of the hearing of a case, the legal representatives . . . must appear and be ready to assist the Court both in regard to the application for the postponement itself and, if the application is refused, the consequences that would follow*."[3]

8 Shortly after Ms Fleischer began addressing me on the postponement request, I raised with her the fact that I had no substantive application for a postponement before me. Ms Fleischer said that there was no postponement application because there had not been enough time to prepare one. However, she went on to say that she had discovered that the matter had been set down for 24 July, at 10am the previous morning (Sunday, 23 July 2023) and had spent some time on the Sunday trying to prepare basic heads of argument so that the matter could proceed.

9 Having read the papers in the matter, it was clear to me that Ms Fleischer was steeped in the case. She had been acting as the second respondent's attorney in all her dealings with the applicant. She had been responsible for the pertinent correspondence attached to the papers setting out the second respondent's position. Furthermore, during the course of arguing for the postponement, Ms Fleischer, herself, began addressing the merits of the application.

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[3] *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC) 1113D

10 The applicant opposed the postponement. I was informed that this was the second respondent's second postponement request. The previous postponement was granted by agreement between the parties because Ms Fleischer had suffered some personal difficulties towards the end of last year and so was not in a position to proceed with the matter in November 2022. That postponement resulted in the matter coming before court again only on 24 July 2023 – eight months later.

11 Mr Steenkamp, who appeared for the applicant, pointed out that a further delay in the matter would likely result in the case only being heard in 2024. It would also mean that further legal costs would be incurred because counsel would again have to prepare for, and attend, a further hearing. In the event that the applicant was successful at the later hearing, those further costs would likely have to be paid out of the estate. As the sole heir of the deceased's estate, it was the second respondent who would be prejudiced most by further legal costs being incurred in the matter.

12 In the circumstances, I exercised my discretion to refuse the postponement for six main reasons.

12.1 No substantive application for a postponement had been prepared. Such an application could have been prepared in the 24 hours before the hearing on the 24 July 2023. However, instead of preparing a proper application for postponement, Ms Fleischer had turned her attention to preparing basic heads of argument for the matter.

12.2 Ms Fleischer was clearly steeped in the matter. This was evident from her role in the matter over many years as well as her foray into the merits of the case during her address on the postponement application.

12.3 There had been one previous postponement already to accommodate Ms Fleischer's difficulties.

12.4 The finalisation of the estate has been pending for more than five years.

12.5 Further delays in the finalisation of the matter would involve further legal costs being incurred and if the second respondent were to be unsuccessful at that later date, the costs would be paid out of the estate of which she was the sole heir. It was therefore primarily to her detriment for further legal costs to be incurred in the matter.

12.6 Finally, I had prepared fully to hear the matter and did not believe that it would be in the interests of justice to burden another court with the obligation to hear a matter that was already ripe for hearing and in which the second respondent's interests could be well represented by her attorney, Ms Fleischer.

13 I therefore refused the postponement and the matter proceeded on the merits. I have no doubt that the second respondent's interests were properly represented by Ms Fleischer. In my engagement with her during the hearing, she revealed a close understanding of the facts and the law.

The Merits

Background facts

14 The applicant was nominated as the executor of the late David Hartley's estate in his will and was appointed as the executor in April 2018.

15 After his appointment, the applicant appointed a specialised chartered accountant to assist him in finalising the estate. A liquidation and distribution account was drawn up. The estate's main assets, at the time of the deceased's death, were a property at 16 Shiraz Boulevard, Berg-en-Dal, Hout Bay, two motor vehicles, positive bank balances in various accounts, some furniture and a claim against a debtor, Mr Bradley Lynn.

16 Judgment had been taken against Mr Lynn in October 2015 before the deceased's death in the amount of £27,260. Mr Lynn had entered into a payment arrangement to discharge his indebtedness by paying R15,000 a month for some time. However, at a point in mid-2020, he started to experience financial difficulties and ceased the instalment payments.

17 In order to finalise the estate, the applicant needed to have sufficient funds to pay creditors, the administration costs of the estate, the advertising, the Master's fees and the executor's fees. At the time that the application was launched in October 2021, this amounted to just over R206,000.

18 The challenge facing the applicant, however, was that there were no liquid funds available in the estate. The applicant explained in his founding papers that in his more than 50 years' experience as an attorney and conveyancer, he had come to learn that the most efficient way to raise cash to finalise an estate in such a situation was for the heir to make a cash contribution. However, the second respondent had not been willing to do so.

19 The applicant also considered other ways to obtain sufficient funds to finalise the estate. According to the applicant, however, none of these alternatives presented a viable solution.

19.1 In so far as the estate's bank accounts were concerned, the funds in them had been depleted, presumably for the day to day living expenses of the second respondent.

19.2 In so far as the judgment against Mr Lynn was concerned, given his unwillingness to pay the outstanding debt, the only option available would be to apply for his sequestration. But that would require legal fees to be paid and the estate did not have any liquid assets with which to pay those legal fees. Even if the legal fees could somehow be paid, it was not clear that the outcome of sequestration would be to the benefit of creditors as there may well be no meaningful dividend.

19.3 Securing short-term debt would not be possible because the estate was unlikely to qualify for a loan, and even if it did, assets would in any event have to be sold to repay the loan.

19.4 Selling the two motor vehicles might present an option for realising some cash but the applicant did not know the state of the vehicles and so could not establish whether their sale would raise sufficient proceeds. In any event, the sale would have to be done by the second respondent as the cars were registered in her name.

19.5 Finally, selling the estate's furniture was unlikely to generate sufficient proceeds because they were not of substantial value. In addition, their value was likely to be sentimental and personal to the second respondent and the applicant was reluctant to sell items that would hold that type of value for the second respondent.

20 In the circumstances, the applicant had been left with no option but to sell the Hout Bay property. However, the second respondent does not want the property to be sold.

21 Under section 47 of the Administration of Estates Act 66 of 1965, such a sale requires the heir's consent to the manner and conditions of the sale and, if such consent is not given, then the property is to be sold in a manner and on conditions approved by the Master.

22 The applicant therefore wrote to the Master in September 2020 to seek his approval of the proposed manner and conditions of the sale.

23 However, there was no response from the Master's office for many months. Despite the applicant's numerous follow-up letters, by June 2021, there still had been no response. The applicant then wrote to the Minister of Justice to seek his assistance but that letter, too, went unanswered.

24 As a result of these challenges presented by the dysfunction of the Master's office, the applicant decided to approach this court to approve the manner and conditions of sale of the estate's immovable property.

The legal test

25 Section 47 of the Administration of Estates Act reads as follows:

> "***Sales by executor*** *— Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stockbroker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to*

the conditions which the heirs who have an interest therein approve in writing: Provided that—

(a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or

(b) if the said heirs are unable to agree on the manner and conditions of the sale,

the executor shall sell the property in such manner and subject to such conditions as the Master may approve."

26 In the case of *Essack v Buchner NO and Others* 1987 (4) SA 53 (N), the Natal Provincial Division of the High Court held that the section relates to the manner and conditions of sale of estate property by the executor, and not to the decision whether or not to sell. According to the court, that decision falls within the discretion of the executor alone. He merely requires approval as to the way in which he intends to carry it out.[4] This approach has been followed in more recent decisions as well.[5]

27 In cases where the heirs do not agree with the manner and conditions proposed by the executor, the Master can then provide approval. Ordinarily, in such a situation, the executor would approach the Master for approval. That step was attempted in this case but the Master simply did not respond, despite repeated follow-ups.

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4 *Essack v Buchner NO and Others* 1987 (4) SA 53 (N) 57C

5 See, for example, *Govindasamy v Pillay* 2020 JDR 2169 (KZD) para 18 and *Jackson v Cawood* 2017 JDR 1379 (LP) paras 29 and 30

28 So the applicant was eventually forced to approach the court directly for approval. In the founding papers, the applicant correctly identified that the Master's failure to take a decision constituted administrative action[6] and presented a case for the exceptional remedy of substitution. The basis for substitution was twofold. The applicant argued that remitting the matter to the Master would be a futile exercise given the general state of dysfunction in the office of the Master. He also contended that the further delay in awaiting the Master's decision would be prejudicial.

29 The second respondent advanced five main grounds on which she resisted the relief claimed.

29.1 First, the second respondent alleged that the funds required to finalise the estate would have been forthcoming if the applicant had more diligently pursued collection of the debt owed by Mr Lynn.

29.2 Second, she contended that she had not been asked to consent to the sale of the immovable property.

29.3 Third, she complained that the fees that the applicant had charged as executor were too steep.

29.4 Fourth, there was an allegation that selling the immovable property would be inconsistent with the terms of the will.

29.5 Finally, the second respondent said that selling the immovable property would leave her without a home.

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6 *Nedbank Ltd v Mendelow and Another NNO* 2013 (6) SA 130 (SCA) para 28. As I set out in more detail later in the judgment, the Master's power under section 47 of the Administration of Estates Act clearly involves a choice and is therefore discretionary in the relevant sense to qualify it as administrative action.

30 I deal with each of these, in turn, below.

Collection of the debt

31 The second respondent complains that the sale of the property is not necessary because, if the applicant had simply done his duty and diligently collected the debt from Mr Lynn, there would be sufficient funds to finalise the estate.

32 There are two problems with this claim, however. The first is that it is made at the level of assertion without any facts to support it and, second, it fails to take into account the costs of proceeding against Mr Lynn.

33 The applicant set out in the founding affidavit that, as at October 2021, an amount of approximately R206,000 was required to finalise the estate. The second respondent's answer to this was to list certain of the estate's expenses that she had paid. But even if one deducted the payments that the second respondent had made since October 2021, when the application was launched, at least R150,000 would still be required.

34 Whether pursuing Mr Lynn would produce enough cash to cover this amount is unclear from the papers. At no point, does the second respondent indicate precisely what amount remains to be recovered from Mr Lynn. There is at least one indication in the papers that his remaining outstanding indebtedness was standing at R120,000 in November 2020, which would have been insufficient to finalise the estate.

35 But even if that were not so, and repayment by Mr Lynn of his full indebtedness would be sufficient to allow for the finalisation of the estate, that recovery will come at a cost.

There is a dispute on the papers about whether Mr Lynn in fact has the financial means to discharge his indebtedness. But even if he were *able* to do so, as the second respondent contends, he has not been *willing* to do so since mid-2020. This means that legal fees will inevitably have to be paid by the estate to pursue further legal remedies against Mr Lynn. Those legal services will come at a cost and the estate has no cash currently available to it to cover those fees.

Consent to the sale

36 The second respondent asserts that she has not been asked to consent to the sale of the property. However, it is clear from her opposition to this application that she does not consent and will not agree to the manner and conditions of sale, as a result. That is enough to entitle the applicant to approach the Master to approve the manner and conditions of sale.

The executors' fees

37 The second respondent complains that the executors' fees are too high. The applicant says that they are not because they are in terms of the express provisions of the will. However, even on the assumption that the second respondent is correct, it is not clear why this is a reason not to approve the manner and conditions of the sale of the Hout Bay property. Even if the applicant's fees were cut in half, the estate would remain illiquid and there would be no way to finalise it.

38 In any event, the second respondent has various remedies available to her to deal with the claimed excesses of the applicant's fees. She may lodge a complaint with the Legal

Practice Council if the complaints relate to his professional fees.[7] She may also take steps to have the applicant removed as executor if she believes he has abused his fiduciary responsibilities.[8] But the second respondent has not pursued these remedies.

Inconsistency with the will

39 At a point in the answering affidavit, the second respondent claims that selling the Hout Bay property would be inconsistent with the will. However, she never identifies the particular provision of the will that is alleged to preclude such a sale. She is, in any event, incorrect. The will does the opposite; it vests the power to make the decision to sell the assets of the estate in the sole discretion of the executor.

The home

40 The second respondent's final ground of opposition is that selling the Hout Bay property would leave her "without a home". At the hearing of the matter, I queried this statement with Ms Fleischer because it seemed, from everything else that had been said in the answering affidavit, not to be an accurate statement.

41 The value of the Hout Bay property is not insignificant. The value referred to in the liquidation and distribution account and in the papers is approximately R3.5 million. If the property were to achieve that type of sale price, there is no indication that the second respondent would be unable to purchase another property as her home. Mr Fleischer

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7 The complaint would be lodged with the Legal Practice Council in terms of section 3, read with section 38, of the Legal Practice Act 28 of 2014

8 *Volkwyn NO vs Clarke and Damant* 1946 WLD 456 at 456

fairly conceded that when the second respondent had said that she would be left without "a home", it was clear that she had meant "that home" – the Hout Bay home.

42 It is correct that the second respondent will be left without the Hout Bay home, if the sale were to take place. However, as the applicant repeatedly pointed out in the founding papers and in his correspondence with the second respondent preceding the institution of litigation, the second respondent can take steps to avoid the sale of the property. She could sell the motor vehicles, or otherwise obtain funding, to provide the estate with sufficient cash so that it can be finalised.

43 The second respondent has refused to do so, it seems, because she believes that the applicant must first pursue Mr Lynn for the outstanding debt. But, for the reasons given above, this is not a viable option for the applicant because is it not clear that pursuing Mr Lynn would produce sufficient cash and, even if it could, litigating against Mr Lynn would require legal fees to be paid that the estate is not in a position to cover given its illiquidity.

Conclusion of grounds of opposition

44 None of the second respondent's grounds of opposition therefore survives scrutiny. More importantly, however, her complaints do not found a legal basis on which to refuse the relief sought. This is primarily because the deceased's will gave the power to decide whether sell the estate's assets exclusively to the applicant. His power to make this decision is also recognised by the legislature in section 47 of the Administration of Estates Act. Given that it is his decision, alone, to make, there are two remaining questions. The first is what the nature and extent of the Master's powers under section 47 are and the second is whether this court should substitute the decision of the Master.

The Master's power under section 47

45 In *Davis and Another v Firman NO and Others*.[9] Levinsohn J dealt with the proper interpretation of section 47 of the Administration of Estate Act. The analysis began with the forerunners to the section in both statute and common law.

46 Levinsohn J highlighted that an executor holds an office *sui generis* and referred to the now century-old description of the executor's duties in *Ex Parte Lebaudy's Executor* 1922 TPD 217 at 219, where de Waal J held as follows:

> "*Now it is the duty of an executor to liquidate the estate of which he has the administration as speedily as possible. He must promptly pay all debts and legacies due by the estate, and for that purpose, if funds are wanting, he must realise some or all of the assets of the estate, as the case may require.*"

47 Levinsohn J emphasised, however, that the powers of an executor are not unfettered. Thus, while an executor is enjoined to realise estate assets to pay the debts of the estate, "he does not possess an unfettered right in regard to the manner in which he or she can proceed to achieve this."[10]

48 According to Levinsohn J, there is a "golden thread" running through all of the developments in the law that he analysed. It is that if any estate assets are to be sold, the best possible price must be attained for the benefit of the heirs.[11] He also held that

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9 *Davis and Another v Firman NO and Others* 2000 JDR 0619 (N)

10 *Davis and Another v Firman NO and Others* p13

11 *Davis and Another v Firman NO and Others* p13

even in a case where there is a single heir, as opposed to a number of heirs, if the single heir did not consent to the manner and conditions proposed for the sale by the executor, the executor would be required to approach the Master for approval.[12]

49 *Davis and Another v Firman NO and Others* has been followed in a number of subsequent decisions.[13]

50 It is clear, therefore, that the Master plays an oversight role in relation to the manner and conditions of sale of an estate's assets. In situations like this one, where there is a sole heir who has not consented, the Master's approval is required.

51 The question that arises is how broad the Master's discretion is to approve the manner and conditions of sale. In this matter, the question is particularly important because the court has been asked to substitute the decision of the Master. It is therefore necessary to have an understanding of nature and extent of the Master's powers because, in substituting the Master's decision, the court must take care to ensure that it is exercising the same power that the Master has been given under the statute. The power must be the same power as that which the Master exercises because the court is stepping into the shoes of the Master when it substitutes his decision. A court that decides that substitution is an appropriate remedy is deciding to substitute rather than remit the decision to the functionary who originally made it. So the court must exercise no more and no less than the power that the functionary would exercise.

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12 *Davis and Another v Firman NO and Others* p16

13 *Kisten and Another v Moodley and Another* (13043/2012) [2016] ZAKZDHC 31 para 31; *Govindasamy v Pillay* 2020 JDR 2169 (KZD) para 19

52 The proper interpretation of the section must take into account its text, context and purpose.[14]

53 In so far as the text is concerned, the relevant part of section 47 reads as follows:

> "… *the executor shall sell the property in such manner and subject to such conditions as the Master may approve.*"

54 The language of the section is consistent with the Master exercising a discretion to determine the manner and conditions of the sale because it refers to "such manner and subject to such conditions as the Master may approve". The use of the word "may" indicates that the Master is not limited to merely approving or rejecting the manner and conditions that the executor proposes. On the contrary, the language of the section indicates that the sale will be authorised in such manner and subject to such conditions as the Master determines. This signifies a broad discretion.

55 The discretion is not, however, unguided. It is a discretion that will have to be exercised in the light of the purpose of the section. That purpose, as I have highlighted above, has been found by the courts to be to attain the best possible price for the benefit of the heirs.

56 Furthermore, it is clear from the context of section 47 as a whole, that the legislature was concerned to ensure that the views of the heirs would be taken into account in determining the manner and conditions of a sale of an estate's assets. This is evident from the fact that the legislature provided that executors were, first, to seek to secure the

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[14] *Close-Up Mining and Others v Boruchowitz NO and Another* 2023 (4) SA 38 (SCA) para 23

agreement of the heirs to the manner and conditions of sale. It is only in the event that agreement is not forthcoming, that the Master must be approached. But even when that takes place, the views of the heirs will be a relevant consideration for the Master to take into account.

57 I therefore conclude that the Master's discretion under section 47 is a broad one, to be exercised in the light of the overall purpose of obtaining the best possible price for the heirs, and in the light of the heirs' views about the manner and conditions proposed by the executor.

58 The final question is whether the court should substitute the decision of the Master.

Substitution

59 The applicant justified an order of substitution in this case on two main grounds – the delay in sending the matter back to the Master and the general state of dysfunction in the Master's office. He did not, however, advance any submissions on the other two considerations that usually feature in a case of substitution following a review under Promotion of Administrative Justice Act 3 of 2000. Those considerations are whether the court is in as good a position as the functionary to make the decision and whether the decision is a foregone conclusion.[15]

60 The balancing of interests that is required in a case such as this one where the executor's duty to finalise the estate as swiftly as possible knocks up against the

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[15] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) para 47

objective of ensuring the best possible price for a sale of the primary asset in the estate, is a difficult task.

61 The challenges posed by such a balancing exercise are borne out by the manner in which this case has unfolded. At the hearing of the matter, I raised with the parties various alternative formulations to the manner and conditions of sale proposed by the applicant in order to establish whether there were ways in which to accommodate some of the second respondent's concerns about the sale of the property.

62 At the conclusion of the hearing, I requested both parties to provide me with a proposed draft order addressing the issues that had been discussed during the debate in court. It became clear on receipt of those drafts that each party ought to be afforded an opportunity to make submissions of the draft of the other party. I therefore also gave them a further opportunity to provide submissions on their drafts.

63 The issues that were canvassed during the hearing included:

63.1 whether to delay the sale of the property to afford the second respondent an opportunity to settle the liabilities and expenses of the estate so that it could be finally wound up without the need to sell the property; and

63.2 the setting of a reserve price for the property.

64 I received further submissions from the parties on these issues. Those submissions and the complexity of their resolution makes it clear that this court is not in as good a position as the Master would be to approve the manner and conditions of sale. I give just one example of this complexity.

65 In her proposed draft order, the second respondent sought to place a Lexis Nexis valuation report before the court to justify a R5 million reserve price for the property. The applicant objected to this on the basis that it amounted to evidence from the Bar but did not then provide any independent justification for his own, much lower, proposed reserve price of R2.5 million. In objecting on this basis, the applicant overlooked the fact that it was he who had sought a substituted remedy from the court. When a court decides to substitute a decision of a functionary, it must exercise the same power as the functionary and therefore consider the factors that such a decision requires be taken into account. In this case, the proper consideration of those factors requires further engagement with the parties and a further opportunity for them to justify the reserve price that, they say, should be applied to the sale.

66 The court is therefore not in as good a position as the Master would be to make the decision on the manner and conditions of sale. It is also clear from the difficulties highlighted above that the selection of the manner and conditions of sale is not a foregone conclusion.

67 I therefore find that this court is not in a position to substitute the decision of the Master. In making this determination, I have not overlooked the fact that the Master has been grossly dilatory in failing to respond to the applicant's request for approval under section 47 of the Administration of Estates Act. However, the Master has not previously been under court order, with a specified timeframe within which to make this determination.

68 In the face of a court order directing the Master to make the determination under section 47 of the Act within a specified period of time, any wilful failure on the Master's part to comply with the order would amount to contempt of court.[16]

Conclusion and costs

69 I therefore conclude that the review of the Master's failure to take a decision under section 47 of the Administration of Estates Act should succeed. However, this is not an appropriate case for an order of substitution. The matter will therefore need to be remitted to the Master with a requirement that the decision be taken within two months of the order.

70 The final issue in the application is one of costs. It is customary in matters of this nature[17] for the applicant's costs to be borne by the estate on an attorney and client basis in order to, as fully as possible, recompense the applicant for the costs of litigation incurred in the exercise of his duties as executor. I see no reason to depart from that ordinary approach.

Order

71 I therefore make the following order:

(a) The first respondent's failure to make a decision in response to the applicant's request for approval under section 47 of the

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16 *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42

17 *Steel, NO & Another v Davis & Another* 1950 (3) SA 432 (W) 441F - 442C; *Tshabalala v Hood* 1986 (2) SA 615 (O) 619I – 620A

Administration of Estates Act 66 of 1965 is reviewed and set aside.

(b) The decision is remitted to the first respondent.

(c) The first respondent is directed to make a decision on the manner and conditions of the sale of the immovable property known as 16 Shiraz Boulevard, Berg-en-Dal, Hout Bay ("the property") within two months of the date of service of this order on the first respondent.

(d) In making the decision on remittal, the first respondent is directed to call for representations from both the applicant and the second respondent on the appropriate manner and conditions of sale and to consider those representations before making the decision.

(e) The costs of this application will be costs in the estate, on a scale as between attorney and client.

(f) The applicant is directed within 5 days of this order, to serve a copy of the order on the first respondent.

K HOFMEYR

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Applicant's counsel:	Adv J-P Steenkamp
Applicant’s attorneys:	E N Bester & Associates
Second Respondent's counsel:	Ms J G Fleischer
Second Respondent's attorneys:	Janice Fleischer Attorneys