

SOUTH AFRICA / JUDGMENT

Duiker v Rakale and Others (14689/2021) [2021] ZAGPJHC 439 (20 September 2021) [2021] ZAGPJHC 439

COURT

South Gauteng High Court, Johannesburg

BEFORE

D Mahon

CASE / FILE NUMBER

14689/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 14689/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

NO

DATE

20 September 2021

In

the matter between: KATLEGO
DUIKER
Applicant
and
MMBATHO
LILLIAN RAKALE
First Respondent
WELCOME
NORMAN JACOBS
Second Respondent
(In
his capacity as Trustee of Mayibuye Trust)
THE
MASTER OF THE HIGH COURT,
JOHANNESBURG
Third Respondent

JUDGMENT

MAHON AJ

[1] In this application the applicant seeks an order:

[1.1] removing the first respondent as executor of the estate late Itumeleng Benjamin Duiker and Daphne Duiker (“the deceased estate”);

[1.2] staying all activities by the Mayibuye Trust to “round-up” the deceased estate; and

[1.3] that the third respondent cease any or all processes of administration relating to the deceased estate pending the finalisation of criminal proceedings relating to the said estate.

[2] The applicant’s father passed away on 25 September 2016 and his mother passed away on 6 May 2017. They died testate with a valid will and elected the first respondent, the applicant’s aunt, to be the executor of their estate.

[3] The basis of the present application is captured in a few short paragraphs in the founding affidavit. It is comprised of the following:

[3.1] that, even after having obtained the letters of executorship in 2018, “... not much activity with regards to winding-up the estate has taken place ...”;

[3.2] that there have been a number of administrators who have been appointed by the first respondent to assist in the administration of the estate, prior to the appointment of the second respondent;

[3.3] that certain incidents have fuelled the applicant’s “suspicions” of criminal activities on the part of the first respondent in the administration of the deceased estate, namely:

[3.3.1] the fact that the second respondent delivered a letter to the erstwhile executor informing him that he was the newly appointed agent

nominated by the newly appointed executor to administer the estate whilst the appointment of the current executor was only approved on 24 August 2020 and the power of attorney signed only on 31 August 2020;

[3.3.2] that the applicant's legal representatives approached the office of the third respondent to uplift the files relating to the estate and, on three occasions, found that the files were missing.

- [4] The applicant's suspicions led the applicant to open a criminal case of fraud against the first respondent and to notify the third respondent of this state of affairs.
- [5] During the course of argument, the applicant's counsel drew my attention to a further aspect which, he submitted, provided an indication of untoward activity on the part of the first respondent. This consisted in the delivery of a power of attorney, under the first respondent's name but on the second respondent's letterhead, in which the estate is referred to as an "intestate estate" (which is factually incorrect). The applicant could not, however, suggest any motive for the first respondent to deliberately mislead anyone in this regard and the possibility that this reference was simply made in error could not reasonably be excluded.
- [6] It is on the basis of these allegations that the applicant seeks the first respondent's removal.
- [7] The first respondent denies any wrongdoing in the conduct of the administration of the estate.
- [8] The process by which an executor may be removed from office is governed by the provisions of section 54 of the Administration of Estates Act 66 of 1965. Section 54(1)(b) deals with the grounds for removal of an executor by the Master and is therefore not of application to these proceedings.
- [9] Section 54(1)(a) provides for the removal of an executor by the court. During the course of argument, the applicant conceded that sections 54(1)(a)(ii) to (iii) were not applicable to the present facts. The applicant sought to rely on the provisions of section 54(1)(a)(v) which provides that an executor may at any time be removed from his office, by the court if the court is satisfied that it is undesirable

that he should act as executor of the estate concerned.

- [10] Thus, in order for me to grant the application I must be satisfied, on a balance of probabilities, that it is undesirable that the first respondent should continue to act as executor of the estate.
- [11] In the present application, however, there is a dearth of any factual foundation for the motivated removal.

- [12] A mere suspicion of criminal activity cannot, in and of itself, justify the removal of an executor, particularly where the facts from which the inference of criminal activity is to be drawn fall far short of what could reasonably engender such a suspicion. Indeed, there are any number of possible reasons for files to go missing in the Master's office or for the second respondent to have incorrectly described the estate as intestate. The conclusion which the applicant seeks to draw from this misstatement in correspondence, namely, an intention to deceive in relation to the true nature of the deceased estate is, in my view, a bridge too far.
- [13] In his heads of argument, counsel for the applicant contended that the first respondent had "violated" the requirements of sections 29, 31, 35 and 36 of the Act and sought to rely upon these alleged violations as a basis to seek the first respondent's removal in terms of section 54(1)(a)(v). However, there is simply no basis to conclude that any of the above sections find any application to the facts of the present matter, save, perhaps, for section 36 which provides as follows:
- "If any executor fails to lodge any account with the Master as and when required by this Act, or to lodge any voucher or vouchers in support of such account or any entry therein in accordance with a provision of or a requirement imposed under this Act or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of the estate, the Master or any person having an interest in the liquidation and distribution of the estate may, after giving the executor not less than one month's notice, apply to the court for an order directing the executor to lodge such account or voucher or vouchers in support thereof or of any entry thereon or to perform such duty or to comply with such demand."*
- [14] This section, however, is only peripherally relevant insofar as the applicant complains of a delay in the administration of the estate. However, the high watermark of the applicant's case in this regard is the bald allegation that after having obtained letters of executorship in 2018, "... not much activity with regards to winding-up the estate has taken place".
- [15] It is peculiar, however, that in light of the applicant's dissatisfaction with the perceived delay in the finalisation of the estate, the applicant has nonetheless not sought to exercise his rights in terms of section 36. Even more strange, is the applicant's prayer for an order directing the third respondent to cease any or all processes of administration relating to the estate pending the finalisation of the criminal proceedings relating to the estate. This relief, if granted, would further delay the finalisation of the estate.
- [16] Finally, I am mindful of the fact that shortly before the hearing of this matter, the third respondent delivered a report in regard to the current status of the estate and made no adverse comments in regard to the conduct of either the first or the second respondent.
- [17] On a conspectus of the allegations contained in the founding affidavit, there is simply insufficient factual matter to sustain the

conclusion

that it is undesirable for the first respondent to continue as executor in the estate.

[18] That being the case, the claim for the additional relief sought by the applicant must similarly fail.

[19] I accordingly make the following order:

[19.1] The application is dismissed with costs.

D MAHON

Acting Judge of the High Court

Johannesburg

APPEARANCES:

For the applicant: Adv J Mabaso

Instructed by: Frans Mashele Incorporated

For the respondent: Adv J J Venter

Instructed by: Kruger & Co Incorporated Attorneys

Date of hearing: 8 September 2021

Date of judgment: 20 September 2021

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Prepared on 9 October 2026 · Esheria