

SOUTH AFRICA / JUDGMENT

## Koch v Weiland N.O. and Another (16526/2020) [2022] ZAWCHC 96 (18 March 2022) [2022] ZAWCHC 96

COURT

Western Cape High Court, Cape Town

BEFORE

Van Zyl AJ

CASE / FILE NUMBER

16526/2020

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### Source record

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

Case

number: 16526/2020

In

the matter between:

PAULUS  
BERNHARDUS KOCH  
Plaintiff  
and  
MICHELE  
WEILAND  
N.O.  
First defendant  
THE  
MASTER OF THE HIGH COURT, CAPE TOWN  
Second defendant

**JUDGMENT**

DELIVERED ON 18 MARCH 2022

VAN ZYL AJ:

**Introduction**

1. The plaintiff sues the first defendant on the basis of a contract for services rendered in the administration and liquidation of the estate of the late Priscilla le Roux. The first defendant is the duly appointed executor of the estate, having received letters of executorship from the second defendant on 13 September 2020. The first defendant is the deceased's daughter, and was nominated in the deceased's will as executor.
2. The plaintiff's claim is for the amount of R1 296 622,96, based on the prescribed rate for the remuneration of executors in terms of section 51(b) of the Administration of Estates Act, 1965, read with regulation 8(a) to that Act, which is calculated at 3,5% of the gross value of the assets of the estate.
3. The plaintiff seeks, in addition, an order that the first and second defendants be prohibited from finalizing the estate pending the final determination of the action.
4. The first defendant excepts to the plaintiff's particulars of claim on the basis that they fail to disclose a cause of action. This is because, so the first defendant argues, in terms of the Regulations prohibiting the liquidation or distribution of the estates of deceased persons by any person other than an attorney, notary, conveyancer or law agent ("the regulations") (discussed below), the plaintiff is prohibited from administering and liquidating deceased estates unless he falls into one of the categories of persons and institutions that are allowed to do such work, or within the category of persons and institutions exempted from the ambit of the regulations. There are no allegations in the particulars of claim that indicate whether the plaintiff is either so allowed or so exempted.
5. In the circumstances, the first defendant argues that the plaintiff has not disclosed a cause of action entitling him to claim fees for the services rendered as well as the prohibition against the finalization of the estate by the defendants.

**The legal principles underpinning exceptions**

6. An exception is a legal objection to the opponent's pleading, complaining of a defect inherent in such pleading. Admitting for the

moment that all the allegations in the particulars of claim are true, exceptions assert that even with such admission the particulars do not disclose a cause of action<sup>[1]</sup> in that, for example, they do not justify the conclusions drawn therein, or that they are vague and embarrassing to such an extent

that the excipient is unable to plead to them.[2]

7. The object of an exception is to dispose of the case or a portion thereof in an expeditious manner, or to protect a party against an embarrassment which is so serious as to merit the costs even of an exception. Thus, an exception founded on the contention that

particulars of claim disclose no cause of action (such as the present case) is designed to obtain a decision on a point of law that will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial.[3]

8. To succeed, an excipient must persuade the Court that, upon every reasonable interpretation of the particulars of claim, no cause of action is disclosed.[4] The Court must look at the pleading excepted to as it stands.[5] No facts outside those stated in the pleading may be brought into issue (except in the case of inconsistency) and no reference may be made to any other document.[6]
9. It is against this backdrop that the first defendant's exception should be considered.

#### The regulations

10. The regulations were originally promulgated in terms of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, as R910 in Government Gazette 2080 of 22 May 1968 (as amended by R1030 in Government Gazette 2439 of 20 June 1969 and R1376 in Government Gazette 3227 of 13 August 1971). They are reproduced in Meyerowitz The Law and Practice of Administration of Estates and their taxation (2010 edition) ("Meyerowitz").
11. Regulation 1 contains definitions of the institutions mentioned in the rest of the regulations.
12. In terms of regulation 2, subject to the provisions of regulations 3 and 4, no person other than an attorney, notary or conveyances as defined in section 1 of the Attorneys, Notaries and Conveyancers Admission Act, 1934, or an agent in terms of the section 22 of the Magistrates' Courts Act, 1944 (a so-called law agent) may liquidate or distribute a deceased estate. In terms of regulation 1(1)(iv), liquidation or distribution in relation to a deceased estate includes the performance of any act relating to the liquidation or distribution of the estate other than the realisation, transfer or valuation of estate assets or of any right in or to such assets.
13. The exemptions provided for in the regulations are a numerus clausus. Regulation 3 exempts the following persons permanently from the provisions of regulation 2:
  - 13.1. Any board of executors as defined.
  - 13.2. Any trust company as defined.
  - 13.3. Any public accountant defined in the prevailing legislation regulating accountants and auditors.

13.4. Any person licensed as a broker or agent under the Licences Act, 1962, and carrying on a business predominantly consisting in the liquidation or distribution of deceased estates.

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14. Regulation 4 provides that the classes of persons or institutions permanently exempt from the prohibition in regulation 2 are:

14.1. Any natural person nominated as executor by any deceased person by a will registered and accepted in the office of the Master, in so far as he or she is personally liquidating or distributing the estate of such deceased person.

14.2. The surviving spouse of or any person related by consanguinity or affinity up to and including the second degree to a deceased person, in so far as he or she is liquidating or distributing the estate of such deceased person.

14.3. Banking institutions under certain conditions.

14.4. Any person who is in the full-time service of any other person who is lawfully liquidating and distributing the estate of a deceased person, in so far as he is assisting such other person with or is acting on his or her behalf in any matter relating to the liquidation and distribution of the estate.

14.5. Any person in the full-time service of a trade union under certain conditions.

14.6. Any person liquidating or distributing an estate on the instructions of an attorney, notary, conveyancer or law agent.

14.7. Any person liquidating or distributing an estate under the direction of the Master in terms of section 18(3) of the Administration of Estates Act, 1965.

The issues for

## determination

15. The issues to be determined are, firstly, whether the regulations are still in force, given that they had been promulgated under an Act repealed a long time ago. If the regulations are in force, then the second issue is whether they apply to the plaintiff's case. The final question that flows from this is whether the particulars of claim disclose a cause of action.

16. I deal with each of these issues in turn.

Are the regulations still in force?

17. The regulations were originally promulgated by the Minister of Justice by virtue of the powers vested in him by section 30 of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934. That Act was repealed in its entirety by the Attorneys Act 53 of 1979, with effect from 1 June 1979.

18. The Attorneys Act catered for the continuance of regulations made under an Act repealed by it, stating in broad terms in section 86(3) that “anything done or deemed to have been done” under any provision of a law repealed by the Attorneys Act would remain in force as if done under the Attorneys Act. The regulations therefore remained in force as if promulgated under the Attorneys Act.
  19. The Attorneys Act was, in turn, repealed by the Legal Practice Act 28 of 2014 with effect from 1 November 2018. The Legal Practice Act provides, in section 119(2), that any regulation made under any law which is repealed by it and in force immediately before 1 November 2018 remains in force, except insofar as it is inconsistent with the provisions of the Legal Practice Act or until it is amended or revoked in terms of the Act. The Legal Practice Act provides, in addition, in section 119(3) that “anything done in terms of a law repealed by this Act remains valid if it is consistent with this Act”.
  20. It seems that the regulations are consistent with the Legal Practice Act inasmuch as the Act (in section 94) empowers the Minister of Justice to make regulations regarding many aspects of legal practice. The Minister is also given a general catch-all regulatory power in that he or she may make regulations relating to “any other matter in respect of which regulations may or must be made in terms of this Act” (section 94(1)(o)). The plaintiff in any event did not argue that the regulations are inconsistent with the Legal Practice Act.
- [1] Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd 2006 (3) SA 138 (SCA) 143I-J.
- [2] Miller v Muller 1965
- (4) SA 458 (C) 468D-G.
- [3] Lampert-Zakiewicz v Marine and Trade Insurance Co Ltd 1975 (4) SA 597 (C) 599G-600A.
- [4] First National Bank of Southern Africa Ltd v Perry NO 2001
- (3) SA 960 (SCA) 965C–D.
- [5] Burger v Rand Water Board 2007 (1) SA 30 (SCA) 32D-E.
- [6] Pretorius v Transport Pension Fund 2019
- (2) SA 37 (CC) 44F–G.
- [7] See, for example, the reference to the regulations in the recent case of Mlunguza and another v Master of the High Court and another (21755/2018) [2020] ZAWCHC 6 (11 February 2020) at para [30].
- [8] Section 52 of the Administration of Estates Act, 1965.
- [9] Bramwell and Lazar NNO v Laub 1978
- (1) SA 380 (W) 384A.

[10] Soofie v Hajee Shah Goolam Mahomed Trust and others 1985

(3) SA 322 (N) 328B-F.

[11] My translation. As an aside, this appears to me to be an irrevocable power of attorney, which renders it unenforceable on the authority referred to earlier. The exception was however not taken on this basis, and I say nothing more about it.

[12] Francis v Sharp 2004

(3) SA 230 (C).

[13] As to the nature of agency see Kerr The Law of Agency (4ed, LexisNexis) at pp 3-4.

[14] 2012 (4) SA 593 (SCA) para [18].

[15] The Administration of Estates Act deals with this in section 13(2): “No letters of executorship shall be granted or signed and sealed and no endorsement under section fifteen shall be made to or at the instance or in favour of any person who is by any law prohibited from liquidating or distributing the estate of any deceased person.”

[16] Versluis v Greenblatt 1973

(2) SA 271 (NC) 278.

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Prepared on 11 October 2026 · Esheria