

SOUTH AFRICA / JUDGMENT

Mailula and Another v Modiba and Another (2022/7692) [2023] ZAGPJHC 367 (24 April 2023)

[2023] ZAGPJHC 367

COURT

South Gauteng High Court, Johannesburg

BEFORE

F Bezuidenhout

CASE / FILE NUMBER

2022/7692

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG

CASE NUMBER:

2022/7692
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
REVISED
24.04.23
In the matter between: -
MAILULA,
VUSI JAMES
First
Applicant
KOLOBI,
BOPHELO METSING
Second
Applicant
and
MODIBA,
ALTEVESE SIR-MONE PUNI
First
Respondent
MASTER
OF THE HIGH COURT
Second

Respondent

Neutral

Citation: Mailula Vusi James &

Another v Modiba Altevese Sir-Mone Puni & Another (Case No.

7692/2022) [2023] ZAGP JHC 367 (24 April

2023)

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e mail and publication on CaseLines. The date and time for hand-down is deemed to be 14h00 on 24 April 2023.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] The first applicant is the executor in the estate of the late Ms Dudu Phillips. He applies for the removal of the first respondent as the executrix in the estate of the late Mr George Phillips. In addition, the applicants seek an order restraining and/or interdicting the first respondent from using the assets of the joint estate and appointing the applicant as the executor of the estate of the late Mr George Phillips.
- [2] The first respondent opposes the application and seeks a dismissal with costs de bonis propriis.

ISSUES FOR

DETERMINATION

- [3] The first respondent raised the following points in limine: -

[3.1] The preference in terms of administering the estate of a deceased married in community of property is given to the surviving spouse. Accordingly, so the argument goes, Mr George Phillips was bestowed the right to administer his deceased wife's estate. Accordingly, the Master incorrectly granted letters of executorship to the first applicant.

[3.2] The notice of motion does not cite the applicant in his nomine officio capacity. The first applicant therefore lacks locus standi to bring the application.

[3.3] The first applicant's application to be appointed as executor was erroneously sought and erroneously granted on the basis that only the estate of the surviving spouse has locus standi to apply for letters of executorship. In the premises, the appointment of the first applicant falls to be revoked and set aside.

[3.4] The application is defective in that the first applicant was first required to exhaust the procedural remedies available to him in law, which remedies included a complaint to the Master.

- [4] In addition to determining the merits of the application and opposition, this court was called upon to pronounce on the points in limine raised by the first respondent.
- [5] Upon an enquiry made by this court, counsel for the parties agreed to argue the points in limine with the merits of the application.

THE FIRST APPLICANT'S CASE

- [6] Mr George Phillips was married to Dudu Phillips in community of property on the 5th of December 2007. Two minor children were born of the marriage. The parties also had children from previous relationships. The deceased's husband, Mr George Phillips, had two children, namely a daughter who is the first respondent, and a son, the second applicant.
- [7] On the 7th of June 2021 Ms Dudu Phillips died intestate. Eight days later, Mr George Phillips died intestate.
- [8] Both parties resided in Welkom, Free State Province shortly before their demise.
- [9] On the 21st of July 2021 the first respondent was appointed by the Master in Johannesburg as the executrix in the estate of her father, the late Mr George Phillips. The biological daughter of Ms Dudu Phillips approached the first applicant for legal advice regarding the two deceased estates. The first applicant advised that it would be prudent to appoint an independent executor in anticipation of disputes regarding the two estates.
- [10] On the 4th of August 2021, the first applicant therefore approached the Master of Bloemfontein, requesting the Master to relinquish jurisdiction to the Master in Johannesburg.
- [11] On the 22nd of October 2021 letters of executorship were issued to the first applicant by the Master, Johannesburg.
- [12] Upon receiving the duly issued letters of executorship, the first applicant opened an estate late bank account and advertised the deceased estate in terms of section 29 of the Administration of Deceased Estates Act, 66 of 1965 ("the Act").
- [13] On the 15th of November 2021, the first applicant, the daughter of Ms Dudu Phillips as well as the executor of the estate of the late Mr George Phillips and her agent, Mr Olifant, met and agreed on the process to be followed in administering the two estates. One of the terms of the agreement was that the assets of the joint estate would be kept as they were and preserved in order to retain the value of the estate in the interest of the heirs and/or beneficiaries.

- [14] On the 10th of December 2021 the first applicant travelled to Welkom in order to prepare an inventory, but he was unable to access the premises. He called Mr Olifant and asked him to inform the first respondent to grant him (the first applicant) access to the house. Mr Olifant did not revert to the first applicant as undertaken and on the 21st of January 2021 the first applicant received a letter from Mr Olifant, informing him that for purposes of attending to an inventory, an independent appraiser was required to be appointed.
- [15] The first applicant raises the following concerns regarding the conduct of the first respondent, which he submits are sufficient to justify a removal of the first respondent from office: -
- [15.1] The first respondent was involved in an accident whilst driving a vehicle forming an asset in the joint estate.
- [15.2] After the vehicle was damaged in the collision, the first respondent parked the vehicle and used another vehicle which similarly forms an asset in the joint estate.
- [15.3] The first respondent received more than R1 million in life cover from the estate of the late Mr George Phillips and she has refused to disclose the exact amount received.
- [15.4] The first respondent failed to submit to the Master an account within six months in accordance with the provisions of section 35 of the Act.
- [15.5] The first respondent failed to account to the first applicant in his capacity as executor of the estate of the late Ms Dudu Phillips, thus making it difficult for the first applicant to discharge his fiduciary duties.
- [16] The first applicant concedes that he could have approached the Master and made an application in terms of section 54 of the Act. However, he explains that delays and the state of the office of the Master have necessitated the first applicant to approach this court directly. In addition, one of the challenges was that the estate late file containing information regarding the first respondent's appointment cannot be located and accordingly the appointment was not captured on an electronic database.
- [17] The first applicant states that he has since made an application to the office of the Master to uplift the file, but there is no way of verifying that the documents that were given to the first applicant emanate from the file and represent the original documentation submitted by the first respondent.

THE FIRST RESPONDENT'S CASE

- [18] The first respondent complains that the first applicant expects this court to usurp the powers and duties of the Master in circumstances where the complaint regarding the first respondent was not submitted to the Master and the Master was not given an opportunity to remove the first respondent as executrix.

- [19] The first respondent alleges that the child of Ms Dudu Phillips was born “in wedlock” and “unless there is testamentary nomination giving her the power to apply for letters of executorship”, she legally has little entitlement.
- [20] The first respondent accuses the first applicant of unethical behaviour in that he purportedly alleged that he was an authorised executor and agent not only of the estate of the late Ms Dudu Phillips, but also of the estate of the late Mr George Phillips.
- [21] The first respondent alleges that it is the first applicant who had the duty to submit the liquidation and distribution account first in light of the fact that it was a predeceased estate. This would have enabled the first respondent to include the values due to the estate late Mr George Phillips vis à vis the estate of the late Ms Dudu Phillips.

THE SUPPLEMENTARY AFFIDAVIT

- [22] On the 10th of January 2023 the second applicant brought an application for leave to supplement the founding papers. The second applicant tells the court that during his father’s lifetime, he had always received maintenance in the form of payment of university tuition and a monthly stipend. He complains that the executrix has refused, failed or neglected to act in terms of section 26(1A) of the Act to pay his tuition fees.
- [23] The supplementary affidavit refers to a letter of the 2nd of June 2022 the second applicant’s attorneys addressed to the Master requesting the Master to intervene and to instruct the executrix to make payment of the university fees.
- [24] On the 15th of August 2022 the second applicant’s attorneys attended to the Master’s office to follow up on their letter of the 2nd of June 2022. An official at the Master’s office, Mr M Mphanama, provided the first applicant’s attorneys with a letter dated 15 August 2022 transmitted to the first respondent’s attorneys. This letter required the executrix to submit the liquidation and distribution account within the prescribed period in terms of section 35(1) of the Act. Furthermore, the Master advised the executrix that it was proceeding with section 54 proceedings to remove her as executrix. The Master accordingly granted the executrix 30 days to submit representations.
- [25] On the 27th of September 2022 the second applicant’s attorneys once again attended at the offices of the Master to receive feedback regarding their letter of the 2nd of June 2022. A letter dated 27 September 2022 was delivered to the Master’s office in this regard.
- [26] The second applicant asserts that to date, neither the executrix nor her attorneys have submitted representations to the Master’s office.

- [27] The first respondent failed to file a supplementary answering affidavit in response to the supplementary founding papers, notwithstanding the fact that the application for leave to supplement was brought before the hearing of the application and the supplementary founding papers were deposed to on the 9th of November 2022. The first respondent's counsel objected to the supplementary founding affidavit, in circumstances where the first respondent failed to file opposing papers to the application.
- [28] I enquired from counsel appearing for the first applicant why the supplementary founding affidavit was filed a year after it was deposed to. Counsel for the first applicant made a valiant attempt to explain the reason for the belated filing of the supplementary founding affidavit, but failed to convince the court. The dilemma counsel faced was that the reasons ought to have been presented to the court on affidavit and not from the Bar.
- [29] The second applicant's attorneys addressed correspondence to the Master's office on the 2nd of June 2022. This was after the affidavits in this application had already been exchanged and after the first respondent raised the point in limine that the first applicant failed to exhaust its remedies as provided for in the Act before approaching the court.
- [30] The conundrum the court faces is that the supplementary founding affidavit contains material information and raises more questions than answers.
- [31] Evidently the Master addressed correspondence to the first respondent where the first respondent was alerted to the fact that she failed to submit the liquidation and distribution account within six months from the date of issue of the letters of executorship and was advised that the Master was proceeding with her removal as executrix. Pertinently, the letter afforded the first respondent an opportunity to submit representations within 30 days from receipt of the letter. This is where the paper trail abruptly ends.
- [32] Due to the lateness of the application for leave to file a supplementary affidavit, the first respondent was not afforded an opportunity to file a supplementary answering affidavit. The court has also not been favoured with any further affidavits or documentation from the Master after the 27th of September 2022 when the last correspondence was addressed to the Master by the second applicant's attorneys.
- [33] It is also important to point out that it was not the first applicant, but the second applicant who addressed the Master on the first respondent's non-compliance. One would have expected the first applicant to do so by virtue of his fiduciary duties as executor.
- [34] Having regard to the seriousness of the allegations made against the first respondent and correspondence addressed by the Master, the court is disinclined to simply disregard the supplementary founding affidavit altogether. I therefore allow the supplementary affidavit. However, it does call for an answer not only from the first respondent, but also from the Master in circumstances where it would appear that the Master may have already implemented a process in accordance with the provisions of section 54 of the Act for the removal of the first respondent.

THE LAW

The role and powers of the Master

[35] The function of the Master has been succinctly described in Wessels[1] as follows: -

“The sole interest which the Master has in the administration of estates is to protect the interests of creditors, heirs, legatees and all other persons having any claim upon the estate.”

[36] The Master is accordingly tasked to carefully supervise the entire administration process to ensure that the estate is administered in accordance with the provisions of the Act, other legislation related to estates and, where applicable, the common law. In the exercise of its functions, the Master is by virtue of the provisions of the Act given very extensive powers of supervision, ranging from the appointment and removal of executors to decisions regarding alienation of assets.[2]

When may the Master remove an executrix?

[37] An executrix may[3] at any time be removed from office by the Master if she fails to perform satisfactorily any duty imposed upon her by or under the Act or to comply with any lawful request of the Master. This would include all cases of dereliction of duty such as a failure to lodge accounts.

[38] The Master must, before removing the executrix from office, forward to her by registered post a notice setting forth the reasons for such removal and informing her that she may apply to court within 30 days from the date of such notice for an order restraining the Master from removing her from office.[4] The executrix is thus given an opportunity to contest her removal. She may do so for example on the ground that the facts or reasons relied on by the Master are incorrect.

[39] At this juncture it is important to point out that it has been suggested that even where grounds for the removal of the executrix exist, when the matter is before court, it should consider whether despite its existence, it is undesirable in all the circumstances that she should act as executrix.[5]

[40] Where the application for removal is made by the Master, he may institute proceedings in the division of the High Court within whose area of jurisdiction the appointment was made. [6] The Master can proceed by way of application or motion and report in writing the facts upon which he relies instead of stating them on an affidavit.

When may the court remove an executrix?

[41] An application for the removal of an executrix may be made by any interested party, including a surety for the executrix or the cessionary of the rights of an heir.

[42] Where a person other than the Master applies, it should be made on notice of motion or where the facts are in dispute by way of action for a declaratory order.[7]

[43] Section 54(1)(a) of the Act provides that an executor may at any time be removed from his office by the court under specific circumstances, which include if for any reason the court is satisfied that it is undesirable that the executrix should act as an executrix of the estate and by the Master in circumstances where inter alia the executrix failed to perform satisfactorily any duty imposed upon her by or under the Act or to comply with any lawful request of the Master.

[44] The court will remove an executrix on the ground of maladministration or absence of administration if proved to its satisfaction.[8] Executors have been removed for failing to lodge accounts after a long period had lapsed,[9] for failing to sign account without just cause, for refusing without just cause to pass transfer[10] and for serious dereliction of duty.

[45] Mere negligence in administration will ordinarily not be a ground for removal in the absence of proof that the estate or the beneficiaries

would be prejudiced if the executor remained in office.[11]

[46] Meyerowitz states that: -

“Where it is sought to remove an executor from office it must appear that the acts complained of are such as to stamp the executor as a dishonest, grossly inefficient or untrustworthy person whose future conduct can be expected to expose the estate to actual loss, or of administration in a way not contemplated ...”[12]

The test applied when removing an executrix

[47] Mere hostility between the executrix and other interested parties which does not affect the administration or even negligence which may expose the executrix to a claim to make good the loss, is not sufficient ground for removal. The test is whether the continuance of the executrix in office will prejudicially affect the future welfare of the estate placed in her care. [13]

Is the court empowered to appoint another executrix?

[48] Where the court removes an executrix it has no power to appoint an executrix in her place. [14] This is the function of the Master.

The duties of an executrix

[49] Section 35 of the Act is peremptory. It provides that an executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29(1) but within six months after letters of executorship have been granted to him, submit to the Master an account in the prescribed form of the liquidation and distribution of the estate.

Is preference given to the surviving spouse?

- [50] Section 14(1) of the Act provides that the Master shall, subject to subsection (2) and (16) and (22), on the written application of the person who 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 is not incapacitated from being an executor of the estate of the deceased and has complied with the provisions of the Act, grant letters of executorship to such person.
- [51] Section 19 provides that if more than one person is nominated for recommendation to the Master, the Master shall, in making any appointment, give preference to: -
- [51.1] the surviving spouse or his nominee;
- [51.2] if no surviving spouse is so nominated or if the surviving spouse has not nominated any person, an heir or his nominee;
- [51.3] if no heir is so nominated or no heir has nominated any person, a creditor or his nominee;
- [51.4] the tutor or curator of any heir or creditor so nominated who is a minor or a person under curatorship, in the place of such heir or creditor.
- [52] The section also contains a proviso that the Master may join any of the said persons as executor with any other of them or if there is any good reason therefor, pass by any or all of the said persons.
- [53] The Master's power to appoint an executor is not reviewable under section 95 on the merits and it is only where there has been some gross irregularity or the Master in making an appointment has acted mala fide, the court will interfere with the exercise of the Master's discretion.

DELIBERATION

- [54] Having considered the relevant legal principles and legislation, a intestate surviving spouse is a preferent candidate for executorship only if more than one person is nominated for recommendation to the Master. The provisions of section 19 of the Act are plain in this regard. It was not the case before me that there was more than one contender. Accordingly, the argument that the surviving spouse enjoyed preference, has no merit.
- [55] The proviso provided or in section 19 also that the Master may join any of the said persons as executor with any other of them or if there is any good reason therefor, pass by any or all of the said persons. The Master therefore has a wide discretion as far as the appointment of an appropriate executor is concerned. In any event, the Master's power to appoint an executor is not reviewable under section 95 on the merits and it is only where there has been some gross irregularity or the Master in making an appointment has acted mala fide, the court will interfere with the exercise of the Master's discretion. No case for gross irregularity has been made out.

- [56] If a surviving spouse is not nominated an heir or her nominee may be appointed. In terms the laws of intestate succession the biological daughter is an heir. She was advised to appoint an independent agent or nominee to assist her in the administration of her late father's estate. There is accordingly no bar against her appointing the first applicant as her agent. I accordingly find that there is similarly no merit in the argument that the first applicant lacks locus standi.
- [57] The objection that the first application was not cited in his nominio officio capacity is over-technical in the extreme in my view. His appointment as executor was proven and not refuted with any documentary evidence to the contrary by the first respondent. A simple reading of the founding papers together with the answering papers supports this view.
- [58] It is trite that a party may at any time approach the court for the removal of an executrix and that there is no duty on such a party to exhaust non-litigious remedies first. The applicants were therefore entitled to bring this application.
- [59] In the premises, all the points in limine are dismissed.
- [60] As far as the merits of the application is concerned, the facts and the actions taken by the Master bolsters the applicants' concern that the first respondent is not fulfilling her duties as executrix and that there may very well be instances of maladministration. However, the court is still somewhat concerned about the fact that there are steps that have in fact been taken by the Master and that the court has not been apprised of the outcome. Accordingly, I am of the view that it would be in the best interests of justice for the parties and the Master to first place all these relevant facts before the court before a final determination can be made one way or the other.
- [61] In the meanwhile, I am of the view that the estate of the late Mr George Phillips does require protection and preservation, given the alarm raised by the applicants and the Master and that such an order would be in the best interests of the intestate heirs. I therefore intend to grant interim relief in this regard.
- [62] As far as the issue of costs is concerned, this can only fairly be determined upon the finalisation of the application as provided for in the order that I intend to make.

ORDER

In the circumstances I make the following order: -

"1. The application is postponed sine die.

2. The Master is directed to furnish a written report to this court on the following aspects:

2.1 Whether the first respondent has been removed as executrix of the estate of the late George Phillips, pursuant to the Master's letter in terms of section 54 of the Administration of Estates Act, 66 of 1965, dated 15 August 2022.

2.2 If the first respondent has not been removed as executrix, the Master is to advance reasons why this has not been done and whether sufficient grounds exist for the removal of the first respondent as executrix of the estate of the late George Phillips.

3. The Master is directed to furnish the report within 30 (thirty) days of this order.
4. Pending the Master's report and any other order of this court, the first respondent is interdicted from taking any further steps whatsoever in the administration of the estate of the late George Phillips.
5. The parties are granted leave to supplement their papers upon receipt of the Master's report, whereafter either party may enrol the application for hearing provided that all other directives of this court relevant to the enrolment of the application, have been complied with.
6. The costs of the application are reserved.

F BEZUIDENHOUT

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 19 January 2023

DATE OF JUDGMENT: 24 April 2023

APPEARANCES:

On behalf of applicant: Adv Waseem Bava waseembava@rsabar.com Instructed by: Vusi Maimula Incorporated vmailulaattorneys@gmail.com On behalf of first respondent: Adv Henry Motsemme motsemme818@gmail.com Instructed by: Simon Senosi Attorneys simon_senosi@icloud.com.

- [1] Wessels v The Master 9 SCA 18.
- [2] Meyerowitz D: The law and practice of administration of estates and estate duty (2007 edition), p 1-4.
- [3] Gush & Newman v Mnqandi 1913 EDL 132; Seagull v Seagull 1977 (3) SA 247 (C).
- [4] Section 96(2).
- [5] Meyerowitz D, 10th edition, 2010, chapter 11, p 11-5.
- [6] Section 96(1)(a).
- [7] Jamie v Adams 1914 WR 691.
- [8] Section 54(1)(a).
- [9] Die Meester v Meyer 1975

(2) SA 1 (T).

[10] Re Kastelein's Estate 11 CTR 174.

[11] Van Heerden v Keyser 1913 CPD 3; Nettleton v Kilpatrick 1 Roscoe 190; Keane v Coghlan 11 CTR 550.

[12] Volkwyn NO v Clarke & Damant 1946 WLD 456.

[13] Letterstedt v Broers 9 AC 370; Sackville West v Nourse 1925 AD 516 at 527.

[14] Bankorp Trust Bpk v Pienaar 1993

(4) SA 98 (A).

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