

SOUTH AFRICA / JUDGMENT

McCann v McCann and Others (D11184/2024) [2025]

ZAKZDHC 30 (21 May 2025)

[2025] ZAKZDHC 30

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D11184/2024

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FLYNOTES:

WILLS

AND ESTATES – Locus standi – Widow and sole heir –

Seeking

urgent relief against respondents prior to appointment of executor

– Aimed at preserving and protecting business

interests and

status quo of two corporate entities – Beningfield exception

discussed – Relief claimed could only

endure until the

executor was appointed – Executor then having duty to

preserve, realise and distribute estate assets

– Relief in

rule nisi partially confirmed against first respondent only –

Administration of Estates Act 66 of 1965, s 26(1).

IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D11184/2024

In

the matter between: RACHEL
ELIZABETH McCANN
APPLICANT
and
ANTHONY
SEAN CLIFTON McCANN
FIRST
RESPONDENT
CINDY
McCANN
SECOND
RESPONDENT
CATHERINE
McCANN
THIRD
RESPONDENT
STANDARD
BANK OF SOUTH AFRICA LIMITED
FOURTH
RESPONDENT
ABSA
BANK LIMITED
FIFTH
RESPONDENT
THE
MASTER OF THE HIGH COURT, DURBAN
SIXTH
RESPONDENT

Coram: Mossop J

Heard: 7 May 2025

Delivered: 21 May 2025
ORDER
The

following order is granted: 1.
Paragraph 1(a)(i) of the rule nisi granted by Radebe J on 20
September 2024 is confirmed against the first respondent only.
2.
The rule is otherwise discharged against all the respondents.
3.
Each party shall pay their own costs.

JUDGMENT

MOSSOP J:

Introduction

[1] On 20 September 2024, Radebe J granted an urgent rule nisi, with interim relief, at the instance of the applicant (the rule). Despite six respondents being identified, the relief claimed by the applicant was primarily directed at the first, second, and third respondents. I am now required to determine whether the rule should be confirmed.

The rule

[2] The rule reads as follows:

‘1. The first to sixth respondent are called upon to show cause on 24 January 2025 at 09h30 or as soon as the matter may be heard why an order in the following terms should not be made final:

- (a) Pending the finalisation of the winding up of the estate of the late Sean McCann (the deceased) the first to third respondents, for so long as they remain employed by or otherwise involved in the affairs of either Corporate Motor Management CC (Registration No. 1997/044775/23), hereinafter referred to as “the CC”, or Autorox (Pty) Ltd (Registration No. 2021/688372/08), hereinafter referred to as “the Company”, or the business trading under the name and style of The business, hereinafter referred to as “the Business”, are hereby interdicted and restrained from:
 - (i) drawing from the bank accounts or cash reserves from the CC, the Company or the Business any amounts other than those that they would have each been entitled to in the ordinary course of their employment therewith prior to the death of the deceased, provided the CC, the Company or the Business remain in a position to make the aforesaid payments;
 - (ii) conducting themselves or carrying on the business of the CC, the Company or the Business in such a manner as to cause the CC, the Company or the Business to be in breach of the Mahindra Dealership Agreement concluded by either the CC or the Company, as the case may be, with Mahindra South Africa (Pty) Ltd and for so long as the said Mahindra Dealership Agreement remains in existence;
 - (iii) conducting themselves or carrying on the business of the CC, the Company or the Business in such a manner as to cause prejudice to the interests thereof;
 - (iv) causing either the CC or the Company to cease making payment of any amounts which were paid by either of them prior to the death of the deceased in respect of the applicant and the deceased’s monthly expenses provided, (sic) the CC or the Company remain in a position to make the said payments.

- (b) Pending the finalisation of the winding up of the deceased's estate, the fifth respondent is directed to provide, upon request by the applicant, copies of all monthly statements in respect of any banking accounts held with it in the name of either the CC or the Company, and to provide the application (sic) with such information as she may require and as the fifth respondent may be in possession of in relation to any transactions appearing on the said monthly statements.
- (c) The first to third respondents are directed to pay the costs of the application.
- 2. The provisions of paragraph 1.a, 1.a.i., 1.a.ii., 1.a.iii., 1.a.iv., and 1.b. above shall operate as interim relief with immediate effect.'

Common cause

- [3] It is not in dispute that Mr Regan McCann was married to the applicant and conducted the business of a Mahindra motor vehicle dealership in Umhlanga Rocks, KwaZulu-Natal (the business) through two corporate entities. The two corporate entities were Corporate Motor Management CC (CMM) and Autorox (Pty) Ltd (Autorox). CMM attended to the sale of motor vehicles on behalf of the business and Autorox was responsible for the running of the business's automotive workshop.
- [4] On 2 August 2024, Mr McCann sadly took his own life, and I shall accordingly henceforth refer to him as 'the deceased'. The business apparently remains operational, despite the passing of its guiding mind.
- [5] The first respondent is the deceased's father, the second respondent is his mother, and the third respondent is his sister. They are employees of the business, although by which entity each is definitively employed is not conclusively revealed in the papers. The applicant, the first and second respondent's daughter-in-law, is not aware of the capacity in which the first respondent is employed. She is, however, certain that the second respondent is employed as the bookkeeper of the business, and she knows that the third respondent is also employed in an administrative capacity.
- [6] It appears to also be common cause that the relationship between the applicant and the deceased's immediate family has broken down for a variety of reasons that need not be explored in this judgment.

The reason for the urgent application

- [7] The applicant revealed the reason why the application was brought at the commencement of her founding affidavit, claiming that it was:

'... aimed at preserving and protecting the business interests and general status quo in respect of two corporate entities ...'

The two corporate entities referred to are CMM and Autorox.

- [8] The deceased died testate. In fact, he and the applicant concluded a joint will in which each appointed the other as the sole heir of their respective estates. Both further agreed that either Standard Executors and Trustees Limited or Standard Bank of South Africa Limited, whichever first accepted the appointment, was to be appointed as the executor of their respective estates upon their deaths. The joint will does not provide for any bequests to any legatees and the applicant is, thus, the deceased's sole heir.
- [9] The formal appointment of an executor, regrettably, often takes some time and that was the case in this matter. The deceased died on 2 August 2024 and by the date upon which this application was launched, 13 September 2024, the sixth respondent had not yet made the required appointment. Eventually, Ms Winnie Alexander, as a nominee of Standard Executors and Trustees Limited, was appointed as the executrix (the executrix) to the deceased's estate on 2 December 2024, precisely four months after the deceased died.
- [10] The appointment of the executrix, however, lay in the future when the applicant brought her application. Indeed, the application was considered necessary precisely because her appointment had not yet occurred. Whilst the applicant awaited the appointment of the executrix, she determined that certain irregularities appeared to be occurring at the business. In identifying these irregularities, the applicant candidly conceded that her knowledge of the business was imperfect and that she had:
- ‘... very limited information regarding the status of the business of the company and the CC.’
- [11] That statement is repeated in various permutations in both affidavits to which the applicant has appended her signature in this application. This is, perhaps, understandable, for she had no formal connection to either CMM or to Autorox and was not a member of the former, nor was she a director or shareholder of the latter. Her only rather tenuous link to either of them was that she happened to be married to their guiding mind.
- [12] However, as sole heir to the estate of the deceased, the applicant reasoned that if the business was denuded of its resources and assets, including its cash resources and its dealership agreement with Mahindra, it would be diminished in its value, and she would, consequently, ultimately inherit less. She accordingly submitted that she was entitled to interdict such conduct of the first to third respondents that might lead to a reduction in the value of her inheritance.
- [13] From my understanding of the papers and, in particular, the position adopted by the first to third respondents, it appears that they are prepared to accept the principle that the applicant was entitled to act in order to preserve estate assets. The first respondent stated in the answering affidavit that he delivered on behalf of himself and the second and third respondents that:
- ‘In the most remote of circumstances, and considering there is not yet an executor or executrix appointed in respect of my late son’s

estate by the Sixth Respondent, notionally the Applicant could at best argue that she needs to preserve assets.’

[14] I deduce therefrom that the first to third respondents accept that the applicant, on some level, may have been justified in approaching the court to preserve her late husband’s estate pending the appointment of an executor. I, however, do not lose sight of the fact that the first respondent goes on to state in the answering affidavit that no case was made out by the applicant for the allegation that the value of the deceased’s estate was, indeed, being imperilled by any culpable conduct on the part of himself or the second or third respondents. This statement, however, must be open to some doubt, especially with reference to the conduct

of the first respondent, given his admitted conduct of withdrawing money from CMM’s bank account, which is examined in more detail later in this judgment.

[15] I also do not lose sight of the provisions of s 12(1) of the Administration of Estates Act 66 of 1965 (the Act), which read as follows:

‘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.’

The applicant would have been entitled to request the sixth respondent for such an appointment to occur. She did not do so but, instead, approached this court. She has not explained why this was not done. It is notionally possible that she chose to approach this court given the obvious lethargy displayed by the sixth respondent in performing the functions assigned to that office. The applicant clearly believed that immediate action was required, not a further interlude of being required to patiently stand in line awaiting a decision by the sixth respondent.

The relief claimed in paragraph (a) of the rule

[16] Summarised, the applicant seeks to interdict the first to third respondents from drawing money from the business beyond what their functions ordinarily permitted them to draw and from conducting themselves in a manner that would ultimately prejudice the interests of the business and imperil the franchise agreement that it holds with Mahindra. Whilst seeking to restrict the withdrawal of money by the first to third respondents from the business, ironically, the applicant also seeks to compel them to ensure that the business continues to make payments that it made in respect of the deceased’s and her monthly living expenses whilst the deceased was alive. This she does, indirectly, by compelling the first to third respondents

personally not to stop making those payments.

[17] It is perhaps convenient to deal with the issue of the payment of the monthly expenses first, for the issue can be dealt with simply and swiftly. Mr Aldworth, who appeared for the applicant, conceded that the rule could not be confirmed in respect of that relief. The

payments claimed are a form of maintenance and such a claim should be directed to the executrix, who must determine the issue. There is a further reason why the claim for payment cannot be permitted. The applicant's claim is, in truth, against the business, as constituted by CMM and Autorox. None of the first, second or third respondents physically make those payments using

their own money. The business makes the payment but neither the business, nor CMM or Autorox, are joined in the application. No order compelling the business to continue making those payments could therefore be granted against it in its absence.

[18] As regards the other relief claimed in paragraph

(a) of the rule, I deal with the withdrawal of money first. The applicant explained that she acquired access to the business's accounting records and from that she discerned that the first respondent ordinarily received a monthly salary of approximately R23 000 from the business. In the month in which his son died, August 2024, the first respondent withdrew from CMM's bank account the amount of approximately R142 000. He had previously never been paid anything by CMM. The applicant regarded this transaction with extreme suspicion, and it appears that her discovery of this fact prompted

this application.

[19] The first respondent admitted to drawing that sum from CMM's bank account. His explanation for doing so was the following:

'129. However, the close corporation which attends to the sale of the vehicles required a dealer principal.

130. I took over this role to save the business from closure. I was told by the auditors that I needed to pay myself a salary for the sake of the books of account and tax affairs of the close corporation. These are the same auditors that the Applicant has relied upon by providing the financial statements.

131. The amount of R141 577.12 was not "for the month of August". It was two months' worth of salary at this position. It was paid as a lump sum due to provisional tax considerations.'

[20] I confess that there is much that I do not understand about this explanation. Perhaps the biggest difficulty that I have is that if the amount of R142 000 was payment to the first respondent for two months' salary, which two months does it relate to? If it was for July and August 2024, why was the first respondent required to take over as dealer principal when his son was still alive and, by all accounts, was performing that function perfectly adequately himself? And if the two months are August and September 2024, why was the first respondent entitled to be paid in advance in August for the month of September 2024? No explanation has

been forthcoming. What has been explained simply leads to further questions. If the auditors gave the first respondent that advice, why have they not confirmed their advice under oath? What are the provisional tax implications involved? Who determined that the first respondent's salary should be increased from R23 000 per month to an amount northwards of R70 000 per month? No answer has been proffered to any of these questions.

[21] That the first respondent's entitlement to this money is, at the very least, questionable, appears to have been realised by him and he accordingly made the following statement in the answering affidavit immediately after advancing the explanation just narrated:

'I am very happy to pay this money back to the business considering the payment was only made on the advice of the auditors, and I did not jump into the business for the purpose of immediate financial reward...'

[22] As I understand things, the repayment has not been made. However, the tender of repayment was repeated in argument before me by Mr Tucker, who appeared for the first to third respondents. It appeared to be made seriously and, in my view, should be given effect to.

[23] The remaining issue in paragraph (a) of the rule, being the applicant's concern over the way that the affairs of the business are now being conducted is less clearly defined. What appears to irk the applicant is that the first respondent stepped forward, took control of the business, and took certain decisions immediately after the death of his son. The first respondent had previously been the sole member of CMM and at some stage had transferred his membership interest in it to the deceased. The applicant indicated that she is aware that there may be a considerable sum of money owing to the first respondent arising out of this transaction, although she has not seen documentary proof of the existence of the indebtedness. The applicant consequently advised the first respondent in her founding affidavit to formally present his claim for payment to the executor and admonished him against simply helping himself to funds from the business.

[24] The applicant stated that she had observed from the business's website that the first respondent has now identified himself as being the dealer principal of the business. What she says in this regard is the following:

'Quite obviously, Sean has no authority to unilaterally appoint himself the dealer principal of the dealership. While I do not necessarily take issue with him having done so, it illustrates the fact Sean seems to be of the view that he can simply take over and run the business as he wishes to.'

[25] The fact of the matter is that someone had to step up to the plate when the deceased passed away to allow the business to continue to operate. To have remained passive, it seems to me, would inevitably have led to the failure of the business. The first respondent had experience in the industry in which the business operated and did what had to be done. The applicant, on her own version, has none of that experience: she is an educator. In my view, she has sensibly indicated that she does not take issue with what the first respondent did. That being

the case, I fail to understand what her complaint is regarding the way in which the business is being conducted. No case has been made out for such dissatisfaction in the founding affidavit, unless the complaint relates to the withdrawal of money by the first respondent, which has already been discussed. I do not discern any other grounds in the founding affidavit that relate to the way that the business is presently being conducted. No case may be made out in reply, for obvious reasons.[1]

The relief claimed in paragraph (b) of the rule

[26] Not much needs to be said about this portion of the rule. The rule permitted the applicant to demand from the business's bank, the fifth respondent, that it provide her with copies of the business's bank account statements and to provide her, upon her request, with information regarding any transaction appearing in the bank statements.

[27] In argument, Mr Aldworth, who most ably represented the applicant throughout, intimated that it would be difficult for him to seek the confirmation of paragraph (b) of the rule. In my view, he was correct in making that concession. The applicant has no entitlement to receive the business's bank statements. Those are the property of the business. In the performance of her duties, the executrix will have access to them, but the applicant has no right to such access.

Analysis

[28] While the facts of this matter are being considered some time after the appointment of the executrix by the sixth respondent, it is important not to be distracted by the fact of that appointment. It is so that upon being appointed, an executrix assumes control of a deceased person's estate. Section 26(1) of the Act creates the following skeletal outline of the executrix's obligations and powers:

'Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.'

[29] To this skeleton, the courts have given muscle and sinew. In 1959, the Appellate Division commented as follows on the duties of an executor in *Lockhat's Estate v North British and Mercantile Insurance Co Ltd*: [2]

'The duty of an executor who has been appointed to administer the estate of a deceased person is to obtain possession of the assets of that person, including rights of action, to realise such of the assets as may be necessary for the payment of the debts of the deceased, taxes, and the costs of administering and winding up the estate, to make those payments, and to distribute the assets and money that remain after the debts and expenses have been paid among the legatees under the will or among the intestate heirs on an intestacy.'

[30] This approach was echoed in Clarkson NO v Gelb and others,[3] where the court observed that:

‘A deceased estate is an aggregate of assets and liabilities. It has no legal personality and, when referring to it as an entity, one must be careful not to imply or understand thereby that one is dealing with anything like a persona. The executor is vested with its administration and he alone has the power to deal with this totality of rights and obligations. He is not merely a procurator or agent. His primary duty is to obtain possession of the assets of the deceased, to realise them as far as may be necessary, to make payment of debts and expenses, to frame a liquidation and distribution account and thereafter to effect a distribution to the heirs and legatees.’

[31] That is all well and fine. And undoubtedly correct. It also follows that virtually all that is claimed in the rule naturally falls within the powers and duties of the executrix now appointed. But what is being considered here is not the present situation with the executrix in place, properly performing her duties. What is being considered is the situation before such an appointment was made.

[32] The crisp issue to be determined is whether, pending the appointment of the executrix, the applicant had the necessary standing in law to take steps to preserve the corpus of the deceased’s estate. The first to third respondents suggest that she did not have the legal standing to do so, notwithstanding their qualified acknowledgment mentioned earlier that she could take such

steps.

[33] In his heads of argument, Mr Aldworth drew attention to the concept of the Beningfield exception. Beningfield v Baxter[4] was a decision of the erstwhile Natal Supreme Court that found its way, ultimately, to Her Majesty’s Most Honourable Privy Council in the United Kingdom (the Privy Council). The Privy Council recognised an exception in Beningfield (hence the name, ‘the Beningfield exception’) to the general rule that only an executor of an estate has locus standi in relation to estate assets and transactions. Through the Earl of Selborne, the Privy Council found as follows:

‘When an executor cannot sue, because his own acts and conduct, with reference to the testator’s estate, are impeached, relief,

which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty. . . .’[5]

[34] The Beningfield exception was approved of, and followed by, Corbett CJ in Gross and others v Pentz,[6] where the Chief Justice stated that:

‘In my view, the Beningfield exception should be recognised and the general rule modified to this extent. Clearly a defaulting or delinquent trustee cannot be expected to sue himself. The only alternative to allowing the mBeningfield exception would be to require the aggrieved beneficiaries to sue for the removal of the trustee and the appointment of a new trustee as a

precursor to possible action being taken by the new trustee for the recovery of the estate assets or other relief for the recoupment of the loss sustained by the estate. This, in my opinion, would impose too cumbersome a process upon the aggrieved beneficiaries.'

[35] It would therefore appear that the Beningfield exception, in its purest form, first requires an executor to be in place and then further requires intolerable or impeachable conduct by the executor before the right to act on behalf of the estate accrues to an interested party.

However, in *Standard Bank of South Africa Limited v July and others*,^[7] the high court was faced with a situation where an appointed executor had died, and the heirs took steps to preserve estate assets where there simply was no executor able to act. The high court held that although, generally, only an executor can claim on behalf of an estate, the Beningfield exception allowed beneficiaries of an estate to claim where the executor will not or simply cannot. On appeal, the Supreme Court of Appeal considered the respondent's argument that the Beningfield exception could not apply because there was no delinquent executor in place. That proposition was rejected, and the decision of the high court was upheld, with Lewis JA opining that the Beningfield exception, as approved of in *Gross*, covered the situation.

[36] The applicant clearly is an interested party, and she was thus entitled to take steps to preserve the estate assets, pending the appointment of the executrix. That, however, does not necessarily mean that she made out a case entitling her to relief, but she cannot be non-suited because of a lack of legal standing.

[37] I am, in the event, not satisfied that the applicant has made out any case against the second and third respondents. Through the operation of chance, they happen to be blood relatives of the deceased. The second respondent is the bookkeeper of the business, and it appears to be suggested by the applicant that she was somehow complicit in allowing the payment to the first respondent to be made. There is, however, no evidence that supports that allegation nor is there any evidence of the system in place at the business regarding the authorisation of bank payments. There is even less reason to include the third respondent in this application.

The applicant explained why she was included as follows:

'Obtaining relief against the first and second respondents would be effectively meaningless if said relief did not extend to the third respondent as well. In such circumstances, the first and second respondents would be able to facilitate the commission of any acts which the relief sought in these proceedings was intended to guard against by the third respondent without them actually being in breach of any order granted against them.'

[38] No factual basis for this supposition is advanced. No evidence was adduced that established that the second and third respondents had acted in any improper way whatsoever and they cannot simply be swept along in this application in the belief that doing so may help to prevent a potential future difficulty.

[39] A final thing needs to be said about the duration of the rule. I have accepted that the applicant sought to preserve the deceased's estate until the appointment of an executor and that she was entitled to do so. However, the relief granted by Radebe J, ex facie the order, was to endure until the estate of the deceased had been finally wound up. In her founding affidavit, the applicant did not put the matter as crisply as that. She proposed that the relief that she claimed was:

'... to apply either pending the appointment of an executor to the deceased's estate or to the finalisation of the winding up of the deceased's estate ...'

[40] If preservation was the true motivating factor, as I have found that it was, then the relief claimed could only endure until the executor was appointed. The duty to preserve, realise, and distribute estate assets would then be the executor's. I can find no justification for the applicant and the executrix both having parallel rights in this regard, for the Act makes it perfectly clear that the executrix acquires all the rights necessary to wind-up the deceased's estate. Permitting the applicant to have overlapping rights with the executrix would be a breeding ground for future disputes. However, given the decision to which I have come, the duration of the relief has become moot.

Conclusion

[41] For the reasons set out above, only the relief detailed in paragraph 1(a)(i) of the rule can be confirmed and only against the first respondent. The balance of the relief contained in the rule cannot be confirmed and must be discharged.

Costs

[42] Both parties have tasted success: the applicant in obtaining limited relief against the first respondent and the first to third

respondents in having the balance of the rule discharged. The application had all the qualities of the curate's egg.[8] Some of it was good and some of it was bad. As a consequence, I am of the considered view that the appropriate order should be that each party bears its own costs.

Order

[43] I consequently grant the following order:

MOSSOP J

APPEARANCES

Counsel for the applicant: Mr D W D Aldworth Instructed by: Goldman Schulz Attorneys Suite 4 55 Gladys Mazibuko Road Berea Durban Counsel for the respondent: Mr M C Tucker Instructed by: Thorpe and Hands Incorporated Unit 8, Northsands Centre 5 Forest Drive Umhlanga Rocks

[1] Pienaar v Minister of Police [2019] ZANHC 18 para 13.

- [2] Lockhat's Estate v North British and Mercantile Insurance Co Ltd 1959
- (3) SA 295 (A) at 302F-G.
- [3] Clarkson NO v Gelb and others 1981
- (1) SA 288 (W) at 293C-E.
- [4] Beningfield v Baxter (1886) 12 AC 167 (PC) (Beningfield).
- [5] Ibid at 178-179.
- [6] Gross and others v Pentz [1996] ZASCA 78; 1996
- (4) SA 617 (A) (Gross) at 628G-H.
- [7] Standard Bank of South Africa Limited v July and others [2018] ZASCA 85.
- [8] The story of the curate's egg stemmed from an 1895 Punch cartoon. Served a bad egg for breakfast by his host, the bishop, the young curate told his host: 'Oh no my Lord, I assure you, parts of it are excellent.'
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