

SOUTH AFRICA / JUDGMENT

Nadat v Bibi-Sulaman and Another (1718/2022) [2024] ZALMPPHC 39 (23 April 2024) [2024] ZALMPPHC 39

COURT

Limpopo High Court, Polokwane

BEFORE

Ledwaba AJ

CASE / FILE NUMBER

1718/2022

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REPUBLIC

OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 1718/2022

In

the matter between:

KNOORJAHAN
MUSSA
NADAT Applicant
And
FATIMA
8181-SULAMAN
N.O. First
Respondent
MASTER
OF THE HIGH
COURT Second
Respondent

JUDGEMENT

LEDWABAAJ

Introduction

- [1] On the basis that it is allegedly undesirable as envisaged in section 54(1)(a)(v) of the Administration of Estate Act 66 of 1985 (the Act), the applicant prays for the removal of the first respondent as executrix of the estate of her late husband, Ismail Ahmed Ismail Nadat Nadat (the deceased). She also prays for the court to consider whether the first respondent is entitled to any remuneration. The ancillary relieves include that the second respondent grants appointment letter to an alternative representative of the deceased's estate, that the first respondent hands over any and all the documents relating to the deceased's estate, and further to order the first respondent to pay the costs in her personal capacity. The founding affidavit states the basis of the removal as the alleged maladministration of the deceased's estate and the alleged material misrepresentations made to the second respondent.
- [2] The applicant is the deceased's mother and the first respondent's mother in law.
- [3] The first respondent opposes the application. She also applies to strike out certain paragraphs in the founding and replying affidavits.
- [4] The deceased was married to the first respondent according to the Muslim rites on the 26th July 2008. The deceased died on the 19th August
2021. On the first respondent's version, the deceased died intestate. On the applicant's version the deceased died on the strong grounds which indicate that the deceased left behind a will drawn up in accordance with Sharia law.
- [5] The first respondent reported the deceased's estate on the 25th August 2021[1]• She was appointed as executrix two days later on the 27th August
2021. In terms of section 29 of the Act, the estate was published on the 8th October 2021 with the creditors given thirty days to lodge claims. The thirty days period lapsed on the 7th November 2021. The amended inventory was submitted on the 29th October 2021. On the basis that the deceased allegedly received cash payments of R202 200.00 and R157 800.00 (totalling of R360 000.00) on behalf of the applicant as the seller for safe keeping from the property sale agreement, the applicant submitted her claim as the creditor to the second respondent on the 18th February 2022. The first respondent disputes the applicant's claim that annexure FA 4 reflects that her claim was emailed to the first respondent's attorneys on the 16th February 2022 and takes the position that the applicant has failed to prove locus standi. Among the reasons for disputing the applicant's claim, the first respondent avers that as the deed of sale expressly provides that the payment of the purchase price was to be made into the transferring attorneys' trust account, the first respondent disputes the applicant's claim that any payment was made to the deceased. She further points out that

because the deceased started self-isolating due to Covid 19 from the end of June 2021 before he tested positive on the 15th July 2021 when he was sedated at the hospital until his death, he could not have received the money in respect of the deed of sale which was signed the day before on the 14th July 2021. She avers that the Nadat family had safe and other cash deposit services to keep the money. She further says the subject property is still registered in the applicant's name, to which the applicant replies that the transfer process has been held over by agreement with the purchaser.

- [6] The first respondent submitted the final liquidation and distribution account on the 15th February 2022, before the applicant submitted her claim. She avers that as the deceased's surviving spouse and their children's legal guardian, she is entitled to be appointed as the executrix. As the executrix, she stands in the fiduciary relationship with the creditors, the estate beneficiaries and the court.
- [7] The applicant sates that she has strong grounds to believe that the deceased left behind a will drawn up in accordance with Sharia law. According to the applicant, that will gives her and her husband a share in the deceased's estate. The existence of the will is denied by the first respondent. She submits that even if it could be accepted that the deceased left behind a will drawn up in terms of the Sharia Law, that law is contrary to the provisions of the South African law and would not be accepted by the second respondent for the purpose of the administration and the distribution of the deceased's estate.
- [8] It is common cause that in the absence of the will, the Intestate Succession Act 81 of 1987 applies. This entitles only the first respondent and her children to inherit from the deceased's estate.
- [9] The first respondent abandoned all points in limine raised; namely non-compliance with Justice of the Peace and Commissioners of Oath Act 16 of 1963, non- joinder of interested party and failure to attach confirmatory affidavits.
- [10] The first respondent denies the alleged fraud and maladministration of the deceased's estate on her part. She denies that she deliberately misrepresented to the second respondent the deceased's estate in the first inventory she submitted. She avers that the inventory was completed on the basis of information available to her attorney to assist the second respondent to determine whether the deceased's estate was a section 18(3) of the Act (where the estate is valued under R250 000.00) or a letter of executorship estate (where the estate is valued above R250 000.00).
- [11] The first respondent admits having made an error by confusing the street and erf numbers in the description of the property in the first inventory. Her view is that only one immovable property is registered in the deceased's personal name. She denies having deliberately omitted to mentioned in the first inventory immovable properties registered in the name of the various entities in which the deceased had interest. She avers that the inventory should reflect the value of the shares/interests in the entities and that the applicant, the Nadat family and deceased's former co-owner refuse to disclose the financial statements. This

makes it impossible for her to determine the value to be included in the inventory.

Discussion

- [12] This application is about the removal of the first respondent on the basis of the alleged undesirability as contemplated in section 54(1)(a)(v) of the Act. The applicant alleges that because the first respondent allegedly committed fraud and maladministration as the deceased's estate executrix, she deserves to be removed from her position. For the interpretation of this section, the applicant relies on the authority of Mpasi case[2]
- [13] On the authority of Gory[3], the applicant submits that the discretion vested on the court when dealing with the application based on section 54(1)(a)(v) of the Act is a discretion in the strict sense. I understand this to refer to a discretion in the true sense where there are a wide range of equally permissible options available. The court said that the appeal court will ordinarily only interfere with the exercise of that discretion in limited circumstances; for example, if it is shown that the court of first instance did not act judicially in exercising its discretion, or based the exercise of that discretion on a misdirection on the material facts or on wrong principles of law.
- [14] The applicant's case is based on the founding affidavit. She is only allowed to reply to the first respondent's answering affidavit and not to make her case on the replying affidavit. This is because the first respondent is not automatically given an opportunity to respond to new allegations raised in the replying affidavit. In the same breath and as the applicant is also not automatically given an opportunity to reply to new allegations in the supplementary affidavit, the first respondent is not permitted to raise new issues in the supplementary affidavit.
- [15] The applicant submits that the courts have accepted that there is a discretion for flexibility to permit new material in reply. She refers to the case of Nkengane.[4]
- [16] Based on Msunduzi Municipality and Anderson cases[5], the applicant submits that a striking out application is not intended for technical objections of no advantage to any of the parties.

Relying on the interpretation of Rule 23(2)(b) by Beinash[6] case, she further submits that a party intending to apply for the striking out must show that it will be prejudiced if the matter is not strike out.

- [17] Relying on Swissborough Diamond Mine (Pty) Ltd v Government of the Republic of South Africa[7] the first respondent submits that in motion proceedings, the affidavits serve not only to place evidence before court, but also to identify and define the issues between the parties for the case to be met. She submits that the applicant must stand and fall by her papers.

Based on R v Myers[8], Ruto Flower Mills(Pty) v Moriates & Another[9] and Ferreira v Landre & Another[10], the first respondent submits that fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth , or recklessly, careless whether it be true or false and was intended to be acted upon. Referring to Home Talk[11] case , the first respondent submits that fraud is a serious false representation which is not to be lightly made and which is not

easily established.

[18] The applicant elected to approach this court for the final order by way of application. Motion proceedings are all about the resolution of legal issues based on common facts. Unless the circumstances are special they cannot be used to resolve issues because they are not designed to determine probabilities.[12] The first respondent rightly points out that the applicant's choice of the motion proceedings denies the parties an opportunity to test under oath the other's version.

An applicant who seeks a final relief using motion proceedings must, in the event of dispute of fact, accept the version set up by a respondent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.[13]

[19] The party which raises dispute the facts is required to do so seriously and unambiguously. Bare denial may suffice where there is no other way open to the disputing party and nothing more can be expected of such a party, but even that may not be sufficient if the facts averred lies within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment: Wrightman t/a JW Construction v Headfour(Pty) Ltd & Another 2008(3)SA 371(SCA)- par 12 and

13. The first respondent's version is not a bare denial which can be regarded as being far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers without oral evidence.

[20] The basis on which the applicant claims that it is undesirable that the first respondent should remain acting as executrix is disputed not on bare denial. The first respondent's version raises real, genuine dispute of facts. Those facts are not so far- fetched or clearly untenable that the court is justified in rejecting them merely on the paper.

[21] To prove the alleged fraud and maladministration, the applicant relies on disputed facts and claims. The applicant's locus standi claim is based on the disputed allegation that cash money was given to the deceased for safe keeping.

[22] The applicant has not produced the alleged will to prove its contents. She relies on her belief and the confirmatory affidavits of Jeinab Bibi Ebrahim Nadat Nadat (Jeinab) and his wife. The first respondent states that she is in a legal dispute with Jeinab on the deceased's interest in the entity co-owned by the deceased and Jeinab and that the latter is not co-operating with her to establish the deceased's shares in the entity they ran together.

[23] On the authority of Letterstedt[14] Sackville and Meyerowitz[15], the parties agree that the test is whether the continuance of the first respondent in office will prejudicially affect the future

welfare of the estate placed under her care. The first respondent further submits that mere negligence without proof of prejudice in the estate administration will ordinarily not be the ground for removal.

[24] On the basis that she had not lodged a claim against the deceased's estate as was the case in the Grobbelaar case[16], the first respondent denies alleged conflict of interest.

[25] Given the above and on the balance of probabilities, the applicant has failed to prove that the continuance of the first respondent as the executrix will prejudicially affect the future welfare of the deceased's estate placed under her care. The applicant's application fails.

[26] On the basis that the founding and replying affidavits allegedly contain averments which are malicious, vexatious and scandalous, the first respondent applies for the striking out of those averments. A party which seeks to strike out that kind of averments is required to give the required notice as provided in Rule 23(2)(a). In terms of Rule 23(2)(a) where a party intends to apply to strike out an averment on the basis that it is scandalous, vexatious or irrelevant, such party is required to deliver that notice within ten days of the receipt of the pleading and give its opponent an opportunity to remove the cause of complaint within fifteen days of delivery of the notice of intention to strike out.

Rule 23(2)(b) provides that the court shall not grant the application to strike out unless it is satisfied that an applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.[17]

[27] On the balance of probabilities, the first respondent has failed to prove that it will be prejudiced in the conduct of her case if the striking out application is not grant. Her application also fails.

[28] On the basis that the first respondent allegedly acted fraudulently or in a gross negligent manner when dealing with the deceased's estate, the applicant prays for de bonis propriis costs against the first respondent. In response and on the authority of Nel[18] the first respondent submits that by reason of special considerations arising from either the circumstances which give rise to the action or from the conduct of the losing party, the court in the particular cause considers it just , by means of such an order, to ensure more effectually than it can do by means of a judgment for a party and party costs that the successful party will not be out of pocket in respect of the expense caused to him or her by

the litigation. On the same authority she submits that the awards of costs on attorney and client scale are used by the court to mark its

displeasure of some conduct which should be frowned upon.

[29] The first respondent submits that there are grounds for the punitive costs order to be awarded against the applicant.

[30] Punitive costs are awarded to mark the court's displeasure against a vexatious litigant.

[31] Both parties have not been succeeded in their respective prayers. There is no basis to order any party to pay the other's costs

Order

[a] On the balance of probabilities, the applicant has failed to prove that it is undesirable that the first respondent should remain the executrix in the estate of Ismail Ahmed Ismail Nadat Nadat. The applicants' application is dismissed

[b] On the balance of probabilities, the first respondent has failed to prove that it will be prejudiced in the conduct of her case if the striking out application is not grant. The first respondent's striking out application also fails.

[c] Both parties have failed to prove their cases on the balance of probabilities.

[d] Each party pays its own costs.

LEDWABA AJ

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

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Heard on: 5th

February 2024

Judgement

was electronically delivered on: 23 April 2024

[1] The reporting documents included the death notice, nomination by beneficiaries, acceptance as executrix, death certificate, special

power of attorney (regulation 9.10 of the AEA forbids administration of without attorneys assistance) beneficiaries' identity documents, reporting affidavit and inventory.

[2] Mpasi NO v Master of the High Court (2018) NASC(17 August 2018)

[3] Gory v Kolver NO & Others (2006) ZACC 20 2007(4) SA 97(CC) at 57

[4] Nkengane v Schnetler (2011) 1 All SA 272(SCA)

[5] Msunduzi Municipality v Natal Joint Municipal Pension Fund & Others 2007(1) SA 142(N): Anderson & Another v Port Elizabeth

Municipality 1954(2) SA 299(E)

[6] Beinash v Wixley 1997(3) SA 721 (SCA) at 733B-734A.

[7] 1999(2)SA 279(T) at 323 F

[8] 1948(1) SA 375(A)

[9] 1957(3) SA I 13(T) at 116A

[10] 1964(4) SA 589(T) at 592H

[11] Home Talk Developments(Pty) Ltd & Others v Ekurhuleni Metropolitan Municipality (2017) ZASCA 77 hu

[12] National Director of Prosecutions v Zuma 2009(2) SA 277(SCA)

[13] Tsambo v Sengadi (2020) ZASCA 64 paragraph 19

[14] Letterstedt v Broers 9 AC 379

[15] Sackville West v Nourse 1925 AD 516 at 527; Meyerowitz on Administrative of Estates And their Taxation , 2010 Edition page 11-2, par 11.4.

[16] Greobbelaar v Grobbelaar 1959 (4)SA 719(A)

[17] Beinash V Wixley 1997(3) SA 721 (SCA) at 733B-734A.

[18] Nel v Waterberg Landbouers Ko-operatiewe Vereening 1946 AD 597

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