

SOUTH AFRICA / JUDGMENT

Ncamiso N.O (16488/2024), Ex parte [2024] ZAWCHC 304 (10 October 2024)

[2024] ZAWCHC 304**COURT**

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

16488/2024

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Source record**Latest****amended version: 14 October 2024****FLYNOTES:**

WILLS AND ESTATES – Administration of estates – Search warrant –
Executor
believing property unlawfully withheld – Deceased ran taxi
business – Alleged that unknown persons collecting
income –
Executor seeking return of vehicles – Section 26 explicitly
delineates process for obtaining warrant
– Application must
be to magistrate’s court having jurisdiction – Section
does not envisage High Court
hearing such application –
Application struck off the roll – Administration of Estates
Act 66 of 1965, s 35(2).
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
CASE
NO: 16488/2024
In

the matter between:

In
the Ex Parte Application
NOLUSINDISO
NCAMISO
N.O
Applicant
Heard: 07 October 2024
Delivered: Electronically
on 10 October 2024

JUDGMENT

LEKHULENI J

1.

Introduction

- [1] This is an ex parte application in which the applicant, who is the duly appointed executrix of the deceased estate of Mziwetemba Solani, is seeking an order in terms of section 26(3) read with section 102 of the Administration of Estates Act 66 of 1965 ('the Administration of Estates Act') for the issuance of a warrant for search and seizure of all assets registered in the name of the deceased as of the date of his death. In addition, the applicant seeks an order that the sheriff of the court be authorised to enter, search and seize several motor vehicles wherever they may be found and that these vehicles be delivered to the applicant's custody, as the executrix of the late Mziwetemba Solani's deceased estate. The applicant asserts that as an appointed executrix, she has a fiduciary duty to take possession and control of all documents of the late estate except for those in possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.

Background

Facts

- [2] The applicant's father, Mziwetemba Solani ('the deceased'), operated a taxi business during his lifetime and was affiliated with the Cape Amalgamated Taxi Association. On 29 November 2023, the deceased was shot by unidentified assailants in Gugulethu. His assailants are still at large. Subsequent thereto, the deceased's estate was reported to the office of the Master of the High Court. The Master of the High Court issued Letters of Executorship No.1758/2024 in favour of the applicant on 27 May 2024.

[3] On 10 February 2024, the deceased's wife, Ms Voyolwethu Solani, was also gunned down in the Nyanga location by unknown assailants. The murders of Mr and Mrs Solani are still under police investigation. Pursuant to the murder of Ms Solani, the Master of the High Court issued Letters of Authority No. 3432/2024 in favour of Avela Koboko in terms of section 18(3) of the Administration of Estates Act.

[5] The applicant expressed a reasonable suspicion that the deceased's vehicles remain in the possession or control of unknown individuals related to the deceased who are conducting business for their selfish gain. According to the applicant, the motor vehicles serve as a security for money lent and advanced by Toyota South Africa Motors in

favour of the deceased. The applicant also asserted that those in possession of the vehicles have no right to do so and have acted

unlawfully by taking possession or withholding or concealing the deceased's assets from the control and possession of the appointed

executrix to the detriment of the deceased estate.

[6] The applicant brought this application on an ex parte basis and contended that should the possessors be alerted of this application prior to the hearing; there is a reasonable apprehension

that they would hide away the vehicles and defeat the object of the seizure and search application. The applicant implored the court to issue an order for the authorisation of the warrant in terms of section 26(3) of the Administration of Estates Act directing the Sheriff of this court to search and seize vehicles and place them in her possession from wherever and or whomever they may be found.

Principal Submissions by the Applicant's Counsel

[7] At the hearing of this matter, the applicant's Counsel prayed the court to grant the relief sought in the notice of motion. The court questioned the applicant's Counsel as to whether this matter should not have been lodged at the magistrate's court, as section 26 specifically envisages that applications of this nature must be instituted in the Magistrate's Court. In response, Counsel

argued that this court should invoke its inherent jurisdiction and grant the relevant order. Furthermore, Counsel submitted that it would be inconvenient to institute proceedings in the magistrate's court as the vehicles of the deceased may be in different districts.

Applicable Legal principles

[8] The applicant's application is predicated on section 26 of the Administration of Estates Act. The relevant parts of section 26 provide:

“(2) If the executor has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).

- (3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, just all the book or document in any deceased estate is concealed upon any person or at any place or upon or in any vehicle or vessel or receptacle of any nature, or is otherwise unlawfully withheld from the executor concerned, within the area of the magistrate’s jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.
- (4) Such a warrant shall be executed in like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the executor concerned.” (my emphasis)
- [9] In terms of section 85 of the Administration of Estates Act, section 26 of the Act applies mutatis mutandis with reference to tutors and curators. Section 26 of the Administration of Estates Act mirrors section 69 of the Insolvency Act 24 of 1936, which gives a trustee of an insolvent estate the responsibility to take charge of the property of the estate and the power to apply for a search warrant to a magistrate having jurisdiction if he has reason to believe that any such property or books are concealed or otherwise withheld from him.[1]

Discussion

- [10] Section 26(1) of the Administration of Estates Act enjoins an executor, immediately after letters of executorship have been granted to him, to take into his custody or control all movable property, books and documents belonging to the deceased estate. In terms of section 26(2), if the executor, such as the applicant in the present matter, has reason to believe that any property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in

section 26(3).

- [11] On the other hand, section 26(3) of the Act empowers a magistrate upon application under oath that there are reasonable grounds for suspecting that any property, book or document belonging to a deceased estate is concealed or is otherwise unlawfully withheld from the executor concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document. Section 26(3) is particularly intended to strengthen the hand of an executor in carrying out his obligations to take charge of all the assets belonging to the deceased estate.[2]

[12] The primary purpose of section 26(3) is to enable an executor to collect and take control of assets reasonably believed to belong to a deceased estate being concealed or unlawfully withheld. Section 26 holds significant importance as it outlines the specific requirement of applying to a magistrate as part of a legal process or procedure. Before a magistrate may exercise his discretion to issue a warrant in terms of the section, it must appear to him that there are reasonable

grounds for suspecting that any property, book or document belonging to a deceased estate is either concealed in any of the ways set out in the section or is otherwise unlawfully withheld.

[13] In my view, section 26 explicitly delineates the process for obtaining a warrant to recover assets or documents for a deceased estate. It regulates the procedural requirements that must be adhered to prior to the issuance of such a warrant. The section envisages that an application must be to a magistrate's court having jurisdiction. The section does not envisage the High Court to hear such an application. In my respectful opinion, the applicant instituted this application in the wrong forum. I accept that this court enjoys inherent jurisdiction. However, the exercise of the inherent jurisdiction of this court must not encroach upon the authority of the magistrate's court. Such action would, in my opinion, undermine the legislative authority of Parliament.

[14] Furthermore, it is crucial to emphasise that section 1 of the Administration of Estates Act delineates a clear differentiation between a magistrate and the High Court. According to the Act, "Court" means the High Court having jurisdiction, or any judge thereof. In other words, where the Act refers to court, reference is directed to the High Court.

[15] On the other hand, "magistrate" includes an additional magistrate and an assistant magistrate and, in relation to any particular act to be performed or power or right exercisable or duty to be carried out by the magistrate of a district, includes an additional magistrate or assistant magistrate permanently carrying out at any place other than the seat of magistracy of that district the functions of the magistrate of that district in respect of any portion of that district, whenever such act, power, right or duty has to be performed, exercised or carried out by virtue of any death occurring, or deceased having resided or carried on business, as the case may be, in such portion of that district.

[16] Section 26 specifically refers to the 'magistrate' and not the 'court'. It is evident from the aforementioned that the applicant mistakenly submitted her application to an incorrect forum. The application ought to have been filed in the magistrate's court possessing the requisite jurisdiction.

[17] Given all these considerations, the applicant's application falls to be struck off the roll.

Order

[18] The applicant's application is hereby struck off the roll.

18.1 No cost order is made.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPERANCES

For the Applicant: Panini Attorneys

50 Long Street

Cape Town

[1] See *Bruwil Konstruksie (Edms) Bpk v Whitson NO and Another* 1980 (4) SA 703 (T).

[2] See *Cooper NO v First National Bank of SA Ltd* 2001

(3) SA 705 (SCA), where the court discussed the purpose of section 69(3) of the Insolvency Act.

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