

SOUTH AFRICA / JUDGMENT

Rozani (Born Nohako) and Another v Qoboka and Another (4443/2020) [2022] ZAECMHC 42 (20 October 2022) [2022] ZAECMHC 42

COURT

Eastern Cape High Court, Mthatha

BEFORE

B R Tokota

CASE / FILE NUMBER

4443/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION: MTHATHA)

Case

No.4443/2020

Reportable

In

the matter between:

NOZIPHIWO
ROZANI (BORN NOHAKE)
First Applicant
ZUKISWA
NOHAKE O.B.O HLANGALWANDILE
NOHAKE
Second Applicant
And
SHIRLEY
QOBOKA
First Respondent
THE
MASTER OF THE HIGH COURT
MTHATHA
Second Respondent

JUDGMENT

TOKOTA ADJP

- [1] This application concerns a declaratory order that the appointment of the first respondent, as the executrix of the deceased estate of the late Mzwandile Nohako, dated 25 January 2018 by the Master of the High Court, is unlawful and should be set aside. Furthermore, the applicants seek a declaratory order that the first applicant is the rightful person to be appointed as the executrix of the deceased estate of the late Mzwandile Nohako.
- [2] Although the first respondent has filed opposing affidavit she failed to file heads of argument and practice note as required in the practice directive of this Division.[1] The applicants have also failed to comply with Rule 62 of the Uniform Rules of Court and the Practice Directive in that the papers are not properly collated, secured and paginated as required.[2] Rule 3(a) of the Practice Directive stipulates that “This requirement will be strictly enforced”.
- [3] There appears to be a growing prevalence of failure to comply with the Rules of Court and a total disregard for the practice directives. Rules and Practice Directives are made for the efficient, expeditious and uniform administration of justice in the High Courts. Coetzee J, in *Reitmann v Jansen van Rensburg* 1984 (2) SA 174 (W) at 179H, said:
- 'Rules are made to be followed and Rules are there so that rights and duties flow; in the event of non-compliance legal results flow.'
- [4] It is time consuming, tedious and emotionally draining when a judge has to trawl through the papers looking for an annexure not clearly identified in the index, or if identified, papers are not paginated. In my opinion the time has now come to sound a stern warning to the practitioners that unless there are justifiable circumstances warranting condonation for the omission or default, Courts will not tolerate non-compliance with the Rules of Court and Practice Directives.
- [5] Rules are made to regulate and facilitate speedy preparation by the judges as well as parties themselves and thereby enhance speedy resolution of the disputes and minimize costs attendant to perusal.
- [6] In the present matter an index has been prepared. According to it the notice of motion commences at page 1 to 5. No such pagination has been made. The printed page 1 of the notice of motion states, inter alia, that the applicants will seek “an order in the following terms” and the next page is a certificate of the deponent who has acknowledged that she understands the contents of the affidavit which was sworn to before the commissioner of oaths. The founding

affidavit, according to the index, is supposed to commence from page 6 to page 18. There is also no such pagination and the founding

affidavit ends at printed page 19. There are unmarked documents consisting of more than twenty pages.

- [7] It can be assumed that the documents referred to above are annexures. None of them have been marked as such. There are also attachments written in manuscript which are also unmarked. The next document, after the founding affidavit and unidentified annexures as well as confirmatory affidavits, is a filing notice of the answering affidavit. This commences by a page numbered 66. There are no page numbers before page 66. Rule 62(2) of the Uniform Rules stipulates that all documents must be clearly and legibly printed or typewritten in permanent black or blue-black ink on one side only of paper of good quality and of A 4 standard size. This has not been complied with.
- [8] Conduct of this nature can only stop if the Rules are strictly enforced. The unfortunate part is that litigation is expensive. Legal representatives do not lose out in that they still charge fees for attending court even if the matter does not proceed. The only way to force them to comply is to deprive them of the fees for preparation and appearance once the matter is struck off the roll. Failure to comply with the rules is deliberate in that any practitioner can see the defects when preparing heads of argument. This is so because when preparing heads of argument legal practitioners ought to refer to page numbers in the record. In the absence of pagination this is not possible.
- [9] In the circumstances this matter has to be struck off the roll and reinstatement thereof will only be allowed once a satisfactory affidavit is filed explaining why the file was not paginated. I must sound a warning that in future this Court will not hesitate to make an order that legal practitioners concerned for both sides be deprived of their fees for preparation and appearances in Court if the matter is struck off the roll for failure to comply with the Rules.
- [10] In any event even on the merits of the case I would like to make the following observations without deciding whether or not the applicants will be entitled to the relief sought. A declaratory order need not have a claim for specific relief attached to it. Generally, it is not an appropriate remedy where one is dealing with events which occurred in the past. Such events, depending on the nature thereof, may afford a litigant with a remedy for review. When the Master of the High court appoints an executor he/she exercises a power in terms of the Administration of Estates Act 66 of 1965 (the Act). If any irregularity occurs in the process the appropriate remedy is to review the decision. There is nothing in the Act which specifies that only a relative of the deceased must be appointed.
- [11] The declaratory order and the setting aside of the Master's decision to appoint the executrix amounts to a review of that decision. Consequently the rule of unreasonable delay and the Promotion of Administrative Justice Act 3 of 2000 apply.[3] The appointment was done on 25 January 2018. These proceedings were launched on 11 December 2020 a period of more than 180 days from the date of the decision to appoint. No application has been made for condonation for the delay. The first respondent has performed in terms of the duties

imposed on her by the Act and no complaint has been lodged either by the Master or anyone in connection therewith.

[12] Furthermore the appointment and removal of an executor is a duty assigned to the Master of the High Court in terms the Act.[4] This Court is not entitled to usurp that power.[5] The Court is only empowered to remove the executor if the applicant can establish the factors mentioned in section 54(1)(a) of the Act. No reference to this is made in the papers.

[13] The respondent has not filed heads of argument and has not taken any points in the matter either with reference to failure to paginate or observations made above. This goes to the question of costs.

[14] In the light of the fact that papers are not properly collated, secured and paginated, the matter cannot be entertained.

[15] Accordingly the following order will issue:

The matter is struck off the roll.

B R TOKOTA

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearances:

For the applicants: Mr M Wakaba

Instructed by M Wakaba Attorneys

For the Respondent: In Person

Date of Hearing:

20 October 2022

Date delivered:

20 October 2022.

[1] Practice /directive 8(a)

[2] Practice Directive Rule 3(a); Uniform Rule 62(4).

[3] Naptosa v Minister of Education, WC 2001 (2) SA 112 (C) at 126; Lion Match Co Ltd v PPWAWU 2001 (4) SA 149 (SCA) para.25.

[4] Section 14,15 and 54(b).

[5] The Master of the High Court (GNP) v Motala NO 2012 (3) SA 325 (SCA) ([2011] ZASCA 238) para.14.

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