

SOUTH AFRICA / JUDGMENT

Sundarparsad and Another v Ramnarain and Another (7679/2016) [2018] ZAKZDHC 14 (8 May 2018) [2018] ZAKZDHC 14

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Henriques

CASE / FILE NUMBER

7679/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO. 7679/2016

In

the matter between:

RAASMANIE
SUNDARPARSAD FIRST
APPLICANT
ISHWARLALL
(DAN)
RAMNARAIN SECOND
APPLICANT
and
SEWNATH
RAMNARAIN FIRST
RESPONDENT
(Executor
nominate)
MASTER
OF THE HIGH
COURT SECOND
RESPONDENT
ORDERS
(a) The application is dismissed.
(b) Each party is to pay its own

costs.

JUDGMENT

HENRIQUES J

Introduction

- [1] This application serves before me as an opposed motion for inter alia, an order for the removal of the first respondent as the executor appointed by the Master of the High Court in terms of a will dated 8 January 2008, and for the first applicant to be appointed as executrix. The application falls within the provisions of s 54 of the Administration of Estates Act 66 of 1965, as amended (the Act).
- [2] The applicants and the first respondent are the children of the deceased, the late Chandermani Beharie (the deceased). The second respondent is the Master of the High Court, Durban who is cited as an interested party, having appointed and issued letters of executorship to the first respondent. Neither a report nor a notice to abide has been filed by the second respondent.

Factual Matrix

- [3] The deceased died testate on 28 November 2009 with her last will and testament being registered and accepted by the second respondent on 3 December 2009. The applicants and first respondent are testate heirs in terms of the deceased's last will and testament. The first respondent was nominated by the deceased to be the executor and administrator of the estate in terms of such will.
- [4] There is no dispute between the applicants and the first respondent that the deceased's last will and testament is a valid and binding will.

Applicants' contentions

- [5] The applicants inter alia seek the removal of the first respondent as the duly appointed executor under letters of executorship issued by the second respondent on 3 December 2009, for the following reasons:
- (a) The first respondent has been in control of the property, the income derived therefrom and the estate banking accounts from inception;
 - (b) The first respondent has failed to furnish the applicants with any documents and bank statements pertaining to the administration of the estate, incorporating the financial affairs of the estate;
 - (c) The first respondent allegedly rejected an offer for the sale of the immovable property, which comprises the major asset in the estate;

- (d) The first respondent has been conducting business from the property for his own accord, and failed to account to the heirs for all monies collected and the concomitant liabilities that have been incurred;
- (e) The first respondent has breached his fiduciary duty to the heirs and has not acted transparently and bona fide;

The applicants in view of such contentions argue that it axiomatically follows that the first respondent should be impugned and removed as the appointed executor of the deceased's estate.

The first respondent's contentions

[6] The first respondent needless to state, joins issue with the applicants' contentions:

- (a) The first respondent maintains that if it was not for his sole efforts in resisting the litigation against the estate, the applicants'

inheritances would have been diminished or extinguished;

- (b) The first respondent maintains that he has complied with the requirements of the second respondent and has discharged his obligations in accordance with the provisions of the Act;
- (c) The first respondent accordingly contends that he is not a mere agent of the heirs nor does he represent the creditors of the estate.

Relevant Legislation

[7] The applicants' case is premised on the provisions of s 54 of the Act, specifically, s 54(1)(a)(v) which reads as follows:

'(1) An executor may at any time be removed from his office

- (a) by the Court –
- (v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned; and.'

[8] It is instructive to note at this juncture that whilst the applicants made reference to an application to the second respondent for the removal of the first respondent as the executor, presumably in terms of s 54(1)(b)(v) of the Act, prior to instituting the current application, they have not seen fit to furnish the court with such application nor the second respondent's reasons for the refusal of such application.

[9] As previously alluded to, a report from the second respondent was not furnished to this court, and neither is the present application a review of the second respondent's refusal to remove the first respondent as the executor of the estate, pursuant to the applicants' direct application to the second respondent.

Legal Principles

- [10] In the matter of S & another v Master of Kwazulu-Natal High Court, Pietermaritzburg & others (3426/14) [2015] ZAKPHC 45 (8 September 2015), Moodley J analysed the relevant authorities apropos, the removal of an executor from his office by the court.
- [11] I align myself with the reasoning and analysis of the authorities as set out by the learned Moodley J. It is clear that an elevated standard including but not limited to dishonesty, gross inefficiency or untrustworthiness on the part of an appointed executor is required to remove an executor from his office. Mere hostility between the executor and other interested parties is not sufficient grounds for removal. The test is whether the executor's continuance in office will prejudicially affect the future welfare of the estate placed in his care (see D Meyerowitz *The Law and Practice of Administration of Estates and Estate Duty*).
- [12] In *Volkwyn N.O. vs Clarke and Damant* 1946 WLD 456 at 456, Murray J commented that it is a serious matter to interfere with the management of the estate of a deceased person by removing from the control thereof persons whom, in reliance upon their ability and character, the deceased had deliberately selected to carry out his/her wishes. It was further stated that even if the executor acted incorrectly in his duties and had not observed the strict requirements of the law, something more is required before his/her removal is warranted. It is clear that in the

application of the legal principles, a court must be satisfied that an act or conduct on the part of the executor demonstrates or proves that it is undesirable for him to continue so acting as the executor.

- [13] In analysing and considering the applicants' contentions and weighing same against the respondent's contentions, it is neither apparent nor clear that the executor's acts or conduct are of such nature as to warrant his removal. The applicants'

contentions considered either singularly or conjunctively do not in my view amount to establishing that the alleged transgressions of the first respondent render it undesirable that he should continue to act as the executor. The applicants have several alternate remedies in terms of the Act, including but not limited to the provisions of ss 35 and 36 of the Act.

- [14] In the premises, I am not satisfied that the conduct of the first respondent as alleged by the applicants warrants the removal of the first respondent as the executor of deceased's estate.

Costs

- [15] It is trite that the issue of costs falls within the discretion of the court. The animosity between the applicants and first respondent is patently clear which the first respondent has candidly admitted to, notwithstanding the obfuscatory denial of the applicants, the enmity between the parties is obvious from the papers.
- [16] The first respondent's conduct in his dealings with the applicants is however not exempt from criticism. The first respondent

undertook on more than one occasion to furnish the applicants with documentation and information as is evident in the correspondence

exchanged between the parties' attorneys. The first respondent failed to honour such undertakings, which to a large extent

precipitated this application. Had the first respondent denied the applicants' request for information and documentation, the applicants may have reasonably considered an alternate course of action. It is for inter alia the above reasons that I deem it appropriate to detract from the general rule that costs should follow the result.

[17] In the premises, it is both just and equitable that the parties should be ordered to pay their own costs.

Order

[17] The following orders are granted:

Date of application: 25 October 2017

Date of judgment: 8 May 2018

Counsel for the applicants: WN Shapiro

Instructed by: Sanjay Lorick & Partners

89 Juniper Road, Essenwood

Durban

Ref : SL/S0486/15/RV

Counsel for the first respondent : M Collins SC

Instructed by : Naidoo & Company Inc

8 Sinembe Park,

La Lucia Ridge Office Estate

Ref : R Naidoo/B272L

Second respondent : The Master of the High Court, Durban

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Prepared on 14 October 2026 · Esheria