

SOUTH AFRICA / JUDGMENT

Visagie v Bosua N.O and Others (342/2024)

[2024] ZAMPMBHC 85 (29 November 2024)

[2024] ZAMPMBHC 85

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse AJ

CASE / FILE NUMBER

342/2024

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA, MPUMALANGA DIVISION (MAIN SEAT)

Case

Number: 342/2024

In the

matter between:

MACHDEL VISAGIE

Applicant

and

HERMAN CORNELIUS

BOSUA N.O.

First Respondent

ELLA LOUISA NEL

Second Respondent

ELSIE PETRONELLA

NEL-SNYMAN

Third Respondent

MASTER OF THE HIGH

COURT, MBOMBELA

Fourth Respondent

This judgment shall be

delivered by distribution to the parties by e-mail and by publication

on SAFLII. The judgment shall be deemed

to be delivered at 11:00 on

29 November 2024.

JUDGMENT

Roelofse AJ:

INTRODUCTION

- [1] The applicant is one of three heirs in the estate of her late father, D.J Nel.[1] The applicant's sisters, the second and third respondents, are the other heirs. The first respondent is the executor[2] testamentary[3] ("the executor").
- [2] The applicant is dissatisfied with the way the executor administers the deceased estate. She complains about inordinate delays in the finalization of the estate as well as various acts by the executor including infidelity.
- [3] The applicant seeks the removal of the executor in terms of the provisions of Section 54(1) (a) of the Administration of Estates Act 66 of 1965 ("the Act"), an order that the executor may not charge a fee for the services he had rendered up to now and that the Master appoint another executor for the deceased estate.
- [4] Despite the first to third respondents opposing the application, only the first and second respondents delivered an answering affidavit. The applicant is the only heir that seeks the executor's removal.

REASONS FOR THE EXECUTOR'S REMOVAL

- [5] It is common cause that the deceased passed away on 4 November 2020. The executor was appointed on 15 December 2020. The deceased estate is yet to be finalized, and a final liquidation and distribution account must still be lodged.
- [6] The applicant alleges that the executor has failed to adhere to his obligations in terms of the Act and by doing so has caused substantial harm to the deceased estate.
- [7] In this regard applicant alleges that the executor: has failed to secure his appointment as an interim director of the companies in the deceased estate which includes, amongst others, a liquor business, a vehicle dealership and properties; the executor is not able to provide the heirs with information such as bank statements of the business accounts, and whether the municipal charges in respect of the properties in the deceased estate were paid or not; has, for a period of 14 months, failed to contact the applicant and third respondent is over the administration of the deceased estate; has, notwithstanding demand, failed to explain this failure to act diligently and efficiently as is required from him; already paid himself; failed to publish the liquidation and distribution account and it has not laid open for inspection as required in terms of the Act; and, the executor has improperly accepted a claim by the second respondent against the deceased estate; failed to recover rent due in respect of existing lease agreements, failed to recover vehicles belonging to an entity in the deceased held; failed to pay local authority taxes; and failed to meet its obligations to the South

African Revenue Service.

- [8] As a result, so the applicant argued, the executor has failed to comply and/or contravened Sections 26, 29 and 35(12) read with Section 51(4) of the Act.

THE EXECUTOR'S RESPONSE

- [9] The executor appointed an agent to assist him with the administration of the deceased estate. The agent deposed to the answering affidavit. The executor filed and delivered an affidavit confirming the content of the agent's affidavit. I therefore take it that what the agent says is also what the executor says.
- [10] What follows is the essence of the executor's defence, as set out by the agent.
- [11] The executor denies the applicant's notion that he has acted maliciously or vexatious or alternatively negligently.
- [12] The executor says that he would, without reservation, and upon a unanimous request for his removal made by the heirs, vacate the office. It was tendered before this application was launched. In addition, the executor says that he only opposes the application because of the application was based on erroneous facts and defamatory statements all of which are unproven.
- [13] The executor furthermore says that, although the winding up of the deceased estate has taken some time, no evidence has been presented to show that the executor has acted in such a manner that would warrant his removal from office or tht the deceased estate had indeed suffered damages.
- [14] The executor admits that there has been a delay in the finalization of the deceased estate. The agent wants to finalize the deceased estate for him to be paid. The executor denies the applicant's insinuation that he delayed the finalization of the deceased estate and that the deceased estate has suffered any harm. The applicant's allegations that the executor caused the deceased estate harm is unsubstantiated and amounts to mere speculation. In addition, the unfounded allegations cause harm to the executor's good name and character.
- [15] The executor admits that he is yet to be appointed as interim director of the companies in the deceased estate. The executor denies that the deceased ran a retail liquor business.
- [16] The executor alleges that the applicant continuously embarks upon a witch-hunt with regards to the deceased estate rather than to contribute constructively so that the administration of the deceased estate be finalized.
- [17] With regards to the rent due to the deceased estate, the executor alleges that attorneys have been appointed to collect the arrears.

- [18] The executor's agent alleges that, although not required to do so, but because of the relationship the agent had with the deceased, he used his own funds to pay for repairs at immovable property in the deceased estate. The executor's agent attaches to the answering affidavit proof that the deceased estate's municipal accounts were paid by the second respondent although she had no obligation to do so.
- [19] Furthermore, the executor alleges that all assets that the executor was aware of were secured and properly dealt with.
- [20] The executor criticizes the applicant's consistent libelous and malicious claims against the executor and the agent under circumstances where they are paying funds from their own accounts to establish that the estate expenses are paid which would ultimately also benefit the applicant. I interpose to state that this allegation is not denied by the applicant instead the applicant alleges that it must be because of the executor and agent's guilty conscience that they pay the expenses. I already say that there is no reason for the applicant's

conclusion.

- [21] With regards to the failure to submit a liquidation and distribution account in terms of the provisions of the Act, the executor alleges that the draft account could not be finalized to be submitted because there had been queries on the draft account. Credence exists for the statement as the applicant challenges the draft liquidation and distribution account in her evidence.
- [22] The executor makes the point that just because the applicant is unsatisfied with information that was given to her by the executor, it does not mean that the executor's conduct is insufficient. The executor alleges that information had been given to the applicant when same became available.
- [23] The executor says that the applicant has failed to show what harm has been caused to the deceased estate by the unavailability of financial statements for the entities in the estate.
- [24] The executor concedes that there had been delays in the finalization of the deceased estate but that the applicant has failed to show that the executor is the cause of the delays.
- [25] With regards to the applicant's allegation that the executor has paid himself in contravention of section 35(12) of the act, the agent says as follows:

"The Applicant is misguided in the understanding of the payments made. The payments made are not payments that emanate from work that has been done prior to the passing of the deceased. The payments made are payments necessary for the finalization of the estate and to which the beneficiary of the payments has been entitled. I find it disingenuous that the Applicant wishes for financial statements to be drawn as well as L&D statements to be drawn but refuses the payment of same to be authorized."

- [26] In respect of the second respondent's claim, the executor alleges that he has made it clear to the applicant that the second respondent's claim is not recognized and that the second respondent reserves the right to institute a claim against the deceased estate.

DISCUSSION

- [27] Section 54 of the Act provides for the removal of an executor from office by the court. The Section reads in relevant part:

“Removal from office of executor.—(1) An executor may at any time be removed from his office—

(a) by the Court—

(i)

.

(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.....”

- [28] The applicant relies upon the provisions of Section 54(1)(a)(v) for executor's removal from office.

- [29] Section 54(1)(a)(i) affords the Court has a discretion to remove an executor from office, “.....the predominating consideration remains the interests of the estate and the beneficiaries.”[4] Much is required for the removal of an executor. A failure to exercise his of her duties or to strictly observe the law is not enough. In *Sackville West v Nourse and Another*[5] it was said: “ ...it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity...”. Reasonable fidelity depends on the circumstances of each case, in particular, whether the executor is dishonest, grossly inefficient or untrustworthy. The court must be able to reasonably foresee that the executor's conduct, as demonstrated by proven past conduct, is expected to expose an deceased estate to risk or actual loss. See: *Oberholster N.O. and Others v Richter* [2013] All SA 205 GNP. What is required from an executor is to act with the necessary skill and care, independently and in the interest of the deceased estate and its heirs while having due regard to the rights of the deceased estate's creditors.

- [30] Punishment for whatever conduct is not the reason for removing an executor. Punishment is irrelevant for purposes of considering an executor's removal. The rights of the heirs and benefit of the deceased estate and the heirs are of paramount relevance. The court must imagine and consider what would be best for the deceased estate and the heirs. What must be considered is whether the removal of the executor would benefit the deceased estate and its heirs more than keeping the executor in office. For this the court must consider the all the facts and circumstances of the matter and not only the executor's alleged conduct or the heirs' wishes. When it is proven, or it is apparent that an executor is dishonest, grossly

inefficient or untrustworthy or lacks fidelity the result must be that it would not benefit the deceased estate to keep the executor in office.

Failure to comply with the provisions of section 26 of the Act

[31] Section 26 of the Act, in relevant part, reads:

“Executor charged with custody and control of property in estate.—(1) 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.

(1A) The executor may before the account has lain open for inspection in terms of section 35 (4), with the consent of the Master release such amount of money and such property out of the estate as in the executor’s opinion are sufficient to provide for the subsistence of the deceased’s family or household.

(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).”

[32] The applicant is of the view that the executor, by not securing his appointment as director of the companies in the deceased estate, has failed to take into his custody or under his control all the property of the estate. Likewise, the applicant accuses the executor also of a transgression of this section because he has allegedly not taken under his custody or control certain vehicles belonging to the estate and did not pay taxes. The executor gives an explanation about two vehicles but gives no particulars of other vehicles.

[33] The executor admits that he has yet to be appointed a director of the companies in the deceased estate. While this must surely have led to a delay in finalizing the estate, the applicant has shown no real damage suffered by this failure to the estate. In any event, the allegation that the municipal levies were not paid was fully dispelled by the executor.

[34] The deceased’s will refers to vehicles that were on consignment. This is what the will records:

“1. Die maatskappy [Danel Motors (Edms Bpk)] besit voorraad voertuie, wat op consignment stock verkoop word, en ‘n bankrekening, en mikien ‘n paar los bates.

2. Die consignment stock moet so vining moontlik verkoop word vir kontant.”

The other assets in Danel Motors had to be sold. The proceeds of the sale had to be used to pay the tax liability and settle the deceased’s loan account. Any residue had to be divided in equal shares between the three heirs.[6]

[35] Usually, a motor dealer does not own vehicles on consignment. In a consignment arrangement the consignor owns the thing until it is sold. It is therefore uncertain whether the vehicles that are referred to are indeed assets in the deceased estate which the executor was obliged to take control of.

[36] I find that the executor has not strictly complied with the provisions of Section 26 of the Act in respect of his appointment as interim director for the companies in the deceased estate, such failure does not warrant the executor's removal from office.

Contravention of Section 35 of the Act

[37] Section 35 of the Act, in relevant part, reads:

“Liquidation and distribution accounts.—(1) An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but within—

- (a) six months after letters of executorship have been granted to him; or
- (b) such further period as the Master may in any case allow, submit to the Master an account in the prescribed form of the liquidation and distribution of the estate....”

.....

12) When an account has lain open for inspection as provided in this section and—

- (a)
- (c)

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration relating to such distribution, or lodge with the Master a certificate by the registration officer or a conveyancer specifying the registrations which have been effected by the executor: Provided that an affidavit by the executor in which he or she declares that a creditor was paid or that an heir received his or her share in accordance with the account, may be accepted by the Master in lieu of any such receipt or acquittance.”

[38] It is common cause that the executor has not published a liquidation and distribution account within the time provided for in Section

29. It is still not done and that is after some 4 years since his appointment. The executor says that this is due to various difficulties he has experienced with the deceased estate. This is a bold allegation, and no specific details are given. I find that the executor has failed in his duties. However, the executor says that the Liquidation and Distribution account is almost ready to be submitted.

[39] Section 36 of the Act provides:

“Failure by executor to lodge account or to perform duties.—(1) If any executor fails to lodge any account with the Master as and when required by this Act, or to lodge any voucher or vouchers in support of such account or any entry therein in accordance with a provision of or a requirement imposed under this Act or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of the estate, the Master or any person having an interest in the liquidation and distribution of the estate may, after giving the executor not less than one month’s notice, apply to the Court for an order directing the executor to lodge such account or voucher or vouchers in support thereof or of any entry therein or to perform such duty or to comply with such demand.”

- [40] The applicant did not seek relief in terms of Section 36 of the Act. The executor produced a draft liquidation and distribution account. The only issues the applicant has with the draft account are the inclusion of the second respondent’s claim and the payments made to the executor. In my view, the process of the finalizing of the deceased estate has at least proceeded to this point, albeit with undue delay. It would not benefit the deceased estate to remove the executor at this stage.

Payments to the executor in contravention of Section 51(4) of the Act

- [41] Section 51(4) provides that an executor shall not be entitled to receive any remuneration before the deceased estate has been distributed unless payment of such remuneration has been approved in writing by the Master.
- [42] It is common cause that: the deceased estate is yet to be distributed; the Master has not approved payment to the executor; the executor was paid two invoices in the amounts of R 13 943.75 and R 25 875.00 respectively. The executor could not pay himself.
- [43] Regarding the payment to the executor, the agent says: “The payments made are payments necessary for the finalization of the estate and to which the beneficiary of the payments has been

entitled.”[7]

- [44] The two payments are supported by invoices both issued by Boshua and Cornelissen and not the executor or the agent. The invoices were not disclosed, and the executor does not say exactly what the invoices were for save for the bold statement above. Although (even if the payment was for the executor) this payment contravenes the Act, it does not constitute an offence because the willful distribution of any deceased estate otherwise than in accordance with the provisions of section 35 (12), or of the relevant will, and not a payment to an executor, constitutes an offence under Section 102(1)(f) of the Act.
- [45] Although the applicant has established that the executor may have contravened Section 35(12) of the Act, I consider this contravention does not warrant the removal of the executor from office.

[46] I do not consider each proven contravention in isolation. I consider all the contraventions as a whole. I weigh this against the time that has already elapsed, the stage in the finalization of the deceased estate and the fact that none of the other heirs seek the executor's removal. Having regard to all the factors, I am of the view that the executor should not be removed from office.

Costs

[47] The delay in the finalization of the estate must have a consequence. Although the applicant failed, I do not consider it just to order that the applicant pay the respondents' costs. The applicant has not approached the court with a case without any substance.

[48] The applicant used emotive words in expressing her dissatisfaction with the executor. The allegations the applicant made against the executor imputes dishonesty on his side. This was unnecessary and must have a consequence.

I am of the view that each party pays their own costs will meet out some measure of justice between the parties.

[49] In the premises, I made the following order:

- (a) The application is dismissed.
- (b) Each party shall pay their own costs.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 19 November 2024 DATE OF JUDGMENT: 29 November 2024

APPEARANCES

FOR THE APPLICANT: Mr. G Potgieter

Instructed by J Naude Attorneys Incorporated

FOR THE FIRST AND SECOND RESPONDENTS: Mr. H Foure

Instructed by Cronje De Waal Skhosana Incorporated

[1] Mr. Nel died on 4 November 2024.

[2] The executor was appointed on 15 December 2020.

[3] By virtue of clause 2 of the will.

[4] Gory v Kolver NO and Others (CCT28/06) [2006] ZACC 20; 2007 (4) SA (CC) at para. 56.

[5] 1925 AD 516 at 527.

[6] Clauses 3.1 to 3.5 of the will.

[7] Para. 25 *ibid.*

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