



THE REPUBLIC OF SOUTH AFRICA  
**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 15699/2017

Before the Hon. Mr Justice Bozalek and the Hon. Mr Acting Justice Sievers

Hearing: 7 December 2018  
Delivered: 18 February 2019

***In the matter between:***

***M J***

***Applicant***

***and***

***MASTER OF THE HIGH COURT***

***1<sup>st</sup> Respondent***

***SETLAKALANE SHIRLEY THOBEJANE N.O.***

***2<sup>nd</sup> Respondent***

***N K***

***3<sup>rd</sup> Respondent***

***CUMA LENNOX PININI***

***4<sup>th</sup> Respondent***

---

***JUDGMENT***

---

***BOZALEK J***

[1] This is a review application in which the applicant, Mr M J ('the applicant'), launched proceedings against the Master of the High Court ('the Master'), Ms SS Thobejane ('Ms Thobejane'), an attorney, in her capacity as the executor of the estate of

the late L K ('the deceased'), Mr NM K, the brother of the deceased ('Mr K') and Mr CL Pinini ('Mr Pinini'), an attorney practising in Cape Town who, prior to the appointment of Ms Thobejane, had been appointed as executor of the deceased's estate.

[2] The relief originally sought in Part A of the notice of motion was an order interdicting Ms Thobejane from acting as executor of the estate pending the determination of relief sought in Part B of the notice of motion. It would appear that this temporary interdict was not pursued. In Part B of the notice of motion the applicant sought the following relief:

1. The review and setting aside of the Master's decision to remove Mr Pinini as the executor of the estate ... in terms of section 54(1)(b)(v) of the Administration of Estates Act, 66 of 1965, under Court order dated 12 October 2016;
2. Reviewing and setting aside the Master's decision on 16 March 2017 appointing Ms Thobejane as the executrix of the estate;
3. Directing the Master to permit the applicant to nominate an executor dative to administer the estate.

[3] The application was opposed on behalf of Ms Thobejane and Mr K who filed opposing affidavits. The Master filed a notice to the effect that he abided the decision of the Court but later decided to actively oppose *inter alia* for the reason that the applicant was seeking a costs order against his office. The matter came before Court on some half dozen occasions and was finally argued before Court on 7 December 2018. On that day the applicant's counsel advised that the only relief being pursued was the review of the

Master's decision to appoint Ms Thobejane. In other words the applicant no longer sought to review the Master's decision to remove Mr Pinini as executor of the estate or an order directing the Master to permit the applicant to nominate an executor dative to the estate.

### **Background**

[4] The deceased died intestate on 6 March 2016 leaving behind a minor child, B K, ('the minor child'). The minor child is currently in the care of Mr K, her maternal uncle, and his wife in Gauteng.

[5] The minor child was born on [...] January 2015 from a relationship between the applicant and the deceased. They were never married but lived together at the deceased's home in Parklands ('the property'). In July 2015 the deceased put the property on the market for sale, indicating that she intended to leave Cape Town. At that stage the deceased was ill with cancer and her prognosis was poor. In early December 2015 the deceased left Cape Town with her minor child to attend her mother's funeral in Polokwane. Shortly after her arrival there the deceased's condition deteriorated and her siblings and elderly father stepped in to take care of the minor child. The deceased died on 6 March 2015. During the final weeks of the deceased's life and for the immediate period thereafter her minor child was taken care of by the deceased's elderly father and two of her siblings. During June 2016 the minor child was taken into the fulltime care of Mr K, the deceased's brother, and his wife at their home in Johannesburg. Mr K regards himself as the minor child's de facto guardian with the associated rights and responsibilities which he has assumed at his personal expense. In this he is supported by all members of the deceased's family.

[6] In early 2016, apparently unbeknownst to the deceased's family, the applicant nominated his attorney, Mr Pinini, in Cape Town, as executor of the estate and letters of executorship were duly issued to Mr Pinini on 14 April 2016. It would appear that the applicant nominated Mr Pinini as executor without consulting the deceased's family notwithstanding the fact that the minor child had been out of his custody and control for some months and indeed within the custody and control of the deceased's family in Polokwane and Johannesburg from early December 2015, a period of some five months.

[7] Mr K duly launched an application in this court for the removal of Mr Pinini as executor in the estate in terms of section 54(1)(a)(v) of Act 66 of 1965 ('the Act'). That section provides *inter alia* that an executor may be removed from his office by the Court '*if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned*'. In that matter Mr Pinini was the first respondent, the applicant was the second respondent and the Master the third respondent. The application was opposed by Mr Pinini. Judgment was handed down by Mantame J on 22 September 2016 and culminated with the following order:

- '60.1 *It is undesirable that the first respondent (Pinini) should act as executor of the Estate of the late L K;*
- 60.2 *First respondent is hereby removed from the office of the executor of the estate ... forthwith;*
- 60.3 *First respondent is ordered to return his letters of executorship to the Master within three days of this order;*
- 60.4 *First respondent is ordered to file a report of the work done with the Master of the High Court, Cape Town and a copy to applicant, from the date of the issue of the letter of acceptance of trust as executor i.e. from 11 April 2016 to date within three days of this order;*

60.5 *First and second respondent are ordered to pay the costs occasioned by this application.'*

[8] In para 58 of her judgment Mantame J found as follows:

*'[58] In fact, first respondent's actions as an attorney of second respondent were in conflict with those of the estate. The fact that first respondent is unable to separate his role as an executor of the deceased estate and his role as an attorney of second respondent points to one direction that he is not fit to continue his role as executor of the deceased estate. Besides the process leading to his appointment as an executor is very much controversial. It is clouded by dishonesty, untrustworthy conduct and misrepresentation of facts ...*

*[59] ... In the present case, the misconduct committed is very serious and has gross dishonesty and conflict of interest situations. In light thereof, it would be undesirable for first respondent to continue in the office as executor and would detrimentally effect the total worth of the estate, judging from the treatment of second respondent by the first respondent who is living in the deceased's property rent free'.*

[9] The Master subsequently sent a Notice of Removal to Mr Pinini on 17 October 2016 informing him of his removal as executor of the estate in terms of section 54(1)(b)(v) of Act 66 of 1965 and pursuant to the order of Mantame J. That section provides that an executor may be removed by the Master *'if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master ...'*

[10] Mr Pinini sought leave to appeal against the judgment and order. That application was heard on 12 October 2016 and dismissed with costs. Mr Pinini then petitioned the Supreme Court of Appeal on 4 November 2016 for leave to appeal but this was dismissed on 21 January 2017. In the meantime Mr K launched a further application, this one in

terms of section 18 of the Superior Courts Act, 10 of 2013, seeking to execute the order of Mantame J pending the outcome of the petition or any subsequent appeal. That application was heard by McCurdie AJ who, on 5 December 2016, ordered that sub-paras 2, 3 and 4 of Mantame J's order would operate pending the outcome of the petition and any appeal process.

[11] On 13 February 2017 Mr Pinini petitioned the Constitutional Court for leave to appeal against the judgment and order of Mantame J. That petition was dismissed on 20 March 2017. The applicant himself applied for leave to appeal against the judgment and order of Mantame J on 29 May 2017 but, likewise, that was also dismissed. On 16 March 2017 the Master issued letters of executorship to Ms Thobejane after she had been nominated for that position by the deceased's family.

[12] The next step in this spiral of litigation was taken on 28 August 2017 when the applicant instituted these proceedings and in which Mr Pinini has filed a notice to abide. It is not without significance that although the applicant has never sought Mr Pinini's reinstatement as executor in terms of the relief sought in his notice of motion, in para 20.3 of his founding affidavit he prays for an order *'directing the (Master) to reinstate forthwith the appointment of (Pinini) as executor'*.

[13] It is appropriate to identify the grounds of review relied upon by the applicant in relation to the only relief now sought, namely, the review and setting aside of the Master's decision to appoint Ms Thobejane as executor of the estate. The applicant alleges, firstly, that the decision is reviewable in that it:

*'3.1.1 is not authorised by the empowering provisions or it was taken in contravention of the law;*

3.1.2 *the procedure set by the Act for the (Master) in taking the impugned decision is procedurally unfair;*

3.1.3 *the Master's (decisions) ... were taken arbitrarily or capriciously; and*

3.1.4 *the actions of (the Master) is unreasonable, irrational and unlawful.'*

[14] Another ground of review relied upon is based on section 95 of the Act which provides that every appointment of an executor or decision taken by the Master is subject to review by any person aggrieved thereby. This ground can be disposed of immediately. The right to review any appointment by the Master in terms of section 95 of the Act is merely a statutory recordal of such right and provides no independent grounds of review apart from those contained either in the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') or, to the extent that it is applicable, the common law. This ground of review is therefore subsumed by the review grounds in terms of PAJA. As was said by the Court in *Da Silva and Another v Da Silva NO and Others*:

*'That the decision taken by the third respondent [the Master] is reviewable is beyond question. Section 95 of the Administration of Estates Act is the answer to this question. Any decisions taken by third respondent in terms of the Act is reviewable under the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA').'*<sup>1</sup>

[15] A further ground of review is based on the common law principle of legality, said to include the circumstances where the decision-maker did not act in accordance with the empowering statute. This ground must also receive short shrift. It is not clear on what basis the applicant relies on this principle as a ground of review. He states that he is advised that the grounds of review under that principle are not the same under those

---

<sup>1</sup> *Da Silva and others v Da Silva NO and Others* (2498/2007 and 4247/2007) [2007] ZAWCHC 82 para 11.

under PAJA but also that the principle covers the ground of legality and rationality. In the matter of *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd*<sup>2</sup> the Supreme Court of Appeal recently held as follows:

*‘In my view, the proper place for the principle of legality in our law is for it to act as a safety net or a measure of last resort ... (w)hen PAJA does apply, litigants and the courts are not entitled to bypass its provisions and rely directly on the principle of legality.’*

[16] In *Minister of Defence and Military Veterans v Motau NO and Others*<sup>3</sup> the Constitutional Court stated that the correct order of inquiry is to consider, first, whether PAJA applies and only if it does not, what is demanded by constitutional principles such as the rule of law. In the circumstances I see no room here for applying the *‘principle of legality’*, given that there is no dispute that the Master’s decision to appoint Ms Thobejane was administrative action and reviewable in terms of PAJA on any applicable ground.

[17] In his supplementary affidavit the applicant sought to supplement his grounds of review as follows:

1. the manner in which the nomination of Ms Thobejane as executor was conducted was not in accordance with the required procedure in terms of Chief Master’s Directive 3 of 2006 where it is stated that *‘nominations should be only be obtained from major heirs and/or legal guardians of minor heirs...’*;

---

<sup>2</sup> 2017 (2) SA 63 (SCA).

<sup>3</sup> 2014 (5) SA 69 (CC).

2. he alleges further that the Master was at all material times aware of the fact that Ms Thobejane acted as attorney of record for Mr K in litigation against the applicant.
3. in para 12 of his supplementary affidavit the applicant alleges that the Master's failure to inform him, presumably prior to the nomination and appointment of Ms Thobejane, of his intention to do so and/or his failure to furnish reasons for his (the applicant's) exclusion are:
  - '3.1. *Procedurally unfair;*
  - 3.2. *Biased or suspected to be reasonably biased*
  - 3.3. *Irregular;*
  - 3.4 *Influenced by an error of law; and*
  - 3.5 *Arbitrary or capriciously.'* (sic)
4. Finally, although not mentioned in the founding affidavit as a ground but which formed a central argument advanced by the applicant, was the point that at the time the Master appointed Ms Thobejane as executor, an appeal against the judgment of McCurdie AJ putting the order of Mantame J into effect was pending and thus the Master could not at the time lawfully appoint Ms Thobejane as executor.

[18] I propose to deal now with this last point. Ms Thobejane was issued letters of executorship by the Master on 16 March 2017. By this stage Mr Pinini's application for leave to appeal against her judgment had been dismissed by Mantame J and his petition to the Supreme Court of Appeal had likewise been dismissed. Mr Pinini also petitioned the Constitutional Court for leave to appeal which application was dismissed by the Court a few days after Ms Thobejane was appointed. Importantly, however, by 16 March 2017

Mr K had already successfully applied for the execution of the material terms of Mantame J's order in terms section 18 of the Superior Court Act. That application was granted by McCurdie AJ on 5 December 2016. However, it too was the subject of an appeal by Mr Pinini, who filed same on 15 December 2016. The applicant's case in this regard is that the noting of that appeal suspended the judgment of Mantame J pending the Constitutional Court's decision.

[19] That would be an appeal in terms of section 18 of The Superior Courts Act, 10 of 2013 which provides that, subject to certain qualifications, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal is suspended pending the decision of the application or appeal. One such qualification is where the Court '*under exceptional circumstances orders otherwise*'. If a Court so orders '*otherwise*' it must immediately record its reasons for doing so and the aggrieved party has an automatic right of appeal to the next highest Court which must deal with it as a matter of extreme urgency. Pending the outcome of that automatic and urgent appeal the order by the Court putting into operation the order sought to be appealed against is suspended pending the outcome of such appeal.

[20] However, the provisions of section 18 make it quite clear that any appeal to the next higher Court in terms of an aggrieved party's automatic right of appeal is one which has to be pursued as a matter of extreme urgency. In this regard the applicant's papers are virtually silent as to what steps Mr Pinini took to pursue the urgent appeal against McCurdie AJ's judgment beyond merely noting it on 12 December 2016. It is common cause, moreover, that no such appeal hearing was heard and thus, by the time the Master appointed Ms Thobejane on 16 March, more than three months had passed since the urgent appeal had been noted.

[21] Section 18 of the Superior Courts Act does not deal with the time limits or procedures to be followed in pursuing an urgent automatic right of appeal. Recourse must be had to Rule 49 of the Uniform Rules of Court where subrule 18 provides as follows: *‘notwithstanding the provisions of this rule the Judge President may, in consultation with the parties concerned, direct that a contemplated appeal be dealt with as an urgent matter and order that it be disposed of and the appeal be prosecuted at such time and in such manner as to him seems meet’*. Generally speaking the fourth term in this Division concludes in mid-December with the first term commencing in late January or at the latest, early February. In the absence of any evidence from the applicant concerning what steps were taken by or on behalf of Mr Pinini to pursue his urgent appeal against the order made by McCurdie AJ in terms of section 18 of the Superior Courts Act by mid-March 2017, the only reasonable inference to be drawn is that no such steps were taken. The result, in my view, was that by the time Ms Thobejane was appointed by the Master, the urgent appeal had lapsed.

[22] For this reason alone the argument that the Master acted unlawfully in appointing Ms Thobejane as executor, since the removal of Mr Pinini as executor pursuant to the order of Mantame J had been suspended, has no merit.

[23] As far as the balance of the grounds of review are concerned they clearly overlap or are repetitive and can be distilled as follows: Ms Thobejane’s appointment was:

1. unlawful in that it failed to comply with the provisions of the Act or a directive issued by the Chief Master;
2. procedurally unfair for want of the Master’s failure to inform the applicant beforehand of his intention to appoint Ms Thobejane, (presumably to allow

him to object or to nominate an executor of his choice) and a failure to furnish reasons for his appointment of Ms Thobejane;

3. arbitrary, irrational, unreasonable or capricious, principally in that Ms Thobejane was unsuited to be appointed as executor.

[24] Before dealing with these grounds it is necessary to briefly set out the Master's case in response to these allegations. He first points out that Mr Pinini was removed as executor by order of Court in terms of section 54(1)(a)(v) of the Act and that all attempts to appeal that judgment were exhausted. He, as Master, was bound by the findings and order of the Court. The Master also avers that the applicant is not the *de facto* guardian of the minor child since the latter has not resided with him from December 2015. In addition, the Master's case proceeds, Mantame J concluded that the best interests of the minor child were not real considerations for either the applicant or Mr Pinini in, respectively, nominating the latter as an executor or acting as an executor in the deceased's estate. The Master considered himself bound by the judgment of Mantame J, as the upper guardian of all minor children, insofar as she also found that in those circumstances the applicant lacked *locus standi* to act on behalf of the minor child. The Master further relied on Mantame J's finding that the '*collusion*' between the applicant and Mr Pinini was so glaring that it led the Court to conclude that, apart from any other factors, Mr Pinini had not performed his fiduciary duties properly.

[25] Insofar as the Master's notice of removal addressed to Mr Pinini refers to him being removed in terms of section 54(1)(b)(v) of the Act i.e. not section 54(1)(a)(v) upon which the Mantame J judgment relied, he explains this reflected his stance on the findings made by the Court. It bears mentioning that the Master's notice of removal also refers to the executor's removal '*in terms of the Court order dated 12 October 2016*', this

being the order of Mantame J wherein she refused Mr Pinini leave to appeal against her previous order and judgment.

[26] In my view it was incorrect for the Master to refer to section 54(1)(b)(v) of the Act inasmuch as the Court had already ordered the executor's removal in terms of section 54(1)(a)(v). In these circumstances all that could have been expected of the Master was to convey the Court's decision to Mr Pinini for the sake of good order.

[27] The Master also placed reliance on the following findings which appear from the judgment of Mantame J at para 54:

*'It seems, when the Master of the High Court Cape Town appointed first respondent (Pinini) as an executor of this estate, the true state of affairs was not presented to the Master. First, and / or second respondent (the applicant) who reported the death of the deceased, completed the death notice, next of kin affidavit, completed an inventory, nominated the executor, conveniently did not advise the Master that this minor child second respondent (the applicant) is professing to be representing is not even living with him; second, he has no interest in her well-being and as a result does not have contact with this child; third, does not contribute to the care and maintenance of this child and fourth the death of the deceased did not even take place in the jurisdiction of this Master.'*

[28] The Master stated further that Ms Thobejane was appointed as executor after she was nominated by the deceased's father and her six siblings. He pointed out further that the applicant was neither the deceased's spouse nor her blood relative; moreover, it would appear that he did not have *de facto* guardianship of the minor child, who was the sole beneficiary of the deceased estate. In the premises the Master considered himself entitled to appoint the second respondent (Ms Thobejane) as the executor of the estate after his office received the requisite surety and an adequate bond of security. The Master denied that the applicant was entitled to nominate his preferred candidate for

executorship to compete with Ms Thobejane. He pointed out that the applicant had nominated Mr Pinini, who was appointed as the executor on information that was found by the Court to have been false and which misled the Master, subsequent to which he was removed by order of Court.

[29] Finally, the Master noted that Mr K is the brother of the deceased and that the minor child resides permanently with him and his family in Midrand and that the Court had clearly found that he was in fact the guardian of the minor child. This viewpoint appears to have been endorsed by McCurdie AJ who stated as follows:

*‘The second respondent (the present applicant) is not a beneficiary in the estate of the ‘deceased’, nor is he, as matters stand, the recognised guardian of the minor child who is the beneficiary of such estate. In fact, the second respondent does not appear to have any legal interest in this matter’.*

[30] Against this background I return to the remaining grounds of review. The appointment of executors is dealt with in terms of section 18 of the Act which provides *inter alia* as follows:

*‘(1) The Master shall ... -*

*a) if any person has died without having by will nominated any person to be his executor; or*

*...*

*e) if any person who is the sole executor ... cease(s) for any reason to be executor(s) thereof;*

*...*

*appoint and grant letters of executorship to such person or persons who he may deem fit and proper to be executor’.*

[31] Section 19 of the Act deals with the situation where there is competition for the office as executor i.e. if more than one person is nominated for recommendation to the Master but that situation did not arise in the present instance.

[32] The Chief Master's Directive 2 of 2015 deals with the appointment of executors in deceased estates. The preamble reads, *inter alia*:

‘1.1 The primary function of the Master is to regulate the administration of estates. It is the duty of the Master to ensure that the legal and financial interests of those affected in the administration of an estate are taken care of in a compassionate manner;

1.2 the conduct of a Master must at all times assure the public that the manner in which estates are administered is –

1.2.1 in compliance with the law; and

1.2.2 that the financial and legal interests of all those who may be vulnerable will be protected’.

[33] Para 7.9 deals with nominations and provides *inter alia* that where the deceased died intestate ‘the Master may ... consider calling a meeting in terms of section 18 for the purposes of electing an executor’ and further that ‘... (n)ominations should only be obtained from major heirs and/or legal guardians of minor heirs’.

[34] Having regard to the provisions of the Act and the Directive, it is clear that there was no obstacle, legal or otherwise, to the Master appointing Ms Thobejane as executor following the removal of Mr Pinini. The Master enjoyed a wide power in terms of section 18 of the Act to grant letters of executorship to any person whom he deemed fit and proper to be executor. The relevant Directive required him to ensure that the ‘*financial and legal interests*’ of the minor child and sole heir would be protected. Given that Mr

Pinini, the first executor who had been nominated by the applicant and removed by an order of Court in the circumstances referred to in paras 6 and 7 above, it would, in my view, have been irrational for the Master to have considered a second nomination by the applicant. By contrast, as the Master has pointed out, he received a nomination from Mr K, the *de facto* guardian of the minor child (and whose family she had been living with since December 2015), for the appointment of Ms Thobejane, an attorney who had acted for the said Mr K.

[35] The applicant specifically criticised Ms Thobejane's appointment on two grounds; firstly, that Ms Thobejane had acted for Mr K in the application which was determined by Mantame J and in other litigation relating to the deceased estate and, secondly, inasmuch as at one point she had used the affidavit of an attorney who had been struck from the roll.

[36] I am aware of no rule of law which disqualifies an attorney from acting as executor in any estate simply by reason of the fact that she presently acts or has previously acted for the person who has nominated him as executor, either in other matters or in relation to the particular estate. Each case must be determined on its merits taking into account that an executor has a duty to act impartially in discharging his or her duty as such. There is nothing in the papers to suggest that Ms Thobejane would have found herself unable to so act.

[37] As far as the second objection is concerned it is quite unclear whether, and in fact unlikely that, the Master knew of the applicant's complaints relating to the disbarred attorney. In these papers the use of the affidavit was explained by Ms Thobejane as an oversight. This reason not to appoint Ms Thobejane, even if it had been brought to the

knowledge of the Master prior to her appointment, was not one which would, without more, have served to disqualify her as an executor. In any event it remains open to the applicant to pursue his complaints against Ms Thobejane in terms of section 54 of the Act. What he cannot do is attribute knowledge of these complaints or of the alleged improper conduct on the part of Ms Thobejane to the Master prior to the latter making the appointment and seek a review of that decision on that ground.

[38] To the extent that para 7.9 of the Chief Master's Directive provides that nominations should only be obtained from major heirs and/or legal guardians of minor heirs, I regard this requirement as satisfied vis-à-vis Mr K. The concept of guardianship in relation to a minor child is dealt with by section 18 of the Children's Act, 38 of 2005 which provides inter alia that:

- '1. Person may either have full or specific parental responsibilities and rights in respect of a child
- ...
- 3. Subject to subsections 4 and 5, a parent or other person who acts as a guardian of a child must –
  - a) administer and safeguard the child's property and property interest'.

[39] Section 9 of the Children's Act provides that *'in all matters concerning the care, protection and wellbeing of child the standard that the child's best interest is of paramount importance, must be applied'*. Section 32 provides for the care of a child by a person not holding parental responsibilities and rights and would apply to Mr K prior to his appointment by a Court as legal guardian. It provides:

- ‘1) A person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, must, whilst the child is in that person’s care –*
- (a) safeguard the child’s health, wellbeing and development; and*
- (b) protect the child from ... exploitation, and any other physical, emotional or mental harms or hazards.*
- 2) Subject to section 129, a person referred to in subsection 1 may exercise any parental responsibilities and rights reasonably necessary to comply with subsection 1, including the right to consent to any medical examination ...’*

[40] As far as the applicant’s rights as a guardian are concerned it appears they are determined in part by the provisions of section 21 of the Children’s Act which provides that *‘the biological father of a child ... acquires full parental responsibilities and rights in respect of the child –*

- a) if at the time of the child’s birth he is living with the mother in a permanent life partnership;*

For the purposes of this application I am prepared to assume that the applicant, as he claimed, was so living with the deceased at the time of the minor child’s birth. However, I agree with Mantame J that this status alone does not give the applicant the exclusive power to nominate an executor to the estate, let alone the right to have his nomination accepted by the Master. It would appear furthermore that Mr K had instituted proceedings in the South Gauteng High Court in 2017 for legal guardianship of the minor child. In the High Court judgment given by Mantame J, the close relationship between Mr K, his siblings and the fact that he and his wife have voluntarily cared for the minor

child since 15 December 2015 were canvassed. In my view there is every prospect that such application will be successful.

[41] Where, as in this case, the guardianship of the minor heir is questionable or contested, section 9 of the Children's Act prevails and prioritises the child's best interests of being of paramount importance. In this regard Mantame J stated as follows:

*'[12] In my view, section 9 is directive. The child's best interest is of paramount importance. In this case, the deceased herself entrusted them to her family and they continued protecting the child's interest until she met her death... It was within Mr K's right to nominate applicant to take care of the child's best interests which he still continued to do to date. I therefore cannot find fault in these circumstances for the applicant to act in the representative capacity of the minor child...'*

[42] Thus the applicant cannot be heard to suggest that he had an unassailable right to represent the minor child when it came to the nomination of an executor or to insist that a meeting should have been held prior to the nomination or appointment of Ms Thobejane. The Master may convene a meeting of interested parties for the nomination of an executor at a meeting in terms of section 18(1) of the Act but he is not obliged to do so.

[43] Ms Thobejane was nominated by seven blood relatives of the deceased who included the third respondent, Mr K, as well as the deceased's father. Ms Thobejane also provided a bond of security to the Master which was backed by the attorney's insurance indemnity fund. She also completed an acceptance of trust as an executor. The Master was therefore in possession of all the relevant documents and Ms Thobejane satisfied the requirements for appointment as executor to the estate. There was, therefore, a rational connection between all the facts and information available to the Master and his decision

to appoint Ms Thobejane as executor and there is no substance to the contention that it was arbitrary, unreasonable or capricious.

[44] As far as the applicant's complaints of procedural unfairness on the part of the Master are concerned, the specific aspects he relies upon are the Master's failure to inform him, prior to Ms Thobejane's nomination, of his intention to appoint her and his failure to furnish reasons for his decision to appoint her. As far as the latter point is concerned no case is made out by the applicant that he called for such reasons in vain. To the extent that he requires such reasons these have been furnished at length in the Master's opposing affidavit.

[45] As regards his first complaint, as has been set out, the Master does not appear to have been under any statutory or regulatory obligation to inform the applicant that he had received a nomination from the deceased's family members for the appointment of Ms Thobejane as executor following the removal of Mr Pinini from this position. Be that as it may, section 3 of PAJA stipulates that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. It is therefore at least arguable that the applicant should have been given adequate notice by the Master that he had received a nomination to appoint Ms Thobejane as executor and affording him a reasonable opportunity to make representations in this regard.

[46] However, section 3(2)(a) of PAJA also provides that a fair administrative procedure depends on the circumstances of each case. In the present matter the applicant had already exercised his right to nominate an executor, Mr Pinini, who was duly appointed. The Western Cape High Court subsequently held that Mr Pinini was unfit to

hold the office of executor and removed him from that position. The applicant was a party to those proceedings and had every opportunity to present his case in relation to the challenge to Mr Pinini's appointment. He had failed to do so. Moreover, the Court found that the applicant and Mr Pinini had colluded and that numerous irregularities had been perpetrated in effecting Mr Pinini's appointment and in the manner in which the latter had performed his duties. In these circumstances I do not consider that it was incumbent on the Master to have notified the applicant of the nomination of Ms Thobejane as executor or his proposed appointment of the latter. The applicant had been completely discredited by the judgment of the High Court as a legal guardian who would act in the best interests of his minor child. Furthermore, it emerged in that judgment that the applicant's dealings with the minor since the deceased had left Cape Town in 2015, as well as his contribution to the child's well-being and maintenance, had been minimal. In the circumstances this ground of review cannot be sustained.

[47] For these reasons it follows that the application must be dismissed with costs. On behalf of Ms Thobejane and Mr K costs on the attorney and client scale were sought. The applicant launched this application in the face of damning findings contained in the judgment of Mantame J, none of which were ever overturned on appeal. Furthermore, much of the relief the applicant initially sought was eventually abandoned by him, although only after several postponements at his instance. In bringing the application it is possible, though unlikely, that the applicant may have believed that as the minor child's legal guardian he was entitled to be heard before the Master appointed Ms Thobejane as executor notwithstanding Mantame J's findings. He may also have believed that Ms Thobejane was not a suitable appointment and was not solely motivated by self-interests. However, he has failed to make out a case in either of these regards. In my view the

application was singularly ill founded and amounted to vexatious proceedings notwithstanding the possibility that this may not have been the applicant's intent. See in this regard *In re Alluvial Creek Ltd* 1929 CPD 532. To the extent that there may be a shortfall between the costs incurred by Ms Thobejane and perhaps Mr K as well in opposing the application, they will fall to be met by the deceased's estate in which the minor child is the sole heir. I see no reason, however, why the deceased estate should be depleted by the costs attendant upon opposing this application.

[48] The Master did not seek a special costs order and several of the factors weighing in favour of such an award to Ms Thobejane and Mr K, do not apply to the Master. I will therefore make no such award in his favour.

[49] In the result the following order is made:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs of the first to third respondents such costs to include those of all the postponements preceding the final hearing of the application;*
3. *In the case of the second and third respondents only, such costs will be on the attorney and client scale.*

---

**BOZALEK J**

---

**SIEVERS AJ**

|                                           |   |                                |
|-------------------------------------------|---|--------------------------------|
| For the Appellant<br>As Instructed        | : | Adv N Kunju<br>Gwaza Attorneys |
| For the 1st Respondent<br>As Instructed   | : | Adv ML Davis                   |
|                                           | : | State Attorney                 |
| For 2 – 3 Respondents<br>As instructed by | : | Adv T Pharoah                  |
|                                           | : | Thobejane Attorneys            |