FMT

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED ✓
25-2-2010
DATE SIGNATURE

25/02/2010.

CASE NO: 46388/09

In the matter between

PAUL CALDER LE ROUX	**APPLICANT**
And	
DEBORAH MARIE MIDDLETON	**1ST RESPONDENT**
MARIA MAGDALENA NELL	**2ND RESPONDENT**
THE MASTER OF THE HIGH COURT	**3RD RESPONDENT**

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Applicant in this application seeks an order in the following terms:

"1. That this application is of a semi-urgent nature and that the Rules are dispensed with insofar as the Applicant did not comply with it;

2. That the executor in the estate of the late Christopher John Millar be removed from office;

3. That the Master of the High Court is requested to appoint another executor in the estate of the late Christopher John Millar;

4. That the First Respondent is ordered to pay the costs of this application;

5. Further and/or alternative relief."

BACKGROUND FACTS

[2] The application is brought in terms of section 54 of the Administration of Estates Act, No. 66 of 1965 ("The Act"). The deceased in the matter is the late C. J. Millar born in South Africa on 15 August 1961. he is also alleged to have been born in the United Kingdom on 8 September 1959. He passed away on 25 November 2007. The dual identity with different birth dates has not been disclosed to the Master of the High Court. He executed two wills under the name of Paul Cantrell and Christopher John Millar. The first Respondent, the deceased's sister who is the executrix in the estate of the late C. J. Millar ref. no. 1320/08 only lodged one will with the Master. This was not clarified with the Master and a declaratory order was not sought by the first Respondent to clarify the issue either. The first Respondent is an heir and an executrix in the estate. The Applicant contends that the deceased,

to conduct business transactions using the name Paul Cantrell, registered himself as the sole member of BLC Holdings and Consultancy CC on 11 September 2002. It is contended that the deceased, while he lived, was at some stage insolvent. It is further contended that the Applicant met the deceased in January 2007 through a company called P T Shamrock. The two entered into several oral business ventures based on trust. As contended, the Applicant would provide finances and share in the profits equally with the deceased. The deceased, according to the Applicant, died a few months later before any profits were made out of the ventures. Tradevest 401 CC and Always Trading CC were registered as trading entities for some of the ventures. According to the Applicant, the deceased later gave instructions that he be registered as the sole member of the two Close Corporations. On 27 March 2007, without the knowledge of the Applicant, the deceased registered two more Close Corporation. One of the ventures was to buy a property known as Holding 111 Jatinga, White River Estates, Eastern Section Agricultural Holdings for R1.9 million in the name of Tradevest 401 CC. It is said that the Applicant, through loans from two of his overseas companies paid monies over into an attorney's trust account for the benefit of Tradevest 401 CC. The founding affidavit shows the various payments allegedly made by the Applicant as agreed. The Applicant contends that the deceased used some of the money invested by him for the projects to purchase luxury items unrelated to the business ventures such as motor vehicles and unessential items without the knowledge and consent of the Applicant. The Applicant, from about March 2007 made various payments to the deceased or his nominated banking accounts which are dealt with in the founding affidavit and the Applicant's heads of argument. The first Respondent, the Applicant alleges, refused to allow him to peruse the bank statements of the Close Corporations. The Applicant then lodged his claims with Mr Meyer of Phillip Meyer Attorneys, the first Respondent's agent. The Applicant, it is said, during May 2009, served notices on the executrix, the agents and the Close Corporations which the Applicant paid money to. The Applicant states that, despite sufficient proof and compelling evidence, the executrix through her agents dismissed the Applicant's claims while payment of the money remains undenied.

THE DISPUTES

[3] The Applicant contends that the executrix has failed the estate and its creditors in that she has not executed her duties in their best interest. The first Respondent, according to the Applicant, should be removed from office. The first Respondent avers that she has done nothing wrong to warrant her removal and that any acts or omissions on her part had been occasioned by the conduct of her erstwhile agent and that she cannot take the blame for that. The application, according to her, consequently, should be dismissed with costs alternatively that the matter be referred for oral evidence.

The Applicant, according to the first Respondent, must prove his claims which, to date, are not justified.

COMMON CAUSE FACTS

[4] The common cause facts are that:

4.1 the first Respondent is the deceased's sister;

4.2 she was appointed as executrix in the deceased estate of Christopher John Millar with the Master's reference number : 1320/08;

4.3 the death notice shows that the deceased was born in South Africa on 15 August 1961;

4.4 he was also allegedly born in the United Kingdom as one Paul Cantrell ("Cantrell") on 8 September 1959;

4.5 The dual identity with different dates was not disclosed to the Master of the High Court;

4.6 the deceased executed two wills under the names of Paul Cantrell and Christopher John Millar;

4.7 only one will was filed with the Master;

4.8 the deceased was engaged to the second Respondent ;

4.9 the first Respondent's agents dismissed or refused the Applicant's claims against the deceased and the Close Corporations

[5] The first Respondent annexed a Notice of Motion in the form of annexure "M" seeking an order to strike out evidentiary matter which she regarded as evidence tendered in an irregular manner. This, in the main, had been because the Applicant had not deposed to the founding affidavit and, as it was submitted, had failed to explain such failure. The evidence, therefore, had been said to be hearsay or based thereon. The Applicant's failure to depose to the founding affidavit, it was submitted on behalf of the Applicant, had resulted from the fact that the Applicant, is a very busy business man who travels all over the world. It was further contended

that the Applicant, in any event, had authorised Mr William Petrus Meintjies (“Meintjies”) by way of a power of attorney dated 29 February 2008, to run his affairs in South Africa. Meintjies is an attorney of this court.

Mr Van der Merwe, on behalf of the first Respondent, submitted that in the absence of an affidavit from the Applicant which is in a form of a founding affidavit or a confirmatory affidavit, the founding affidavit and the replying affidavit amount to hearsay evidence.

[6] Annexure “BM1” to the Applicant’s replying affidavit is a confirmatory affidavit of Paul Calder Le Roux, the Applicant. On 14 August 2008 the Applicant, deposed to an affidavit in terms of section 32 (1) (a) of Act 66 of 1965. Annexure “A” to the founding affidavit is the Power of Attorney in which the Applicant nominates, constitutes and appoints Meintjies to be his lawful Attorney and agent in his name, place and stead to represent him

using his discretion - "managing my affairs and conducting my business in the Republic of South Africa and in every territory or country anywhere in the world". The powers in the Power of Attorney include the power in clause 9 which provides:

"9. Litigation on my behalf

On my behalf to institute, conduct and conclude, defend or abandon, legal proceedings that are in his discretion reasonably necessary to preserve my interests in any court or before any body or persons in the Republic of South Africa and elsewhere in the world, and to suffer judgment or order of court to be given against me in any of (sic) legal proceedings by default."

Clause 11 provides:

"11. Interest in estates

To attend meetings of persons interest in any estate, testate and intestate with which I may be concerned

> *as next of kin, heir, legatee, creditor or otherwise, to vote for the appointment of an executor or executors dative to do whatever may be required to prove my claims, and to act for me in all maters pertaining to such estate."*

The Power of Attorney was signed at Johannesburg on 29 February 2008.

[7] Mr Van der Merwe submitted that if the confirmatory affidavit "BM1" confirms the founding affidavit, then the replying affidavit is not confirmed and should therefore, be ignored.

In *Leith, N. O. and Heath, N. O. v Fraser 1952 (2) SA 33 (O) at 36 B* the court said:

> *"A Notice of Motion could in a proper case be supported by an affidavit by one not a party to it, if he were in a position to provide the necessary material to support the claim."*

Any person who can lawfully be a witness can execute an affidavit. (See *Chaimowitz v Chaimowitz (1) 1960 (4) SA 818 (C).*) The case clearly shows that a court in motion proceedings may permit hearsay evidence where in fact the source from which such information is obtained is given. Evidence of this nature is allowed merely because the matter is urgent and the evidence may not be obtainable at first hand in the ordinary way and a party may in the meantime suffer irremediable harm if he or she may not use the available evidence. The source of the information is given so that the evidence can be tested.

[8] It is important to note that:

8.1 the Applicant has *locus standi;*

8.2 the court has jurisdiction;

8.3 the affidavit makes *prima facie* case for the relief claimed;

8.4 the affidavit discloses allegations upon which Applicant relies.

[9] Mr Van der Berg submitted that the question of urgency was interwoven with the merits of the case. Mr Van der Merwe did not think that there was a case where the two were entirely separated. They both argued the merits and the urgency.

[10] The matter involves the deceased Christopher John Millar ("Millar"). The deceased, in South Africa, was born in Pretoria on 15 August 1961. The same person was born in the United Kingdom on 8 September 1959 where he was known as Paul Cantrell ("Cantrell"). His British passport number is 704223792, while his South African Identity number is 6108055062082. He died on 25 November 2007. The deceased's sister D. M. Middleton, was appointed as executrix in the estate of the late Millar. The Master's reference number 1320/08 was

allocated. One asks, oneself why the deceased had to do something like this. What was the need for it if there was nothing wrong and sinister. One further asks oneself if the reason for such conduct was not known to the sister, the first Respondent. One surely would have expected the first Respondent to have been better informed on the aspect. This appears nowhere from the evidence of the sister. It is doubtful, in my view, if the deceased could have done this without a valid reason. The deceased himself, in paragraph 2 of both wills which he executed in the names of Millar and Cantrell declares that the two people are one and the same person and that that 'relates to a personal issue' which he does not disclose.

[11] It is noteworthy that the two wills, with the exception of the names, the identity number and the passport number, are identical. The fact that the deceased was known as Millar and Cantrell can never be bringing joy to anyone. Why would he, as the same person, be born

twice. Why was this aspect not taken up with the Master of the High Court? Why was only one will registered with the Master and not both wills? Why did the deceased have to have the two wills drawn in the manner they were drawn. Why would the executrix want to administer the estate of Cantrell without the necessary appointment and the Master's reference number?(the necessary authority). Why would the executrix want to administer the estates of Millar and Cantrell which have assets which are in the names of two different people without clarity and authority first having been sought and found from the Master or the court? There are certain of the assets which are registered in the names other than the names of Millar and Cantrell. Shouldn't the Master have been properly involved and notified about this? There are bank accounts which are in the names of the Close Corporations where Cantrell appears to be the sole member. There are also properties which are owned by the Close Corporations where Cantrell appear to be the sole member. Was the Master not supposed to have been informed about this? There are motor vehicles which have been registered in the names of Cantrell while other motor vehicles have been registered in the names of other people. It is clear in my view, that the Master should have known about this from the very word go.

[12] It may well be so that the papers may not be naming and disclosing the business ventures alleged to have been entered into by the Applicant and the deceased but one thing which is clear is that the Applicant's affidavit refers to them. Choene Ephraim Modisha's supporting affidavit marked annexure "H" on page 69 to the founding affidavit deals with the US Dollars in the region of 761.000.00 which the Applicant had to declare at OR Tambo International Airport, Johannesburg on 16 May 2007. The Applicant deals with the money in his affidavit in terms of Section 32 (1) (a) of Act 66 of 1965. This money which he states he handed to the deceased personally was to be invested in the development known

as Plot III, Jatinga White River (Gypsies Project). This money, he states, was misused on unrelated items such as motor vehicles and extravagant expenses by the deceased who, according to him, passed away during November 2007 prior to their meeting. This, according to the affidavit, resulted in his attorney getting instructions, to lodge the necessary claims in December 2007. The Applicant further states that he furnished the attorney with details and particulars of the transactions which were submitted to the executrix.

[13] It was submitted on behalf of the Applicant (and confirmed by the Applicant in the affidavit of 14 August 2008) that monies were paid or transferred into the deceased's nominated accounts on numerous occasions between February and November 2007. The first Respondent admits in her answering affidavit that the amounts that the Applicant refers to in his founding affidavit in particular in paragraphs 13.1 and 13.2

appear to have reached the accounts as set out in the paragraphs.

[14] Instead of answering or dealing with questions raised in paragraph 11 above, the executrix blames her first agent Mr P. Meyer ("Meyer") of Philip Meyer Attorneys. This is clearly born out by what the first Respondent says in *inter alia*, paragraphs 68, 69, 71 and 72 of her answering affidavit.

In paragraph 69 the first Respondent says:

"I have given no instructions to Mr Meyer to disregard the legal requirements in respect of the administration of the estate and it is for the reason of him making mistakes that I appointed new agents."

In paragraph 71 she states:

"I trusted him in the administration of the Estate on my behalf as he is a legal expert or gave himself out to be a legal expert in so far as estates are concerned."

Further, in the same paragraph, she states:

"I have entrusted the administration of the Estate to Mr Meyer and it seems that he failed to perform his duties through no wilfulness or negligence on my part and it was never my intention to administer the Estate in contravention of any legal requirements."

In paragraph 58 the first Respondent admits '*that three vehicles belong to the Close Corporations as set out in annexure "M14" annexed hereto.' "I have already given instruction that the other will be filed, in so far as it is necessary, which is denied. The execution of my duties was left in the hands of my agent, Mr Meyer who did not perform satisfactorily. I apologise to this Honourable Court if mistakes were made, but it was not due to my own doing."*

In paragraph 77 she states:

"Any acts or omissions was (sic) brought about by the conduct of my erstwhile agent, for which I cannot take the blame."

In paragraph 68 she states:

"I will see to it that the mistakes made by Mr P. Meyer, be rectified."

The first Respondent's view loses sight of the fact that she, in terms of section 52 of Act no. 66 of 1965, is personally responsible for performing all the functions of an executrix once she has accepted trust and letters of executorship issued to her. The agent that she appoints does not relieve her of her responsibility. She remains responsible for such agent's acts. (See *Bramwell and Lazar NNO v Laub 1978 (1*) SA 380 (W). The first Respondent ratified the acts of Mr Meyer in her Power of Attorney. She, therefore, cannot be exonerated from her wrongdoings and mistakes which occurred with her approval. Despite the mistakes that Meyer, according to her, made he was paid R88.883.22 during January 2009.

[15] Mr Van den Berg, in his submissions, correctly stated that the application is for the removal of the executrix

from office and for no other purpose. The reasons for such removal, according to him, are, *inter alia,* that:

15.1 The two wills referred to above mentioned assets in the names of the deceased, Cantrell, Close Corporation Tradevest 401 CC, Always Trading 110 CC, Future Perfect Invest CC and BLC Holdings and Consultants CC. The inventory lists all these assets under the estate of the late C J. Millar with reference number 1320/08;

15.2 The first Respondent does not explain why both wills were not lodged with the Master or why the court was not approached for a declaratory order or an appropriate relief in the circumstances of the case. She appears to want to lean heavily on paragraph 2 on page 1 of the will to explain that away. This, in my view, is of no assistance to her. She did not even deem it necessary to register the will of Cantrell.;

15.3 She fails to inform the Master that the estate of Millar is part of a dual identity – there is Millar and Cantrell with different dates of birth and identity numbers. She administers the estate of Cantrell without proper direction from the Master of the High Court. The death of Cantrell is not disclosed to his potential creditors in the section 29 estate advertisement. This does not curb the potential creditors' potential prejudice. The Master is not shown Cantrell's will to alert him to the nature of the estate that has to be administered;

15.4 Meyer, once the Applicant's claim was lodged, held the view that as soon as the claim was admitted, the estate would be insolvent. This, in my view, should have affected and worried the first Respondent who, against the backdrop of the insolvency referred to by Meyer, merely proceeds to settle claims without ensuring that there is, indeed, security in the event that the estate is, indeed, insolvent;

15.5 The Section 32 (1) (a) affidavit in terms of Act 66 of 1965 was filed with Meyer who requested the Master to authorise the enquiry in terms of Section 32 (1) (b). Such authority was obtained. This enquiry was never held despite, (as submitted on behalf of the Applicant) the availability of other witnesses who could have been called. Meyer, in his letter of 25 November 2007, notified the Applicant that he had resigned as agent. The first letter from the new agents dated 2 December 2008 notified the Applicant that his claim had been rejected. The Applicant filed a late claim for an amount of 55,612 US$ deposited by him into a Hong Kong bank account in the name of the deceased. The first Respondent, according to the Applicant, has, to date not indicated if the claim has been admitted or rejected;

15.6 The first Respondent distances herself from her legal responsibility of properly administering the estate without favour or prejudice and ultimately shifts the blame to Meyer as demonstrated above;

15.7 The first Respondent admits payments or transfers in paragraphs 27, 48 and 53 of her opposing papers. This according to Mr Van der Berg, is a clear indication that the first Respondent has all along been privy to the source of information although she persistently denies the source. This, according to him, is an attempt by her to cloud the real issues resulting in the clouding of her objectivity to the point where serious questions are raised. One of the questions, according to him, is whether the first Respondent, acting through the new agents, is a fit and proper person to remain in office *nomine officio.* There seems to be merit in the submission. Mr Van der Berg, accordingly, holds the view that an objective executor is needed.

15.8 According to Mr Van den Berg the first Respondent deliberately attempted to mislead the court with the deliberate omissions regarding payments made personally by the Applicant. He attributes this to either the first Respondents ignorance in not being fully versed with the facts of the application or to her disinterestedness in determining the veracity of the Applicant's claims. She says that if payments were made they were probably made for services rendered. She, according to him, fails to provide proof and invoices to bolster her assumption. This, according to him, demonstrates that she is biased and impartial and that she has decided not to accept the claims.

[16] The first Respondent openly stated in paragraph 73 of her answering affidavit that:

"I state that there is hostility between the Applicant and myself as Executor ..."

Hartzenberg J in *Gory v Kolver NO and Others 2006 (5) SA 145 at 158 A – C paragraph 27* said:

"The Applicant has the perception that the first respondent does not want to administer the estate to achieve his best interests. As must be clear, he has reason to think so. If the applicant were the heir from the outset, he would have nominated an executor. Section 54 of the Administration of Estates Act deals with circumstances under which an executor may be removed from office. In terms of s 2 (b) (i) the Master may remove an executor who has been nominated by will after the will has been declared void. The first respondent was not nominated by will but he was nominated by intestate heirs who were not heirs. In my view, that is one factor pointing to his removal. Because of the way in which he treated the applicant, I am of the view that it is desirable that he be removed in terms of s 54 (1) (a) (v)".

In *Grobbelaar v Grobbelaar 1959 (4) SA 719 (A) at 719 G* the court said:

"Where application is made for the removal of an executor from office on the ground that he has made a claim

against the estate which is disputed by the heirs it is not necessary to go into the validity of the claim, as the question who is right and who is wrong is irrelevant. The executor finds himself in the impossible position of the one hand having to fight for his claim as a creditor of the estate and on the other hand having as executor to defend the estate against the same claim. In this position he is obliged to take sides. He cannot remain impartial and must be removed from office."

[17] The Master of the High Court elected to abide by the decision of the court.

The second Respondent, too, decided not to oppose the application. She also elected to abide by the decision of the court.

[18] The parties addressed the court on the merits and urgency. Having regard to the fact that the issues have been sufficiently ventilated, I do not think that it will be

prudent to separate the issues and deal with them as though I do not have the full facts. I, also, am of the view that regard being had to what I have dealt with above the need to strike out any portion of the Applicant's allegations in any section of the affidavits should not arise.

[19] Mr Van der Berg submitted that the first Respondent had registered estate assets in her personal name. This, the first Respondent does not deny. She, instead, says in paragraph 72 of her answering affidavit: *"I undertake not to encumber or alienate any asset which forms part of the deceased estate and which is registered in my personal name pending the approval of the liquidation and distribution account"*. This begs the question: why was it done in the first place if it was done? This, in my view, supports, Mr Van der Berg's submission that the first Respondent finds herself as heir and executrix and that it has been demonstrated that she finds herself in an

impossible position where she, indeed, has to fight for her claim while at the same time defending the estate against the same claim. The first Respondent, according to him, is bound to be bias, partial and subjective. There is merit in the submission. The facts of the matter clearly demonstrate this.

[20] The facts of the case clearly evince that an objective and an impartial executor is needed. The sooner this happens, the better for the estate, its heirs and its creditors. The Applicant, in my view, has successfully demonstrated why a new executor should be a must. The application to strike out, in my view, should fail and the Applicants application to remove the executrix from office ought to succeed with costs.

[21] In the result the order I make is as follows:

1. The application to strike out is dismissed with costs.

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2. An order in terms of prayers 2, 3 and 4 of the Notice of Motion dated 29 July 2009 is granted.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 16 September 2009
For the Applicant: Adv. J. G. Van den Berg
Instructed by: Ngobe Nkosi Attorneys
For the 1st Respondent: Adv. M. P. van der Merwe
Instructed by: Du Toit Smuts & Mathews Phosa