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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No. 19110 / 2021

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED:

Date: 17/01/2024

Signature:

In the matter between:

NYIKO INNOCENTIA MOGALE

(identity number 8[...])

1st Applicant

GRACE NCANE THUKETANA

(Identity number 5[...])

2nd Applicant

and

ALICE SDUDLA THELA

(Identity number 5[...])

1st Respondent

MASTER OF THE HIGH COURT

JOHANNESBURG

2nd Respondent

IN RE:

**ESTATE LATE HAMBUKA THEODORE THUKETANA, Masters Ref:
2501/2019**

JUDGMENT

MAHOMED AJ

1. The applicants are beneficiaries in the Estate Late HT Thuketana, they are the wife and daughter of the late Mr Thuketana. The deceased died in February 2017 and the finalisation of his estate is still pending. The second respondent issued letters of executorship, and appointed the first respondent as executor, who has done nothing since her appointment, she is allegedly the customary law wife of the deceased. Four years have passed, and the applicants have no information as to the nature and extent of the estate. The application is brought in terms of sections 54(1)(a)(ii) and (1)(a)(v) of the Administration of Estates Act¹, (“the Act”) to remove the First respondent, from her position as executor and several other orders are sought.

THE SUBMISSIONS

2. Ms R Isat, the attorney for the applicants referred the court to an offer of settlement made by the first respondent’s attorney however the applicants were only in partial agreement and therefor her instructions were to proceed for the remainder of the orders sought.
3. The main issue between the parties relates to the removal of the first respondent as executrix. It is disputed that she is the customary law wife of the deceased, she ought not to have been appointed executor and the applicants allege she has sought to obtain an advance of R15 000 from the deceased estate. It is contended that that she failed to perform her duties as executrix since appointment and that she is not entitled to benefit from the estate.

¹ Act 66 of 1965

4. Kemack SC, appeared as pro bono counsel for the 1st respondent and conceded that the first respondent has failed to attend to the administration of the estate over the past years and conceded that it is sufficient grounds for her removal. Counsel contended that the 1st respondent acted on poor advice of her erstwhile attorney, and submitted there were no further submissions in that regard, however it is denied that the first respondent is mala fides in her failure to act or in any other way. It was submitted that this court cannot determine those allegations in motion proceedings. Therefore, the removal of the first respondent as executor is no longer in dispute and prayer 2 falls away.
5. Ms Isat submitted that a valid will is in place, and that the first applicant; the deceased's daughter is a beneficiary and is an appropriate person for appointment as executor. There is no evidence before this court of her incompetence, unreliability or on her credibility to disqualify her, she has the necessary ability and an interest in the finalisation of this estate. She is a beneficiary together with her mother the second applicant and will oversee her mother's best interests in that regard. It was submitted that the will directs how the estate must devolve, the first applicant has only to understand her duties on appointment and can execute her duties on further direction from the Master's office. The is pending for 6 years, and the Masters office has been of no assistance with their requests for an investigation into the complaints they raised against the first respondent. Ms Isat argued that there is nothing contentious in prayer 5, the applicants merely suggest to the Master that the first applicant is a worthy substitute for consideration by the Master and if she is successful, the Master must be ordered to issue the letters of executorship and appoint her within 10 days of approval.
6. Kemack SC contended that there is animosity between the parties and there are two factions, it would be appropriate to appoint an independent third party to administer the estate to avoid any prejudice to the first respondent and ensure a smooth process to finalisation. Counsel referred

the court to the decision in *Reichman v Reichman*² where the court noted the disputes raised by attorneys, that decisions were to be taken on whether the litigation was to continue in the matter, and the court held that in the circumstances an independent third party would be the best persons to serve the estate.

7. In reply, Ms Isat persisted with the suggested appointment of the first applicant as executor. She submitted that the first applicant is a beneficiary, it is in her interest to ensure that the administration progresses, and nothing prevents her from doing so. There was a delay for six years, as the matter was initially with Old Mutual, which entity denounced its executorship, then followed the first respondent's attorney's firm, whose brief she terminated, after the attorney refused to advance loans to her, and her total disregard and neglect for her fiduciary duties as executor, further delayed matters whilst the beneficiaries in the estate continued to suffer serious prejudice. The applicants were forced to rely on others and to date nothing has been done in the finalisation of the estate. Ms Isat submitted that the applicants harbour no animosity and appreciate that if the first respondent has a valid claim against the estate it will have to be considered.
8. Mr Kemack contended that it is fair if each party must pay their own costs, the applicants ought not to have launched this application, they could have approached the office of the Master with their concerns for the delays and the first respondent's neglect of duties, in terms of the Act. The evidence that the applicant has approached the Master and that the Office has not responded to their demand for an investigation since 2021.

² 2012 (4) SA 432 (GSJ) at para 20

JUDGMENT

The Law

9. Section 54 (1) (a) (i to v) provides for a court's removal from office of an executor on various grounds.
10. Counsel conceded that the first respondent has not done anything in the administration and that her removal is justified, in the circumstances.
11. I noted Kemack SC's submissions regarding the appointment of an independent person in the light of the alleged fractious environment that parties find themselves in, however I am not persuaded that an independent person would necessarily address the applicant's complaints of the long delay in the finalisation of this estate and the inevitable prejudice they suffer.
12. There are reports that the office of the Master is in an "intensive care unit," in regard to operations and management. Any progress in the estate is going to need more than letter writing and telephonic contact. In my view it will require a more robust approach to get the estate back on track toward finalisation, such as consultations, timelines, and monitoring. The first applicant has an interest in moving things along and in my view, she will adopt that robust approach to ensuring that she and her mother the only beneficiaries according to the deceased's will, are fully informed on the nature and extent of the estate and its realisation.
13. I agree with Ms Isat that should the first respondent have a valid claim, she has a remedy and can submit her claim at the appropriate stage of the administration process. The applicants on the other hand, have explored their options when they sought the assistance of the Old Mutual, the Master, awaited some action on the part of the appointed executor, the first respondent, and nothing was achieved.

14. The nature and extent of the estate is irrelevant, every deceased estate evokes emotions, and all beneficiaries are entitled to transparency and full disclosure in the process of administration. The applicants in casu allude to problems of distrust and mismanagement, they must be assisted now to take over full control and management of the deceased's estate to realise all that may belong to them.

COSTS

15. The applicants pray for costs in the event of opposition, Mr Kemack argued that the applicants ought to have approached the Master's Office with their complaint rather than have launched this application. As mentioned earlier, the applicants have had no assistance from that office. Mr Kemack correctly proffered that neither party can be blamed in that regard.
16. In **PUBLIC PROTECTOR v SOUTH AFRICAN RESERVE BANK**,³ the court referred to the principles espoused by Innes CJ:

“cost on an attorney client scale are awarded when a court wishes to mark its displeasure of the conduct of the litigant. Attorney client costs have been awarded for fraudulent, dishonest or mala fides (bad faith) conduct, and conduct that amounts to an abuse of process of court.”

17. Having regard to the conspectus of the evidence and that she knew all along she had failed in her fiduciary duties to the estate, she ought not to have opposed this application, given that the main issue was her removal as executor. In opposing this application, she has drawn the applicants into litigation, where they are to pay opposed costs to their attorney. This court views her behaviour in serious light.

³ [2019] SACC 29 at 82 para 223

18. Her reliance on the defence of “poor legal advice” cannot assist the first respondent, albeit in the context of an application for condonation, see **SALOOJEE AND ANOTHER NNO v MINISTER OF COMMUNITY DEVELOPMENT**,⁴ Innes CJ stated, “*if he relies on upon the ineptitude or remissness of this attorney, he should at least explain that none of it is to be imputed to himself.*” The first respondent has known of her neglect of the estate all along, she failed to raise any cogent or worthy opposition in the matter timeously, when she could have. It is fair that she must pay the applicant’s costs.

I make the following order:

1. The first respondent is removed as Executrix of the Estate Late Hambuka Theodore Thuketana under Master’s Reference 2501/2019, on date of this order.
2. The letters of executorship issued by the second respondent in favour of the first respondent in the Estate is to be cancelled.
3. The second respondent is ordered to in terms of section 54(5) of the Act return the letters of authority issued to her, within 5 days of this order.
4. The second respondent, the Master of the High Court, Johannesburg, is ordered to consider the First Respondent, Nyiko Innocentia Mogale, identity number 8[...]) for appointment as Executor, and within 10 days of this order to appoint an Executor for the Estate.
5. The first respondent is to pay the applicants party and party costs.

MAHOMED AJ

Acting Judge of the High Court

⁴ 1965 (2)SA 135 A p142

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 17 January 2024.

Date of Hearing: 29 November 2023

Date of Judgment: 17 January 2024

Appearances:

For Applicant: Ms R Isat

Instructed by : Paizes Attorneys

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For First Respondent: A Kemack SC, with him M Clark

Instructed by: Christodoulou & Mavrikis Inc

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