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**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO OTHER JUDGES: YES/NO
 (3) REVISED.

CASE no:3343/2019

NOKO HELLEN SETATI

APPLICANT

And

THE MASTER OF THE HIGH COURT

FIRST RESPONDENT

RAMAHLAPE MICHAEL DUBE

SECOND RESPONDENT

JUDGMENT

MULLER J:

INTRODUCTION

- [1] The expression "first come, first serve" has acquired new meaning when we are dealing with the appointment of executors in deceased estates. There are in many instances the erroneous perception that the person who is appointed first as executor will be entitled to the proceeds of the estate.

BACKGROUND

- [2] Kwena Regina Setati passed away 18 October 2017.¹ The death certificate

¹ Hereinafter referred to as "the deceased".

indicates that her marital status as "never married". The deceased is survived by a minor child B[...] T[....] S[....] born on 1 December 2008.

- [3] The applicant, who is the mother of the deceased, completed the required death notice and the declaration of subsisting marriage.² She indicated that the deceased was never married. She reported the death to the first respondent³ in Polokwane 25 October 2017 and also applied to be appointed as the executrix of the deceased estate.
- [4] On 4 December 2017 the deceased was informed by the Master that the second respondent was appointed as the executor.
- [5] The attorney of the applicant inspected the file at the offices of the Master and discovered from the said file that the second respondent also applied to be appointed the executor on the basis that he is the surviving spouse of the deceased.
- [6] It bears mentioning that neither the applicant nor the second respondent handed a will which was executed by the deceased to the master with their respective applications.
- [7] The applicant applied in terms of section 95 of the Administration of Estates Act⁴ to review the decision of the Master to appoint the second respondent as executor in the deceased estate of the late Kwenia Regina Setati, and seeks an order that the Master considers the provisions of section 19 of the Act 66 of 1965 after having made a determination in terms of section 5 of the Reform of Customary Law of Succession and Regulation of Related Matters Act.⁵
- [8] The second respondent opposed the application. He maintained that he was married to the deceased in terms of customary law. Lobola of R32000.00 which was agreed upon between the families was paid and a wedding ceremony was held. In addition, he attached to his papers a letter from the Moletsi Traditional Council confirming that he and the deceased

² The documents included the death notice, inventory, affidavit of guardianship, application to be appointed as executor and a declaration of subsisting marriage.

³ Hereinafter "the Master".

⁴ Act 66 of 1965. (Hereinafter "the Act 66 of 1965").

had entered into a customary marriage.

The Law

[9] No person may liquidate or distribute the estate of any deceased person except under letters of executorship granted or signed under Act 66 of 1965.⁶ In compliance with section 13, the second respondent was appointed by the Master as the executor dative in the deceased estate under letters of executorship issued on 31 October 2017.

[10] The letters, *ex facie* the document were purportedly issued in terms of section 14 of Act 66 of 1965. The relevant part of section 14 provides:

'14(1). The Master shall, subject to subsection (2) and sections 16 and 22, on the application of any person who-

- (a) Has been nominated as executor by any deceased person by a will which has been registered and accepted in the office of the Master; and
- (b) Is not incapacitated from being an executor of the estate of the deceased and has complied with the provisions of this Act,

grant letters of executorship to such person. (2) ...'

[11] The reference to section 14 in the letters of executorship is incorrect. On the facts of this matter, the appointment was not authorised by section 14, since the deceased died intestate. The Master may make an appointment and grant letters of appointment under section 14, if the deceased has executed a will and the said will has been accepted and registered by the Master. The letters of appointment is misleading to the extent that it purports to indicate that the deceased executed a will.

[12] Section 18 provides that

'(1) The Master shall, subject to the provisions of subsections (3), (5)

⁵ Act 11 of 2009. (Hereinafter 'the Act 11 of 2009').

⁶ Section 13(1) of Act 66 of 1965.

and (6) -

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

(b)... .

appoint and grant letters of executorship to such person or persons whom he may deem fit and proper to be executor or executors of the estate of the deceased or, if he deems it necessary or expedient, by notice published in the *Gazette* and in such other manner as in his opinion is best calculated to bring it to the attention of the persons concerned, call upon the surviving spouse, (if any), the heirs of the deceased and all persons having claims against the estate, to attend before him or, if more expedient, before any other Master or any magistrate at a time and place specified in the notice, for the purpose of recommending to the Master for appointment as executor or executors, a person or a specified number of persons.'

(2) If the Master has published a notice under subsection (1) he shall, on receipt of the recommendation in question or when it appears that the persons concerned have failed to make any recommendation, subject to the provisions of subsection (3) and sections 19, 22 and 23, unless it appears to him to be necessary or expedient to postpone the appointment and grant letters of executorship to such person or persons as he deems fit and proper to be executor or executors of the estate of the deceased.

(3) If the value of any estate does not exceed the amount determined by the Minister by notice in the *Gazette* the Minister may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed.⁷

[13] It is noteworthy that the Master has stated in his report that:

⁷ The Minister determined the amount at R250 000.00 in terms of Government Notice R920 dated 24 November 2014. The value of the estate exceeded the amount determined by the Minister.

'6. On 31 October 2017 I appointed the second respondent in this matter to be executor of his deceased wife estate since that I was satisfied that the marriage relationship existed between him and the deceased. I took this decision relying on the provisions of section 5(1) the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, "which provides that if any dispute or uncertainty arise with... the Master of the High Court having jurisdiction under the Administration of Estates Act, 1965 (Act 66 of 1965), **may**, subject to subsection (2), make such a determination as just and equitable in order to resolve the dispute or remove the uncertainty.

7. The Act specifically indicate that the Master may conduct an enquiry if he is not certain the marriage relationship existed between the parties, now in this case the Master was satisfied that the marriage relationship existed, lobola was paid in full and there is evidence by the photos that a white wedding was celebrated between the deceased and the Second Respondent."

[14] It is contended by the applicant that the appointment of the second respondent by the Master was influenced by an error of law who ought to have applied section 19 when both the applicant and second respondent applied for appointment, after having considered a determination in terms of section 5 of Act 11 of 2009. It is furthermore argued that the Master appointed the second respondent after consideration of irrelevant considerations and failed to take relevant considerations into account.⁸

[15] The provisions of section 18(1) and 18(2) of Act 66 of 1965 are peremptory.⁹ The Master is obliged to follow them to appoint an executor dative in the deceased estate. When a person died without a will, the Master has the discretion, in terms of section 18(1)(a), to follow one of two routes, in his discretion, to appoint a person which the Master may deem fit and proper to be an executor.

⁸ Section 6(e)(iii) of the Promotion of the Administrative Justice Act 3 of 2000.

⁹ *Master of the Supreme Court v Stern* 1987 (1) SA 756 (T) 770D-E.

[16] The Master may, in the first instance, appoint and grant letters of executorship to a person or persons whom the Master considered to be a fit and proper person. Or, in the second instance, if he/she deems it necessary or expedient, by notice in the Gazette or such other manner which the Master considered necessary or expedient, call upon the surviving spouse (if any), the heirs of the deceased and all other persons with claims against the estate to appear before him or another Master or even a magistrate for purposes of recommending a person or persons for appointment as executor.

[17] The Master, after he/she has published the notice, on receipt of the recommendation and subject to section 19, 22 and 23 (subsections 22 and 23 are not relevant to the present issues) make an appointment, unless it is necessary to postpone the appointment or publish a fresh notice.¹⁰ If two, or more persons are nominated, the Master must then turn to section 19 of the Act 66 of 1965 for assistance.

[18] Section 19 states the following:

'19. If more than one person is nominated for recommendation to the Master, the Master shall, in making any appointment, give preference to -

- (a) the surviving spouse or his nominee; or
- (b) if no surviving spouse is so nominated or the surviving spouse has not nominated any person, an heir or his nominee; or
- (c) if no heir is so nominated or no heir has nominated any person, a creditor or his nominee; or
- (d) the tutor or curator of any heir or creditor so nominated who is a minor or a person under curatorship, in the place of such heir or creditor:

Provided that the Master may -

- (i) join any of the said persons as executors with any other of them; or
- (ii) if there is any good reason therefore, pass by any or all of the said persons.'

¹⁰ If an objection is raised against the nomination the Master may refuse to issue letters of executorship in terms of section 22. The Master may require security in terms of section 23. Both section 22 and 23 find no application in the present circumstances.

- [19] The Master did not invoke any of the procedures set out in section 18(1)(a) or 18(2) to call for recommendations. It is common cause that applications by the applicant and the second respondent were not prepared and submitted by them as a result of a notice published in the Gazette by the Master or as a result of any other notice issued by the Master in terms of section 18(1)(a) or section 18(2).
- [20] The applicant and the second respondent forwarded their applications for consideration for appointment to the Master independently from each other and of their own volition. Neither the applicant nor the respondents can rely on the provisions of section 19, nor is the Master able to apply section 19 until such time that a person or persons are nominated for recommendation in terms of the procedure prescribed in section 18(1)(a).
- [21] It is not disputed that the Master applied the provisions of section 5 of Act 11 of 2009 to make the impugned appointment, instead of using the procedures prescribed in section 18(1) or 18(2).
- [22] I turn next to determine whether to procedure which the Master utilised was authorised in terms of the provisions of section 5 of Act 11 of 2009.
- [23] Section 5 states:

'5(1) If any dispute or uncertainty arises in connection with-

- (a) the status of any claim by any person in relation to a person whose estate or part thereof must, in terms of this Act devolve in terms of the Intestate Succession Act;
- (b) the nature or content of any asset in such estate; or
- (c) the devolution of family property involved in such estate,

the Master of the High Court having jurisdiction under the Administration of Estates Act 1965 (Act no 66 of 1965), may, subject to subsection (2), make such a determination as may be just and equitable in order to resolve the dispute or remove the uncertainty.

(2) Before making a determination under subsection (1), the Master may direct that an enquiry into the matter be held by a magistrate or a traditional leader in the area in which the Master has jurisdiction.

(3) After the enquiry referred to in subsection (2), the magistrate or a traditional leader, as the case may be, must make a recommendation to the Master who directed that an enquiry be held.

(4) The Master, in making a determination, or the magistrate or a traditional leader, as the case may be, in making a recommendation referred to in this section, must have due regard to the best interests of the deceased of the deceased's family members and the equality of spouses in customary and civil marriages.

(5) The Cabinet member responsible for the administration may make regulations regarding any aspect of the inquiry referred to in this section.'

[24] The basis of the application, on pain of repetition, is that the appointment of the executor in the deceased estate is reviewable due to an error of law and the consideration of irrelevant considerations. The applicant asserted that the appointment is flawed due to the failure of the Master to take into account that certain essential elements must be proved before the Master can be "satisfied" that a customary marriage exists. The dispute, so the argument ran, is that a customary marriage has not been proved to have been entered into. The Master, therefore, could not have been satisfied that the second respondent is the surviving spouse of the deceased. And for the Master to be satisfied, an enquiry in terms of section 5 for must be conducted to determine whether a customary marriage indeed existed between the second respondent and the deceased.

[25] It is unnecessary to traverse the essential requirements for a valid customary marriage because of the view that I take.

[26] The preamble of Act 11 of 2009 sets out the purpose of the Act. It is:

'To modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of so called succession and the law of property in relation to persons subject to customary law; and to amend certain laws in this regard; and to provide for matters connected therewith.'

[27] The Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Another*¹¹ reiterated that it is:

'A fundamental tenet of statutory interpretation that the words in a statute must be given their ordinary grammatical meaning unless to do so will result in an absurdity. There are three important interrelated riders to this general principle, namely;

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly be contextualised; and
- (c) al statutes must be construed consistently with the Constitution, that is, where reasonable possible, legislative provisions ought to interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).¹²

[28] Act 11 of 2009, deals with succession. The provisions of section 5 is not a mechanism which a Master may invoke to determine who is a fit and proper person for appointment as executor on the one hand, or who to appoint where more than one person applied to the Master to be appointed where a deceased died intestate, on the other. Act 66 of 1965 makes provision for the administration of deceased estates which clearly provides for the appointment of executors.

[29] Section 5 may be invoked when there is uncertainty or a dispute which has arisen in connection with incidents referred to in subsections (a), (b) or (c). Those incidents relate to the status of claims in terms of the Intestate Succession Act, the nature or content of assets in the estate and the devolution of family property in a deceased estate.

[30] The Master is required by section 5 to undertake an enquiry to resolve any of those disputes. Put differently, the purpose of section 5 has nothing whatsoever to do with the appointment of an executor of a deceased estate.

¹¹ 2014 (4) SA 474 (CC)

¹² Par 28. Also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

- [31] The Master conceded that he utilised section 5 of Act 11 of 2009 to appoint the second respondent and to issue the letters of executorship to him. In that respect the Master has erred. The failure of the Master to follow the procedure provided by section 18 of Act 66 of 1965 to make the appointment, resulted in an error of law.

CONCLUSION

- [32] In the result, the appointment and the letters of executorship issued to the second respondent by the Master must be set aside. The Master must comply with the provisions of section 18(1)(a) which is the empowering provision.
- [33] I am convinced that the dispute who to nominate for an appointment will resolve itself when the family members or interested parties are called upon to assist the Master in the appointment of the executor. Wiechers and Vorster explains:¹³

'At present the procedure for appointment of an executor dative in terms of section 18(1) is for the most part the same as for the appointment of an executor testamentary. It is no longer necessary for the interested parties to nominate an executor at a meeting, unless the Master considers it necessary or expedient to convene such meeting....

It the administrator is aware of discord amongst the interested parties, the Master should be requested to convene a meeting for the appointment of an executor. This would prevent an accusation that some heirs are being treated with partiality.'

- [34] In this Province, most of the disputes in relation to the appointment of executors and matters of succession originate from disputes over the validity of customary marriages. The present case is no exception. The Master should have acted in terms of section 18(1), to resolve which person(s) should be appointed soon after the applications were filed. The

¹³ Wiechers NJ *et al Administration of Estates* Lexisnexis (Loose leaf) (2019) par 2.2.3

public is entitled to rely on the Master to scrupulously observe the provisions in Act 66 of 1965. It is by acting fairly within the confines of the law that the confidence of the public is fostered and maintained.

[35] The application was opposed by the second respondent. The applicant is the successful party although for different reasons, and is entitled to her costs.

ORDER

1. The appointment of the second respondent as executor of the deceased estate of the late Kwená Regina Setati and the letters of executorship issued by the Master is reviewed and set aside.
2. The applications of both the applicant and the second respondent for appointment as executors in estate late Kwená Regina Setati are referred back to Master to comply with the provisions of section 18 of the Administration of Estates Act, Act 66 of 1965.
3. The second respondent is ordered to pay the costs of the application.

GC MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

- | | | |
|----|------------------------------------|-----------------|
| 1. | For the Applicant | : Avd A Diamond |
| 2. | For the 2 nd Respondent | : Avd Ledwaba |
| 3. | Date heard | : 18 May 2020 |
| 4. | Date delivered | : 19 May 2020 |