

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2017/4324

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
17/9/2018 DATE	
MOKOSE SNI	

In the matter between:

SUSAN LEVINSON N.O.

Applicant

and

THE MASTER OF THE HIGH COURT
(GAUTENG DIVISION)

1st Respondent

JANE LEVINSON N.O.

2nd Respondent

JEFFREY STEWART SALANT

3rd Respondent

JUDGMENT

MOKOSE AJ

- [1] The applicant approaches this court in order to set aside the decision of the Master of the High Court (“the Master”) taken on 19 October 2016 as a result of non-compliance with the Administration of Estates Act 65 of 1965 (“the Act”) and to set aside the second respondent as executrix and the third respondent as the authorised agent.
- [2] This application has been brought in terms of Section 95 of the Act, the issue for determination being whether the decision of the Master to remove the first respondent as executor in the estate of the deceased was fair and reasonable in the circumstances.

Background

- [3] The deceased, Ralph Morris Levinson, had four children, the applicant, the second respondent and their two brothers, Clive and John. In his will, the deceased nominated the applicant to be the executrix of his estate. Upon her appointment, the applicant appointed her attorney, Mr Ellis as her agent to assist with the administration and winding up of the estate.
- [4] After almost four years since the appointment of the applicant as executrix in the estate and it had still not been wound up, the Master sent a letter, on 11 April 2016, of final demand to Mr Ellis in his capacity as the executrix’s agent stating the following:¹
- “I wish to draw your attention to the account of your administration dated 24 March 2014 lodged with me in your capacity as executrix. The account has been examined by me, but I cannot for the reasons set*

¹ Paginated page 162

out in Annexure "A" hereto accept it as an adequate and correct account for your administration of the above estate.

*Be good enough therefore to take notice that having failed to comply with my requirements and the provisions of Act 66 of 1965 as set out in Annexure "A" hereto, you in your aforesaid administration of the above estate on or before **29th of July 2016** by complying with the abovementioned requirements or to furnish me with satisfactory proof or reasons why they should not or cannot be complied with.*

Failing punctually to comply with this notice you may be removed from office in terms of section 54(1)(b)(v) of the abovementioned Act. Your attention is also directed to section 51(3)(b) (disallowance of remuneration)."

- [5] The applicant responded to the letter of demand and indicated to the first respondent that she was awaiting the Capital Gains certificate from the South Africa Revenue Services (SARS). The applicant had requested Ms Lebohang Motsepe, a SARS employee to assist in this regard. Ms Motsepe then telephoned Mr Mphanama of the first respondent to apologise and explain that the executrix was not to blame for the delay. The applicant avers that Mr Mphanama was satisfied with the explanation.
- [6] On 4 August 2016 the first respondent despatched a demand in terms of Section 54(2) of the Act which was received by the applicant only on 22 August 2016. In this letter of demand, the first respondent instructed the applicant to approach a competent court interdicting the removal of the applicant as executrix of the estate. The Capital Gains certificate was lodged with the first respondent on 25 August 2016.
- [7] On 29 August 2016, the applicant delivered a letter to the first respondent in relation to the notice of 4 August confirming that as all the requirements have been complied

with, there would be no need to approach the court to prevent her removal as executrix in the estate. The applicant received a letter from the first respondent in which she was told to disregard the letter of 4 August 2016² as the liquidation and distribution account had been lodged and examined.

[8] On 5 September 2016 the final estate account was hand delivered by the applicant to the first respondent, on which day notice was received from Mr Sephaka, of the first respondent confirming the removal of the applicant as executrix in terms of Section 54(1)(b)(v). No reasons were given for the removal.

[9] Pursuant to a notice published on 30 September 2016 for the election of an executrix, a meeting was held on 19 October 2016 wherein the second respondent was appointed the executrix in the deceased estate.

The applicant's case

[10] The executrix's case is that she is not to blame for the delay and that she had in fact informed Mr Mphanama of the delays. The applicant avers that the genesis of the dispute finds itself in the sale of Portion 57 (a portion of portion 42) of the Farm New Thorndale 394 ("the Farm") which property was an asset in the estate of the deceased. The applicant avers that various attempts were made to sell the Farm and eventually was transferred into the new owner's name on 8 September 2015. The applicant gives evidence of the five attempts to sell the Farm.

² Paginated bundle p74

- [11] Furthermore, the applicant avers that the second and third respondents had been litigating against her in an attempt to remove her as executrix, citing her mental health, *inter alia*, as a reason therefor. The applicant is of the view that the first and second respondents' submissions that "nothing has happened" is disingenuous and a clear attempt to mislead the court.
- [12] The applicant avers further that it is peremptory for a Capital Gains certificate from SARS to be issued and submitted to the office of the first respondent. Such certificate was submitted on 25 August 2016, which delay had been occasioned directly by the office of SARS. The office of the first respondent was aware of the delays in obtaining such certificated.
- [13] The applicant contends further that the disputes which had arisen between her and her siblings in the administration of the deceased estate were referred to mediation by agreement, which mediation did not dispense with all the disputes.
- [14] The applicant contends that the letter from the first respondent of the 4th August was only received on 22 August. The final outstanding document, being the Capital Gains certificate was delivered on 26 August. The letter from the office of the first respondent of 29 August requested her as executrix to ignore the letter of the 4th August. She averred that it did not make sense when on 5 September, after full compliance with Section 35 a letter was received from Mr Sephaka, in the office of the first respondent advising her of her removal as executrix in the estate. The account lay for inspection from 16 September 2016 and a certificate was issued by Mr Madi of the office of the Master on 13 October of the liquidation and distribution account having lain for inspection, free from objections.

- [15] At this point, the estate is ready to be distributed. The third respondent had forwarded a list of queries which, on 2 November 2016, was advised had been complied with by the applicant as well as all obligations in terms of Section 35 of the Act.

The first respondent's case

- [16] The first respondent's case is that consequent to the lodgement of the deceased's will and registration and acceptance of it as the last will and testament of the deceased, the applicant was appointed and issued with letters of executorship. Mr Ellis was appointed by the applicant as her agent to assist her in the winding up of the estate.
- [17] The first liquidation account was lodged on 16 October 2013 and the first query sheet issued on 16 November 2013. The applicant had two months to deal with the preliminary queries raised therein. The applicant and her agent failed to deal with the said queries for a period of approximately four years during which time the liquidation and distribution account was drawn and submitted four times without the queries being attended to.
- [18] Several complaints were received by the first respondent against the applicant in the manner in which the estate was being administered. At a meeting of 30 November 2015 which was convened for the purpose of discussing the issue, it was agreed that the applicant and her agent be afforded the opportunity of dealing with the queries and the lodgement of a new liquidation and distribution account by 17 December 2015. A liquidation and distribution account was not lodged as agreed but was lodged only on 24 May 2016 in which it was found that the queries had still not been attended to.

- [19] A letter sent to Mr Ellis, the applicant's agent to comply with the query sheet on 25 April 2016 remained unanswered. A final demand on 11 July 2016 was sent to the applicant's agent stating that a failure to comply with the request could result in the removal of the applicant as executrix of the estate. A notice of intention of removal of the applicant and her agent was served on the applicant's agent on 4 August 2016 in terms of Section 54(1)(b)(v) of the Act. The notice clearly advised the applicant to approach the court for an order interdicting the first respondent from effecting her removal as executrix within 30 days, failing which her removal would be effected.
- [20] The first respondent avers that the applicant failed to do so despite being aware of the said notice and her agent attempting to comply with the query sheet. The executrix and her agent were effectively removed on 5 September 2016.

The second and third respondents' case

- [21] The second and third respondents' case is that after almost four years had passed since her appointment as executrix and the estate had not been wound up, the first respondent had notified the applicant of his decision to remove her from office as an executrix in the estate of the deceased in terms of Section 54(1)(b)(v) of the Act. In the letter of removal, the Master advised the applicant that she may apply to the court within 30 days for an order restraining the Master from doing so. The applicant failed to apply for such an order with the result that the Master advised the applicant that she had been removed as an executrix and must forthwith return the letters of executorship which had been issued in her name.

[22] On 16 January 2017 the second respondent launched an application in the Magistrate's Court sitting at Johannesburg in terms of Section 26 of the Act for a search warrant, authorising the sheriff to search, seize and take into his custody all documents relating to the estate in possession of the applicant and her agent, Mr Ellis. The matter has been postponed *sine die* pending the outcome of this matter.

[23] The second and third respondents are of the view that the six month period within which the applicant should have wound up the estate and the period prescribed in terms of Section 35 of the Act had expired on 20 May 2013. Whilst Mr Ellis did ask for an extension to file the liquidation and distribution account, this request was made on 30 May 2013 after the six month period had expired. No formal extension was granted by the Master nor was an indefinite extension was granted by the Master entitling the applicant and her agent to finalise the estate after the 20 May 2013.

[24] The first and second respondents are of the view that the applicant's contention that the decision to remove her as an executrix was unlawful in light of Mr Mphamana's letter of 29 August 2016 is without merit for the following reasons, *inter alia*:

- (i) the applicant's reliance on the letter of 29 August instructing her to ignore the letter of the 4th August is stillborn as the Master's decision to remove her as executrix had in fact been made albeit that it could not be implemented for a period of 30 days and an interdict not having been granted. As such, the Master was *functus officio* after he had made his decision and cannot reconsider, amend or disregard his decision;
- (ii) the applicant's option to were to either accept the Master's decision or apply to court within 30 days to restrain the Master. The applicant elected the former by not applying to court to restrain the Master within the 30 days or at all;

- (iii) the applicant failed to make out a case that the Master's decision on 4 August 2016 to remove her was unlawful in that she does not challenge the content and substance of the final demand dated 11 July 2016, nor does she challenge the removal letter dated 4 August 2016. She relies on a procedural irregularity pertaining to the fact that she had been advised by Mr Mphamana to 'disregard' the removal letter.

Issues

- [25] The issue to be determined by this court is whether the Master's decision to remove the applicant as executrix in the estate of the deceased and to appoint the second respondent in her stead was unlawful and falls to be set aside. If the court finds that the decision by the Master was indeed unlawful, then a further issue to be determined is whether the applicant ought to be removed from her office as executrix by this court in terms of Section 54(1)(a)(v) of the Act.

The law

- [26] Section 95 of the Act provides as follows:

"Every appointment by the Master of an executor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master under this Act shall be subject to appeal to or review by the Court upon motion at the instance of any person aggrieved thereby, and the Court may on any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be."

- [27] Section 54 of the Act provides as follows:

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

(a) By the Court –

(i).....

(ii).....

(iii).....

(iv).....

(v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned; and

(b) by the Master –

(i).....

(ii).....

(iii).....

(iv).....

(v) 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; or

(v).....

(2) before removing an executor from his office under sub-paragraph (i), (ii), (iii), (iv) or (v) of paragraph (b) of sub-section (1), the Master shall forward to him by registered post a notice setting for the reasons for such removal, and informing him that he may apply to the court within thirty days from the date of such notice for an order restraining the Master from removing him from his office.

(3)

(4)

- (5) *Any person who ceases to be an executor shall forthwith return his letters of executorship to the Master."*

[28] Section 55 of the Act provides as follows:

"Continuance of pending legal proceedings by remaining or new executor – (1) No civil legal proceedings instituted by or against any executor shall lapse merely because he has ceased to be an executor.

(2) the Court in which any such proceedings are pending may, upon receiving notice that such executor has ceased to be an executor, allow the name of the remaining or new executor to be substituted for the former, and the proceedings shall thereupon be continued as if they had originally been instituted by or against such remaining or new executor."

[29] Section 35 deals with the liquidation and distribution account and Clause 35(1), in particular, provides as follows:

"(1) An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29(1) but within-

(a) Six months after letters of executorship have been granted to him; or

(b) Such further period as the Master may in any case allow,

submit to the Master an account in the prescribed form of the liquidation and distribution account of the estate."

[30] Section 36 deals with the failure by the executor to lodge an account or to perform his duties and reads as follows:

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

(2) The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the executor, de bonis propriis."

[31] The applicant has made application to this court firstly for a review of her removal as executrix in the deceased's estate. It is common cause that on 30 May 2013, six months after the applicant had been appointed, her agent, Mr Ellis wrote to the Master requesting an extension within which to lodge the liquidation and distribution account on the applicant's behalf. It is noted that the liquidation and distribution account was to have been lodged on or by 20 May 2013. The extension was however granted by the Master and the first and final distribution account was lodged on 16 October 2013, almost a year after the applicant had been appointed as executrix.

[32] It is also common cause that a query sheet had been dispatched to the applicant on 5 February 2016 with the following queries³:

- (i) capital gains tax;
- (ii) a request to confirm the limited interest in the estate of the pre-deceased spouse;

³ Paginated page 51

- (iii) confirmation of the full purchase price of the immovable property;
- (iv) request for a taxed bill of costs;
- (v) request for the correct registration numbers of the Kia truck in the liquidation account;
- (vi) request for copies of the Section 35(4) and (5) advertisements and an amendment to be made to the heading of the account itself.

[33] The applicant avers in her founding affidavit that she duly responded on 5 February 2016 and dealt with all such queries. This is denied by the first respondent who brings to the court's attention that the applicant's agent responded as follows:

"The notes raised by your office are being finalised and as soon as the capital gains tax amount has been received from the deceased's auditor. The account will be relodged with you by tomorrow."

[34] Objections were also received from the second and third respondents during March 2016 to the estate account. Such objections were forwarded by the office of the Master to the applicant who only addressed the issue of the capital gains tax and not the other items. On 24 March again the Master dispatched another query sheet requesting the applicant to furnish the following items:⁴

- (i) request specific account in respect of claims 28, 29, 30, 33, 34, 35, 40, 41, 43, 47 and 48;
- (ii) Capital Gains Tax certificate to be furnished;
- (iii) valuation of member's interest in the Tono Investments CC to be furnished;

⁴⁴ Paginated page 54

- (iv) original executor certificate duly signed and dated;
- (v) note that vouchers 35, 36, 37, 38, 39, 42, 44, 45, 46, 47, 48, 51 and 77 are inconsistent with the figures as reflected in the liquidation account and to amend same;

[35] In response to this query sheet, the applicant only furnished the Master with the valuation from the auditor for Tono Investments CC, being only one item from the query sheet being addressed. A final demand was made by the Master on 26 July in which he demands that the correct account for the administration of the estate must be lodged on or before 29 July. Furthermore, the Master brings to the attention of the applicant that failure to punctually comply with the notice could result in her removal in terms of Section 54(1)(v) of the Act.

[36] The applicant contends that she was surprised by the letter for her removal as executrix as no reasons were given. Furthermore, the notices in terms of Section 35(4) and (5) were due to be published. She had also been told to disregard the letter of 4 August by the office of the Master.⁵⁵

[37] Section 54(1)(v) of the Act provides that an executor may at any time be removed from his office by the Master if he fails to perform satisfactorily any duty imposed upon him or under this Act or to comply with any lawful request of the Master. Wallis J in the case of **Van Niekerk v Van Niekerk and Another**⁶⁶ held:

⁵⁵ Paginated page 18 para 9.33.3 to 9.33.5

⁶⁶ 2011 (2) SA 145 (KZP) at p150 F - G

“However, where it is apparent from the executor’s conduct that it is their purpose and intent to use their office to resist all claims, or all claims from a particular source, irrespective of the merits and without any fair-minded consideration thereof, that may, in my view, constitute good cause for their removal in terms of Section 54(1)(v). That view may be strengthened where the motive was to secure personal financial benefit in their capacity as heir.”

[38] The court held in the matter of **Oberholster N.O. v Richter**⁷ as follows:

“...mere disagreement between an heir and the executor of a deceased estate, or a break-down in relationship between one of the heirs and the executor, is insufficient for the discharge of the executor in terms of Section 54(1)(v) of the Act. In order to achieve that result, it must be shown that the executor conducted himself in such a manner that it actually imperilled his proper administration of the estate. Bad relations between an executor and an heir cannot lead to the removal of the executor unless it is probable that the administration of the estate would be prevented as a result....”

[39] It is evident from the papers before this court that the applicant and her agent have been dilatory in the finalisation of the estate. The winding-up of the estate has taken an unacceptably long period. Whilst Mr Ellis sought an extension from the Master to file the liquidation and distribution account on 30 May 2013, such request was submitted after the six-month period had expired. The submission of the liquidation and distribution account then proceeded at a leisurely rate until 26 July 2016 when the Master sent a letter of demand that an adequate and correct account be lodged by 29 July 2016.

⁷ [2013] 3 All SA 205 (GNP) at p210 C – E

[40] After no response had been received by the Master in response to the letter, the Master sent a letter to the applicant on 4 August 2016 advising her of his intention to remove her from office unless she applies to the High Court within 30 days for an order restraining him from so doing. The applicant failed to make such application on the premise that she had received a letter from the office of the Master on 29 August 2016 urging her to disregard the letter of 4 August. The applicant furthermore contends that at this stage, she had furnished the outstanding Capital Gains certificate and had lodged a redrawn liquidation and distribution account which had been examined by the office of the Master.

[41] The applicant and her agent's conduct must be seen against the context of Section 35 of the Act which provides that an executor "shall" submit to the Master an account in the prescribed form of the liquidation and distribution of the estate within six months after letter of executorship have been granted or such other period as the Master may in any case allow.

[42] Whilst there is evidence of a bad relationship between the executrix and the heirs and other interested parties being the second respondent in particular, it is not sufficient for the applicant's discharge in terms of Section 54(1)(v) of the Act.

[43] There is no evidence of an extension having been granted by the office of the Master. Even if the extension had been granted, it was not granted for an indefinite period. Furthermore, the applicant failed to adequately respond to the Master when queries were referred to her for attention. This failure to attend to query sheets continued for a period of almost four years. This was reason enough for her removal as an executrix. In the circumstances, I am of the considered view that the applicant failed to timeously

fulfil her duties in terms of the Act and as such, the Master had the right to remove her as executor of the estate.

[44] The conduct of the office of the first respondent is also not without reproach. Whilst a letter dated 4 August 2016 was sent to the applicant that she should approach a competent court to interdict her removal as executrix, a letter dated 29 August 2016 was subsequently received by the applicant urging her to ignore the letter of 4th August. A further letter was received dated 5 September 2016 from Mr Sephaka advising her of her removal as executrix in the estate. Despite these conflicting messages, the account lay for inspection from 16 September 2016 and a certificate was then issued by Mr Madi of the Master's office on 13 October confirming that the liquidation and distribution account had lain for inspection free of objections.

[45] A reasonable person in the circumstances would definitely had been confused as to whether they still have the powers bestowed on them by the letters of executorship or not. It appears that at this time several people dealt with the matter and they did not consult with one another as to what should be done in the circumstances. Furthermore, I am of the view that once the letter to remove the executrix had been dispatched, the first respondent was *functus officio* and unable to reverse the decision to remove her.

[46] The applicant also seeks to set aside the appointment of the second respondent as executor of the estate and their respondent as her authorised agent.

[47] On 5 September 2016 the Master sent a letter to the applicant and her agent recording that the applicant had been removed as executrix in the estate of the deceased and to return the letters of executorship. Following on this and on 30 September 2016, the Master issued a notice that a meeting would be held for the purpose of appointing a new executor. A meeting was duly held whereupon the second respondent was elected as executrix in the deceased estate. It is noted that the applicant did attend such meeting and left without recording any objection.⁸

[48] No evidence has been put before the court that the second respondent's appointment as executor and the third respondent's appointment as agent were irregular. The applicant was notified of the meeting. She attended such meeting and lodged no objection thereto. The perfect opportunity for the applicant to lodge an objection to the appointment of the executrix for the reason that the estate had been essentially finalised and that the only matter still to be dealt with was the distribution itself had presented itself. However, this was not to be, and the second respondent was granted the letters of executorship.

[49] I find no irregularity therein and am of the considered view that the appointment of the second respondent was regular in all respects.

[50] Although it appears as if the only outstanding issue in the matter is the distribution of the assets in the estate, I am of the view that it would not be in the interest of the estate and the beneficiaries of the estate for the applicant to finalise the estate. In the premises the following order is granted:

⁸ Paginated page 240 para 18

The application is dismissed with costs, which costs are to be paid by the applicant in her personal capacity.


MOKOSE AJ

Acting Judge of the High
Court of South Africa
Gauteng Local Division,
Johannesburg

For the Applicant:

Adv MD Kohn

instructed by

AM Ellis Attorneys

For the First Respondent:

Adv T Malope

instructed by

The State Attorney, Johannesburg

For the Second and Third Respondents

Adv MTA Costa

Instructed by

Salant Attorneys

Date of Hearing: 12 June 2018

Date of Judgement: 19 September 2018