

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

Case no: 3454/14

In the matter between:

IDRIS ABDULHACK PEER N.O

First Applicant

Identity Number: [6....]

ABDUL HUQ PEER N.O

Second Applicant

Identity Number: [3....]

BILAL ABDUL HUK PEER N.O

Third Applicant

Identity Number [6....]

PILASE SIPHO WILSON SINUKELA

Fourth Applicant

Identity Number [8....]

VEZI SINUKELA

Fifth Applicant

Identity Number: [8....]

NTSIKELELO SINUKELA

Sixth Applicant

Identity Number: [6....]

ROYAL ALBATROSS PROPERTIES 27 (PTY) LTD

Seventh Applicant

Registration Number 2004/022787/07

and

NOBANTU SINUKELA ENLIE

First Respondent

Identity Number: [4....]

**THE MASTER OF THE HIGH COURT,
MTHATHA**

Second Respondent

THE REGISTRAR OF DEEDS, MTHATHA

Third Respondent

ESSA SAJID

Fourth Respondent

Identity Number: [7....]

JUDGMENT

MBENENGE J:

[1] This application encapsulates two parts. The first part (Part A), brought by way of urgency, is a quest for an interdict *pendente lite*, which, at the time the proceedings were commenced on 04 December 2014, resulted in the applicants seeking and obtaining a *rule nisi* which called upon the respondents to show cause, if any, on Thursday 29 January 2015, why the following order should not be granted:

- “2.1 **That** pending the final determination of the trial action instituted against the first respondent under **Case Number 390/2013**, and the finalisation of the application in **Part 2** of this application, the first respondent be interdicted from sub-dividing, alienating in any way or encumbering the immovable property described as Portion of **Erf [1....], Main Street Flagstaff** (“the property”).
- 3 Paragraph 2.1 above shall serve as an interim interdict/mandamus pending the finalisation of the second application hereinafter referred to and the trial action instituted against the first respondent under Case Number **390/2013**.
4. Costs of this application be costs in the second application.”

[2] In the second application (otherwise referred to as Part B) the applicants seek an order:

- “1. Declaring that the last will and testament of the late Mr Erasmus Tozama Sinukela (the deceased), attached and marked “**NOM1**” to the founding affidavit, is the final valid last will and testament of the deceased.
2. Declaring that the first respondent’s letters of authority issued by the Master of the High Court, Umtata on 10 February 2009 and attached marked “**NOM 2**” to the founding affidavit, as well as the letters of executorship issued by the Master of the High Court, Umtata on 19 August 2014 and attached and marked “**NOM 3**” to the founding affidavit, are invalid and that the first respondent accordingly has no legal right to control the estate of the deceased (“the estate”).
3. Directing the second respondent to appoint the fourth applicant as the executor of the estate as provided for in section 18(1) of the Administration of Estates Act, 66 of 1965, and to issue him with the necessary letters of executorship.

4. Confirming that the fourth applicant has the sole power to administer and manage the property for the benefit of the trustees of the Sinukela Farming Trust.
5. Declaring that the first respondent is unfit to hold the position of the executrix to the estate.
6. Ordering the first respondent to account to the second respondent as well as sixth applicants in respect of:
 - (i) any bank account/s opened in the name of the estate;
 - (ii) any amounts paid into such bank accounts;
 - (iii) any claims lodged against the estate
 - (iv) any accounts submitted by her to the Master of the High Court as prescribed by section 35 of the Administration of estates Act;
 - (v) any funds and/or income received by her relating to any of the estate property; and
 - (vi) any other issues relating to the estate or any property forming part of the estate.
7. Ordering the first respondent to pay to the fourth applicant, after the fourth applicant's appointed as the executor to the estate, all amounts received by the first respondent on behalf of the estate and particularly in respect of rentals received from the property.
8. That the first respondent pays the costs of this application on the attorney and client scale and in the event of any of the other respondents opposing the applications, that such respondents pay the costs of the application jointly and severally the one paying the other to be absolved.
9. That the Court grant whatever further and/or alternative relief it may deem fit."

[3] Both Parts A and B served before this Court on 29 January 2015, on which date the following order was granted:

- "1. The second application is postponed *sine die* and the *rule nisi* dated **4 December 2014** is extended until the finalisation of the second application and the trial action instituted against the first respondent under Case Number **390/2013**.
2. First respondent file her answering affidavit on or before 12 February 2015.
3. First respondent to pay today's wasted costs."

[4] I heard both Parts of the application on 24 March 2016 after all the papers had been filed. I observed that the *rule nisi* granted on 04 December 2014, not having been extended to a specific date, on 29 January 2015, had lapsed¹. After the parties

¹ See *Fisher v Fisher* 1965 (4) SA 644 (W); see also *Wele v Economic Freedom Fighters and Others* [2016] ZAECHC 3 (23 February 2016).

had supported one another, applying for the resuscitation of the *rule nisi*, I entertained Part A, as well.

[5] The factual matrix of the case makes it incumbent on me to mention the parties to this litigious matter. The first three applicants² are the trustees for the time being of the Peer Ahmed Cassim Family Trust (the Cassim Family Trust). The other applicants³ are children born of the first marriage of the late Erasmus Tozama Sinukela (the Deceased). The last two applicants⁴ are involved in the leasing of a property of which the deceased was the beneficial owner namely, Erf [1....], Flagstaff (the Property).

[6] The first respondent⁵ is cited as being the second wife of the Deceased. The second and third respondents⁶ have been joined in their official capacities as functionaries who may have an interest in the orders being sought in these proceedings. The other two respondents⁷ are also tenants of the Property.

[7] It is common cause that during his life time the Deceased acquired the Property, but the transfer thereof in his name took place during or about the year 2007. On 12 January 1996 the Deceased concluded a lease agreement in terms whereof he let the Property to “*IDRIS PEER ... in his capacity as trustee for a company or close corporation formed or to be formed.*”

[8] The lease agreement recorded that, as on 12 January 1996, the leased premises constituted a “*fixed building structure ...suitable for purposes of conducting a wholesale and/or retail and/or any other business therefrom*” and that “*the structure [was] ... unoccupied, unutilised and empty*”. It was further recorded that the tenant intended at some and/or any time during the current of the lease to, *inter alia*, sublet the leased premises and/or the structure and/or one or more portions of the leased

² Idris Abdulhack Peer, Abdul Huq Peer and Bilal Abdul Huk Peer.

³ Pilase Sipho Wilson Sinukela, Vezi Sinukela, Ntsikelelo Sinukela.

⁴ Royal Albatross Properties 27 (Pty) Ltd.

⁵ Nobantu Sinukela Enlie.

⁶ Master of the High Court, Umtata, and Registrar of Deeds, Umtata.

⁷ Sajid Essa and M A Hawkers CC.

premises and/or the structure for “*residential and/or business and/or whatever other purposes it may from time to time at its sale and absolute discretion desire.*”

[9] The lease was to be for “*a period of 20 (twenty) years commencing on the 1st day of December 1995 and terminating on 30th day November 2015.*” The lease also granted the tenant the first right of refusal to the sale of the Property and the first option to renew the lease for the entire or part of the leased premises.

[10] It is further common cause that during or about August 2007 the seventh applicant entered into a lease agreement with the fourth respondent on behalf of the fifth respondent in terms whereof it rented the Property to the fourth respondent for an amount of R30 000.00 per month, to increase annually at the rate of 10%.

[11] The Deceased signed a will on 20 January 2009, and passed away on 31 January 2009. Besides, *inter alia*, appointing the first respondent referred to in the will as “[*his*] wife”, his grandson Vezi Sinukela, and his son Sipho Sinukela (the fourth applicant) as his heirs, bequeathing thereto certain movables, the Deceased formed a trust referred to as the Sinukela Farming Trust (the Farming Trust). The first respondent as well as the fourth to sixth applicants were nominated as trustees of the Farming Trust. Another of the Deceased’s sons, Mpendulo Sinukela, who has since become deceased, was also nominated as a trustee. The beneficiaries to the Farming Trust are the first respondent, the Deceased’s grandson Vezi Sinukela (the fifth applicant), Sipho Sinukela (the fourth applicant), the Deceased’s son Ntsikelelo Sinukela (the sixth applicant) and all “[*the Deceased’s*] grand children of [*the deceased’s*] sons from their wedding (sic).”

[12] In his will, the Deceased has further directed that the Property be the Farming Trust’s property. He nominated the fourth applicant to be responsible for the administration and management of the Property, including collecting rental, which he directed should be used “*in the maintenance, payment of all municipal levies and services and the balance to be divided amongst all the beneficiaries subject to the direction of the Trustees.*”

[13] The will further accorded the trustees the discretionary powers to sell, mortgage and/or alienate the property “*subject to veto powers of [the first respondent] on condition that she remains at our family home.*”

[14] The Deceased nominated, constituted and appointed Bubele Benedict Linyana of Attorneys Linyana Somacala Incorporated as executor and administrator of his estate, but Mr Linyana declined to accept the appointment.

[15] On 10 February 2009 the second respondent, purporting to act in terms of section 18(3) of the Administration of Estates Act⁸ authorised, by letters of authority, the first respondent to take control of Deceased’s estate, to “*pay the debts, and to transfer the residue of the estate to the heir/heirs entitled thereto by law.*” By letters of executorship issued by the second respondent on or about 19 August 2014, the first respondent was appointed executrix and authorised as such to liquidate and distribute the estate of the Deceased.

[16] Beyond this point, there is little, if any, that the parties have made common cause.

[17] According to the applicants, in the face of an existing lease agreement between the seventh applicant and third parties, upon the Deceased’s death, the first respondent approached the second respondent and secured an appointment as the representative of the Deceased’s estate knowing full well that the Deceased had passed a will and testament, but did not convey those facts to the second respondent.

[18] Notwithstanding the fact that the estate is worth far more than the current threshold of R60 000.00 and the second respondent should have appointed an executor to the estate in terms of section 18(3) of the AEA, the first respondent, lament the applicants, received a letter of authority in 2009. In his will the Deceased had nominated an executor who did not accept the appointment. Upon that happening, the

⁸ 66 of 1965 (the AEA). In relevant part, the section provides:

“If the value of any estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master 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.”

second respondent issued letters of executorship to the first respondent without first calling a meeting of the beneficiaries to the estate to call for a nomination for an executor to be appointed.

[19] The applicants further allege that in the face of an existing lease agreement between the seventh applicant and third parties, the first respondent approached the fourth and fifth respondents and unlawfully collected rental directly from them. Resulting from this, the Family Trust and the eighth applicant instituted action against the first, fourth and fifth respondents under case number 390/2013, which is currently pending.

[20] As already indicated above, the will points to the first respondent as having been the Deceased's wife. Based on documents featuring in this application,⁹ the applicants dispute that the first respondent had been married to the Deceased. Purely for that reason, they contend, the first respondent ought never to have been granted letters of authority. In so far as it may be found that the Deceased and the first respondent had been married to one another, the applicants contend that such marriage would, on the first respondent's own showing,¹⁰ have been out of community of property.

[21] The applicants further accuse the first respondent of improper and unbecoming conduct which disqualifies the first respondent from holding the office of executrix. She is said to have used the rental money she collected for her personal benefit; the beneficiaries never received the rental proceeds; she concealed the existence of the will about which she learnt during her interaction with Mr Linyana, the appointed executor who did not accept the appointment from the fourth to sixth applicants, beneficiaries under the will; she was bent on sub-dividing the property without involving other relevant stake-holders.

[22] According to the applicants the conduct of the first respondent as detailed above points to her as acting in blatant, wilful disregard of the Deceased's wishes as

⁹ According to the records held by the Department of Home Affairs the deceased is described as having "*never married*".

¹⁰ In her notice to the second respondent she stated that she was married "*out of community of property*".

expressed in his will, having circumvented at least two valid lease agreements in order to collect the higher rental directly for herself. The applicants harboured the belief that the first respondent was acting to the detriment of the will's beneficiaries and bent on depriving them of the benefits they were entitled to in the event of her succeeding in her quest to sub-divide and sell the Property.

[23] The fourth applicant, as duly appointed executor, is, according to the applicants, entitled to be issued with the necessary letters of executorship by the second respondent, and should be so appointed.

[24] Besides contending that there is a conflict of interest between the Sinukela applicants and the Peer applicants which disqualifies the applicants' attorneys from acting as such, the first respondent disputes the truthfulness of the applicants' causes of action. She maintains that she and the deceased had been married by civil rites in community of property and is thus entitled to an undivided half share of the estate, at the very least. She states that she merely reported the death of the Deceased, hence she was served with letters of authority. After obtaining the consent of other beneficiaries (the fourth and fifth applicants), she was properly appointed as executrix.

[25] The first respondent has further averred that she had no intention of disposing of the Property. Even the sub-division, she claims, would not be done clandestinely. The sale or sub-division of the Property would be done either with the consent of the Sinukela applicants or pursuant to an appropriate court order. Much as she did collect rental as alleged, she never utilised the money she received for her personal benefit. She utilised the money towards the maintenance of the Deceased's descendants. However, she is on record as willing to account for the money she received to the Sinukela Trust.

[26] According to the first respondent the Sinukela applicants have, at all relevant times, been aware of the provisions of the will, having never mentioned to her that they were shocked or astonished thereby.

[27] At the hearing of this matter the applicants and the first, fourth and fifth respondents were *ad idem* that the first and second prayers of Part 2 fall to be granted. The conflict of interest argument referred to in paragraph [24] above was not persisted in.

[28] Prayers 3 and 5 of Part 2 have been made the subject of a massive dispute of fact rendering it inapposite for this Court to make a determination on those prayers without the aid of oral evidence. On the authority of *Volkwyn NO v Clarke and Damant*¹¹ the onus of removing a person as executor or administrator is not light.

[29] Flowing from the above conclusion is the inescapable conclusion that until the first respondent shall have been found to be disqualified from holding the position of executrix to the estate of the Deceased, it is untimely and premature to give consideration to the appointment of the fourth applicant as the executor of the Deceased's estate. The same should go for the seventh prayer.

[30] The dispute of fact highlighted above does not affect the duty cast on the first respondent to account and disclose to the second respondent and also to the fourth, fifth and sixth applicants. The first respondent has undertaken to do so. There is no reason why the sixth prayer to the notice of motion should not so long be granted.

[31] What remains to be considered is whether the applicants are entitled to confirmation of the *rule nisi* (with interim relief) granted on 04 December 2014.

[32] There is not much to be said about the applicant's entitlement to the confirmation of the *rule nisi*. In the first place, the first respondent's stance to the relief sought in Part 1 is that had the applicants solicited an undertaking from her that pending finalisation of the pending related action she be interdicted from sub-dividing,

¹¹ 1946 WLD 456 at 464 where it was held:

“Both the statute and the case cited indicates that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. It must therefore appear, I think, that the particular circumstances of the acts complained of are such as to stamp the executor or administrator as a dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument.”

alienating or encumbering the Property she would have given that undertaking. She contends that the application was brought hastily and without any prior request for any such undertaking, as indeed she would not subdivide, alienate or encumber the Property without the consent of the Sinukela applicants or an appropriate order.

[33] The real difficulty facing the court in relation to the confirmation of the rule *nisi* in Part 1 lies therein that the applicants seeking that part of the relief¹² have been shown to lack the requisite *locus standi*. These applicants rely on the memorandum agreement or lease concluded between the deceased and Idris Peer.¹³

[34] The right of first refusal or the right to renew the agreement flows from a lease agreement that terminated by effluxion of time on 30 November 2015.¹⁴ Beyond that date any rights flowing from the lease agreement in question were extinguished.

[35] The *rule nisi* therefore falls to be discharged. It is not opportune stage to determine the issue of costs as definitiveness in relation thereto cannot be achieved. Several issues remain outstanding.

[36] The order I grant is the following:

1. The rule *nisi* granted by this Court on 04 December 2014 is hereby discharged.
2. It is declared that the last Will and Testament signed by the late Mr Erasmus Tozama Sinukela (the Deceased) on 20 January 2009 is the final, valid and last Will and Testament of the Deceased.
3. The letters of authority issued by the Master of the High Court, Mthatha (the Master), recognising Nobantu Sinukela Enlie (the first respondent)

¹² The first, second, third and seventh applicants.

¹³ Clause 12.7 of the agreement reads:

“The tenant shall have the first right of refusal to the sale of the premises mentioned under the lease. The tenant shall also have the first option to renew this lease for the entire or part of the premises.”

¹⁴ *Mittermeier v Skema Engineering (Pty) Ltd* 1984 (1) SA 121 (A).

as the executrix of the Deceased's estate, on 10 February 2009, is of no force and effect.

4. The first respondent is directed to account and disclose to the Master as well as to the fourth, fifth and sixth applicants, within 90 (ninety) days from the service of this order on the first respondent, any-
 - a. bank accounts opened in the name of the estate;
 - b. amounts paid into such bank accounts of the estate by any persons;
 - c. claims lodged against the estate;
 - d. liquidation and distribution account submitted to the Master as prescribed by section 35 of the Administration of Estates Act 66 of 1965;
 - e. funds and/or income received by the first respondent in relation to any asset of the estate, including the Property; and
 - f. remaining assets forming part of the estate, which she has or is under her control or was disposed of since the deceased's death including the assets referred to in the Will.
5. The following issues are referred for the hearing of oral evidence on a date to be arranged with the Registrar of this Court:
 - 5.1 whether the deceased and the first respondent were ever married to each other and, in the event of it being found that they were married, which matrimonial property regime governed their marriage; and
 - 5.2 whether the first respondent committed any unbecoming and improper conduct in conducting the affairs of the estate and therefore disqualified from being executrix of the Deceased's estate.

6. The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however to what is provided in paragraphs 5 hereof.
7. Save for the witnesses whose affidavits are already filed, neither party shall be entitled to call any witness unless:
 - 7.1 that party has served on the other party, at least fourteen days before the date appointed for hearing (in the case of a witness to be called by the respondents) and at least ten days before such date (in the case of a witness to be called by the applicant), a statement signed by the witness wherein the evidence to be given in chief by such person is set out; or
 - 7.2 the court, at the hearing, permits such person to be called despite the fact that no such statement has been served in respect of his or her evidence.
8. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.
9. Within twenty days of the issuing of this order, each of the parties shall in accordance with rule 35 of the Rules of this Court make discovery, on oath, of all documents relating to the issues referred to in paragraph 5 hereof, which are or have at any time been in the possession or under the control of such party.
10. Costs of this application shall be costs are hereby reserved for determination by the court hearing oral evidence.

S M MBENENGE

JUDGE OF THE HIGH COURT

Counsel for the applicants : Mr G M Ameer
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Date heard : 24 March 2016

Judgment delivered : 31 May 2016