



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: MTHATHA

CASE NO: 2517/2023

In the matter between:

SINDISWA BONGIWE MANDISA SIHLALI

APPLICANT

And

REGISTRAR OF DEEDS AND OTHERS

RESPONDENTS

JUDGMENT

MHAMBI AJ

INTRODUCTION

1. The applicant in part A of this application, sought in the main an order that, the 7th Respondent, the Master of the High Court, Mthatha, appoint her, alternatively, such other person as he deems fit to hold office as an executor of the estate late Siphso Benjamin Sihlali, **“the deceased”**.
2. Further reliefs, not necessary for this court to deal with, are contained in parts B and C of the application.

3. The practice note and the heads of arguments filed by the Applicant asked this court to deal only with part A of the application, and have issues in parts B and C postponed *sine die*.
4. Central to this application is the question of whether the master is correct to refuse to appoint the executor in respect of the deceased estate. The master did not oppose the application, save to file the notice to oppose and later file a report in which he opposed the grant of costs order against him.
5. Consequently, this court has to deal with the relief sought in part A of the applicant's application on uncontested opposed basis.

BACKGROUND FACTS

It is necessary to indicate that: -

6. The Applicant submitted that it sought to be appointed as the Executrix of the deceased estate, to enable her with the *locus standi*, legal standing, to challenge and seek for orders prayed in parts B and C of the application.
7. It appears *ex facie* the papers that the applicant once sought for orders prayed in parts B and C of this application, but that attempt was dismissed when the matter served before Toni AJ, on the basis that it is trite that an executor is the only person endowed with legal standing to represent the estate of the deceased and institute proceedings on its behalf.
8. Toni AJ reasoning on this aspect was correct. That reasoning finds authority in **Ohlsson's Cape Breweries V Hermsberg**¹, the Court held that:-

¹ 1908TS 134

“In the case of the deceased estate, it is trite that an executor is the only person endowed with the legal standing to represent the estate of the deceased person and institute action on it’s behalf”.

9. In **Boysens and Others V Boysens and Others**², the Court stated that:-

“the deceased estate is not a persona iuris and does not have a separate legal existence of its own.

10. In **Clarkson No V Gelb and Others**³, the Court affirmed that, unless dealing with deceased estates:-

“The executor is vested with its administration, and he alone has the power to deal with totality of rights and obligations”.

11. The reasoning and authorities cited above are the basis of the orders sought in part A when this matter was heard on 18 October 2024.

12. It is worthy for this court to deal with appointment of the executor.

APPOINTMENT OF THE EXECUTOR

13. The Master has the authority in terms of Section 14 of the Administration of Estates Act⁴, herein after referred to as “**the Act**”, to appoint nominated persons as executor by any deceased person in a will which has been accepted by the master and issue letter of executorship to such persons.

² (29558/10 2012 2 SA (GSJ) 25 March 2011.

³ 1981 (1) SA 288 (W)

⁴ 66 of 1965,

14. Section 18(1) of the Act deals with master's authority to appoint executor in instances where the deceased person failed to nominate any person in his will to be executor.
15. Section 18(3) deals with instances where the value of an estate does not exceed the amount determined by the Minister from time to time in the Government Gazette, the current amount determined by the Minister is R250 000.00. The Master in terms of Section 18(3), may disperse with issue of letter of executor and issue letters of authority if the value of the estate at issue before him/her is less than R250 000.00.
16. The words in Section 18 of the Act means nothing more than their grammatical meaning as contained in the Act itself.
17. In **Cool Ideas 1186 CC V Hubbard and Another**⁵, it was held that:-

"A fundamental tenet of statutory interpretation is that words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity".
18. The Constitutional Court followed same principle of interpretation in **Independent Institute for education (Pty) Ltd V KwaZulu Natal Law Society**⁶.
19. It is clear that Section 18 of the Act requires the Master to disperse with the appointment of an executor and issue letter of authority when the value of the estate is below the threshold. The Master was correct in the instant case to issue the Applicant with the letter of authority as the value of the property at that time was below the threshold.

⁵ 2014 (4) SA 4 74 cc at para 25

⁶ 2020 (2) SA 325 cc, see para 13 of the judgment.

20. This court needs to stress it in clear and succinct terms that the power to appoint the executor rests upon the Master, the court cannot usurp the powers of the Master to appoint an executor. The power to grant or refuse letter of executorship rests upon the Master as functionary.
21. In **Goldfields Trading Company (Pty) Ltd V Schutter**⁷, the Court expressed that:-
- “The appointment of provisional trustee is purely statutory and I cannot see how the Court has any inherent power where such power is vested in the Master by Statute”*
22. In **Lips Chitz V Watrus No**⁸, Myburgh J stated:-
- “As to any such provisional appointment [of trustees, liquidators, and judicial managers] the Master clearly has unfettered and sole administrative discretion and it is within his enacted powers to give directions to his staff about such appointments”.*
23. In **Ex parte: The Master of the High Court South**, (North Gauteng), Bertelsmann J⁹ issued orders declaring that the Master of the High Court of South Africa is the only person authorized to appoint, trustees, Liquidators Judicial Managers and Provisional Judicial Managers.
24. In my view, the executor falls within that category, it is the Master and only him, is vested with power to appoint and or remove the executor.

⁷ 1956 3 SA 1 (O) at 2D

⁸ 1980 (1) SA 662 (T) at 671 G,

⁹ 2011 (S) SA 311 (GNP)

25. Section 18 of the Act does nothing more than conferring upon the office of the Master the exercise of public power. The master then is expected to act within the ambit and perform functions as the Statute enjoins him to do so.

26. In **Fedsure Life Assurance V Greater Johannesburg Transitional Metropolitan Council and Others**,¹⁰ the Court stated that:-

“It seems Central to the conceptus of our Constitutional order that the Legislature and executive in every sphere of government is constrained by principle that they may exercise no power and perform no function beyond that conferred upon them by court”.

27. The Master is bound to act in that manner too.

28. In **Affordable Medicines Trust v Minister of Health**, the Constitutional Court held that: -

“The exercise of public power must therefore comply with the Constitution, which is the Supreme law, and the doctrine of legality, which is part of that law”.

29. The Master even though he exercises statutory powers, he has a discretion to appoint the executor as directed by Section 18 of the Act, he is not immune from scrutiny.

30. This is so to guide against the abuse of power. In **Gleinster v President of the Republic of South Africa and Others**¹¹, the Court stressed that a clear abuse of power cannot be allowed to go unheeded.

¹⁰ 1999 (1) SA 374 cc at 400 para 58

¹¹ 2009 (1) SA 287 (CC)

31. In this case, the Master was advised of the challenge to the sale of the property, forming subject matter to part B and C of the application, that was in fact the cause of the application before Toni AJ.
32. He was advised that the value of the property is R550 000.00, necessitating the required threshold for the issue of the letter of executorship.
33. He was advised that the property is subject to legal challenge, in order to achieve that the executor has to be appointed as suggested by Toni AJ in his judgment. However, he insisted that he will only appoint the executor through the court order, he disregarded the information at his disposal, and the legal challenge in which the deceased estate sought to pursue.
34. In my view, the Master acted unreasonably and prejudiced the applicant. The Master only filed notice to oppose without filing an answering affidavit but rather filed a report. During the hearing Mr. Mgidlana advised the Court that his client, first respondent do not oppose the grant of prayers sought in part A.
35. This matter has to be approached on the basis of **Plascon-Evans Paints Ltd V Van Riebeeck Paints (Pty)Ltd 1984 (3) 5623 (A)**. Cf also **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) [also reported at [2009] JOL 22975 (SCA) – Ed]** where Harms DP said the following in paragraph [26]:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s (Mr Zuma’s) affidavits, which have been admitted by the respondent (the NDPP), together with

the facts alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justifiable in rejecting them merely on the papers."

CONCLUSION

36. This court has considered the facts averred in the applicant's founding affidavit which in any way are not controverted by the 7th Respondent, this court is satisfied that the applicant has made a case for the reliefs sought in part A of its notice of motion.
37. I refuse to direct the Master to appoint the applicant as the executor, I have cited authorities supporting why this court cannot do so.
38. However, regard had to be to the powers this court has in terms of Section 173 of the Constitution and balance that with the interest of justice as Madlanga J did so in **Mokone v Tessos Properties cc**¹². In the interest of justice, the following order issues: -

ORDER

1. The Master, 7th Respondent, is directed to exercise its' powers and discretion, vested in it in terms of Section 18 of the Administration of Estates Act 66 of 1965, to appoints a person it deems fit and proper to be the executor of the estate late Simon Benjamin Mazwi Sihlali, within 30 days from the date of service of this order.

¹² 2017 ZACC 25

2. The 7th Respondent is directed to pay the wasted costs as far as necessary only to part “A” of the applicant’s application, on scale A of the amended Rule 67A.
3. The hearing of part B and C are postponed *sine die* with no order as to costs.

M. MHAMBI
JUDGE OF THE HIGH COURT(ACTING)

Date heard: 18 October 2024

Date Delivered: 24 October 2024

APPARANCES

For the Applicant: Mr Pukwana

For the 1st Respondent: Mr Mgidlana

No appearance for the other Respondents

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