



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

CASE NUMBER: 2022/22404

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

DATE: 8 January 2024

In the matter between: -

MAKI ESTHER LETHOKO N.O.

First applicant

(in her capacity as the appointed executrix in the
estate of the late SABATA ELIAS MOILOA)

MAKI ESTHER LETHOKO

Second applicant

(in her capacity as beneficiary in the
estate of the late SABATA ELIAS MOILOA)

and

MASTER OF THE HIGH COURT, JOHANNESBURG

Respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 16h00 on 8 January 2024.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] The applicants seek to review and set aside a decision taken by the respondent ("**the Master**") on 29 April 2021 to transfer an amount of R38 771.76 ("**the funds**") held in the name of the late Sabata Elias Moiloa ("**the deceased**") into the Guardians Fund.
- [2] Once the decision has been set aside, the applicants seek an order that the Guardians Fund transfer the funds to the bank account of the second applicant ("**the beneficiary**") and/or trust account of the beneficiary's attorneys of record within thirty (30) days of service of the order. A costs order is also sought against the Master.
- [3] The Master opposes the application on several grounds: -
- [3.1] It avers that the first applicant's appointment ("**the executrix**") was not proper and therefore disputes the *locus standi* of the executrix to institute the present proceedings.
- [3.2] It alleges that the next of kin affidavit submitted by the applicants to the Master and the one attached to the founding papers contain material discrepancies and is fraudulent.
- [4] The Master therefore seeks a dismissal of the application on a punitive

costs scale.

THE APPLICANTS' CASE

- [5] The executrix informed the court that she was appointed in her *nomino officio* capacity upon the issuing of letters of authority on the 12th of August 2020. A copy of the letters of authority is attached to the founding papers and reflects one asset only, namely funds to the tune of R38 771.76 held in a First National Bank account.
- [6] The deceased died intestate.
- [7] The beneficiary alleged that she is the only surviving kin and therefore the only beneficiary, of the deceased estate. In support she attached a next of kin affidavit deposed to by her on the 26th of January 2022. A copy of this affidavit was attached to the founding papers (**"the 26 January affidavit"**).
- [8] The 26 January affidavit contained the following information: -
- [8.1] It states there is no surviving spouse of the deceased;
- [8.2] The deceased had no children;
- [8.3] The parents of the deceased are identified, but are both deceased;
- [8.4] The beneficiary is listed as the only full blood sibling of the deceased;
- [8.5] Other than the beneficiary, there are no other brothers and sisters.

- [9] The beneficiary informed the court that she is the older sister of the deceased who passed away on the 15th of February 2020. She alleged further that she and the deceased resided with one another during his lifetime. She advised that the deceased did not acquire any immovable and/or movable property during his lifetime, save for the funds which he held in his First National Bank account.
- [10] During the funeral arrangements the executrix (then not yet appointed) elected to intend to the administration of the deceased estate but she was concerned that she would not be able to do so as she and the deceased have different surnames. She sought advice from a certain Mr Seanego Josiah ("**Mr Josiah**"), who introduced her to a gentleman by the name of Mr Sakie ("**Mr Sakie**").
- [11] On the 3rd of March 2020 Mr Sakie and Mr Josiah visited the executrix at her home where she was informed by Mr Sakie that he would be able to assist her in obtaining letters of authority. Believing Mr Sakie's offer to be legitimate, the second applicant accepted his assistance at a charge of R4 500.00. She duly paid the fee to Mr Sakie and provided him with the required documentation for the issuing of letters of authority, which *inter alia* included the deceased's death certificate.
- [12] On the 5th of March 2020 Mr Sakie returned to the executrix's home with issued letters of authority, handed it to the second applicant and left, never to be seen again.
- [13] On the 6th of March 2020 the executrix attended at the Lakeside Mall branch

of First National Bank and submitted the required documents to enable the financial institution to pay the funds over to her. She was assisted by one Mr Isaac Lemeka ("**Mr Lemeka**").

[14] During August 2020 the executrix returned to the First National Bank branch and enquired about the progress of the payout. She was once again assisted by Mr Lemeka, who informed her that upon checking his system, the account had been flagged for fraudulent activity. Mr Lemeka advised her to approach the Master and to seek legal assistance as the financial institution's hands were tied. It was then that Mr Josiah informed the executrix that the letters of authority provided by Mr Sakie were fraudulent.

[15] In the days that followed, the executrix attended at the offices of the respondent and personally applied for the issuing of legitimate letters of authority, whereupon the Master issued the executrix with such letters of authority.

[16] The executrix mentions that criminal proceedings were instituted against her as a result of the flagged bank account, but that the charges were withdrawn with a finding of *nolle prosequi* by the prosecuting authority.

[17] The executrix then consulted her present attorneys of record, who addressed correspondence to First National Bank wherein a certificate of balance of the deceased's bank account was requested, a copy of the legitimate letters of authority was provided as well as an explanatory affidavit setting out how the second applicant had come about the fraudulent letters of authority.

- [18] On the 19th of April 2021 the Assistant Master, Mr Angelo Hendricks ("**Mr Hendricks**"), addressed a letter to First National Bank directing them not to allow any transactions on any and all accounts held by the deceased and to transfer the funds over to the Guardians Fund. First National Bank complied and the funds were so transferred.
- [19] On the 26th of November 2021 the executrix caused a letter to be addressed to Mr Hendricks wherein he was informed that the criminal case against her had been withdrawn, that she had been exonerated of all wrongdoing, that she was the duly appointed executrix of the deceased estate and the only beneficiary. On this basis, the beneficiary sought to claim funds held by the Guardians Fund.
- [20] In response, Mr Hendricks on the 30th of November 2021, requested that the relevant and particular section of the Intestate Succession Act, 81 of 1987 be complied with, together with particulars of the next of kin affidavit to demonstrate the beneficiary's entitlement to inherit, whereafter the matter would be reviewed.
- [21] On the 20th of January 2022 a letter was duly addressed to Mr Hendricks wherein it was set out that the beneficiary is the intestate heir of the deceased estate by virtue of the provisions of section 1(1)(e)(i)(bb) of the Intestate Succession Act.
- [22] On the 21st of January 2022 Mr Hendricks responded and requested the particulars of the status of the beneficiary's parents, whether they were living or deceased. This information was provided to Mr Hendricks on the

26th of January 2022. The beneficiary attached to the founding affidavit a death certificate of her late mother and confirmation of her father's passing.

[23] On the 2nd of March 2022 a follow-up email was addressed to Mr Hendricks enquiring about progress.

[24] On the 3rd of March 2022 Mr Hendricks replied and informed the beneficiary that notwithstanding the withdrawal of the criminal proceedings, the Master was not satisfied that she was entitled to inherit from the deceased's intestate estate.

[25] Understandably, the beneficiary was dissatisfied with this outcome and implored the Master to reconsider all the information before it and to attempt to resolve her claim amicably without approaching this court. No details of the attempt made or process followed is provided in the founding papers.

[26] The applicants accordingly brought the present proceedings in terms of section 95 of the AE of Deceased Estates Act, 66 of 1965 ("**ADE**"), which 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."

THE RESPONDENT'S CASE

[27] Mr Hendricks deposed to the answering papers on behalf of the respondent. He informed the court that there are a number of discrepancies between the next of kin affidavit attached to the founding papers and the one provided to him, which he attached to the answering papers. The next of kin affidavit provided to him was dated the 20th of January 2022 ("**the 20 January affidavit**") and preceded the 26 January affidavit.

[28] Firstly, Mr Hendricks points out that the two affidavits bear different dates, namely the one is dated the 20th of January 2022 and the other the 26th of January 2022. The signatures of the Commissioners of Oaths differ. The area and position of the Commissioners differ. The 20 January affidavit provides no details regarding the status of the deceased's parents. All that was stated was "N/A" (not applicable), as opposed to the 26 January affidavit where the names of the deceased's parents appear. Mr Hendricks concludes that the 26 January affidavit is either fraudulent or was deposed to in order to cure all of the defects existing in the 20 January affidavit.

[29] Mr Hendricks advised the court that the beneficiary omitted to state in her founding papers that when she attended at the offices of the Master and met with Mr Hendricks to relay to him the story regarding the fraudulent letters of authority, she informed Mr Hendricks that she and the deceased were involved in a romantic relationship at the time of his death and further that the deceased did not have any parents, children and siblings. However, I interject to observe that if one has regard to both next of kin affidavits, the beneficiary consistently recorded her status as the only sister of the

deceased.

[30] Mr Hendricks confirms the version of the beneficiary that she advised him that she paid Mr Sakie and another individual to assist her with the letters of authority. Mr Hendricks does however express some concern about the letters of authority issued on the 5th of March 2020 in that it reflects his name but he did not issue this particular letter of authority. Mr Hendricks further pointed out that the manner in which the assets were described was also suspicious. Mr Hendricks more importantly states that according to the ICMS system, there was and still is no record of a letter of authority issued on the 5th of March 2020 under number 003882/2020. This, in my view, confirms the beneficiary's version that the first letters of authority dated the 5th of March 2020 were issued fraudulently.

[31] Mr Hendricks explained in detail the process to be followed when reporting an intestate estate. He informed the court that after the executrix had relayed to him her encounter with Mr Sakie and the fraudulent letters of authority, Mr Hendricks confiscated the fraudulent letters of authority and let the executrix go with a warning not to use any copies thereof as in doing so, she would be committing a crime.

[32] It was not Mr Hendricks who issued the legitimate letters of authority. He assumes that the executrix managed to have the legitimate letters of authority issued by another colleague on another floor. There is no suggestion by Mr Hendricks, however, that the second letters of authority is not legitimate. In fact, at paragraph 37.1 of the answering affidavit he states that legitimate letters of authority was issued to the executrix after

she had been to another colleague.

- [33] However, Mr Hendricks contends that the beneficiary has not fulfilled all the requirements to satisfy the Master that she is a beneficiary of the deceased estate. He explains that in matters such as these, a deceased must be linked to a common ancestor, preferably parents or a parent by blood or the law through adoption and where that is still insufficient, with corroborating evidence from other family members. He concludes therefore that the beneficiary has failed to provide the corroboratory evidence as required by the Master and the provisions of the Intestate Succession Act.

THE APPLICANTS' REPLY

- [34] The executrix stated that it was thanks to Mr Hendricks that she received confirmation that the letters of authority issued on the 5th of March 2020 were fraudulent, which resulted in the first applicant taking the correct steps to obtain legitimate letters of authority.
- [35] The executrix denies having bypassed Mr Hendricks in order to procure the legitimate letters of authority. She also states that she was not aware that she was expected to return to Mr Hendricks for the issuing of legitimate letters of authority. She was under the impression that she could approach any official in the Master's office and would be assisted accordingly and this is what she did. The beneficiary also denies that she ever informed Mr Hendricks that she was involved in a romantic relationship with the deceased.

MASTER'S REPORT

[36] Mr Hendricks compiled a Master's report which essentially regurgitates the facts set out in the answering papers.

APPLICABLE LEGAL PRINCIPLES

[37] Letters of executorship must be issued or signed and sealed or endorsed in every estate.¹

[38] There are also exceptions which are not applicable in this instance.

[39] Letters of executorship may only be issued *inter alia* by the surviving spouse of the deceased or any person related by consanguinity or affinity up to an including the second degree to the deceased. Persons within the stated degrees are grandparents, parents, children, grandchildren, brothers and sisters and their spouses.

[40] In intestate succession where the deceased is not survived by any spouse, descendant or parent, the intestate estate devolves in equal shares upon those blood relations who are related to the deceased nearest in degree.²

[41] The degree of relationship between blood relations of the deceased and the deceased is determined as follows: -

[41.1] In the red line, the number of generations between the ancestor and

¹ The Law and Practice of Administration of Estates and their Taxation, paragraph 8.2, 2nd edition, Meyerowitz D.

² Section 1(1)(f) of the Intestate Succession Act.

the deceased or the descendent and the deceased, as the case may be;

[41.2] In the collateral line, the number of generations between the blood relations and the nearest common ancestor plus the number of generations between such ancestor and the deceased. Thus, an uncle of the deceased is related to him in the third degree. A common ancestor of the two is the deceased's grandfather; the uncle is one generation away and the deceased is two generations away.³

[42] According to section 1(1)(e)(i)(bb) and (ii) of the Intestate Succession Act, if a person dies intestate and is not survived by a spouse or descendant or parent, but is survived by descendants of his deceased parents who are related to the deceased through both such parents, the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased's mother shall inherit one half of the estate and the descendants related to the deceased through the deceased's father shall inherit the other half of the estate or only by descendants of one of the deceased's parents of the deceased who are related to the deceased through such parent alone, such descendant shall inherit the intestate estate.

[43] In essence, this application seeks a review of the Master's decision and asks the court to compel the Master to change that decision. I therefore take the view that the determination of this matter depends on whether in the circumstances the court has the power to interfere with the Master's

³ Section 1(4)(d) of the Intestate Succession Act.

decision. That in turn depends on the nature of the discretion exercised by the Master.

[44] The ADA is the source of the Master's authority and sections 35(10) and 95 of the Act provide that his decision is reviewable by the court.⁴

[45] The court will only interfere with the Master's decision if it is so grossly unreasonable that it indicates that the Master acted *mala fide* or from improper motives or that he did not apply his mind to the matter.⁵

[46] While no allegations of acting *mala fide* or from improper motive have been made by the applicants in this matter, it was contended for the applicants that the Master is unreasonable in disregarding the status of the second applicant as beneficiary and imply that Mr Hedricks's judgment was clouded by the previous transgression of the first applicant in having procured fraudulent letters of authority.

[47] In *Hartley N.O. v The Master*⁶ Innes CJ stated that: -

"For the matter is left to his entire discretion. The test is what he thinks with regard to prejudice, not what we think. We have no power to compel him to change his mind in respect of the question which he has duly considered."

[48] In *Lipschitz v Watrus N.O.*⁷ Myburgh J reviewed the provisions of *inter alia* the ADA, relating to the powers of the Master to appoint executors,

⁴ *Coetzer en 'n Ander v De Kock N.O. en Andere* 1976 (1) SA 351 (O) at 359.

⁵ *Logan v Morris N.O. and Others* 1990 (3) SA 620 (ZH) at 624D-E.

⁶ 1921 AD 403 at 407.

⁷ 1980 (1) SA 662 (T).

provisional as well as final liquidators, where the words "*if in the opinion of the Master*" or "*he is of the opinion*" are used and concluded at 671: -

"As to any such provisional appointment the Master clearly has an unfettered and sole administrative discretion and it is within his enacted powers to give directions to his staff about such appointments."

[49] Myburgh J cited the judgment of Innes CJ in *Hartley* and at 672A-B, a passage of Maasdorp JA's judgment at 412 of the same case, which reads as follows: -

*"I have said that the discretion of the Master is full and absolute and cannot be interfered with by this court. **But suppose this court is of the opinion that the Master is wrong, which I do not suggest, should the court – for his future guidance – point out where it thinks he erred? I do not think that the court is called upon to do so, and by laying down any legal proposition for the future guidance of the Master it would indirectly interfere with his absolute discretion.** And, even if that mode of instructing the Master were proper, it would, in my opinion, be utterly futile, considering the infinite variety of circumstances under which applications of this sort come before the Master."*(emphasis added)

[50] As Bands J in *Ncelelezi*⁸ stated at paragraph [18]: -

"It is axiomatic that the right to review an appointment by the Master in terms of section 95 of the Administration of Estates Act is a statutory recordal of such right and provides no independent grounds of review apart from those contained in the Promotion of Administration Justice Act, 3 of 2000 or, to the extent applicable, the

⁸ *Ncelelezi v Master of the High Court Mthatha and Others* 2023 JDR 3510 (ECM).

common law."

POINT IN LIMINE

[51] One of the first things to be established when adjudicating a litigious matter is whether the party initiating the proceedings has the necessary *locus standi*.⁹ Insofar as the first applicant is concerned, her *locus standi* is derived from the letters of authority issued by the Master. As already stated, the legitimacy of these letters of authority is not disputed, and I accordingly find that the first applicant had the necessary *locus standi* to bring the application. As far as the second applicant is concerned, she clearly has an interest in the proceedings and it is only right, therefore, that the first applicant cited her as a party.

[52] As was stated in *Booyesen and Others v Booyesen and Others*:¹⁰ -

"In regard to the legal status of both the deceased estate and the executor, the deceased estate is not a separate persona, but the executor is such person for the purposes of the estate and in whom the assets and the liabilities temporarily reside in a representative capacity. The executor only, has locus standi to sue or to be sued."

[53] Accordingly, it can hardly be argued on behalf of the Master that the first applicant does not have the requisite *locus standi*. The point *in limine* is therefore dismissed.

⁹ *Four Wheel Drive Accessory Distributors CC v Leshni Rattan N.O.* 2019 (3) SA 451 (SCA).
¹⁰ 2012 (2) SA 38 (GSJ).

DELIBERATION ON THE MERITS

[54] The issue therefore to be determined in this matter is whether on the common cause facts the applicants are entitled to the relief sought in terms of section 95 of the ADA.

[55] It is then therefore appropriate at this juncture to indicate that nowhere in the founding papers does one find any particular reference to grounds of review relied upon by the applicants in relation to the relief sought other than referring to the Master's decision to transfer the funds to the Guardians Fund as an impugned decision.

[56] Having said that, however, it is quite clear that the Master requires specific information before it can reconsider the second applicant's claim to the funds. However, it can certainly not be argued by the applicants that the Master's decision was taken arbitrarily, capriciously and/or irrationally. Even if such an allegations was made, I do not find any supporting facts.

[57] The remotest case made out by the applicants is perhaps that the Master acted procedurally unfair in not having afforded the beneficiary a further opportunity to amplify the information required in the manner suggested now only by the Master in the answering papers and in the report. In this regard it is telling that although the Master refused to reconsider its decision to transfer the funds to the Guardians Fund, the second letters of authority issued to the executrix remains extant.

[58] In *Nel and Another N.N.O. v The Master*¹¹ the SCA held as follows: -

"[22] South African courts have long accepted that the review envisaged by section 151 of the Insolvency Act is the 'third type of review' identified more than 100 years ago in Johannesburg Consolidated Investment Co v Johannesburg Town Council, i.e. where Parliament confers a statutory power or review upon the court. In the Johannesburg Consolidated Investments Co case, Innes CJ stated, with reference to this kind of review, that a court could enter upon and decide the matter de novo. It possesses not only the powers of the court of review in the legal sense, but it has the functions of a court of appeal with the additional privileges of being able, after setting aside the decision arrived at, to deal with the matter upon fresh evidence.

[23] Thus, when engaged in this third kind of review, the court has powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred. However, while it is sometimes stated that the court's powers under this kind of review are 'unlimited' or 'unrestricted' this is not entirely correct. The precise extent of any 'statutory review' must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review. A statutory power of review may be wider than the 'ordinary' judicial review of administrative action (the 'second type of review' identified by Innes CJ in the Johannesburg Consolidated Investment Co case), so that it combines aspects of both review and appeal, that it may also be narrower, 'with the court being confined to particular grounds of review or particular

¹¹ *Nel and Another N.N.O. v The Master (Absa Bank Ltd and others intervening)* 2005 (1) SA 276 (SCA) at paragraphs [22] and [23].

remedies'."

[59] A court faced with the current application, therefore has a wider discretion. In my view it would serve no purpose to simply dismiss the application because the grounds for review have not been set out succinctly and clearly. It would not be in the best interests of the deceased estate either as it would not put an end to the litigation and would unnecessarily mulct the deceased estate in unnecessary costs.

[60] As already stated, it is quite clear to this court and to the Master what case the Master was called upon to meet. Having considered the facts and the version of the Master, I am unable to find that it acted with any *mala fides* in directing the financial institution to have the funds transferred into the Guardians Fund. The Master oversee all deceases estates and is statutory obligated to preserve the interests of beneficiaries. I accordingly find that the Master acted prudently and reasonably and that its action to have the funds so transferred is not reviewable.

[61] It is not clear whether the second applicant was specifically advised, as was done in the answering affidavit, what additional information was required. It also is not the Master's or the second applicant's case that the second applicant was unable to. It seems that the second applicant took the view, perhaps a little prematurely, that the Master as not going to be satisfied with whatever information is required and therefore decided to approach this Court.

[62] What is clear is that the Master requires more corroboratory information

regarding the second applicant's status as beneficiary. It is incumbent that she provides such information to the Master in order to satisfy the Master that she is entitled to the funds. Accordingly, I intend to grant an order that the second applicant be given a further opportunity to supplement the information and submit it to the Master for consideration. Should the Master still decline to release the funds to the applicants for whatever reason, justified or not, the applicant would then be entitled to approach this court for appropriate relief, on papers duly supplemented.

COSTS

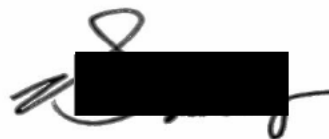
[63] I do not intend to grant a costs order against either of the parties at this stage. In my view the applicants and the Master are equally to blame for the current dilemma the parties find themselves in.

ORDER

I accordingly grant an order in the following terms: -

1. The application is postponed *sine die*.
2. The first applicant in her capacity as executrix shall submit on behalf of the second applicant a new and updated next of kin affidavit, duly completed and commissioned and, as required by the Master, shall include information to establish a link between the deceased and the second applicant to a common ancestor, preferably parents or a parent by blood, or if this is not possible, by way of corroborating evidence from other family members.

3. The next of kin affidavit and corroborating evidence referred to in paragraph 2 of this order, shall be furnished to the Master, within 20 (twenty) days of granting of this order.
4. The Master is requested and directed to consider the next of kin affidavit and information submitted by the first applicant on behalf of the second applicant and shall make its decision whether or not to admit that second applicant's claim as sole beneficiary, and its reasons therefore, known to the applicant within 20 (twenty) days of receipt of the next of kin affidavit and information.
5. Should the Master reject the second applicant's claim as beneficiary, and should the applicants wish to review such decision, the applicants are granted leave to supplement their founding papers, whereafter the Master shall be entitled to supplement its answering papers.
6. Each party shall pay it's/her own costs.



F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 20 April 2023

DATE OF JUDGMENT: 8 January 2024

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