IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

NOT REPORTABLE
Case No.: 1069/2024

In the matter between:

ADEL DOREEN McQUARRIE N O **(ESTATE: ALEXANDER MORRISON BELL)**	Applicant
and	
THE MASTER OF THE HIGH COURT, GQEBERHA	First Respondent
JAN HENDRIK NEL	Second Respondent
HEIDI SWART	Third Respondent
ADEL DOREEN McQUARRIE NO **(THE BELL FAMILY WILL TRUST: MT 2899/2020)**	Fourth Respondent
MARINDA CHRISTINA SUTHERLAND N O **(THE BELL FAMILY WILL TRUST: MT 2899/2020)**	Fifth Respondent

JUDGMENT

EKSTEEN J:

[1] This matter arises from the administration of the deceased estate (the estate) of Alexander Morrison Bell (the deceased). Friction between certain of the heirs (the second respondent, Jan Hendrik Nel, and the third respondent, Heidi Swart) and the applicant, the testamentary executrix in the estate, prompted a request to the first respondent, the Master of the High Court, Gqeberha, for the removal of the executrix from office. Ultimately, on 14 February 2024, the Master advised the executrix that she had failed to satisfactorily perform the duties imposed upon her by the Administration of Estates Act (the Act)[1], as requested by him in two query sheets. Accordingly, he gave notice in terms of s 54(2) of the Act that he intended, in terms of s 54(1)(b)(v) of the Act, to remove her as executrix in the estate (the removal notice), unless she applied to court within 30 days from the date of notice to restrain him from doing so.[2] Hence the application.

[2] The executrix in her notice of motion, sought an order that the Master be restrained and interdicted from removing her as executrix in the estate. In the alternative, in the event that he has already elected to remove her from her office, she

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[1] Act 66 of 1965.

[2] The material portion of s 54 read:

'(1) An executor may at any time be removed from his office-

(a) …

(b) by the Master-

(i) …

(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

...

(2) Before removing an executor from his office under subparagraph … (v) of paragraph (b) of sub-section (1), the Master shall forward to him by registered post a notice setting forth 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.' The executrix has contended that the removal notice had not been forwarded to her by registered mail and that the notice was, accordingly, of no force or effect. By virtue of the decision to which I have come it is not necessary to consider this argument.

sought an order that such decision or ruling be set aside. The Master did not enter an appearance to defend, but Mr Nel and Ms Swart, being the disgruntled heirs, opposed the application.

Background

[3] During his life the deceased had been married to one S Bell and they had jointly owned an immovable property in Jeffreys Bay, each owning one half share. Ms S Bell died shortly before the deceased and the applicant was eventually appointed the executrix of her estate, too. She had bequeathed her half share of the property to the deceased. However, her estate had not been finalised, and letters of executorship had not been issued to the executrix at the time that the deceased died on 18 April 2018. As I have said, in his will the deceased appointed the applicant as the executrix of his estate. He bequeathed one third of his estate in equal shares to two grandchildren born from his stepson, Phillip John Nel (Phillip Nel), to be held in trust. They are represented in these proceedings by the trustees of the *mortis causa* trust created for them for this purpose, namely, the Bell Family Will Trust (the trust). The deceased bequeathed the remaining two thirds of his estate equally to his other two stepchildren, Mr Nel and Ms Swart.

[4] On 27 September 2018, pursuant to the last will and testament, the Master issued letters of executorship in the estate to the applicant, but not in respect of the estate S Bell. These letters of executorship in the estate S Bell were only issued in 2023. I shall revert to this issue. Although she is a qualified, but non-practicing, attorney the executrix chose to appoint one Van Jaarsveld, of the Fiduciary Institute of South Africa, as her agent (the first agent). He passed away in December 2020 after he had done considerable work on the administration of the estate. He had prepared a liquidation and distribution account (L & D account), dated 7 November 2019, which was presented to the Master in November 2019 and the heirs were updated in this regard in December 2019. The 2019 L & D account was examined by the Master and, on 8 January 2020, he issued a query sheet (the 2020 query), in which he raised a number

of matters that required further attention, including a directive that the trust had to be created for the benefit of the two grandchildren of the deceased, as provided for in the will. He also directed the executrix to provide certain supporting documents. As I have said, the first agent passed away before the estate had been finalised and before he had responded to the Master's query. Much of the work which he had done had been recorded and stored on his computer and could not be retrieved, which gave rise to further delay in the administration of the estate.

[5] In January 2021, the applicant appointed one Van Ryneveld, (the second agent) to assist her in the administration of the estate. His progress in the administration of the estate was equally slow, and the heirs became unhappy. On 21 February 2023 Mr Nel, acting on behalf of the heirs, requested the Master to remove the executrix in terms of s 54 of the Act. The complaint was forwarded to the applicant for her response and, after obtaining an extension, she responded on 26 May 2023 and provided 1329 pages of supporting documentation which reflected the chronology of the activities of her agents in their endeavour to bring the estate to finality. The chronology reflects the frustration that the second agent experienced with the inefficiency of the Masters' office, particularly during the period when Covid 19 restrictions were imposed, in respect of a number of issues that caused delay in the progress of the administration. These related, amongst others, to the appointment of trustees in the trust, the approval of the sale of the property and the issue of letters of executorship in the estate S Bell.

[6] In the interim, on 18 April 2023, the second agent lodged another L & D account. The Master examined the 2023 L & D account, and, on 2 May 2023, he issued a fresh query sheet (the 2023 query) raising similar issues to those in the 2020 query. It is apparent from the 2023 query that the second L & D account did not address the issues raised in the 2020 query and the supporting documentation had not been provided.

[7] On 9 August 2023 the second agent emailed the required response to the query sheet dated 2 May 2023 and attached thereto an amended L & D account. The Master was unwilling to accept the amended account because it had been forwarded to him by

email. The Master did not examine the account, and no query sheet was issued pursuant thereto because, so the Master contended, the original had not been lodged. Accordingly, on 11 September 2023, the second agent lodged the correspondence previously emailed to the Master in their original form. Again, the Master declined to issue a query sheet and contended that 'no original certificate by the executrix' was submitted. Nevertheless, the Master examined the amended L & D account.

[8] In the removal notice the Master recorded that the had required proof in the 2020 query of the publication of a notice in terms of s 29(1) of the Act calling upon persons having claims against the estate to lodge such claims with him.[3] In the amended L & D account the Master noted that an advertisement in terms of s 29 had been lodged in the Business Day and the Government Gazette on 30 June 2023, more than three years after the dispatch of the 2020 query. He noted further that he had requested vouchers in respect of certain claims against the estate made by Mr Nel and Phillip Nel and that an affidavit be provided in respect of claims made by Mr Nel in respect of expenses which he had incurred on behalf of the estate. These remained outstanding. These matters had been addressed in the response of the executrix to the complaints of the heirs and the request for the removal of the executrix to which I have referred earlier. The executrix had contended that Mr Nel was retarding progress, and he refused to provide the necessary vouchers and affidavit. He contended that same had been provided to the first agent in 2019 and the executrix ought to have them. The Master, too, considered that the executrix ought to have been in possession of these vouchers when the first L & D account was drafted.

[9] Accordingly, in his notice of removal, the Master concluded that the executrix had clearly failed to comply satisfactorily with the duties imposed upon her by the Act or his

[3] Section 29(1) provides: 'Every executor shall, as soon as may be after letters of executorship have been granted to him, cause a notice to be published in the *Gazette* and in one or more newspapers circulating in the district in which the deceased ordinarily resided at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he so resided in any other district, also in one or more newspapers circulating in that other district, …, calling upon all persons having claims against his estate to lodge such claims with the executor within such period (not being less than thirty days or more than three months) from the date of the latest publication of the notice as may be specified therein.'

lawful requests. In doing so he relied primarily on the failure to have published the advertisement required in terms of s 29(1) timeously and her failure to respond to the 2020 query or to address the issues raised therein when the second L & D account was lodged. He recorded further that certain of his requests, notably the vouchers to which I have referred, had still not been complied with.

Nature of the application.

[10] I have set out earlier the relief sought in the notice of motion. Mr *Costa*, who appeared on behalf of the executrix, argued that the Master has taken no further steps to remove the applicant as executrix following the notice of removal and submitted, accordingly, that there was no need for the alternative relief. He focused the argument on the interdictory relief. Ms *Ellis,* on behalf of Mr Nel and Ms Swart, similarly, approached the matter as an interdict and submitted that the application should be dismissed as the applicant had failed to demonstrate a clear right to continue as executrix.

[11] The approach cannot be sustained. In *Oberholster*[4] the Full Court, in Gauteng, emphasised that it was wrong to approach the matter as if it were an interdict. Indeed, it seems to me, that save for exceptional matters where the Master may have misconstrued the true facts, an executrix would be hard pressed to demonstrate a clear right. Thus, in *Oberholster*, the court explained that the application was one requiring the court to decide whether it was 'undesirable' for the executor to continue in his position. I do not think that this categorisation adequately explains the nature of the application either.

[12] The provisions of s 54 of the Act were recorded earlier.[5] In interpreting the provisions of the legislation the language used should be considered in the context in which the relevant provisions appear, with due regard to the apparent purpose to which

[4] *Oberholster NO and Others v Richter* [2013] 3 All SA 205 [GNP].
[5] Fn 2

it is directed.[6] In addition, all statutory provisions should be interpreted consistently with the Constitution.[7]

[13] Section 54(1)(b)(v) confers on the Master the authority to remove the executrix from office if she fails to perform her duties satisfactorily. Once he has taken a decision in this respect and given notice in terms of s 54(1)(b), his decision is final, and he is *functus officio*[8]. Accordingly, the Master has already elected to remove the executrix from office. The effect of s 54(2) is simply that the Master may not implement his decision for 30 days, so as to permit the executrix an opportunity to challenge his decision. However, his decision constitutes administrative action[9], as envisaged in the promotion of Administrative Justice Act, 3 of 2000 (the PAJA).[10] As such, the decision of the Master is valid and it stands until it is reviewed and set aside.[11] It follows that interdictory relief can only be granted if the decision of the Master is first reviewed and set aside.

[14] Generally, the PAJA is the appropriate route for the review of administrative action. However, where the legislature has conferred on a court a statutory power of review of conduct which constitutes administrative action, a party may choose whether to proceed under the PAJA, or under the special statutory review.[12] Section 95 of the Act provides for such a special statutory review[13]. Where the statutory provision is silent in

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[6] *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[7] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.
[8] *Levinson NO v Master of the High Court and Others* (A5032/2019)[2020] ZAGPJHC 254 (16 October 2020) para 28; and *Coetzer and Another v De Kock NNO and Others* 1976 (1) SA 351(O) at 359C-H.
[9] *Nel and Another NNO v The Master (Absa Bank Ltd and Others Intervening)* 2005 (1) SA 276 (SCA) para 28. (The decision in *Nel* concerned a statutory review in terms of s 151 of the Insolvency Act, 24 of 1936); and *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper NO* 2018 (4) SA 71 para 42 and 43.
[10] Material portion of s (1) of the PAJA defines 'administrative action to mean 'any decision taken … by
(a) an organ of State, when-
(i) …
(ii) exercising a public power or performing a public function in terms of any legislation; … which adversely affects the rights of any person and which has a direct, external legal effect ….'
[11] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26.
[12] *Hoexter and Penfold: Administrative Law in South Africa* (3rd ed) at 154.
[13] Section 95, as it was at the time, provided: 'Every appointment by the Master of an executor …, and every decision, ruling, order, direction … 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

respect of the grounds of review the grounds set out in the PAJA apply. [14] Thus, it seems to me that the application referred to in s 54(2), interpreted in its context, consistently with s 33 of the Constitution, is simply a review as provided for in s 95 of the Act. Accordingly, I intend to approach the matter, rather as a review of the Master's decision.

[15] A special statutory review of the kind envisaged in s 95 has been categorised as the third kind of review identified by Innes CJ in *Johannesburg Consolidated Investment Co.,*[15] being a proceeding in which the court may enter upon and decide the matter *de novo*, exercising not only the powers of a court of review in a legal sense but also having the functions of a court of appeal and enjoying the additional privilege of being able, after setting aside the decision arrived at by the decision maker, to deal with the whole matter upon fresh evidence as if it were the decision maker of first instance.[16] The precise extent of any 'statutory review type power' must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or the body making the decision under review.[17] The exercise of the power afforded the Master in s 54(1)(b)(v) of the Act is governed by expressly identified objective criteria. A decision to remove an executor in terms of the section requires a finding by the Master (i) that the executrix has failed to perform satisfactorily any duty imposed upon her by or under the Act, or to comply with any lawful request of the Master, and (ii) assuming an affirmative finding on (i), a decision whether the removal is an appropriate and proportionate consequence in the circumstances.[18] In respect of the second requirement Binns-Ward J noted in *Van Zyl* that 'the Master (is)

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any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction … as the case may be.'

[14] *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007(6) SA 4 (CC) at para 37.

[15] *Johannesburg Consolidated Investment Co. v Johannesburg Town Council 1903* TS 111.

[16] *Cooper NO v South African Mutual Life Assurance Society and Others* [2000] ZASCA 64 para 11; and *Nel* para 22.

[17] *Nel* para 23.

[18] *Master of the High Court Western Cape Division, Cape Town v Van Zyl* [2019] 2 All SA 442 (WCC) para 12. (*Van Zyl* concerned the remover of a liquidator in terms of s 379(1) and (b) of the 1973 Companies Act.) See also *Meyerowitz on Administration of Estates* and their taxation (2023 ed) at 125, in respect of executors.

obliged to acknowledge and respect the recognition by the courts that the removal of a liquidator is an "extreme step"[19], and must weigh why, in the context, the other (less extreme) remedies provided in the Act to deal with shortcomings in the liquidator's conduct would not suffice.' These considerations find equal application to the removal of a testamentary executrix.[20]

Discussion

[16] Much was made in the extensive papers about the overall delay in the finalisation of the estate. It is indisputable that the effect of the Covid 19 pandemic and the consequent lockdown in South Africa in 2020 hampered the activities of all government departments, including the office of the Master. The response of the executrix to the complaint by Mr Nel demonstrates ongoing endeavours by the agents of the executrix in obtaining necessary information and actions from the office of the Master, in particular relating to the appointment of trustees for the trust.

[17] As I have said, one half of the property jointly owned by the deceased and estate S Bell remained registered in the name of S Bell and had first to be transferred to the estate before it could be dealt with in the estate. The letters of executorship in the estate S Bell were only issued in 2023 and the Master, in his notice of removal, acknowledged this failure. This inevitably would have delayed the finalisation of the deceased estate. Notwithstanding these explanations, the undue delay in the administration of the estate is indisputable. For example, no explanation at all has been provided for the first agent's failure to have perused the establishment of the trust before the first L & D account was prepared. Numerous acrimonious disputes that further delayed progress between the disgruntled heirs and the executrix in respect of the sale and transfer of the property. Accusations and counter accusations endured for

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[19] See *Standard Bank of South Africa v The Master of the High Court and Others* 2010 (4) SA 405 (SCA) at para 135; *Ma-Africa Groep Belange (Pty) Ltd and Another v Millman and Powell NNO and Another* 1997 (1) SA 547 (C) at 666.

[20] *Gowar and Another v Gowar and Others* 2016 (5) SA 225 (SCA) at para 30, in the context of a removal of a trustee; and *Volkwyn NO v Clark & Demant* 1946 WLD 456 at 464.

many months. However, by virtue of the conclusion to which I have come it is not necessary to enter into these disputes.

[18] Suffice it to say that delay is not the only complaint raised by the Master. I have referred earlier to the grounds set out in the removal notice issued by the Master. In the 2020 query sheet he requested proof of the s 29 notice. The request was repeated in the 2023 query sheet and the s 29 notice was eventually published on 30 June 2023. Section 29 requires the notice be published 'as soon as may be after letters of executorship have been granted.'[21] It is one of the first steps which an executor is required to take in the administration of the estate and the notice calls upon all persons having claims against the estate to lodge such claims with the executor within a period specified in the notice. In terms of s 35 of the Act the executor is required to submit an L & D account to the Master 'as soon as may be' after the last day specified in s 29(1), but within six months after the letters of executorship have been granted to him.[22] An L & D account cannot be prepared without first determining the liabilities of the estate. As adumbrated earlier the first L & D account was submitted on 7 November 2019, more than a year after the letters of executorship had been granted to the executrix. Thereafter, the 2020 query sheet was issued and more than three years passed from the date of the query sheet to the publication of the advertisement.

[19] The executrix has tendered no explanation for the delay in publishing the advertisement which occurred under the first agent, nor has any explanation been offered for the further extensive delay under the second agent in this regard.

[20] Mr *Costa* contended that it was not open to the Master to rely on these failures because, on his own account, the advertisement had already been placed when he issued the removal notice. I do not think that the submission is sound in respect of the first step on the enquiry. As I have demonstrated above there has been a gross dereliction of duty in respect of s 29 of the Act and I think that the Master is entitled to

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[21] The provisions of s 29 are set out in fn 3.
[22] Unless the Master has granted a special extension in terms of s 35(1)(b).

expect of the executrix to perform her functions in terms of the Act. He should not be criticised for removing an executrix if he is satisfied that she has failed to perform her functions satisfactorily, unless he can be reasonably confident that she will live up to those requirements in the future.

[21] That brings me to the second step of the enquiry, whether the removal of the executrix is an appropriate and proportional consequence in the circumstances. Many of the issues that lay at the heart of the delays had been resolved prior to the notice of removal. The trust had been established, the trustees appointed, the disputes relating to the sale and transfer of the immovable property had been resolved and the Master had approved the transfer of the property in terms of s 42(2) of the Act.[23] At the time that the application was argued the property had already been transferred. An amended L & D account had been lodged in August 2023 and the only issues outstanding in order to finalise the estate, as recorded in the notice of removal, were certain vouchers in respect of personal loans in favour of Mr Nel and Phillip Nel and an investment, and an affidavit in respect of expenses paid by Mr Nel on behalf of the estate. These, the Master considered, ought to have been in possession of the executrix before the first L & D account had been prepared. I accept, for purposes of this judgment that the Master is correct in this contention, but it is not disputed that Mr Nel is in a position to re-submit these vouchers.

[22] The question which arises is whether, in these circumstances, the removal of the executrix is an appropriate and proportionate consequence of her failure. In *Pharmaceutical Manufacturers*[24] Chaskalson P held that the Constitution required that the exercise of public power must be objectively rational. He said:

> [85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be

[23] Section 42(2) provides: 'An executor who desires to effect transfer of any immovable property in pursuance of a sale shall lodge with the registration officer, in addition to any such other deed or document, a certificate by the Master that no objection to such transfer exists.'
[24] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) paras 85-86.

rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. …

[23] The powers given to the Master in terms of the Act are solely for the protection of the interests of creditors, heirs, legatees, and all other persons having a claim upon an estate.[25] Thus, generally an executrix should not be removed from office unless her continuance in office will prevent the estate being properly administered or will be detrimental to the welfare of beneficiaries.[26] There is no case made out for the dishonesty of the executrix in the administration of the estate and the complaint centres essentially on the inordinate delay which has occurred. I have no doubt that her conduct has fallen short of the ideal, which justified the Master's conclusion that she had not performed her function satisfactorily. However, the removal of a testamentary executrix, who the deceased had selected to carry out his wishes, constitutes an extreme step. In *Volkwyn*[27] the court noted:

> 'Even if the …administrator had acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicate that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate … .'

[24] Once an estate has been administered for a substantial period there may almost always be criticism of the conduct of the executrix, in the sense that there would be

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[25] *Wessels v The Master of the High Court* (1892) 9 SC 18.
[26] *Gowar and Another* para 28.
[27] At p. 464.

things that could have been done better or things that could have been done earlier. It is easy for lawyers, who have not been involved in the administration of the particular estate, to say, with the benefit and wisdom of hindsight, how they could have done better. But the Master has to bear in mind that in almost any case where he elects to remove an executor from office, and replaces him with another, there will be undesirable consequences in terms of costs and in terms of delay.[28] In this case, as I have said, the estate is, for practical purposes, finalised. What remains outstanding is in the possession and control of Mr Nel. It may be that he had previously provided these vouchers to the first agent and the executrix ought to have been in possession of the vouchers at the time when the first L & D account was rendered. That does not detract from the fact that the estate is all but finalised and the removal of the executrix and the appointment of a new executor would inevitably give rise to further delays. A new executor, too, would be required to assess the existing amended L & D account and all the supporting documentation to satisfy himself as to the correctness thereof in order to sign an executor's certificate.[29] He, too, would be required to obtain new copies of the vouchers from Mr Nel, which he has been reluctant to give. Nothing could be gained by the removal of the executrix at this stage of proceedings and the papers do not demonstrate any risk to the heirs or legatees going forward.

[25] To the extent that reliance has been placed on historic delays, including the s 29 advertisement, it is significant that the Master has not sought to compel the executrix to comply with any provision of the Act or reasonable requests, which he could have done in terms of the powers vested in him under s 36 of the Act. For these reasons the decision of the Master to remove the executrix from office is not rationally connected to the purpose of the power vested in him in s 54 of the Act, and it was not, at the time that it was taken an appropriate consequence of her failure.

[26] The following order is made:

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[28] *AMP Music Box Enterprises Limited v Hoffman* [2003] 1 BCLC 319 at para 27, quoted with approval in *Van Zyl* at p. 452-453.
[29] Regulation 5(1)(i).

1. The decision of the Master in terms of s 54(1)(b)(v) to remove the applicant as executrix in the Estate Late Alexander Morrison Bell (2899/2018) is reviewed and set aside.

2. The first respondent is restrained from removing the applicant as executrix in the estate.

3. The second and third respondents are ordered to pay the costs of the application, jointly and severally, including the costs of two counsel on scale B.

J W EKSTEEN
JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv M Costa & Adv Z Minty
Instructed by: Reenen van Reenen Inc
c/o Goldberg & De Villiers Inc
GQEBERHA

For 2nd & 3rd
Respondents: Adv L Ellis
Instructed by: Muller & Co Attorneys
c/o AUKETT ATTORNEYS
GQEBERHA

Date Heard: 31 October 2024
Date Delivered: 4 February 2025