

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

CASE NO: 2023-119339

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
10 June 2025

In the matter between:

ADELE FERMOYLE N.O

Applicant

(In her capacity as executor for the late estate:

JOHN PATRICK SMITH, estate no: 9051/2023)

and

10X INVESTMENTS (PTY) LTD

First Respondent

SHAUN BOWIE

Second Respondent

GUARDRISK LIFE LIMITED

Third Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Fourth Respondent

JUDGMENT

WATT-PRINGLE AJ:

[1] In this matter I have decided to refer certain discrete issues to the hearing of oral evidence. Counsel were helpful in assisting in formulating the terms of the order set out below, for which I am grateful.

[2] Although counsel for the second respondent submitted that the dispute of fact was foreseeable and for that reason the Court should not assist the applicant in this manner, my reasons for referring the matter to evidence are explained below. I deliberately deal with facts in vague terms as I am still seized with the matter and I have not heard full argument on the papers before me, save in relation to the need to refer the matter for oral evidence.

[3] The applicant seeks a declaratory order to the effect that the nomination of the second respondent to the proceeds of her deceased brother's living annuity investment is not valid and that those proceeds fall to be paid to his deceased estate. The applicant is the executor of the estate.

[4] Prior to this application being launched, the first respondent (10X Investments) had indicated that it intended to accept as valid the nomination of the second respondent. For that reason, 10X Investments was cited as first respondent and second respondent was cited by virtue of the obvious interest that he has in the outcome of this matter.

[5] In broad terms, the applicant's case is that according to documents produced by 10X Investments in response to a PAIA request and certain correspondence between the applicant and 10X Investments, the contested nomination was made using a one-time password (OTP) transmitted to a mobile telephone number which was not at the relevant time being used by the deceased, and moreover that the portal administered by 10X Investments on which the nomination was made was last accessed after the death of the deceased, using the same process involving an OTP sent to the same mobile number.

[6] Whereas the initial nomination only described the beneficiary by first name, this was subsequently amended to provide the second respondent's full name.

[7] For these and other reasons I need not canvas at this stage, the applicant formed the view that the purported nomination did not represent the wishes of the deceased.

[8] For his part the second respondent did not profess to know how the 10X Investments portal could be accessed, or how it was in fact accessed, but denied that he was in any way involved in accessing the portal.

[9] It seems that there are facts central to a proper determination of this matter that fall exclusively within the knowledge of 10X Investments.

[10] The applicant appears to have regarded the dispute as one principally between her and 10X Investments, albeit recognising the second respondent's interest in the matter. Had 10X Investments either opposed the matter, or put up an affidavit explaining why it is content to accept the nomination of the second respondent despite the questions to which its own documentation and communications to the applicant give rise, it is likely that the Court would have been in a position to deal with this matter on paper without further delay. But since 10X Investments declined to do so and the second respondent opposed the matter, the inadmissibility as against the second respondent of the contents of the 10X Investments documents referred to above, made it impossible for the Court to grant the declaratory order on the papers as they stand.

[11] The Court was however no more satisfied of the alleged validity of the nomination than it was of its alleged invalidity and consequently the application cannot properly be decided on affidavit. A referral to evidence will *inter alia* facilitate the procurement of admissible evidence from 10X Investments, with a view to resolving disputes of fact and ensuring a just and expeditious decision.

[12] 10X Investments had a contractual relationship with the deceased. Part of that bargain was that it would pay the death benefit to his nominee, and absent any valid nomination of a beneficiary, to his estate. 10X Investments held the investment not for its own benefit, but for the benefit of the deceased and in the event of his death, on the basis that 10X Investments would posthumously honour his wishes.

[13] In my view, 10X Investments would have exemplified its role of fiduciary of the deceased's investment had it either opposed this application, or, not being in any way obliged to join issue, delivered an affidavit the purpose of which would have been to assist the Court to understand how its internal documents are to be understood, whether the nomination was made using a specific mobile phone (as alleged by the applicant) whether there was an alternative method which could have been utilised to make the nomination, and if so, whether its system contains a reliable record of how it was in fact accessed. It is possible that a just and definitive outcome would then have been achieved without the need for further costs to the parties and further use of judicial resources.

[14] I accept that 10X Investments may have cogent reasons as to why it declined altogether to become involved in the dispute, but consider that in general, that kind of assistance in this and analogous circumstances would aid the cause of a just and expeditious outcome to proceedings such as the present. For that reason and because the order below makes provision for 10X Investments to make discovery, I will direct that the applicant's attorneys are to deliver by email a copy of this judgment to 10X Investments.

[15] The order set out below contemplates that the evidence of 10X Investments be obtained, whether with its cooperation or under subpoena.

[16] In the circumstances, I make the following order:

1. The matter is referred for the hearing of oral evidence, before me, on a date and time to be arranged with the Registrar, on the following issues:
 - 1.1 possible methods by which the deceased's 10X Investments portal could have been accessed for purposes of making a beneficiary nomination over the period May to November 2022 (the period);
 - 1.2 the occasions and manner in which the deceased's 10X Investments portal was in fact accessed during the period;
 - 1.3 whether the use of cell phone number: 0[...] was necessary to access the 10X Investments profile on the occasions on which it was accessed during the period; and
 - 1.4 whether the deceased, or any other person had access to and/or the use of cell phone number: 0[...] during the period.

2. 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 paragraph 3 hereof.
3. Save in the case of the applicant and the second respondent, neither party shall be entitled to call any witness unless:
 - 3.1 it has served on the other party at least 14 days before the date appointed for the hearing (in the case of a witness to be called by the applicant) and at least 10 days before such date (in the case of a witness to be called by the second respondent, or any other respondent who wishes to adduce evidence), a statement wherein the evidence to be given in chief by such person is set out; or
 - 3.2 the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of their evidence.
4. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.
5. The fact that a party has served a statement in terms of paragraph 3 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.
6. Within 21 days of the making of this order, each of the parties inclusive of the first respondent but not the third or fourth respondents, shall make discovery, on oath, of all documents relating to the issues referred to in paragraph 1 thereof, which are or have at any time been in the possession or under the control of such party.
7. Such discovery shall be made in accordance with Uniform Rule of Court 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.
8. The applicant's attorneys are directed to serve a copy of this judgment on the first respondent, by email.
9. Costs are reserved.

**BY THE COURT
REGISTRAR**

**CE WATT-PRINGLE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 June 2025.

Date of hearing: 29 May 2025

Date of judgment: 10 June 2025

Appearances

Counsel for the applicant: Kerry Howard

Instructed by: Vermeulen Attorneys

Counsel for the

second respondent: Thandiwe Ndaba

Instructed by: James Bruwer Attorneys Inc