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**Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Before: The Hon. Mr Acting Justice De Waal

Date of hearing: 8 November 2023

Date of judgment: 10 November 2023

Case No: 3430 / 2022

ALBRECHT JURGEN VALTIN MAX MADELUNG First Applicant

HANS RUDOLF CHRISTIAN HERRMANN MADELUNG Second Applicant

And

THE MASTER OF THE HIGH COURT, CAPE TOWN First Respondent

JURGEN WERNER STUHLINGER N.O. Second Respondent

(in his representative capacity as the executor
of the deceased estate of Ingrid Ilse Madelung,
Master's reference no: 1[...])

ISABEL INGRID GERTRUD MADELUNG Third Respondent

JUDGMENT

DE WAAL AJ:

[1] This matter relates to the administration of the estate of the late Ingrid Ilse Madelung ("the deceased"). The second respondent is the executor of her estate ("the executor"). The applicants and the third respondent are the deceased's children and they stand to benefit from her will in varying degrees as co-heirs.

[2] When the application was launched in April of 2022, the applicants sought the following relief:

2.1. An order declaring that the first interim liquidation and distribution ("L&D") account prepared by the executor ("the Disputed Account") is not a valid account in terms of ss 35(1) and/or 35(2) of the Administration of Estates Act 66 of 1965 ("the Act").

2.2. To the extent that the Court finds that the Disputed Account constitutes a valid account, an order:

2.2.1. setting aside the decision of the first respondent ("the Master") dated 10 March 2022 to refuse to uphold the applicants' objections to that account; and

2.2.2. substituting the Master's refusal with a decision upholding the applicants' objections; directing the executor to amend the Disputed Account in line with the applicants' objections; executing his obligations as the executor of the deceased estate; and preparing a final L&D account, afresh.

[3] An amendment was later effected which clarified that the Disputed Account is

dated 26 October 2021 and that it was advertised for objections on 5 November 2021.

[4] The applicants' main contention is that the Disputed Account is an *interim* account which does not comply with the prescripts of s 35(2) of the Act in that the Master did not issue any directive to the executor to prepare such an account. In other words, the applicants' contention is that the executor does not have the power nor can be unilaterally exercise any discretion to prepare an interim account in the absence of a directive from the Master. Given that there was no direction to prepare the Disputed Account, it is contended to be unlawful and invalid.

[5] In the alternative, and only in the event that it is found that the Disputed Account constitutes a valid account, the applicants' challenged the Master's decision to refuse to uphold their objections.

[6] The executor has opposed the application and the relief sought, essentially arguing that s 35 of the Act does not preclude an executor from preparing and lodging an interim account, even in the absence of a directive from the Master. The executor also brought a counter-application in which he seeks an order that the applicants be directed to sign documents to allow him to access and control funds held in the deceased's UBS Switzerland AG bank and LGT Bank ("the Swiss bank accounts"). The applicants have opposed the counter-application, contending that the executor knew what the Swiss bank accounts contained and did not need access and control over those accounts in order to compile a final L&D account.

[7] The Master and third respondent have elected not to participate in or oppose the application. The Master described her attitude to the application as follows:

"6. The First (Interim) liquidation and distribution account was lodged by

the Second Respondent without our office specifically requesting the Second Respondent to do so. My understanding of Section 35(2) of the Administration of Estates Act 66 of 1965 (as amended) is that the Master "may" direct the executor to lodge an Interim account under the circumstances as provided for in the said section (which implies a discretion) or where the funds are available which ought to be distributed, direct the executor in writing to submit such interim account. The executor already obtained the Master's approval in terms of Section 42(2) for the sale of both properties in 2020 in the deceased estate and there were therefore funds at hand at the time.

7. I have no further facts or information to my disposal that may assist the Honourable Court in its discretion.

8. I have no objection to the application and will abide by the decision of the Honourable Court."

[8] It is not clear from the above whether the Master supports the applicants or the executor.

[9] Shortly before the hearing of the matter there were two developments which considerably narrowed the scope of the dispute.

[10] The first development was that a final L&D Account ("the Final Account") was submitted by the executor to the Master on 24 October 2023, 15 calendar days before the hearing. This led to the applicants' withdrawing the relief sought in respect of the Master's refusal to uphold the objections. The terms of the withdrawal are of some importance: it is stated in the notice of withdrawal that the Final Account "supersedes" the Disputed Account and that the applicants' objections will be raised in respect of the Final Account. This much was common cause at the hearing of the

matter, i.e. the parties agreed that the applications' objections will now be raised in respect of the Final Account and the objections will be decided afresh by the Master.

[11] The second development was that the Final Account includes and deals with the Swiss bank accounts. The applicants then indicated that they will sign the declarations sought in the counter-application which will allow the executor access and control over the Swiss bank accounts. This disposed of the counter-application. The executor accordingly did not persist with the relief sought in the counter-application and there is no need to make any order in respect of that application other than to deal with costs.

[12] What remains then is the relief sought by the applicants in paragraph 1 of the notice of motion, which is a declarator that the Disputed Account was not a valid account as it did not comply with 35(2) of the Act. This is largely a legal question, to be determined with reference to the provisions of the Act. Mr Brink, who appeared for the executor, argued that I should refrain from considering this aspect because granting the declarator sought will have no practical effect. Mr Kantor SC, who appeared with Mr Mauritz for the applicants, contended that the issue was not moot as the Disputed Account would remain alive until declared invalid. He further contended that the legal issue raised was in any event one of importance and that I should, in the exercise of my discretion, decide the issue even if moot.

[13] This makes it necessary to determine, first, whether the declaratory relief in respect of the Disputed Account is moot and if so whether I should nevertheless decide the issue of whether an executor may submit an interim account outside the parameters of s 35(2) of the Act.

Mootness

[14] The parties are *ad idem* that the Final Account *supersedes* the Disputed Account.

[15] This means that a declaration that the latter was invalid can have no practical effect. It is so that the lodgement of the Disputed Account caused the applicants to submit objections and the Master to consider these. But the objections will now be considered afresh when the Final Account is processed. In any event, in her refusal decision of 10 March 2022, comprising of ½ a page and six brief points, the Master did not deal with the merits of the objections. In the circumstances, on the facts of the present matter, the issue of whether the Master was *functus officio* in respect of validity of the objections cannot arise.

[16] For these reasons, the declaratory relief sought, which is that the Disputed Account did not comply with 35(2) of the Act, is indeed moot.

[17] This brings me to the next question, which is whether I should nevertheless decide the legal issue. The issue was fully addressed in the parties' heads of argument and during oral argument.

[18] In *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC), the Constitutional Court held that:

"[15] ... a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.

[19] In subsequent cases, such as *Independent Electoral Commission v Langeberg Municipality*. 2001 (3) SA 925 (CC) para 11 and. more recently, *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Ltd and Another* 2020 (4) SA 409 (CC) paras 46 - 50, the Constitutional Court held that it had a discretion to decide a matter, even though it was moot. The discretion must be exercised according to the interests of justice. Relevant factors in the exercise of its discretion may include the practical effect that any possible order may have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced.¹

[20] I think it is fair to say that, for some time, it was believed that the High Court had a similar discretion to decide a legal point, even if a matter was moot between the parties. That belief was quashed in *Minister of Justice and Others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA) where the SCA held that the discretion to decide a moot matter vests only in the appeal courts:

"[25] ... The appeal court's jurisdiction was exercised because 'a discrete legal issue of public importance arose that would affect matters in the

¹ *Normandien* at para 50:

"[50] Moreover, this court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include -

""

- (a) whether any order which it may make will have some practical effect either on the parties or on others;
- (b) the nature and extent of the practical effect that any possible order might have;
- (c) the importance of the issue;
- (d) the complexity of the issue;
- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving the disputes between different *courts*
- (g)

future and on which the adjudication of this court was required. The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination."

[21] *Stransham-Ford* has been applied by the Full Bench of this Court in *Vinpro NPC v President of the Republic of South Africa and Others* [2021] ZAWCHC 261 (3 December 2021) and thereafter also in *Habitat Council v Cape Town City and Others* 2022 (6) SA 383 (WCC).

[22] I am bound by those decisions and accordingly cannot determine the legal issue raised in the application for declaratory relief. This part of the application had not been withdrawn and accordingly falls to be dismissed on the basis of mootness.

[23] In the result, the only issues to be decided are the costs of the main application and the costs of the counter-application.

Costs

[24] How does a court decide the issue of costs in respect of a matter that became moot? I could find no directly applicable guidance on this issue in reported judgments of the High Court.²

[25] There is a helpful decision of the SCA. In terms of s 16(2)(a) of the Superior Courts Act 10 of 2013, an appeal may be dismissed solely on the basis that a decision would have no practical effect or result. Whether this is so, is determined, save in exceptional circumstances, without reference to any consideration of costs. In *John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in Liq)* 2018 (4) SA 433 (SCA), the SCA (per Rogers AJA, as he then was) held that the costs

² In *Vinpro*, the *Biowatch* principle was applied to the fundamental rights challenge which became moot. That principle is not applicable in the present matter as it is litigation between private parties.

referred to in s 16(2)(a) are the costs in the *court a quo* and not the appellate court. Given that the matter became moot and there were no exceptional circumstances, leave to appeal was refused. The SCA nevertheless went on to consider what to do about the costs of the application to the SCA. The SCA held as follows in respect of these costs:

"[10] ... Where an appeal or proposed appeal has become moot by the time leave to appeal is first sought, it will generally be appropriate to order the appellant or would-be appellant to pay costs, since the proposed appeal was stillborn from the outset. Different considerations apply where the appeal or proposed appeal becomes moot at a later time. The appellant or would-be appellant may consider that the appeal had good merits and that it should not be mulcted in costs for the period up to the date on which the appeal became moot. The other party may hold a different view. As a general rule, litigants and their legal representatives are under a duty, where an appeal or proposed appeal becomes moot during the pendency of appellate proceedings, to contribute to the efficient use of judicial resources by making sensible proposals so that an appellate court's intervention is not needed. If a reasonable proposal by one of the litigants is rejected by the other, this would play an important part in the appropriate costs order. Apart from taking a realistic view on prospects of success, litigants should take into account, among other factors, the extent of the costs already incurred; the additional costs that will be incurred if the appellate proceedings are not promptly terminated; the size of the appeal record; and the likely time it would take an appellate court to form a view on the merits of the moot appeal. There must be a proper sense of proportion when incurring costs and calling upon judicial resources."

[26] In my view this approach can be fruitfully employed in deciding the issue of costs in matters which become moot in the High Court as well. As adjusted, the

considerations would be the following:

26.1. When did the matter become moot? If already moot when the matter was launched, it will generally be appropriate to order the applicant to pay the costs.

26.2. Where the application becomes moot at a later time different considerations apply. The parties are under a duty to make sensible proposals so as to obviate the need for the Court's intervention. If a reasonable proposal is rejected by the other, this would play an important part in determining costs.

26.3. Apart from the prospects of success, litigants and ultimately the Court, should take into account, among other factors, the extent of the costs already incurred; the additional costs that will be incurred if the proceedings are not promptly terminated; the size of the record; and the likely time it would take a Court to form a view on the merits of the moot application.

[27] It is apparent from the above that the merits are not the only consideration to apply. If costs in moot cases had to be decided with reference to the merits only, the policy considerations which militate against Courts deciding moot or academic matters would be undermined.

[28] As stated above, in the present instance, both the main application and the counter- application became moot shortly before the hearing. The main application was only rendered moot when the Final Account was lodged by the executor and it was agreed that the Final Account would supersede the Disputed Account. This occurred shortly before the hearing. The counter-application was rendered moot when the declarations were provided which enabled the executor to gain access and control over the Swiss bank accounts. Again, this was done shortly before the hearing.

[29] Both parties acted sensibly thereafter. The applicants withdrew their challenge to the Master's decision to refuse to uphold their objections and the executor did not pursue the relief sought in the counter-application.

[30] It is so that the applicants persisted with the application for declaratory relief regarding the validity of the Disputed Account. That application however remained alive until it became apparent that the Final Account *superseded* the Disputed Account, which was 2 days before the hearing of the matter. By then the vast majority of the costs would have been incurred. The applicants also persisted with what was largely a legal point which limited preparation and argument. The applicants also believed that this Court had a discretion to decide the point, even though it was moot. The applicants were not alerted by the executor to the *Stransham-Ford* line of cases, which found that no such discretion exists.

[31] None of the above factors are in my view decisive.

[32] There is however another factor which is of importance. In both the main and the counter-application it was the conduct of a party shortly before the hearing, essentially complying with the demand of the other, which rendered the applications moot. This will often be the case in the run-of-the-mill case in the High Court, for example, the occupier leaves before the eviction application is heard; the requested record is provided before the hearing in terms of the Promotion of Access to Information Act 2 of 2000 and so on. In such instances, an analysis of the reasons for that conduct, combined with a cursory analysis of the merits would generally suffice to enable one to make a decision on costs.

[33] Against this background, I now turn to deal separately with the costs in respect of the main application and the counter-application. To the extent that I

deal with the merits, I do so solely for the purpose of arriving at an appropriate order as to costs.

Main application

[34] The Final Account was filed under cover of a short affidavit on 25 October 2023. This was 14 days before the hearing. No explanation was given as to why the Final Account was not filed earlier and particularly why it was not filed when it became apparent that Disputed Account was not moving matters forward because the applicants were disputing the validity of that account on the basis that it contravenes s 35(2) of the Act. It is merely stated in the affidavit supporting the admission of the Final Account that the applicants had been advised at the outset that the Disputed Account would be replaced with a Final Account.

[35] In addition, even a cursory examination reveal that the grounds on which the main application were opposed were weak.

[36] Section 35(1) of the Act provides for and governs one of the primary duties of the executor. This duty is to publish a liquidation and distribution account. The section provides as follows:

"(1) An executor shall, as soon as may be after the last day of the period specified in the notice referred to in section 29 (1), but within-

(a) six months after letters of executorship have been granted to him; or

(b) such further period as the Master may in any case allow,

submit to the Master an account in the prescribed form of the liquidation and

distribution of the estate.,

[37] Interpreted in context, the above "account" (singular) is the final account which is to lay open for inspection and which is ultimately to be used to pay the creditors and distribute the estate among the heirs.

[38] Section 35(2) of the Act then deals with a qualification to the above and makes provision for the submission of an "interim account". Section 35(2) provides as follows:

"The Master may at any time in any case in which he has exercised his powers under paragraph (b) of subsection (1) [to grant an extension of the six months period) or in which an executor has funds in hand which ought, in the opinion of the Master, to be distributed or applied towards the payment of debts, direct the executor in writing to submit to him an interim account in the prescribed form within a period specified.,

[39] The purpose is two-fold: the interim account may be a progress report in cases where an extension had been granted and the Master is concerned about delay; or it may provide the Master with the necessary facts to authorise interim payments of debts or make interim distributions.

[40] The executor contends that it is not necessary for the Master to call for an interim account, in order that one be lodged. In this regard, reference was made to the payment of debts by the executor outside the provisions of the Act and without the consent of the Master. This was sanctioned in *Scoin Trading (Pty) Ltd v Bernstein NO 2011 (2) SA 118 (SCA)* where the SCA held as follows:

"[23] Section 35(12) of the Administration of Estates Act 66 of 1965 obliges an executor to pay creditors and distribute the estate to its heirs only once a

Liquidation and Distribution Account has lain for inspection and has been confirmed by the master. Except for the risk of personal liability if he overpays, it is not unlawful for an executor to pay a creditor's claim before the confirmation of such account."³

[41] The argument was that if the executor can pay a creditor's claim without statutory authority to do so under the Act he can also lodge an interim account without statutory authority.

[42] It is indeed so that the Act itself does not confer a general power to pay debts (at risk of personal liability). In terms of the Act, even the release of money and property to provide for the subsistence of the deceased's family can only be done with the consent of the Master.⁴

[43] Hofmeyr and Paleker in the work *The Law of Succession in South Africa* (2023)⁵ at p. 14 describes executorship as a *sui generis* office, a "special office". The learned authors explain further that the functions, duties and liabilities of an executor is derived from the common law or as set out in the Act.⁶ Thus, despite the Act, the executor has residual common law powers to exercise his fiduciary duties to act in the best interests of the estate and the beneficiaries. For instance, it cannot be expected of the executor to obtain a directive from the Master to ensure that payment is made to insure properties or to pay other undisputed claims where it is clearly in the best interests of the estate to do so.

[44] But such residual common law powers would not in my view extend to the lodgement of an interim account outside of the provisions of s 35(2) read with Regulation 5(4)⁷. The Act, in my view, "covers the field" on the issue of interim

³ See, also, LA Kemick *Administration of Estates and Drafting of Wills* (4 ed) (2006) at 46: "normal procedure is for the executor to pay claims as soon as he has sufficient funds".

⁴ See section 26(1A) of the Act.

⁵ A revision of Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2001).

⁶ This would include payments and distributions "at risk". See p.18 of Hofmeyr and Paleker.

⁷ Administration of Estates: Regulations, GN R473 of 1972 published in GG 3425 of 24 March 1972. This regulation draws a distinction between the contents of final and interim accounts. It

accounts.

[45] The Act itself does not empower the executor to lodge an interim account unless s 35(2) applies. As was contended by Mr Kantor:

45.1. Section 35(2) of the Act confers a discretionary power ("may") upon the Master to direct the executor to prepare an interim account, it does not empower the executor in any respect in the absence of such directive.

45.2. When it comes to interim payments and distributions, the Master must exercise this power when it is in her "opinion" that an interim account is necessary. Plainly, the qualification that the power falls within the "opinion" of the Master must be construed to confer a discretion to the Master and not to the executor. No wording in s 35(2) of Act suggests that a broad power has been conferred on an executor to prepare an interim account on her own accord.

[46] On the facts of this case, a jurisdictional fact had not been satisfied by the executor. He did not obtain a directive from the Master to file the Disputed (interim) Account. Accordingly, the Disputed Account did not comply with the Act. To the extent that a legal label needs to be found for finding the Disputed Account invalid, it would be the principle of legality, which forms part of the Rule of law (s 1 of the Constitution of the Republic of South Africa). The exercise of power must comply with the law and be sourced in the law.⁸

[47] For these reasons the costs of the main application should be borne by the executor. The costs of two counsel is justified.

The counter-claim

provides that the account referred to in s 35(2) of the Act shall, in so far as it is appropriate, contain the particulars referred to in subregulation (1) and (2). No provision is made for interim account falling outside of s 35(2).

⁸ *Minister for Justice & Constitutional Development v Chanco* 2010(4) SA 82 (CC) para 27.

[48] The applicants opposed the counterapplication and filed an answer to it. Essentially, they denied that the executor needed to access the bank accounts in Switzerland to prepare the Final Account because a certain Mr Zimmerman had advised the executor what the balances in the accounts were, and he could therefore account for them.

[49] The executor filed a brief reply in the counterapplication. He made the point that simply being told what the accounts' balances were does not enable him to comply with his duties as executor.

[50] In my view executor's decision to bring the counter-application was justified. As he explained, the applicants wrote to the Swiss banks disputing his appointment as executor. The result was that the accounts held at those Swiss banks in the name of the deceased were frozen, and he was unable to take any further steps with regard to the accounts. The executor explained further that he has received advice to the effect that in order to unfreeze the accounts, the applicants (and third respondent) would need to sign declarations. The applicants did not deny any of this. Their point was that the executor did not need control over the Swiss accounts to finalise the L&D account.

[51] Whether or not access was necessary to finalise the L&D account cannot be decisive. In terms of the Act, the executor *must* obtain custody and control of *all* the property in the estate.⁹ He or she is obliged to take control of the assets, preserve them and administer and wind-up the estate as speedily as possible.¹⁰ That being so, the executor" was

⁹ See section 26(1) of the Act:

"Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment: ·

¹⁰ *Kisten and Another v Moodley and Another* (13043/2012) [2016] ZAKZDHC 31 (22 July 2016)

duty-bound to take control of the Swiss bank accounts. It is not satisfactory for him to be told that he can rely on a statement by a third party with respect to the balances of the accounts. He is duty-bound to take control of the assets, and has the right to do so.

[52] The applicants' refusal to provide the declarations prevented the executor from taking control of the Swiss bank accounts. This necessitated the counter-application and the costs must accordingly follow.

[53] Again, it is significant that the applicants provided the necessary declarations very shortly before the hearing. There was no proper explanation as to why this was not done earlier.

[54] For these reasons the costs of the counter-application should be borne by the applicants.

Order

[55] In the result, I make the following orders:

55.1. The application for the declaratory relief sought in paragraph 1 of the notice of motion is dismissed.

55.2. The second respondent shall pay the costs of the entire main application, including the application for the relief sought in paragraph 1 of the

para 25:

·'As executor, he is required in exercising his fiduciary duty, to act in the best interests of the estate and the beneficiaries. He is obliged to take control of the assets, preserve them and administer and wind up the estate as speedily as possible. In the event of conflict between the beneficiaries, he can act in terms of s 47 of the Administration of Estates Act and must seek direction and approval from the Master in the event of the beneficiaries not being in agreement.

notice of motion and including the costs of two counsel.

55.3. The applicants shall pay the costs of the counter-application.

H J DE WAAL AJ
Acting Judge of the High Court
Cape Town
10 November 2023

APPEARANCES

Applicant's counsel: A Kantor SC and N Mauritz.

Applicant's attorneys: Cliffe Dekker Hofmeyr Inc.

Second Respondent's counsel: Unknown. The other respondents have not opposed.

Second Respondent's attorneys: Bisset Boehmke McBlain