



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO: 24852/09

In the matter between:

FAREED MOOSA N.O.

Applicant

and

PIERRENE ANNE MANUEL

Respondent

JUDGMENT : 18TH MARCH 2010

Riley, AJ:

[1] This is an urgent application in terms of which applicant seeks an order directing respondent to sign all transfer documents or any other document or deed of whatsoever nature and kind which may be necessary in order to give and effect registration of transfer at the Deeds Office, Cape Town in respect of erf 1972 Ottery, situate in the City of Cape Town, Cape Division, Western Cape and in the alternative that the Sheriff of this Court be authorised to sign same in stead of the respondent, should she fail or refuse to do so.

[2] On the 21st November 2008 the applicant was appointed as executor of the Estate of the late Theodore Llewellyn Manuel ("the deceased") and authorised to attend to the liquidation and distribution of the deceased's estate. The deceased died on 17 January

2008.

[3] At the time of his death the deceased was married in community of property to the respondent.

[4] It appears that at least since the appointment of the applicant there has existed extreme tension and distrust between the applicant and the respondent resulting in an application under case no. 12042/08 before Allie, J in terms of which respondent sought an order prohibiting the Master of the High Court, Cape Town from appointing the applicant as the executor in terms of the last will and testament of the deceased. In that matter the interdict was sought pending the outcome of an action that respondent intended instituting in which she challenged the authenticity of the signature of the testator and accordingly, the validity of the will.

[5] The applicant opposed the application on the basis that the will is valid and that his appointment as curator in terms of the will is valid.

[6] The applicant further tendered, in his opposing affidavit to proceed to administer the estate if he is appointed as executor but to refrain from making awards to beneficiaries in terms of the will until an action that will be instituted by the applicant, challenging the validity of the will, is finalised.

[7] Allie, J dismissed respondent's application with costs and ordered that applicant shall not make awards to beneficiaries in terms of the will unless the respondents proposed

action to challenge the validity of the will is finalised. She ordered that respondent institute her action within 30 days from date of her judgment.

[8] The following is common cause:

- (1) That the applicant is in fact the executor of the estate of the deceased and that applicant is authorised by letters of executorship to attend to the liquidation and distribution of the deceased estate.
- (2) That the applicant compiled and filed the first liquidation and distribution account of the deceased estate with the Master.
- (3) That part of the assets mentioned in the liquidation and distribution account is a property situate at 3 Whimble Lane, Ottery. ("the property") under Deed of Transfer No. T40545/1999 which property is encumbered.
- (4) That an amount of R594 349.00 which is an interest bearing loan secured by a mortgage bond over the property, is owing to Standard Bank.
- (5) That at the time of his death the deceased was in arrears with his monthly instalments on the bond account;
- (6) That no payments have been made towards this debt after the deceased's death and that the bank has demanded payment of the amount due.

[9] Applicant averred in his founding affidavit that the deceased died without leaving any cash. That there was no cash in the estate to pay the Standard Bank debt and that all the bank accounts of the deceased were overdrawn at the time of his death. That in the circumstances all the assets in the estate of the deceased had to be liquidated so as to have them reduced to cash.

[10] He averred further that even though properties owned by the deceased in Bridgetown and Crawford yielded some rental that these amounts had not been used towards paying the Standard Bank debt as the monthly rental amount was insufficient to settle the arrear instalments and also to pay the current monthly bond instalment.

[11] According to applicant he experienced problems with the tenants who did not pay the rental and he was forced to institute legal proceedings against the defaulting tenants.

[12] He admitted that the costs of the administration of the estate, including the legal costs associated with the various lawsuits against the tenants were being funded out of the rental income.

[13] At the hearing of the matter Mr. Moosa, the appointed executor, who appeared on behalf of the applicant contended that the situation was untenable and could not be left unattended as the deceased's estate was suffering severe financial prejudice, which was also to the detriment of the heirs and the creditors.

[14] He contended that the sale of the immovable properties were necessary as according to him it was the only manner by which the substantial liabilities in the estate could be settled.

[15] It is not disputed that apart from the arrear bond repayments and associated problems, the property has been vandalised by thieves who stole fixtures and fittings etc. causing substantial damage to the property.

[16] The building has become inhabitable and the water supply has been disconnected due to the substantial arrears.

[17] On 28 August 2009 applicant advertised the first liquidation and distribution account for the period as specified by law. According to applicant he is now in a position to liquidate the assets in the estate in terms of the Administration of Estates Act 66 of 1965 as the estate lay open free of objections. This is disputed by the respondent.

[18] It is not disputed that in his capacity as executor applicant signed a Deed of Alienation in respect of the property for an amount of R537 000.00 and that at the time that this action was launched the transfer of the property was ready to be effected but for respondents refusal to sign the relevant documents.

[19] Applicant advanced several reasons why in his view the sale should be allowed to proceed and why this would be to the advantage of all the parties.

(See record para 35 to para 40 founding affidavit)

[20] Mr. Moosa contended that respondent's conduct has been wilfully unco-operative and obstructive as is illustrated by *inter alia* her action under case no. 12042/08, her antagonistic attitude towards him which is illustrated by her lodging two unsuccessful complaints against him at the Law Society and with reference to the criminal case she laid against him at the South African Police for an alleged forgery of the deceased's will.

[21] It is common cause that respondent has also in the interim issued a summons against applicant in terms of which she *inter alia* claims that the deceased's will should be declared null and void.

[22] According to the applicant, respondent has not come up with any better offers even though the respondent avers that the sale price is not market related. For this reason he contended that respondent had no basis in fact or law to refuse to sign the sale documents. He contended that under these circumstances the court was therefore obliged to intervene.

[23] The respondent was represented by Mr. Grobbelaar of the Cape Bar who, like the respondent's attorney of record, are acting on a *pro bono* basis.

[24] I am indebted to them for their assistance in this matter.

[25] At the hearing of the matter respondent's counsel raised a point *in limine* in regard to the fact that applicant had not properly complied with the provisions of Section 47 of the Administration of Estate's Act, Act 66 of 1965 ("the Act"). It was disputed that Ronaldo Manuel to whom the property had been bequeathed in terms of the deceased's will, had

furnished his approval in writing. It was contended that the emailed letter of consent did not contain the initials of the applicant or the commissioner of oaths.

[26] This point was however not pursued further during argument when applicant indicated that he was prepared to obtain the original of the document concerned from Ronaldo Manuel who was overseas, should respondent insist.

[27] In any event, I am not persuaded that this deficiency, if it can be so described, is fatal to the applicant's case.

[28] It is not my intention to deal with respondent's case where it relates to her concerns regarding the validity of the deceased's will and the signature that appear thereon. That is a matter which has already received some attention when Allie J dealt with the application referred to above, and it will receive further attention when the matter regarding the validity of the will eventually goes to trial.

[29] The main thrust of the respondent's case is that the first Liquidation and Distribution Account of the applicant does not correctly reflect the assets and liabilities of the deceased's estate.

[30] As a result of her concerns she instructed her attorneys to address correspondence to the Master setting out her concerns and or objections to the first liquidation and distribution account.

[31] In essence respondent raised concerns, *inter alia* about the fact that applicant has not properly accounted for –

31.1 the amounts of rental received by the applicant in respect of the property of the deceased leased by him in the course of the administration of the estate;

31.2 there was no reference or record of what happened to the money that had been in the account of Brain Wave Projects, a close corporation operated by the deceased during his life time;

31.3 there was no reference or record of what happened to the proceeds of the Old Mutual life policies that had been over her husband's life.

31.4 apart from some deposit slips there was no indication whatsoever how much money had been paid by tenants in respect of lease agreements;

31.5 applicant had failed to make reference to a Standard Bank call account which the deceased operated during his life time.

[32] It is common cause that applicant responded to the respondent's objections by stating that he would deal specifically with the rental income, the Brain Wave Projects CC account and the Old Mutual policies in a subsequent liquidation and distribution account.

[33] As at the date of the hearing no further liquidation account has been lodged and

neither has the applicant provided the respondent with a proper detailed explanation in regard to her concerns or objections.

[34] Applicant conceded during argument that he had not opened a separate estate late banking account to deal with any monies or proceeds due to the deceased estate. On his own admission he stated that he had been paying the rental and all other monies accruing to the deceased's estate into his trust account. He was unable to give a reasonable explanation as to why he had not opened a separate estate account and he was more importantly unable to give a reasonable explanation as to why he had not attached to his founding or supplementary papers, an extract of the relevant transactions and or entries in his trust account records.

[35] Section 28 of the Act provides that:

"28 Banking accounts

(1) *An executor –*

(a) Shall unless the Master otherwise directs, as soon as he or she has in hand monies in the estate in excess of R1 000.00, open a cheque account in the name of the estate with a bank in the Republic and shall deposit therein the monies which he or she has in hand and such other monies as he or she may from time to time receive for the estate;"

[36] In my view the use of the words "shall" in the section makes it clear that the

provisions of the section are peremptory.

[37] The practice of utilising an attorney's trust account instead of opening a separate estate account in terms of section 28 is unhealthy and is to be frowned upon.

[38] Even though respondent clearly raised the issue of substantial amounts of money being paid in respect of the estate and which accrued to the estate it is surprising that the Master, fails to question the existence of such payments, where the payments are being held and whether they can be accounted for. I express my concern in this regard with reference to section 28(2), and section 28(5) of the Act.

[39] Section 28(2) of the Act provides that:

"(2) Every executor shall, whenever required by the Master to do so, notify the Master in writing of the bank and the office or branch of the bank which he or she has opened an account referred to in subsection (1) and furnish the Master with a bank statement or other sufficient evidence of the position of the account."

[40] Section 28(5) provides that:

"The Master and any surety of the executor shall have the same right to information in regard to any such account as the executor himself or herself possesses, and may examine all vouchers in relation thereto, whether in the hands of the bank or of the executor."

[41] Notwithstanding respondent's concerns and objections the Master has failed and neglected to request the relevant information as is provided for in section 28(2) and section 28(5).

[42] Applicant could not explain why he further in the alternative, did not prepare a detailed schedule of income and expenses in respect of the deceased's estate.

[43] I find that the detail he provides in his founding affidavit of and about the income and expenses in respect of the deceased estates financial affairs is seriously lacking in particularity and detail, particularly since he wishes this court to make an order based on the financial status of the deceased's estate and or its abilities to settle its debts.

[44] Even though the respondent raised valid concerns and objections to the first liquidation and distribution account, the Master has failed, refused and neglected to provide respondent with a proper response to her concerns and objections. This notwithstanding several letters addressed to the Master by respondent's attorneys.

[45] The respondent averred in her opposing affidavit that since her objections had not been dealt with by the Master that this prevented the executor from liquidating and distributing the deceased's estate as there has not been proper compliance with Section 35 of the Act. At paragraph 39.2 on page 87 of the court record she states in her answering affidavit that:

"In spite of the fact that the applicant in his answering letter stated that he would deal with

the further aspects as mentioned in paragraph 26.19 above, he has to my knowledge not filed a further L&D account dealing with these aspects. The applicant therefore is not in a position to liquidate assets in the estate or to settle its debts before any objections have been addressed in terms of section 35 of the Act."

[46] I now deal briefly with the relevant provisions of the Administration of Estates Act relating to objections.

[47] Section 35(7) provides that:

"Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate any objection, with the reasons therefore, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any documents which such person may have submitted to the Master in support thereof.

Section 35 (8)

The executor shall, within fourteen days after receipt by him of the copy of the objection, transmit two copies of his comments thereon to the Master.

Section 35(9)

If, after consideration of such objection, the comments of the executor and such further particulars as the Master may require, the Master is of opinion that such objection is well-

founded or if, apart from any objection, he is of opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit.

Section 35(10)

Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.

Section 35(11)

If any such direction affects the interests of a person who has not lodged an objection and the account is amended, the account as so amended shall, unless the said person consents in writing to the account being acted upon, again lie open for inspection in the manner and with the notice and subject to the remedies hereinbefore provided.

Section 35(12)

When an account has lain open for inspection as hereinbefore provided and –

- (a) no objection has been lodged; or*
- (b) an objection has been lodged and the account has been amended in accordance with the Master's direction and has again lain open for inspection,*

if necessary, as provided in subsection (11), and no application has been made to the Court within the period referred to in subsection (10) to set aside the Master's decision; or

- (c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period,*

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration relating to such distribution, or lodge with the Master a certificate by the registration officer or a conveyancer specifying the registrations which have been effected by the executor: Provided that –

- (i) a cheque purporting to be drawn payable to a creditor or heir in respect of any claim or share due to him and paid by the banker on whom it is drawn; or*
- (ii) an affidavit by the executor in which he declares that a creditor was paid or that an heir received his share in accordance with the account,*

may be accepted by the Master in lieu of any such receipt or acquittance.

[48] There is no evidence before me that the Master has dealt with the respondent's objections as is provided for in terms of the law.

[49] On considering the provisions of the Act relating to objections and based on the facts of this case, I am accordingly satisfied that applicant is not in a position to liquidate the

assets as there has not been proper compliance with section 35 of the Act.

[50] It is further most unfortunate that applicant has failed to take the court into his confidence by not presenting to the court a clear and detailed picture of the status of the financial affairs of the deceased's estate.

[51] Instead applicant has accused the respondent of being obstructive and being wilfully unco-operative towards him in the time that he has administered the estate. There is no merit in this allegation.

[52] The respondent is the co-owner of the property concerned and as such she has a vested interest in the matters relating to the deceased's estate. She is accordingly entitled to question the manner in which the estate is being administered and being dealt with.

[53] I can therefore not find that her conduct, in raising her concerns and objections with the Master regarding the clear problems in the first liquidation and distribution account prepared and submitted by the applicant, is unreasonable or obstructive. In my view she is merely exercising her rights. It appears that the applicant, fortified by the fact that the Master appeared to be satisfied with his response to the concerns and objections raised by the respondent to his first liquidation and distribution account and his victory in the matter before Allie, J, then launched this application on an urgent basis to this court.

[54] In my view the applicant could have addressed all the respondent's concerns by providing her with a detailed schedule of income and expenditure in respect of the

deceased's estate. At the least he could have provided the respondent with an extract of the account of the deceased held in his attorney trust account.

[55] He failed on both counts.

[56] In my view the matter could easily have been resolved if he had done a proper accounting to the respondent and or the Master at the time that respondent raised her concerns and or objections.

[57] I accordingly find that applicant's decision to bring the application at the time that he did was misguided.

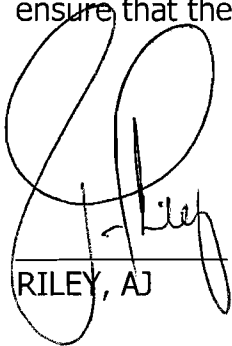
[58] Based on what I have said hereinbefore it follows that applicant's application falls to be dismissed on the basis that:

- (1) Applicant has failed to persuade me that the deceased's estate is unable to pay the outstanding bond on the property that he wishes to have sold and or that the deceased's estate is unable to pay any other debts of the deceased's estate.
- (2) Applicant has further failed to prove that there has been full compliance with the provisions of section 35 relating to the objections made by the respondent to the Master.

[59] In conclusion I order that, even though respondent has not asked for any cost order

against applicant, that applicant shall not be entitled to claim any fees or disbursements from the deceased's estate in his capacity as either executor and or attorney in relation to this application. In the event that applicant has already debited fees on account of this application he is ordered to rectify the position immediately.

[60] I further direct that a copy of this judgment be provided to The Master who must ensure that the objections of the respondent be dealt with in accordance with the law.



RILEY, AJ