

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 9915/2011

DATE: 8 SEPTEMBER 2011

In the matter between:

SONWABILE GLADWELL MBONJWA

1st Applicant

VUYOKAZI GLORIA MBONJWA

2nd Applicant

FRANK MBONJWA

3rd Applicant

WENDY LANGA

4th Applicant

and

NIKHUSELO CORNELIA MBONJWA

1st Respondent

PHATHISWA PRINCESS MBONJWA

2nd Respondent

AMANDA MBONJWA

3rd Respondent

TKR JIYANA

4th Respondent

MASTER OF THE COURT N.O.

5th Respondent

JUDGMENT

DOLAMO. AJ:

I am going to be very brief in my judgment. The applicants herein have brought the

present application for the following relief: that the fourth respondent's appointment, as sole executor in the estate of Meluleko Philip Mbonjwa, Master's reference number 1733/2009, be set aside; that the fifth respondent be directed to appoint Frans Hendrik Cronje, ID number , together with the 4th respondent as joint executors in the estate of Meluleko Philip Mbonjwa; that the respondents pay the cost of this application on the scale as between attorney and client, jointly and severally, the one paying the others to be absolved.

Save for the fifth respondent, all the respondents are opposing this application. The application was originally brought on an urgent basis, but the parties have since resolved this aspect and the matter proceeded on a semi-urgent basis. I shall not repeat, in any details, the allegations contained in the parties' papers, but essentially restrict myself, in summarising the facts, to those which are a matter of common cause between the parties. I shall also draw extensively from both sets of heads of argument, which I have found very useful.

The deceased in this matter, Meluleko Philip Mbonjwa, who died on 8 January 2009, had seven children, five of whom are the applicants and two the second and third respondents, respectively. Applicants were fathered by the deceased with different mothers, whereas the second and the third respondents share a common mother, namely the first respondent, who was married to the deceased in community of property, which marriage subsisted until the deceased's death. The deceased left a sizeable estate, which is valued at approximately R5.8 million. It is, inter alia, made up of immovable properties and two transportation businesses. The deceased died intestate.

The first respondent was initially appointed the executrix to the deceased's estate, by the fifth respondent, that is the Master of this court, but was removed from office during or about June 2010. This was after, according to the Master, failing to properly attend to the administration of the estate. The removal followed on a complaint lodged with the fifth respondent by the applicants. This removal of the first respondent, executrix to the deceased's estate, led basically to two camps making nominations of their preferred candidate for appointment by the fifth respondent as a replacement executor.

These candidates were the fourth respondent nominated by first to third respondents, who were joined by the fifth applicant and, on the other hand, Mr Cronje, who was nominated by the applicants. Both these candidates for appointment as executors are attorneys in private practice.

The fifth respondent, not surprisingly in my view, given the history of the matter and the size of the estate, called for bonds of security for the due fulfilment by the nominated executors of their duties. Fourth respondent furnished the requested security, but Mr Cronje was unable to do so. This led the fifth respondent to appoint the fourth respondent, alone, and this, notwithstanding his or her earlier indication that he or she was willing to appoint both as joint executors.

The appointment of the fourth respondent did not sit well with the applicants and this resulted in this application to review and set aside the fifth respondent's decision and for this court to direct that the fifth respondent appoint Mr Cronje, together with the fourth respondent, as joint executors of the deceased's estate.

In argument Mr Fourie, who appeared for the applicants, conceded that an appropriate relief, if the court were to set aside the fifth respondent's decision, will be to refer the question of the appointment of executor or executors back to the fifth respondent.

The applicants are relying on the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000, which is commonly referred to as PAJA, and, in particular, to section 6(2)(a)(iii), (e)(i)(ii)(iii)(iv)(v) and (vi), (f)(ii) and (h) for the call for a review and the setting aside of the fifth respondent's decision. The first to the fourth respondents naturally disputes the grounds upon which the applicants rely for the review of the fifth respondent's decision. The fifth respondent, as already indicated, is not opposing this application. This, in short, is the brief background to this application. I need to point out at the onset that there is no dispute as to the application of PAJA in this matter.

The following submissions were made in the heads of argument and in argument before court on behalf of the applicants. For the sake of brevity, I have paraphrased these submissions, the same as I did with the submissions and arguments by the respondents:

1. It was submitted that fifth respondent's decision to appoint fourth respondent as the sole executor, is reviewable in terms of section 6(2)(e)(iii) of PAJA, in that at the time of making the decision to appoint the fourth respondent, the first respondent had already been removed as executrix of the deceased's estate after she had failed

to properly administer the estate with the help of fourth respondent.

2. That the fifth respondent knew that fourth respondent had assisted the first respondent in her failed attempt to administer the estate.

3. That the fifth respondent had received the nomination forms from applicants who were nominating Cronje as executor.

4. That the fifth respondent already indicated to applicants that he/she intends appointing both Cronje and fourth respondent as joint executors.

5. That the fourth respondent, on his own version, attended at the offices of the fifth respondent and insisted on being appointed.

6. That on Friday, 3 December 2010, Mr Cronje addressed an e-mail to the fifth respondent wherein he stated that the bond of security will be available for submission to the fifth respondent on Monday 6 December 2010 and warned fifth respondent not to appoint fourth respondent as the sole executor.

7. That consequently fifth respondent clearly did not take into account the aforesaid relevant consideration when making the decision to appoint fourth respondent. It was argued that if he did so, he or she will not have appointed fourth respondent as the sole executor.

8. As regards reliance on section 6(2)(e)(iv) of PAJA, applicants argued that the fourth respondent's decision was reviewable due to the fact that the decision was made because of the unauthorised or unwarranted dictates of first respondent, in that, on fourth respondent's own version, he attended at fifth respondent's offices several times and insisted that fifth respondent must appoint "the" executor,

considering the long period the estate was without an executor.

9. That despite above-mentioned relevant considerations, fifth respondent appointed fourth respondent on the very next business day, being Monday 6 December 2010.

10. Furthermore it was submitted that fifth respondent's decision was also reviewable in terms of section 6(2)(e)(iii) of PAJA, in that fifth respondent appointed fourth respondent for an ulterior purposes. It was pointed out that section 18 of the Administration of Estate Act provides for the appointment of a person who may be deemed fit and proper to be an executor.

11. That in the light of the foregoing factors and circumstances, fifth respondent's appointment of fourth respondent was not because he was deemed a fit and proper person to be appointed sole executor, but because fourth respondent insisted that an executor be appointed.

12. That fifth respondent's decision was also reviewable, in terms of section 6(2)(e)(v) of PAJA, in that the decision was made in bad faith. In this regard, and in this context, bad faith was said to mean that an administrator may be *mala fide*, even though no blameworthiness was present. This kind of *mala fide* action will then relate to a serious dereliction of duty committed in good faith. Reference was made to Law of South Africa, Volume 1, page 115, paragraph 133.

13. That for these reasons, fifth respondent's decision was taken in bad faith and accordingly stands to be reviewed. Again for the same reasons as above, it was submitted that fifth respondent's decision was to be reviewed in terms of section 6(2)(a)(3).

I need to point out that Mr Fourie submitted that the factors and circumstances on which they were relying were so overlapping as to satisfy all the grounds upon which a review of the fifth respondent's decision was sought.

14. And that the fifth respondent's decision to appoint fourth respondent was not rationally connected to the information before him or her, at the time of making that decision.

15. And ultimately that in terms of section 6(2)(h) of PAJA the exercise of fifth respondent's power to appoint fourth respondent was so unreasonable in the circumstances, that no reasonable person could have exercised this power in that fashion.

These were the submissions made in the heads of argument and supported by Mr Fourie's oral argument before court. On the other hand Mr Sidaki argued that the fifth respondent acted perfectly legitimate in appointing the fourth respondent. He also challenged the decision of the applicants to approach the court before exhausting internal remedies as required by section 7(2)(a) of PAJA, which stipulates that no court or tribunal shall review an administrative action in terms of PAJA unless internal remedies provided for in any other law has been exhausted.

At that time when Mr Sidaki made the argument, he did not have any authority to support this submission. He requested, and was granted, leave to submit further heads of argument. This was done this morning, together with a response of further submissions from Mr Fourie. I have found the further submissions also very helpful in lightening the court's burden.

In these further submissions, Mr Sidaki argued that the applicants did not exhaust the internal remedy which would have been to approach the fifth respondent to revisit its initial decision to appoint fourth respondent, same as it did with the first respondent. In short, he was of the view that fifth respondent was not *functus officio* in the sense of the magistrate who was *functus officio* in the case referred to of Nkosi v Khanvile NO and Another 2003 (2) SALR on page 63.

Though this argument has merits, in the light of the view that I have adopted in respect of the application as a whole, I do not deem it necessary to decide the point. I need to point out further that, for the submissions that fifth respondent was pressurised by fourth respondent to make an appointment, Mr Fourie relied on paragraphs 8.19, 8.20, as well as paragraph 20 of fourth respondent's affidavit, where fourth respondent set out the actions which he took and which led to his appointment. The argument was that fourth respondent, by his own admission, knew that fifth respondent was not going to make any appointment until Mr Cronje had filed his bond of security, but nevertheless insisted on the appointment of "the" executor and by doing so, exacted the kind of pressure or influence as will have amounted to an improper exercise of his/her powers by the fifth respondent; thus violating the provision of section 6(2)(e).

I respectfully cannot agree with this argument. It is inconceivable that fifth respondent, even though she/he intended to appoint joint executors, will have waited indefinitely for Mr Cronje to file his bond of security. When Mr Cronje failed to file his bond of security, on 6 December 2010, as he undertook in his e-mail and in the conversations that went on between his secretary and Ms Alexander of the fifth respondent's office, the fifth respondent, by virtue of his powers in terms of section

18 and 19 of the Administration of Estate Act, was perfectly within his/her rights to appoint the fourth respondent the sole executor of the deceased's estate.

I must point out that I find nothing untoward in the conduct of the fourth respondent in calling at the fifth respondent's office to inquire as to the progress made in the deceased's estate. This is normal practice when one is seized with an administration of a deceased's estate and it is so in the circumstances of this case. There was nothing untoward for the fourth respondent to insist on the appointment of an executor. Furthermore, I do not agree with Mr Fourie that he insisted on his appointment. The paragraph 20 that was relied upon, though not drafted in elegant language, clearly makes reference to the appointment of the executor and cannot, in the circumstances, be interpreted to mean that it was the appointment of fourth respondent as the sole executor of the deceased's estate which was sought.

On the whole there is no evidence on the papers that the fourth respondent insisted on his sole appointment, nor any suggestion that the fifth respondent was only moved to do so when the fourth respondent insisted on an appointment of an executor. All the circumstances, on the other hand, points to the fifth respondent having taken his or her own decision, based on the facts available to him or her to appoint the fourth respondent. The inference sought to be drawn that he was influenced by the fourth respondent is not the only reasonable inference to be drawn and I find it inconsistent with the facts at hand.

I am further of the view that the argument that first respondent failed to administer the estate while assisted by the fourth respondent, without any merits. The record

shows that fourth respondent's only involvement, prior to his appointment as the executor of the deceased's estate, was to request from the fifth respondent an extension of time for first respondent to comply with her responsibilities. There is no prove of any involvement in the administration of the deceased's estate as to justify his exclusion from appointment, or as suggested, his appointment as sole executor.

In the absence of any evidence pointing to the fifth respondent being influenced by the fourth respondent to appoint him the sole executor, I cannot find on the papers any proof to substantiate any of the other grounds relied upon by the applicants. In my view the fifth respondent duly exercised the powers invested in him/her in terms of the Administration of Estates Act and appointed the fourth respondent the sole executor of the deceased's estates, based on the circumstances of the case. Mr Cronje was not appointed simply because he did not meet the fifth respondent's requirements that he furnish a bond of security.

Before I make an order, I need to just point out the following which I find relevant remarks to make in the circumstances: An executor administers a deceased's estate under the supervision of the Master of the High Court, in this case the fifth respondent. Any concern which an interested party may have in the administration of a deceased's estate, can be brought to the attention of the Master who, in an appropriate case, may take the necessary steps. We already have proof here that when first respondent was seen to be failing in the administration of the deceased's estate, was summarily removed as an executrix.

There is also the additional safeguard in that a security for the due fulfilment of his

responsibilities was called for in the form of the bond of security which the fourth respondent was able to furnish, leading to his appointment as the sole executor. In the circumstances, it is my view that the application stands to fail and to be dismissed.

The order I make, therefore, is the following:

1. That the application is dismissed.
2. That the applicants are ordered to pay the costs on a party and party scale.

DOLAMO, AJ