FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 4007/2010

In the matter between:-

MAMOHAPI AMELIA MBELE Applicant

and

MOITSWADI PATIENCE MBELE First Respondent

RF ADMINISTRATORS Second Respondent

HEARD ON: 4 NOVEMBER 2010

DELIVERED ON: 4 NOVEMBER 2010

JUDGMENT

RADEBE, AJ

[1] On 9 August 2010 the applicant brought application before this Honourable Court, seeking an order in the following terms

(i) that the Court substitutes the first respondent, wife of the deceased, and appoint the applicant, mother of the deceased, as executor of the estate of the late Simon Shanki Mbele.

(ii) the Court to issue an order that the estate of the deceased from the company be paid to the deceased's mother banking account and the rest be divided amongst the deceased's children born out of wedlock.

The applicant, who appeared in person, had lodged the application on her own, but it is clear from the drafting of the papers that she was being assisted by someone who is either a para-legal or someone with a certain level of legal education.

[2] The application is being opposed by the first respondent on Legal Aid and she has throughout been duly represented by Ms Oosthuizen. There is neither proof of service nor notice to oppose by the second respondent. I shall therefore deal with the matter on the basis that only the two parties (the applicant and the first respondent) are before Court.

[3] The first respondent ("the respondent") filed her answering affidavit on 15 September 2010. In terms of Rule 6(e) of the Uniform Rules, the applicant had until 29 September 2010 to file and serve her replying affidavit. The applicant failed to

timeously serve and file her replying affidavit within the prescribed time limits. Such failure by the applicant entitled the respondent to invoke the provisions of sub-rule 6(f) of the Uniform Rules. Hence, the notice of set-down was served by the respondent on 14 October 2010, in strict compliance with the aforesaid sub-rule.

[4] The applicant subsequently served and filed her replying affidavit on 19 October 2010, which was already 14 court days out of time. There has been no application for condonation of the late filing of the replying affidavit. The respondent has also not made any Rule 30 application to have the replying affidavit struck off. However, in the light of the fact that the applicant is not formally represented and is an unsophisticated lay person, I use my discretion to condone the late filing of the replying affidavit in order to give the applicant a holistic and fair hearing.

[5] The applicant is an adult female residing at 319 Boiketlo Village, Witsieshoek. She is the mother of the late Simon Shanki Mbele ("the deceased") who died intestate on 2 August 2009. The death certificate was issued on 3 August

2009 and shows the deceased's ID number as 731130 5459 087. During his lifetime the deceased was married to the respondent. The marriage certificate shows such marriage to have been in community of property and to have been by civil rites. The deceased and the respondent resided at 14379 Phase 6, Bloemfontein.

[6] On 14 August 2009 the respondent was appointed as the executor of the estate of the deceased, by virtue of the Letters of Authority, No. 9457/2009, issued by the Master of the Free State High Court, Bloemfontein in terms of section 18(3) of the Administration of Estates Act, No. 66 of 1965 (as amended). A copy of the Letters of Authority is annexure "D" of the respondent's answering affidavit. By virtue of these Letters of Authority, the respondent is duly authorised to take control of the assets of the estate of the deceased.

[7] It is the applicant's case that these Letters of Authority were wrongly issued by the Master and in her application the applicant seeks an order that the respondent be removed as executor and that she, the applicant, be appointed in her place as a substitute. Her application is therefore two-fold

although she does not say so in so many words. The third relief she seeks, is that the deceased estate due from the employer be paid into her banking account.

[8] According to annexure "D" (Letters of Authority) the assets of the deceased's estate comprised of:

8.1	Erf 14739, Phase 6, Bloemfontein, with a value of	R2900.00
8.2	An Opel Corsa, registration no. VPY023GP, with a value of	R20000.00
8.3	Standard Bank account no. 027706710	R200.00
8.4	Standard Bank account	R7000.00
8.5	Nedbank account	R5000.00
	TOTAL	R35100.00

[9] During his lifetime the deceased was employed by Fuelogic and enjoyed certain employment benefits, including pension or provident fund benefits. The applicant has not specified which type of benefits defined contribution or defined benefit type of scheme – the deceased was entitled to. The second respondent is cited as a registered financial services provider which administered the pension/provident fund for the

Fuelogic employees. The applicant alleges that the deceased was a member of the said fund and that certain benefits accrued as a result of the death of the deceased. According to the applicant, the beneficiaries who are entitled to the assets of the deceased, including employment benefits, are:

9.1 Mpho Rebecca Nhlapho, ID 930227 0726 087, whom the applicant alleges is the daughter of the deceased, born out of wedlock (hereinafter called “Mpho”);

9.2 Teboho Mbele, ID 940510 5686 085, allegedly adopted by the deceased (hereinafter called “Teboho”);

9.3 Tumelo Mbele, ID 920403 5774 081, allegedly adopted by the deceased (hereinafter called “Tumelo”).

All three children are allegedly under the applicant’s care.

[10] The respondent opposes the application on the basis that:

10.1 the deceased never had any children;

10.2 the deceased died intestate, leaving no Will;

10.3 she was married to the deceased by civil rites and in community of property and that such marriage subsisted until the death of the deceased;

10.4 further that the applicant has no *locus standi* to bring an application on behalf of the abovementioned children.

Applicant claims that she was correctly appointed as the executor of the estate in terms of section 18(3) of the Administration of Estates Act and that the Letters of Authority were correctly issued, regard being had that the value of the estate of the deceased is less than R125 000.00.

10.5 the distribution of the pension fund benefits falls outside the scope of the Administration of Estates Act and cannot be dealt with in terms of the Letters of Authority.

[11] On the contrary:

11.1 The applicant submits that she ought to be substituted for the respondent, as the executor of the deceased estate and should be issued with Letters of Executorship rather than Letters of Authority seeing that the estate of the deceased is in excess of R150 000.00 when taking into account that there are pension benefits as well as shares which have not been disclosed to the Master. She had been so advised by a certain Mr. Papane of Bloemfontein. No proof by way of share certificates or employer's letters, was attached to the applicant's papers.

11.2 In her replying affidavit, paragraph 1.3, the applicant claims that Mpho is the daughter of Maria Ntombe Nhlapho and was born out of wedlock to Maria and the deceased. In annexure "JX" to her founding affidavit, the applicant states under oath that all three children are under her care and are still attending school. Further, by means of a Capitec Bank statement, annexure "RV" to the replying affidavit, the applicant

purports to show that Mpho's residential address is 52A Crutse Street, White City, Soweto, Johannesburg. Further she purports to show that the bank statement is proof that the deceased paid money on a monthly basis into the said bank account as maintenance for Mpho. By these presentations the applicant purports to show that the deceased was indeed the biological father of Mpho.

11.3 The applicant claims that Teboho and Tumelo are adopted children of the deceased and are under her care. In her founding affidavit, the applicant avers that she resides in Witsieshoek. In her heads of arguments she attaches school reports of Teboho (annexure "QX") and Tumelo (annexure "RY") which reflect that the two children attend school at Mampoi High School in Mangaung Village and Tsebo Secondary School at the Rankopane Village, Phuthaditjhaba.

11.4 Further, in her replying affidavit, the applicant made new submissions regarding the following:

11.4.1 Constitutional rights to human dignity, equality and the advancement of human rights and freedom. She referred to various sections of the Constitution of the Republic of South Africa Act, No. 108 of 1996 (the Constitution Act) and to certain decided cases);

11.4.2 The immovable property, Erf 14739, Phase 6, Bloemfontein, which she alleges does not belong to the respondent and the deceased as she, the applicant, gave a sum of R5 000.00 to her daughter, Ntsekiseng Mbele, to purchase such from one P. May. She alleges that the value of the property is not as reflected on the Letters of Authority, but exceeds that sum of R2 900.00. She, however, did not attach any certificate to show an alternative value. She says the property belongs to her.

11.4.3 Section 38 of the Constitution Act gives her

the right to approach a competent court without her first being appointed as a guardian of the three children, Mpho, Teboho and Tumelo.

11.4.4 The total pension benefit accruing to the estate is a sum of R150 000.00 less R10 000.00 already paid by the second respondent to cover the funeral costs. She has been advised by the aforesaid, Mr. Papane, that Teboho and Tumelo are the registered beneficiaries of the pension fund.

11.4.5 Mr. Papane having informed her that there are shares valued at R86 000.00 which the deceased owned and which he had purchased from the company and which have not been registered with the Master of the Free State High Court.

11.4.6 The treatment by Dr. T.L. Khubeka-Molefe,

which is annexure B to the respondent's answering affidavit, was intended to treat respondent's infertility as it was the respondent who could not bear children.

11.4.7 The prejudice that will be suffered by the children as a result of the issuing of the Letters of Authority in favour of the respondent and which the applicant alleges were issued fraudulently.

[12] The respondent's case is encapsulated in the following paragraphs:

12.1 She is the widow of the deceased, having been married to him in community of property on 27 May 2008. She is therefore entitled to be appointed as executor in terms of section 18(3) of the Administration of Estates Act and to be the deceased heir;

12.2 No children were born of the aforesaid marriage and the deceased did not bear any children as a result of

his diagnosed infertility. The deceased also did not have adopted children. She therefore denies that Mpho is a child of the deceased. The deceased never paid any monthly maintenance for Mpho - Tumelo and Teboho are children of the deceased's brother and the deceased was not their adoptive parent. There are further no supporting affidavits or adoption papers attached to the applicant's founding and replying affidavit to prove any form of paternity or adoption.

[13] The respondent raises the issue of *locus standi* of the applicant acting on behalf of the minor children. She further submits that the applicant's failure to cite the Master of the High Court as the party that issued the Letters of Authority makes her (the applicant's) case frivolous.

[14] Since the deceased died intestate, his estate devolves in terms of the laws of intestate succession. This means that as a surviving spouse, she is entitled to inherit by the operation of section 1(1)(c) of the Intestate Succession Act, No. 81 of 1987. She further alleges that the deceased had no children entitled to inherit as intestate heirs. Even if there

were children descendants, the entire estate would still devolve to her in its entirety since the child's share would be less than the gazetted amount of R125 000.00. This would make her the sole heir of the estate.

[15] The pension fund benefit of the deceased's estate does not form part of the estate of the deceased and is specifically excluded from the estate in terms of the Pension Fund Act. The issue of the distribution of the pension fund benefit can only be addressed thereby and not by the provisions of the Administration of Estates Act.

[16] **POINTS *IN LIMINE***

16.1 The applicant alleges that the three children are under her care. However, her own annexures show that the children are not residing with her and are not under her care. Mpho's address is reflected in annexure "RV" of applicant's replying affidavit as 52A Crutse Street, White City, Johannesburg. It is further evident from annexure "RV" that all the cash withdrawals shown therein were done in Johannesburg and surrounding

areas.

The applicant has failed to explain why maintenance would be paid into Mpho's banking account and not into her account if she is the person under whose care Mpho is. Annexure "RV" further shows varying amounts of cash deposits being done at random dates rather than on monthly basis. There is no suggestion in annexure "RV" that the deceased is the person who made the cash deposits. Moreover, even after the death of the deceased in August 2009, the deposits continue to be made well into the year 2010. The second page of annexure "RV" shows random deposits during December 2009, which were not made on a monthly basis, but at intervals of one week. There is no indication on this bank statement as to who makes these deposits which are made at different places, like Vanderbijlpark, Bloemfontein, QwaQwa, Johannesburg and Sebokeng.

16.2 Tumelo's Identity number is 920403 5774 081 as shown in annexure "JX" of the applicant's founding

affidavit and his date of birth is 1992/04/03 as shown in annexure "QX" of the applicant's heads of argument. He was therefore 18 years old and a major when the application was brought. On that point alone, irrespective of whether there was legal adoption or not, the applicant lacks *locus standi*. The applicant has failed to show this Court that Teboho and Tumelo are under her care and guardianship.

16.3 Applicant has also not shown that she has a direct and substantial interest in the right to inheritance and to the pension benefits, both of which are the subject matter of litigation in this matter. I refer here to the decision in **AUCAMP EN 'N ANDER v NEL NO EN ANDERE** 1991 (1) SA 220 (O) at 233 B – C where the issue of *locus standi* in matters similar to this one was revisited. The Court had this to say:

"Namens tweede respondent is betoog dat tweede applikant geen *locus standi* in hierdie aansoek het nie omdat hy geen belang daarby het nie en ook geen benadeling bewys het nie aangesien hy beweer dat dit nie vir hom saak maak wie die

kandidaat is wat verkies word nie."

Again in the case of **ROODEPOORT-MARAISBURG TOWN COUNCIL v EASTERN PROPERTIES (PROP) LTD** 1933 AD 87 at 101 it was pointed out that in bringing an action, a person has to show that he has a direct interest in the matter. The following was held in that respect:

"The *actio popularis* is undoubtedly obsolete, and no one can bring an action and allege that he is bringing it in the interest of the public, but by our law any person can bring an action to vindicate a right which he possesses (*interesse*) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have."

16.4 The applicant seeks to rely on section 38 of the Constitution Act which has the following relevant portions:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has

been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

The provision goes on to list persons who may approach the court. Of relevance are the following categories.

"(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own interest."

In **DE REUCK v DIRECTOR OF PUBLIC ROSECUTIONS, WITWATERSRAND LOCAL DIVISION, AND OTHERS** 2002 (6) SA 370 (W) it was decided that the applicant is entitled to attack the constitutional validity of the statutory provision complained of as he was bringing the proceedings in his own interest. The applicant in this case has failed to satisfy the requirement in section 38(a) and (b).

16.5 The applicant's failure to show this Court that she has the necessary *locus standi* is further reinforced by her lack of qualification even with referrence to section 19

of the Administration of Estates Act, which stipulates that in appointing executors dative the Master gives preference to the following persons:

"(i) surviving spouse or her nominee;

ii) if no surviving spouse, an heir or his nominee;

iii) if no heir, a creditor or his nominee;

iv) or the tutor or curator of any heir who is a minor or a person under curatorship."

The respondent is a surviving spouse and since the deceased died intestate, the question of executor testamentary does not arise. She is therefore an executor dative. On the other hand, the applicant has failed to show that she is a tutor or curator of the children in whose interest she purports to act. She has also not shown that she qualifies as a creditor or an heir of the deceased's estate. When addressing the court this morning, she acknowledged that the three children in respect of whom she purports to act, are not living with her; that Mpho lives with her maternal grandmother in Johannesburg and that Tumelo and Teboho are sons of Abraham Mbele, who is still alive.

[17] The applicant has cited the respondent in her personal capacity and there is nothing wrong with that seeing that this application is governed partly by the provisions of section 54(1)(a) of the Administration of Estates Act. However, since the respondent was appointed by the Master of the Free State High Court, she acts in a delegated authority. The applicant ought to have demonstrated by way of documentary proof that she has notified the Master of her intending to remove the respondent from her office. In order for her to be appointed as executor of the estate, in substitution of the respondent, the applicant has to approach the Master and comply with all the requirements of nomination acceptance of trust as executor or undertaking in terms of section 18(3) of the Administration of Estates Act. There is also no Master's report filed by the applicant as would normally be the case.

[18] Section 54(1)(a) of the Administration of Estates Act provides that an executor may at any time be removed from office by court if certain specific grounds are established. These are listed as follows:

(a) he has at any time be a party to an agreement or arrangement in terms of which he has undertaken that he will, in his capacity as executor, grant or endeavour to grant to or obtain or endeavour to obtain for any heir, debtor or creditor of the estate any benefit to which he is not entitled;

(b) .....

(c) .....

(d) for any other reason the court is satisfied that it is undesirable that he should act as executor of the estate concerned (e.g. maladministration).

Section 54(1)(b) stipulates that an executor may be removed from such office by the Master on the ground of specific conditions which are tabulated therein.

The procedures to be followed are specified in that section and there is no need to repeat them here.

[19] The applicant has failed to satisfy this Court that she is entitled to an order of the removal of the respondent in her

office as executor of the estate, in that she (the applicant) has not shown that any of the grounds detailed in section 54(1)(a) have been found to exist.

[20] When the matter was argued before me this morning, the applicant informed the Court that she managed to submit somewhat elaborate and “sophisticated” papers because a certain Mr. Papane, whom is known as an attorney, was drafting the application papers and assisted her in drafting and filing of the heads of argument. This confirmed what the respondent alleges in her answering affidavit (i.e. paragraph 2.11) that she had on 2 July 2010 received a phone call from Mr Papane promising her that he would help her get her pension benefits from the second respondent within three days, for a fee of R30 000.00. Respondent rejected that suggestion. When she was served with the notice of motion, she recognised the phone number appearing thereon as that belonging to Mr. Papane. In her address, the applicant wanted the Court to believe that she did not have Mr. Papane’s contact or office details. She was less than honest with the Court.

[21] In regard to this type of behaviour by the applicant, I refer to the judgment in the unreported case of this Division, Case no. 1677/2010, in the matter of **I S PAPANE AND ANOTHER**, dated 2 September 2010, where the Honourable Mr Justice Rampai made the following remarks in paragraph 4 thereof:

> "I was reliably informed by more than 2 people in chambers that the first applicant has opened a Close Corporation elsewhere in the city where he projects himself as an attorney. This particular matter clearly shows that the first applicant parades himself in the eyes of the public as a member of the legal profession who can represent them in court of law."

This kind of behaviour is unacceptable. This causes the general public to ultimately lose confidence in the operation of the courts as well as in the judiciary, especially if courts allow people who pass-off as attorneys or advocates to prepare such ill-conceived applications for unsuspecting members of the public.

[22] The applicant has asked for a costs order in her favour. The respondent vehemently objects to this suggestion, arguing

that the fact that the applicant is indigent and was being assisted by Mr. Papane, does not entitle her to be treated differently from any other litigant. Counsel for respondent acknowledges that she is on Legal Aid. However, she argues that the Legal Aid Board is financed through taxpayers funds and nothing precludes the Legal Aid Board from recovering fees if possible. I fully agree with such contention and I refer to the decision in **BIOWATCH TRUST v REGISTRAR, GENETIC RESOURCES, AND OTHERS** 2009 (6) SA 232 (CC) where it was held that the fact that a party is indigent does not entitle her to be accorded a privilege status and should be held to the same standards as any other party. The proper approach is to give primary consideration on whether the order will promote advancement of constitutional justice. The court has to have regard to whether litigation was undertaken to assert a constitutional right and whether litigation has been undertaken in an improper fashion.

[23] *In casu*, it is undoubted that, as I have said above, that the applicant, through the assistance of Mr. Papane, brought this application without having a *locus standi* and did not follow

the procedures prescribed in section 54(1) of the Administration of Estates Act. I refer also to the case of **PELSER v DIRECTOR OF PUBLIC PROSECUTIONS, TRANSVAAL, AND OTHERS** 2009 (4) SA 52 (T) at 55 D – E where it was held:

> "In bringing the application, the applicant purported to be acting on behalf of a group or class of people, namely all the accused in the criminal trial. A point *in limine* was taken by the State on the ground that the applicant had not made out a case of class representation."

And at 57 D the court held that:

> "This was clearly a baseless application ..... It is important, in this respect, to note that the applicant, as with the other accused, is having his fees paid by the Legal Aid Board. In other words, unless it is ordered otherwise, Mr Smit is going to be paid by the Legal Aid Board for his services in respect of this application. The court agrees with counsel for the State that the taxpayers' money may not be abused in this manner."

In the matter before Court the respondent is assisted financially by the Legal Aid Board. If an order is not made that the applicant pays the costs of this ill-conceived and baseless application, then the Legal Aid Board will be

severely prejudiced by not being able to recover the costs incurred in assisting the respondent.

[24] In the circumstances, the following order is made:

24.1 The application is dismissed with costs.

24.2 The applicant is directed to approach the Registrar of this Honourable Court to depose to an affidavit regarding the legal assistance she received from Mr. Papane and to what fees he charged for the legal services rendered, for onward transmission to the Judge President.

MADAME JUSTICE N.H. RADEBE, AJ

On behalf of the applicant: In person

On behalf of first respondent: A. Oosthuizen
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN
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