

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 41975/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED.

DATE: 13.9.2022

SIGNATURE:

In the matter between:

PATRICIA MALULEKE MAMAILA

Applicant

and

MAKOMA MARTHA MAMAILA

First Respondent

ESTATE LATE MOHALE ENOS

Second Respondent

**MASTER OF THE HIGH COURT,
JOHANNESBURG**

Third Respondent

JUDGMENT

Todd AJ.

Introduction

1. This is Part B of an application brought by the applicant to remove the first respondent as executor of the estate of the Late Mohale Enos Mamaila. The application is brought in terms of the provisions of section 54(1)(a)(iii) and (v) of the Administration of Estates Act, 66 of 1965.
2. The applicant seeks ancillary relief including directing the first respondent to return the letters of executorship issued to her by the third respondent, and directing the third respondent to appoint the applicant as executor in place of the first respondent.
3. The application included a part A in which the applicant intended to seek interim relief, pending part B, but Part A was not separately enrolled, the interim relief was not sought in advance, and consequently the matter turns on the primary relief sought by the applicant, being an order removing the first respondent as executor and replacing her with the applicant.

Summary of relevant facts

4. The relevant facts are briefly these.
5. The first respondent was the biological mother of the deceased. The applicant was a customary law wife of the deceased.
6. The applicant's status as a customary law wife was initially disputed on the papers, and it remains a subject of contestation, but the matter has been somewhat simplified after the applicant produced an order of this court, sought and obtained on an unopposed basis, dated 22 October 2020 in which this court effectively declared the existence of the customary marriage.

7. This order was made after the respective decisions of the third respondent not to appoint the applicant as executor of the deceased estate and to appoint the first respondent as executor.
8. The relevant sequence of events is that the deceased died intestate in January 2020. During February 2020 the applicant applied to be appointed as executor of the deceased estate.
9. During March 2020 the applicant's attorneys of record, upon enquiry at the office of the third respondent, were informed that the applicant could not be appointed as executor in the absence of an original or certified copy of the marriage certificate or proof of registration of the marriage issued by the department of home affairs.
10. It transpired that the applicant's marriage to the deceased in terms of customary laws had never been registered during the lifetime of the deceased.
11. On the advice of her attorneys the applicant then set about applying to this court for an order that would effectively cause her customary marriage to be registered. That application ultimately produced the order to that effect dated 22 October 2020.
12. In the meantime, during July 2020 the first respondent had applied to be appointed as executor of the deceased estate. This was approved and letters of executorship were issued on 5 August 2020.
13. After this court's order on 22 October 2020 concerning the existence of the customary law marriage, the applicant then launched this application in December 2020.

Evaluation

14. As indicated earlier, the application is brought under the provisions of section 54 of the Administration of Estates Act (**the Act**), and specifically section 54(1)(a)(iii) and (v).

15. Those provisions state as follows:

“54 Removal from office of Executor – (1) An Executor may at any time be removed from his office –

(a) By the court –

...

(iii) if he has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as executor or to effect or to assist in effecting such recommendation; or

...

(v) if for any other reason the court is satisfied that is undesirable that he should act as executor of the estate concerned.”

16. The applicant relies, in addition, on the provisions of section 19 of the Act, which deals with a situation in which more than one person is nominated for recommendation to the Master for appointment as executor.

17. In fact, that section does not apply in the present circumstances. I agree with the submission of Ms Mbhalati, who appeared for the first respondent, that the section under which the Master was required to make an appointment in the circumstances was section 18, which deals with the situation where a person has died without having by will nominated any person to be his executor.

18. In any event, the applicant does not challenge the correctness or appropriateness of the respective decisions of the Master taken at the time. Instead, the applicant approaches this court under section 54 of the Act, contending that the first respondent,

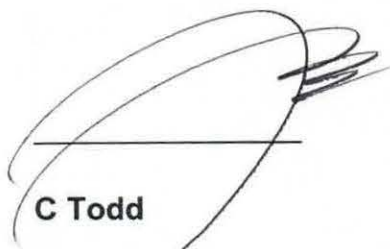
having been duly appointed as executor, should now be removed by this court on grounds arising either under s54(1)(a)(iii) or s54(1)(a)(v) of the Act.

19. Mr Maleka, who appeared for the applicant, submitted that the first respondent had secured her appointment as executor on the grounds of misrepresentation or some other conduct of a similar kind which induced persons to support her recommendation as executor. In the alternative, he submitted that there were grounds on which this court could hold that it is undesirable that the first respondent should continue to act as executor of the estate.
20. When pressed on what factual basis was established on the papers for either of these propositions, Mr Maleka essentially submitted that the applicant's status as common law wife gave rise to an entitlement to be appointed as executor, that since she and her child were beneficiaries of the intestate estate and the first respondent was not this meant that it was undesirable for the first respondent to continue to act as executor, and that the first respondent had no legitimate interest in continuing to serve in that role.
21. In my view, neither of the grounds on which the applicant relies for approaching the court in terms of section 54 of the Act are satisfied on the papers.
22. The fact that the applicant has established that she was a customary law wife of the deceased does not by itself establish either that there was anything wrong with the Master's decision not to appoint the applicant as Executor in the absence of evidence of the existence of the marriage at the time he made that decision, or that there was anything improper about the subsequent decision to appoint the first respondent as executor. No case has been made out on the papers for removal of the first respondent under either of the subsections relied upon by the applicant.

23. Furthermore, it would clearly disrupt the winding up of the deceased estate to replace the first respondent as executor at this stage, more than two years after her appointment.
24. In summary, no case has been made out for this court to intervene under the provisions of section 54.
25. In the circumstances the application falls to be dismissed. Both parties sought an order for costs, and I am satisfied that costs should follow the result.

Order

The application is dismissed, with costs.



C Todd

Acting Judge of the High Court of South Africa.

REFERENCES

For the Applicant:	Adv. K J Maleka
Instructed by:	Leshilo Inc. Attorneys
For the First and Second Respondents:	Mr. L Mbhalati
Instructed by:	Motanya Madiba Attorneys
Hearing date:	07 September 2022
Judgment delivered:	13 September 2022