IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE Number: 17373 / 2019

(1)	REPORTABLE: **YES**/~~NO~~
(2)	OF INTEREST TO OTHER JUDGES: **YES**/~~NO~~
(3)	REVISED: **YES**/~~NO~~

7 March 2025

In the matter between:-

SIPHIWE HILDA MTHEMBU	**Applicant**
and	
THEMBA MLAMBA	**First Respondent**
THEMBA RAFIQ THABIT	**Second Respondent**
TEBOGO DORIS THABIT	**Third Respondent**
MASTER OF THE HIGH COURT	**Fourth Respondent**
REGISTRAR OF DEEDS GAUTENG, JOHANNESBURG	**Fifth Respondent**

JUDGMENT

SNYMAN, AJ

Introduction

[1] The current matter concerns an application brought by the applicant on 16 May 2019, in which the applicant seeks certain declaratory relief, relating to a residential property situate at Erf 7[…], O[…] E[…], Soweto (the property). In particular, the applicant seeks an order that the sale of the property to the second and third respondents be declared to be null and void, and consequently that the registration of the ownership of the property in favour of the second and third respondents be reversed. The applicant seeks a further order that the property be transferred into her name as registered owner. The application has been opposed by the first, second and third respondent.

[2] The application came before me for argument on 19 February 2025. After hearing argument from the attorney for the applicant, as well as counsel for the first, second and third respondents, I granted the following order:

> '1. The applicant's application is dismissed.
>
> 2. The applicant is ordered to pay the first, second and third respondents' costs on the party and party scale B.
>
> 3. Written reasons for this order will be provided to the parties on 7 March 2025.'

[3] This judgment now constitutes the written reasons as contemplated by paragraph 3 of my order of 19 February 2019, above. I will start by first setting out the relevant background facts.

The relevant background facts

[4] The property had in the past been owned by one Nontsikeleo Mavis Sijaji (Sijaji). At the time when the events giving rise to this matter arose, Sijaji was elderly, and residing at the property. Sijaji also had no children of her own.

[5] According to the applicant, she first came to know Sijaji in 2009, when the applicant rented a shack situate on the property, from Sijaji. However, and by 2011, the applicant had moved into the main house on the property, for the purposes of taking case of the elderly Sijaji. The applicant further alleged that Sijaji's relatives neglected her and misused her State grant, and it was only the applicant that took care of her. The applicant relies on a report by a social worker, Refiloe Diale, dated 27 October 2015, in confirmation of her allegations. However there was no confirmatory affidavit by the social worker to substantiate the contents of this report.

[6] The first respondent has a different take of matters. He stated that Sijaji was his aunt (his mother's sister). According to the first respondent, the applicant came to live at the property in February 2010, when she was evicted from her previous residence and the first respondent's sister (Vuyisile Mlamba) brought her to stay at the property. The first respondent states that all Sijaji's relatives '*loved her immensely*', and the allegation that she was being neglected was false. As to the issue of the alleged abuse of Sijaji's grant, the first respondent points out that there as actually a dispute between the applicant and his sister concerning the manner in which the applicant herself was dealing with the grant. The first respondent also disputed the veracity of the report by the social worker, indicating it was 'cut and paste' and was wrong, and he made submissions as to how Sijaji was actually being looked after by her relatives.

[7] In her founding affidavit, the applicant contends that Sijaji had executed a will in October 2011, in which she made the applicant the sole beneficiary of Sijaji's estate. A copy of the will was attached to the founding affidavit. A consideration of this document provided shows that on face value, it appears to have been executed by Sijaji on 17 October 2011, however there is no independent confirmation or verification that it is indeed Sijaji's signature on the document. The document does reflect that the entire estate of Sijaji is indeed bequeathed to the applicant, and that ABSA Trust is appointed as executors.

[8] The first respondent disputed the validity of this will. He questions the veracity of the signature of Sijaji on the document, and provides a specimen signature of

what he contends to be Sijaji's signature which does not compare to the signature on the document. He states that Sijaji died intestate and that the alleged will relied on by the applicant is a forgery. He indicated that he had opened a fraud case against the applicant as a result at the SAPS, under case number 602/06/2016, and provided the documents substantiating such criminal complaint.

[9] The above being said, Sijaji passed away on 30 July 2015. The applicant stated that her '*distant relatives*' simply came for the funeral, and after burying her, moved away. The first respondent agreed that Sijaji's relatives attended the funeral. He however added that at Sijaji's night vigil, the relatives were attacked by the applicant to force them to leave, needing the community to intervene to restore order.

[10] The applicant states that as she was aware of the existence of the alleged will of Sijaji throughout. As a result, she went to ABSA Trust to require them take on the role as executors of the estate of Sijaji, as they were specifically nominated as such in the will. According to the applicant, ABSA trust told her to wait for a month, following which they would provide her with all the documents she needed for the administration of the estate.

[11] I have noticed that one of the documents discovered in the matter is a letter dated 18 September 2015 which purports to be by ABSA Trust renouncing executorship under the will. The problem I have with this letter is that it is not introduced into evidence by way of the any of the affidavits filed. It is simply uploaded on CaseLines as a loose document. In particular, it is not referred to in the applicant's founding affidavit. There is also no indication that this letter was ever presented to the Master.

[12] The applicant states that she went to the Master's Office in Johannesburg (the fourth respondent) to report / register the death of Sijaji and the estate, but was surprised to find that the first respondent had already done so. The applicant further states that the first respondent had '*falsely reported*' the estate on the basis that he was the son of Sijaji and that she had no will. It is not clear when the applicant went to the Master's offices to report the death / estate.

[13] In his answering affidavit, the first respondent disputed that he ever indicated that he was the son of Sijaji. He stated that Sijaji was his 'great aunt', and he reported her estate as her closest relative. He reiterated that she died intestate, an dhe properly reported the estate on such basis. In fact, the first respondent in turn made a similar accusation of fraud against the applicant, indicating that she falsely claimed to be the daughter of Sijaji, when she reported the death of Sijaji to Home Affairs.

[14] What appears undisputed is that the first respondent did report the death of Sijaji and estate, at the Master's office, immediately after the death of Sijaji. It is also undisputed that the first respondent was issued with a letter of executorship by the Master for Sijaji's estate, on 19 August 2015.

[15] According to the applicant, she lodged the will at the Master. She alleges that the Master's office investigated the will and found it to be valid. She also referred to some meeting called by the Master between herself and the first respondent, but does not indicate when this meeting was, what happened in that meeting, or whether there was any resolution arrived at in such meeting. The upshot of all this, according to the applicant, was that the Master decided that the letter of executorship given to the first respondent was '*cancelled*'.

[16] The first respondent does not dispute that such a meeting was convened, and indicated that the date of the meeting was 12 October 2015. He however indicated that the meeting did not ultimately happen because the official from the Master office, being one Bongani Blaauw (Blaauw) had misplaced the file. According to the first respondent, nothing was discussed or decided in the meeting.

[17] In support of her contention that the letter of executorship issued to the first respondent was cancelled, the applicant provides a letter dated 11 February 2016 authored by Blaauw, who appears to be working in the deceased section at the Master's office. The letter reads:

> 'Kindly be informed that Letter of Authority which Themba Mlamba IN NO: 8[…] has, was obtain fraudulent and he doesn't want to return back to us (Master office) that letter. That letter is declared null and void.

The person that suppose to occupy the property is Simphiwe Hilda Mthembu ID. 7[…] as in accordance with will accepted by the Master up until finalisation of the on-going investigation in respect of the alleged fraudulent will …' (sic)

[18] I may add that the letter of 11 February 2016 is preceded by a letter dated 11 November 2015, also penned by Blaauw, which only records that the applicant is the person that is '*supposed to*' occupy the property in accordance with the will accepted by the Master until finalization of the ongoing investigation in respect of the allegedly fraudulent will. No mention is made of the validity of the letter of executorship issued to the first respondent, at this point. But it does appear from the letters of 15 November 2015 and 11 February 2016 that the Master, at this point, was not convinced of the validity of the will and certainly did not finally accept the same as valid.

[19] Nonetheless, the problem with these two letters is that it is not supported by a confirmatory affidavit by anyone at the Master's office. It is not even indicated what position Blaauw held, or what authority he may have to make decisions, or if was even the one who made decisions. There is no indication of what may have been considered in deciding the letter of executorship issued to the first respondent was fraudulent, other than a bald statement.

[20] It is common cause that the first respondent, on 19 August 2015, sold the property to the second and third respondent, relying on the letter of executorship that had been issued to him on the same date, which letter of executorship was obviously valid at that time. It is also common cause that the applicant herself was only issued with a letter of executorship by the Master on 22 August 2016, which is long after the entire transaction had been concluded.

[21] As stated, the transaction in terms of which the second and third respondent purchased the property was concluded on 19 August 2015, when a written offer to

purchase was signed. The purchase price for the property was a sum of R400 000.00, paid by the second and third respondents in equal shares. The property was ultimately registered in the names of both the second and third respondents on 12 October 2015, which concluded the transaction. At the time, there was nothing to indicate that this transaction was somehow untoward, and certainly, there was nothing to indicate that the first respondent's letter of executorship was subject to challenge.

[22] The applicant was in fact evicted from the property by way of an order grated by the honourable Tuchten J on 29 December 2015.

[23] Nonetheless, the applicant believes that the transaction executed by the first respondent in selling the property to the second and third respondents was null and void, because it was executed on the basis of a letter of executorship fraudulently obtained. In short, and according to the applicant, the first respondent had no authority to sell the property, and this property belonged to her in terms of the will. This belief then led to the current application.

Non-service on the Master

[24] In my view, there can be no doubt that the Master has a material interest in the conducting of this case. This is because it is the actions of the Master and the decisions that he had allegedly made that lies at the heart of the applicant's case. In particular, the applicant relies on a case of the Master receiving and registering the will of Sijaji at the outset, investigating and then accepting the purported will of Sijaji as being valid, the Master finding that the first respondent had obtained his letter of executorship by way of fraud, and lastly that the Master had decided to cancel the first respondent's letter of authority on that basis. This case of the applicant is disputed by the first respondent. All this considered, I believe the Master has a substantial legal interest in the outcome of this case.[1] Surely it must be patently

[1] In *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at para 12, it was held: '*It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the*

obvious to the applicant that the involvement of the Master in the case is essential, at least to the extent that the Master can provide his in essence independent views on what the applicant is the Court.[2] Hence the applicant has indeed cited the Master as the fourth respondent in this matter.

[25] It however turns out that the application was never served on the Master. The first respondent pertinently raised this point, and it was not disputed by the applicant that this was indeed the case I have also carefully considered all the returns of service of the application provided by the applicant, as uploaded on CaseLines, and the only proofs of service that exist is service of the application on the first, second and third respondents.

[26] The failure to serve the application on the Master effectively means that there is non-joinder of the Master in this case. Whilst it may be so that the Master is cited as a respondent party, that does not join him to the proceedings by simple reference. The Master must be brought into the proceedings as a party, and this can only happen if the process is served on him. This was made clear in the judgment in *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[3]. That case dealt with dispute referrals under the LRA, which referrals function in exactly the same way in instituting employment disputes, as a notice of motion and founding affidavit would in the case of applications before this Court. It was found in that case, on the facts, that some of the parties who sought to be joined to the proceedings at a later stage were not served with the referrals. The Court had the following to say about this:[4]

> '... The objectives of service are both substantial and formal. Formal service puts the recipient on notice that it is liable to the consequences of enmeshment in the ensuing legal process. This demands the directness of

---

proceedings concerned '. See also *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC) at para 159.
[2] Compare *Leketi v Tladi* 2008 JDR 1188 (T) at para 19; *Menziwa v Ndokwana and Others* 2022 JDR 3259 (WCC) at paras 20 – 21.
[3] (2015) 36 ILJ 363 (CC).
[4] Id at para 53.

an arrow. One cannot receive notice of liability to legal process through oblique or informal acquaintance with it. ...'

[27] The Court in *Vilakazi v Commission for Conciliation, Mediation and Arbitration and Others*[5] adopted the same approach where it came to the failure to serve a review application on a party to the review, where the Court said:

'It follows from the above that a referral to this court of a review application in terms of rule 7A only exists when a notice of motion and founding affidavit is validly served on the respondent parties, and then filed in court. There is no delivery of the review application until such time as both the service and the filing requirements have been fulfilled.

There is an important reason why service on the respondent parties must always be effected in compliance with the requirements stipulated by law. It is this service that places the respondent parties on notice that there exist legal proceedings against them, and then calls on such respondent parties to engage ...'

[28] Another example can be found in *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission*[6]. The case dealt with the question whether a review applciation had to actually be served on a magistrate involved in the decision making. The Court held as follows:[7]

'... Consequently where Rule 53 speaks of the notice of motion having to be 'delivered' to, *inter alios*, the magistrate, it means service upon him of a copy of the notice of motion. And when the Rule speaks of the notice of motion having to be 'directed' to the magistrate it must mean that the magistrate must be cited as a party to the review proceedings. The word 'directed' is not defined in the Rules, but it seems to me to be an appropriate word to describe the process whereby a respondent is cited in motion proceedings. Notice of

[5] (2024) 45 ILJ 369 (LC) at paras 10 – 11.
[6] 1982 (3) SA 654 (A).
[7] Id at 670D-F.

> motion is, after all, a procedure whereby an applicant institutes proceedings by giving notice thereof to any person against whom he claims relief, and to the Registrar of the Court. ...'

[29] In sum, it is my view that the Master should have been called to Court, not only because of his interest in the matter, but also because the applicant herself contemplated this was necessary. However, and by not serving him with the application, the applicant failed to bring him to Court. That failure is fatal, on the basis of it constituting a non-joinder.

[30] But in any event, this failure must at the very least mean the applicant's contentions about what the Master may have done, decided and what happened in the Master's office relating to the letter of executorship of the first respondent and the will cannot be accepted as true. This would include her assertions that the purported will of Sijaji was registered and accepted as valid by the Master, and the letter of authority issued to the first respondent was cancelled by the Master on the basis of fraud. I think this is important to appreciate, as I intend to nonetheless deal with the merits of the applicant's application, in order to illustrate that the case in any event has no merit.

Analysis

[31] Before commencing with my reasoning, it is necessary to deal with several material factual disputes that have arisen in this case. These factual disputes, in summary, relate to the relationship of the first respondent to Sijaji, how the first respondent came to be appointed as executor, and whetehr Sijaji had a valid will that was registered, interrogated, and then accepted by Master as such. This is all intermixed with reciprocal allegations by each party that the other committed fraud. This is the kind of case that is very difficult to resolve in motion proceedings. Considering the history between the parties, which is evident from everything that is filed under CaseLines, the applicant should have anticipated the eventuality of material factual disputes. Yet the applicant pushed on, never sought a referral to oral evidence, and must therefore stand or fall on the basis of how these kinds of factual

disputes are ordinarily resolved in motion proceedings, as enunciated in *Plascon Evans Paints v Van Riebeeck Paints*[8], where the Court held:

> '... These principles are, in sum, that the facts as stated by the respondent party together with the admitted or facts that are not denied in the applicant party's founding affidavit constitute the factual basis for making a determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not creditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable, that the court is justified in rejecting that version on the basis that it obviously stands to be rejected ...'

[32] In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*[9], the Court added another dimension to the enquiry in applying the *Plascon Evans* principle, where the Court said:

> 'Ordinarily, the Court will consider those facts alleged by the applicant and admitted by the respondent together with the facts as stated by the respondent to consider whether relief should be granted. Where, however, a denial by a respondent is not real, genuine or in good faith, the respondent has not sought that the dispute be referred to evidence, and the Court is persuaded of the inherent credibility of the facts asserted by an applicant, the Court may adjudicate the matter on the basis of the facts asserted by the applicant.'

[33] As to when a denial (factual dispute) by the respondent party may not be considered to be real or genuine, the Court in *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[10] provided the following guidance:

---

[8] 1984 (3) SA 623 (A) at 634E-635C.
[9] 2005 (2) SA 359 (CC) at para 53.
[10] 2009 (3) SA 187 (W) para 19.

> '… the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected …'

And in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[11] the Court explained:

> 'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. ...'

[34] All the above being said, I do not believe it can be said that the factual disputes as raised by way of the first respondent's answering affidavit are not real or genuine. Where certain facts were in the knowledge of the first respondent, he put them forward. Where it came to allegations by the applicant concerning the conduct of the Master, the first respondent would not know this, and a bare denial would suffice. This is especially true where it comes to the allegations that the first respondent perpetrated a fraud when he sought to be appointed as executor, and the Master declared his letter of executorship null and void as a result. There is

[11] 2008 (3) SA 371 (SCA) at para 13. See also *Minister of Home Affairs and Others v Jose and Another* 2021 (6) SA 369 (SCA) at para 20.

nothing obviously fictitious, palpably implausible, far-fetched or untenable in what the first respondent had to say in his answering affidavit. There is no reason why this matter should not be decided on the basis of the admitted facts, together with the version as contained in the answering affidavit of the first respondent. In the end, as held in *TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight and Another*[12]:

> '… Credibility is only capable of being addressed on paper when the assertions are palpably absurd or demonstrably false. The threshold that had to be cleared is 'wholly fanciful and untenable'. Moreover, the appetite to resolve paper contests by reference to the probabilities, though ever present, is not appropriate. …'

[35] The above being said, the determination of this matter starts with setting out the relevant statutory framework. The administration of the estate of Sijaji would be regulated by Administration of Estates Act (AEA)[13]. In this context, it must be accepted that the first respondent was closely related to Sijaji, in that she was his aunt. By virtue of this relationship, the first respondent was entitled to report her death and her the estate to the Master by way of a notice of death,[14] as he did. When the first respondent discharged this obligation, he was unaware of any will executed by Sijaji, and reported her as having died intestate. There can be nothing untoward or irregular in any of this, as there is no case made out by the applicant of the first respondent being aware of any will when he submitted the notice of death.

[36] What the applicant did was to in essence pin her hopes on her contention that the first respondent indicated in the death notice that he was the son of Sijaji, which would obviously be untrue. It is so that the applicant discovered some documents by way of her founding affidavit, which had purportedly been submitted to the Master, in which the first respondent appeared to indicate he was the son of Sijaji. The problem with this is that the authenticity of these documents has not been established. The applicant has not indicated where and how she obtained these documents. There is

---

[12] (2017) 38 ILJ 2721 (LAC) at para 29.
[13] Act 66 of 1965 (as amended).
[14] See section 7(1)(a) of the AEA.

no confirmatory affidavit by any responsible person from the Master's office substantiating the veracity of these documents, and I again refer to the issue of the Master not being served with the application, discussed above. This was especially needed, considering that the first respondent specifically denied, in his answering affidavit, that he ever represented that he was the son of Sijaji. For all these reasons, it simply cannot be confidently said, on the facts, that the first respondent obtained the letter of executorship by fraudulent means.

[37] In terms of section 18(1) of the AEA, the Master may, if any person has died without having by will nominated any person to be his or her executor, appoint and grant letters of executorship to any person the Master may deem to be fit and proper. In this instance, and when the estate was reported by the first respondent in August 2015 on the basis that Sijaji died intestate, the Master clearly exercised his discretion in terms of this provision to appoint the first respondent as executor. There is also no case made out by the applicant that the Master decided to appoint the first respondent as executor because he believed the first respondent was Sijaji's son. Clearly the Master properly exercised his discretion in terms of this section, and once he had made this appointment accordingly, he would be *functus officio*.[15]

[38] Because the Master would be *functus officio* following appointment, it is not up to the Master to reconsider the appointment of the first respondent as executor. But what the Master can do is to remove the first respondent as executor. This would be done in terms of section 54(1)(b) of the AEA, which reads:

> '(1) An executor may at any time be removed from his office- ...
> *(b)* by the Master-
> (i) if he has been nominated by will and that will has been declared to be void by the Court or has been revoked, either wholly or in so far as it relates to his nomination, or if he has been nominated by will and the Master is of the opinion that the will is for any reason invalid; or

[15] See *Levinson v The Master of the High Court* 2020 JDR 2180 (GJ) at para 28; *Coetzer en 'n Ander v De Kock, NO en Andere* 1976 (1) SA 351 (O) at 359C-H; *Bouwer NO v Master of the Pretoria High Court and Another* 2023 JDR 3533 (GP) at para 10.

(ii) if he fails to comply with a notice under section 23 (3) within the period specified in the notice or within such further period as the Master may allow; or

(iii) if he or she is convicted, in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged instrument or perjury, and is sentenced to imprisonment without the option of a fine, or to a fine exceeding R2 000; or

(iv) if at the time of his appointment he was incapacitated, or if he becomes incapacitated to act as executor of the estate of the deceased; or

(v) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master; or

(vi) if he applies in writing to the Master to be released from his office.'

[39] However, removing a person as executor under section 54(1)(b) does not contemplate reconsidering the original appointment as executor, nor does it contemplate that the original letters of executorship are declared invalid or null and void. Obviously, removing a person as an executor under section 54 would only be competent if that person was properly appointed as executor in the first place. Only the Chief Master, by virtue of the provisions of section 95(1) of the AEA,[16] would have the power to review the appointment of an executor, and consequently declare a letter of executorship invalid or null and void, however that can only happen once all parties have been given a proper opportunity to make representations, and those representations have been considered.[17] If there is any doubt about this, it must be pointed out that section 54(5) provides that where a person is removed as executor, that person must return the letter of executorship to the Master. What is the point of returning a document that is declared invalid or null and void. Therefore, it would not be permissible for the Master to simply reconsider the issuing of a letter of executorship, and then declaring the same to be null and void or invalid. The Master is *functus officio* in this regard, and simply does not have that power.

---

[16] Section 95(1) reads: '*The Chief Master may review any appointment of an executor, curator or interim curator, and every decision, ruling, order, direction or taxation made by the Master, after taking into consideration representations from an executor, curator, interim curator, beneficiary or any other person whom the Chief Master considers relevant, and the Chief Master may confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be …*'.

[17] See 95(4) of the AEA.

[40] The instances when the Master may remove an executor under section 54 are specifically circumscribed, and concern, simply described: (1) where the will nominating the executor is declared invalid / revoked; (2) the failure to comply with the providing of security requirements in section 23; (3) where the executor is convicted of a criminal offence relating to dishonesty (such as fraud) and sentenced to imprisonment without the option of a fine; (4) the executor becomes incapacitated; (5) the executor fails in his tasks; and (6) the executor resigns. In particular, the Master does not have the power under section 54(1)(b) to remove a person as an executor in circumstances where the letter of executorship may have been obtained by misrepresentation (this would obviously encompass the fraud allegation made by the applicant *in casu*). Only the Court has this power under section 54(1)(v) of the AEA.[18] As succinctly said in *Mlunguza and Another v Master of the High Court and Another*[19]:

> '... This view of the matter is fortified by the division of removal powers between the court and the Master in s 54(1). The grounds on which a court may remove an executor are set out in para (*a*) of the subsection. The grounds listed in sub-paras (ii), (iii) and (iv) are concerned with misconduct of various kinds, while sub-para (v) empowers the court to remove an executor 'if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned'. This would obviously include a complaint that the executor is not a fit and proper person.
>
> By contrast, and leaving aside administrative non-compliance (in respect of which matters the Master has oversight), the only ground of misconduct for which the Master may remove an executor under para (*b*) is where the executor has been convicted of certain offences (sub-para (iii)). And in such cases, it is a determination of wrongdoing by a court which triggers the Master's power; the Master himself or herself does not have the power to

[18] The section reads: '*An executor may at any time be removed from his office (a) by the Court … (v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned.*'.
[19] (21755/2018) [2020] ZAWCHC 6 (11 February 2020) at paras 33 – 34.

> investigate and determine whether the executor has committed one of the specified offences …'

[41] A comparable example of the Court exercising its power sunder section 54(1)(a)(v) is found in *Goss v Bennett*[20], where the Court had the following to say:

> 'I agree with the appellant that there is no issue about his conduct in handling the estate of the decease since his appointment. However, the issue is how he conducted himself in securing his appointment as the executor. Section 54(1)(a)(v) provides for the Court to remove an executor if it is satisfied that it is undesirable for him or her to continue to act as such. The conduct of the appellant before his appointment is telling and is such that the other heirs and legatees have lost confidence that he will handle and wind up the estate properly. He has clandestinely secured his appointment as executor by withholding crucial information to the Master, and by refusing any other party access to the information contained and stored in the laptop of the deceased

[42] The applicant did not approach the Chief Master under section 95 of the AEA to review the appointment of the first respondent as executor on 19 August 2015. There is in any event no evidence of such a decision ever being by the Chief Master, which decision could only have been made if due process and *audi alteram partem* had first been complied with. The applicant has also not applied to this Court under section 54(1)(v), to remove the first respondent as executor based on a misrepresentation he had made when obtaining a letter of executorship from the Master. Instead, the applicant relies solely on what she contends is a decision by the Master reflected in a letter dated 11 February 2016 to declare the letter of executorship issued to the first respondent to be invalid, and null and void.

[43] The applicant's case firstly has difficulty on the facts. As stated above, the letter by Blaauw of 11 February 2016 is of little value in establishing that a decision was actually made by the Master to revoke the letter of executorship issued to the first respondent based on fraud. In particular, one does not even know what position

[20] (A5021/2022) [2023] ZAGPJHC 556 (31 May 2023) at para 16.

Blaauw may occupy at the Master, and in respect he was involved in the decision making at the office of the Master relating to this matter. But worse still, there is no confirmatory affidavit by Blaauw that can attest what may have been considered and on what basis the Master had made a decision, which I believe was important.[21] The applicant has simply not done enough to prove her case in this respect.

[44] But even if it can be said that the Master decided to declare the letter of executorship issued to the first respondent as invalid or null and void based on fraud allegedly perpetrated by the first respondent, the problem remains that the Master simply did not have the power to do so, as discussed above. In sum, he does not have the power to declare a letter executorship as being invalid and null and void, because he is *functus officio*, and he does not have the power to remove the first respondent as executor on the basis of fraud / misrepresentation, as only the Court can do so.[22] This would therefore, on the law, be equally destructive of the applicant's case.

[45] Considering that the will that Sijaji had purported made later came into play, what consequences could this have on justifying the removal of the first respondent as executor? The answer must be nothing at all. I say this for a number of reasons. In terms of section 8(1) of the AEA, the applicant, who contended that she had knowledge of the existence of the will throughout, was obliged to transmit the will to the Master as soon as the death of Sijaji came to her knowledge. There is no indication when she did this, but it does seem that it was only several months later. Where the Master receives the will, the Master registers the same in a register of estates.[23] The applicant has provided no proof the registration of the will *in casu* in the register of estates. The only document she has provided is a copy of the will itself, which documents contains a stamp by the Master reflecting it was registered, but this stamp is only dated 16 February 2016. Accordingly, there is no evidence of the Master even registering the will in this case until long after the entire transaction that the applicant takes issue with, in this case, had been concluded.

---

[21] Compare *Olivier v Master of the High Court and Others* [2016] ZAGPPHC 536 (23 April 2016) at para 38.
[22] See *Mlunguza* (*supra*) at para 38.
[23] Section 8(3) of the AEA.

[46] Further, and even if a will is registered, it does not mean it is accepted by the Master, because under section 8(4) the Master may refuse to accept a will despite it being registered, if it appears to the Master that the will may for any reason be invalid, until the validity thereof has been determined by the Court. There is no indication, on the evidence, that the Master accepted the will. It certainly appears that it was undisputed that the validity of the will was contested. In fact, the letters from Blaauw relied by the applicant herself records that the will is contested, and that it is still subject to investigation. The applicant needed confirmation from the Master that the will was accepted, in the form of at least a confirmatory affidavit by a person from the Master's office in the know. It follows that the applicant has not even shown that the will was accepted by the Master.

[47] A final consideration remains. Accepting for the purposes of argument that the letter of 11 February 2016 by Blaauw can be considered or read to be the removal of the first respondent as executor as contemplated by section 54, then on what provision in this section could the Master have relied upon. First and foremost, if the Master had relied on any of the provisions in section 54(1)(b), the Master also needed to comply with *audi alteram partem*, by giving the first respondent notice of his intentions in this regard. This is evident from section 54(2), which reads:

> 'Before removing an executor from his office under subparagraph (i), (ii), (iii), (iv) or (v) of paragraph *(b)* of subsection (1), the Master shall forward to him by registered post a notice setting forth the reasons for such removal, and informing him that he may apply to the Court within thirty days from the date of such notice for an order restraining the Master from removing him from his office.'

[48] *In casu*, there is no evidence of any compliance by the Master with the provisions of section 54(2). In any event, none of the circumstances as contemplated by section 54(1)(b) have been relied on by the applicant herself, or would be applicable in this case. So, the Master could not have utilised his entitlement under section 54(1)(b) to effect the removal of the first respondent.

[49] This only leaves section 54(3). In terms of this section: '*An executor who has not been nominated by will may at any time be removed from his office by the Master if it appears that there is a will by which any other person who is capable of acting and consents to act as executor has been nominated as executor to the estate which he has been appointed to liquidate and distribute ...*'. It is true that where it comes to the Master exercising his powers of removal under this section, the prvosions of section 54(2) do not apply, and the Master would not have been obliged to give notice to the first respondent before removing him as executor.[24]

[50] However, there is no indication on the facts that the Master relied on section 54(3) in removing the first respondent as executor. The letter of 11 February 2016 certainly gives no such indication. Instead, and as said above, it specifically refers to action being taken as a result of '*fraud*'. There is no confirmatory affidavit from the Master, establishing that that the Master relied on section 54(3). And finally in this respect, section 54(3) effectively contemplates that where the Master had appointed an executor, and it is found that there existed a will which specifically appointed another person as executor, the Master may remove the firstly appointed executor, and then instead appoint the executor nominated by the will itself. This kind of provision would make sense, as it is intended to give effect to the wishes of the testator, and correct where a mistake in appointment of the executor may have been made. But *in casu*, it cannot be said that the first respondent was removed by the Master for the purposes of replacing him with an executor appointed under the will of Sijaji. The executor appointed under the will of Sijaji is ABSA Trust. On the applicant's own case, ABSA Trust renounced executorship as far back as 25 August 2015. The Master could thus not have applied section 54(3) in removing the first respondent as executor.

[51] A comparable example to the case *in casu* in the judgment of *Phanyane NO v Phanyane and Others*[25] bears mention. In that case, the applicant contended that the deceased had made a will in which the applicant was nominated as executor. However, the respondent party had first reported the estate to the Master on the

[24] See *Phanyane NO v Phanyane and Others* 2022 JDR 2131 (GJ), discussed below.
[25] 2022 JDR 2131 (GJ),

basis that the deceased had died without a will, and a letter of executorship was issued to the respondent on that basis. The applicant then also reported the estate, but with the will, which will the Master accepted and registered. The Master then withdrew the respondent's letter of executorship, to appoint the applicant instead. However, the respondent had sold a property, under the first issued letter of executorship, to third parties, and the applicant as a result of the aforesaid events sought the transaction to be declared invalid. The respondent in turn challenged the withdrawal of the letter of executorship by the Master. In considering the aforesaid, the Court first held:[26]

> 'The First Respondent is correct that the Master ordinarily becomes *functus officio* once Letters of Authority or Executorship have been issued. However, this is subject to the powers of removal which the Master has in terms of Section 54 of the Act, titled *Removal from office of executor*.'

[52] The Court in *Phanyane supra* sought to distinguish the different circumstances under which the Master would be empowered to remove an executor. The Court accepted that in the case of a removal under section 54(1)(b), there had to compliance with *audi alteram partem* under section 54(2).[27] But in this case, the respondent had been removed as executor in terms of section 54(3), by virtue of the provisions of the valid will which had come to light. The Court consequently held that:[28]

> '... The procedure prescribed by section 54(2) applies only to removals in terms of subsection (1). It seems clear to me the First Respondent was removed in terms of section 54(3) ...
>
> It is clear from the quoted subsection that the Master has the authority to replace an executor who was <u>not</u> nominated by will, with one who was nominated by will and who is willing and able to act as executor. In the present case the First Respondent was removed following the registration of

[26] Id at para 16.
[27] See para 17 of the judgment.
[28] Id at paras 20 – 21.

the deceased's will, which nominated the Applicant as executor. The Master therefore did not act unlawfully or exceed his powers by withdrawing the First Respondent's Letter of Authority.'

[53] It is also important to note that in *Phanyane supra*, the respondent's letter of executorship had been withdrawn by the Master prior to the final execution of the transaction selling the property, and that meant the transaction was invalid.[29]

[54] Comparing *Phanyane supra* to the case *in casu*, a number of differences are immediately apparent. First, the letter of executorship of the first respondent *in casu* was only disavowed by the Master long after the transaction had been finally executed. Second, the Master did not seek to disavow the letter of executorship based on the will. Third, the applicant was in any event not nominated as executor under the will. As such, the cause for removal could only be one as contemplated by section 54(1)(b), and in which event compliance with *audi alteram partem* as prescribed by section 54(2) was essential.

[55] All the above considered, there is only one conclusion that can follow. The first respondent had been validly appointed by the Master as executor on 19 August 2015, and was *functus officio* where it came to such appointment. The Master cannot declare such appointment as invalid or null and void, as the Master does not have the power to do so. The Master also never removed the first respondent as executor as contemplated by section 54(1)(b) or section 54(3). This must mean that when the first respondent transacted to sell the property to the second and third respondents, that transaction was legitimate and authorised by his extant letter of executorship issued to him by the Master, and the transaction stands. If the applicant believed the original appointment of the first respondent as executor was tainted with invalidity as a result of a fraud or misrepresentation perpetrated by the first respondent in securing such appointment, the applicant should have approached the Court in terms of section 54(1)(a)(v) of the AEA to remove the first respondent as executor, or should have sought a review of the appointment, in terms of section 95 of the AEA, by the Chief Master. But the applicant cannot rely on a purported declaration of

[29] Id at para 27.

invalidity of the letter of executorship issued to the first respondent by the Master as basis for her claim, which was unproven on the facts in any event.

[56] Consequently, the applicant has failed to make out a case for the relief sought in her notice of motion. The applicant has failed to establish a proper factual foundation for her claim, which claim in any event has no legal basis to support it. There is no basis to set aside the transaction concluded between the first respondent, on the one hand, the second and third respondents, on the other, in terms of which the property was sold to, and then registered in the names of, the second and third respondents. The applicant's application falls to be dismissed.

[57] This only leaves the issue of costs. The applicant was not successful. As such, the first and second and third respondents, who opposed the matter, would be entitled to their costs. I also consider that the applicant elected to pursue this matter on motion, when it should have been apparent to her that this would be problematic. Her failure to even serve the Master with the application is also a factor that weighs in my decision with regard to costs. I thus consider that a costs award against the applicant, on the party and party scale B, is justified.

[58] It is for all the reason as set out above, that I made the order that I did as reflected in paragraph 2 of this judgment, *supra*.

SNYMAN AJ
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Appearances:

Heard on:	19 February 2025
For the Applicant:	Ms S Mabaso of Sharon Mabaso Attorneys
For the First Respondent:	Advocate C R Du Plessis
Instructed by:	Nivani Muller Attorneys

For the Second and Third Respondents: Advocate M J Mbadi

Instructed by: Wits Law Clinic

Judgment: 7 March 2025