

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 6134/2022

1. REPORTABLE: NO

2. OF INTEREST TO OTHER JUDGES: NO

3. REVISED: NO

DATE: 23 MAY 2023

In the matter between:

MARTHA KERILENG KGOSI

Applicant

and

KGANYANE LILLY KGOSI

1st Respondent

ESTATE LATE RABAKI PETRUS KGOSI
Estate no:0[...]

2nd Respondent

KL KGOSI NO
Executrix of late estate no: 0[...]

3rd Respondent

DEPARTMENT OF HOME AFFAIRS

4th Respondent

MASTER OF THE HIGH COURT PRETORIA

5th Respondent

JUDGMENT

K STRYDOM, AJ

Introduction:

- 1) On 28 June 1986, Mr Petrus Kgosi ("the deceased") married the Applicant in community of property. By 2008 however the Applicant had moved out of the house

and the deceased was living with the first Respondent. In 2017, he "married" her in a civil ceremony, without having divorced the Applicant. This "marriage" is the genesis of the disputes between Mr Kgosi's two "wives".

- 2) Given the pertinent choice to conclude a civil marriage in community of property, it is no surprise that the Applicant was aggrieved that the first Respondent was appointed by the Master of the High Court as the executrix of the estate of her late husband, following his demise on 18 March 2021.
- 3) She accordingly seeks an order setting aside this appointment by the 5th Respondent ("the Master")

Relief sought

- 4) The Applicant had initially, in her notice of motion sought a variety of orders which can be grouped into: (a) orders aimed at validating the Applicant's marriage to the deceased and invalidating the first Respondent's and (b) orders aimed at the removal of the first Respondent as the executrix of the estate of the deceased
- 5) On the day of hearing, the parties had managed to narrow the issues for determination by agreeing to the following:
 - a) The first Respondent no longer disputed the validity of the marriage of the Applicant to the deceased. The result was that the relief sought in terms of prayers one and two of the notice of motion (and add the validity of the respective managers) fell away.
 - b) The parties agreed that there was no dispute of fact on the papers.
 - c) Counsel for the Applicant, correctly, conceded that, despite the relief sought in the notice of motion, this Court may not usurp the discretion of the Master by appointing

the Applicant in the place of the first Respondent. As such, the prayer in this regard was abandoned¹

- 6) The Applicant now sought the following relief:
 - a) A declaration that the appointment of the first Respondent as the executrix was erroneous and therefore be set aside
 - b) An order directing the Master to remove her as the executrix
- 7) The parties further agreed that the first Respondent, in view of the acceptance of the validity of the Applicant's marriage, would argue that the marriage of the first Respondent was a putative marriage. The argument was to proceed on the papers filed, without supplementation.
- 8) It, however, became clear, during the first Respondent's argument, that she would need to refer to evidence that was not contained in the papers before Court. I accordingly refused to hear argument in this regard. As will be gleaned from the discussion below, the determination of the putative marriage has no significant bearing on the relief sought at date of this hearing.
- 9) Given the nature of the agreements already made between the parties, I granted the parties leave to supplement their papers for argument of the putative marriage at a later stage before another Court. They agreed to certain timeframes for such papers to be filed and also agreed, that if the putative marriage was proven, they would be willing to act as co-executors.

Relevant facts

- 10) The first Respondent was appointed by the Master on the strength of her marriage certificate on 25 March 2021. The Applicant sought appointment on the 9th of April 2021 and was informed of the first respondent's appointment. On 14 April 2021,

¹ *Bankorp Trust Bpk v Pienaar* 1993 (4) SA 98 (A)

caused a letter to be sent to the Master informing it that she was in fact married to the deceased and resultant requested it to cancel the letter of executorship issued to the first Respondent.

- 11) On 19 April 2021 the Master wrote to the first Respondent and indicated that it is considering removing her as executrix on the basis of the complaint received from the Applicant. It was indicated that, if she failed to produce evidence to the contrary, it was “*much amenable*” to cancel the first Respondent's letter of executorship and to appoint the Applicant as executrix.
- 12) The Master has since sending this letter, taken no further action.
- 13) On 11 May 2021, the fourth Respondent also wrote to the first Respondent to indicate that, as her marriage to the deceased was bigamous, the marriage was removed from the National Population Register.

Issues for determination

- 14) From the aforementioned facts it is evident that the Master has performed two administrative action, which the setting aside of each, respectively, has a direct bearing on this matter:
 - a) It appointed the first Respondent as the executor; and
 - b) It took steps to remove her as executor by writing the letter referred to supra.
- 15) The following therefore stands for determination:
 - a) With regards to this second action, insofar as the Master has failed to take a decision, should an application for review have been brought in terms of the Promotion of Access to Justice Act, 3 of 2000 (“PAJA”)?

- b) If the answer to (a) is in the negative, should the appointment of the first Respondent be set aside by the Court?

Legal framework and application

Statutory provisions

- 22) Section 54 of the Administration of Estates Act 66 of 1965 ("the Estates Act"), clearly demarcates the jurisdiction of the Court and the Master, respectively, to remove an executor from a deceased estate.
- 23) The Court may do so, for presented purposes, where it is satisfied that "*it is undesirable that he should act as executor of the estate concerned.*"²
- 24) The Master's jurisdiction to remove an executor, in the present matter, by process of elimination, could only be in instances where either the executor was incapacitated at the time of appointment or has failed to perform her duties satisfactorily.³ Either way, the Master has a duty to, before removing an executor, send a notice by registered post setting forth the reasons for such removal and informing the executor that she may apply to the Court within 30 days for an order restraining the Master from removing her.⁴

Removal by the Master and the applicability of PAJA

- 25) Counsel for the Applicant referred to the judgment in *Mlunguza and Another v Master of the High Court and Another*⁵ in support of the contention that PAJA does not apply to S54(2) of the Estates act. I disagree with this contention insofar as it espouses a rule of general application: In *Mlunguza* the pronouncement was made in the context of the Master having removed the executor, without providing notice in terms of S54(2) of the Estates Act. The Master placed reliance on S3(4) of PAJA to justify her departure from the provision. In the present matter, the issue pertains

² S54(1)(a)(v) Administration of Estates Act 66 of 1965

³ S54(1)(b)(iv) and (v) Administration of Estates Act 66 of 1965

⁴ S54(2) Administration of Estates Act 66 of 1965

⁵ *Mlunguza and Another v Master of the High Court and Another* (21755/2018) [2020] ZAWCHC 6 (11 February 2020) paras 44 and 45

to the possible failure of the Master to make a decision in terms of S54(1)(b) read with S54(2) of the Estates Act.

- 26) To answer the question posed in paragraph 17(a) *supra*, with regards to the applicability of PAJA to the Master's failure to take action, it is necessary to deal with letter sent to the first Respondent by the Master. Simply put, can this be considered to be a notice in terms of S54(2), which would lead to the inference that the Master has subsequently failed to make a decision in terms of S54(1)(b) and therefore trigger PAJA?
- 27) The letter itself does not convey a decision to remove the first Respondent as an executor, nor does it inform her to approach the Court. It is therefore not in compliance with the provision.
- 28) Furthermore, even though the Applicant, in her founding affidavit, complains of the first Respondent's failure to perform her duties, this was not the basis of her complaint sent to the Master. The Master's reasoning for the potential removal, in terms of the letter, is based on the bigamous marriage complained of by the Applicant.
- 29) Despite the necessary inference that the appointment of the first Respondent was done on the erroneous basis that she was the sole spouse, the provisions of S54(1)(b) simply do not imbue the Master with the authority to remove an executor under such circumstances.
- 30) The fact that the appointment was done on an erroneous assumption, cannot be render the executrix incapacitated at the time of appointment. It has, for instance, been held that where an attorney, who was at the time suspended, was appointed as an executor (without disclosing his status), the Master could not remove him on the basis that he is not fit and proper and therefore incapacitated.⁶

⁶ *Mlunguza and Another v Master of the High Court and Another* (21755/2018) [2020] ZAWCHC 6 (11 February 2020): "...the requirement S18 in(1) that an executor dative be "fit and proper" does not, I consider, go to capacity for purposes of S54(1)(b)(iv)."

- 31) Accordingly, the letter sent does not constitute a notice as per the section and, in any event, would not have contained a competent ground for removal of the executrix by the Master. As such there is no basis for a review in terms of PAJA in this regard.

Removal by the Court

- 32) With regards to the application to this Court to remove the first Respondent, it appears from the founding affidavit that the Applicant bases such a removal on the fact that the first Respondent had "*no locus standi to be so appointed*"⁷ and is neglecting her duties as executrix.
- 33) Firstly, there is no such thing as *locus standi* (in the sense meant by the Applicant) with regards to the appointment of an executor. In terms of S18(1) the Master may appoint and grant letters of executorship to any such person whom it may deem fit and proper. The regard that it is enjoined to have to the sole surviving spouse, in terms of S19, only comes into play if more than one person is nominated for recommendation to the Master as executor. That was not the case here.
- 34) Counsel for the Applicant also referred me to the matter of *Bobani v Benge and Others*⁸, where the Court, having found the executrix's marriage to the deceased to have been invalid, set aside her appointment.
- 35) The judgment, however, seems to have been directed primarily at the validity of the marriage and does not pertinently state on what basis the executrix's appointment was set aside. In *Bobani*, the Applicant had attempted to report the estate and wanted to be appointed as executor, but was not afforded the opportunity to address the Master in this regard. In casu, the Applicant had applied for appointment as executrix, but, following advice from family, chose to abide by the appointment of the first Respondent. It is therefore distinguishable from *Bobani*, where there competing claims for appointment.

⁷ CL 01-24

⁸ *Bobani v Benge and Others* (428/2018) [2022] ZAECHC 8 (14 April 2022),

- 36) Therefore, given the provisions of S18 and S19 discussed above, the removal as an executrix does not flow as a matter of course from a declaration of invalidity of a bigamous marriage.
- 37) Secondly, the first Respondent denies that she has neglected any of her duties as the executrix and indicates that she has, for instance, appointed a firm of attorneys to assist her in managing the estate. Her refusals to provide information to and to include the Applicant in the distribution, stemmed from her *bona fide* belief that she was the sole spouse of the deceased and therefore was under no obligation to share information with the first Respondent or to include the first Respondent in the distribution. Even though the parties have agreed that there are no disputes of fact in the application, the working of the *Plascon Evans*⁹ rule in any event requires that this version be accepted.
- 38) I am appreciative of the fact that the first Respondent now admits the validity of the Applicant's marriage in community of property to the deceased, however this admission does not affect the credibility of her belief at the time of deposing of the answering affidavit. Nor does it render her decisions taken with regards to the estate, based on this mistaken belief, suddenly neglectful. Earlier this year, in *Mailula*¹⁰, the Court, approvingly referred to the dictum in *Volkwyn NO v Clarke & Damant*¹¹:
- “Where it is sought to remove an executor from office it must appear that the acts complained of are such as to stamp the executor as a dishonest, grossly inefficient or untrustworthy person whose future conduct can be expected to expose the estate to actual loss, or of administration in a way not contemplated ...”*
- 39) There thus being no finding of gross neglect or inefficiency on the part of the first Respondent, I am accordingly left to determine whether there are other grounds that would render the continuation of the first Respondent as executrix, undesirable.

⁹ *Plascon-Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634

¹⁰ *Mailula Vusi James & Another v Modiba Altevese Sir-Mone Puni & Another* (Case No. 7692/2022) [2023] ZAGP JHC 367 (24 April 2023)

¹¹ *Volkwyn NO v Clarke & Damant* 1946 WLD 456 as quoted in *Mailula* supra

40) I have considered, in addition to the basis for the Master's appointment (discussed *supra*) and the agreements reached between the parties, the relationship between the parties. As was stated in *Mailula*¹²:

"...(m)ere hostility between the executrix and other interested parties which does not affect the administrationis not sufficient ground for removal. The test is whether the continuance of the executrix in office will prejudicially affect the future welfare of the estate placed in her care." [Underlining my own]

41) By all accounts, the parties had a civil relationship prior to the death of the deceased. The first Respondent had lived with the deceased and the children of the Applicant since 2008. She had helped raised the children of the Applicant. The Applicant's children, in fact, to save the peace, had advised the Applicant to accept the appointment of the first Respondent.

42) However, the die has now been cast and the parties are embroiled in litigation. Even their agreement to act as co-executrixes is conditional and seems to be borne out of the probable joint appointment by the Master that would in any event follow if the putative marriage were proven.

43) Will these hostilities affect the first Respondent in her administration of the estate? Not being an adept soothsayer, this Court cannot answer the question. However, that the hostilities could influence her (at least on a subjective level) is reasonably foreseeable. Furthermore, considering that the legal position, (presently) is that 50% of the estate to be distributed belongs to the Applicant, would it be fair to her to, given the hostilities, entrust her portion to an executrix who, until date of hearing, denied her entitlement thereto? Decidedly not.

Finding

44) Without casting any aspersions on the *bona fides* of the first Respondent, I find that this consideration of fairness, coupled with the probability that Applicant (in the

¹² *Mailula* note 9 *supra* at para 47

presence of the true state of affairs) would probably have been appointed as executrix instead of the first Respondent, tips the scales in favour of setting aside the appointment of the first Respondent.

ORDER

45) In the result, it is ordered that:

1. The appointment and issuance of the letters of executorship by the fifth Respondent to the first Respondent, to act in her capacity as executrix of the second Respondent (the late estate of Rabaki Petrus Kgosi) is set aside.
2. The fifth Respondent is directed to remove the first Respondent as the executrix of the second Respondent and to withdraw the letters of executorship issued to the first Respondent.
3. The first Respondent is directed to return the letters of executorship issued to her by the fifth Respondent to the fifth Respondent.
4. The first Respondent is ordered to give a full account of actions taken during her tenure as executrix to the fifth Respondent or the newly appointed executor(s) as and when requested to do so by either.
5. The first Respondent is ordered to provide all documentation in her possession or under her control pertaining to the second Respondent to the fifth Respondent or the newly appointed executor(s) as and when requested to do so by either.
6. The fifth Respondent is ordered to appoint a new executor(s) or executrix(es) to the late estate of Rabaki Petrus Kgosi.
7. In the event that either the Applicant, or the first Respondent, or both contend for appointment of executrix(es) of the second Respondent, the party or parties applying are ordered to bring this judgment and the recorded agreements therein

to the attention of the fifth Respondent for its consideration in making such an appointment.

8. The first Respondent is ordered to pay the Applicant's party and party costs on a High Court scale.

**K STRYDOM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date of hearing:

13 April 2023

Judgment delivered:

23 May 2023

Appearances:

For the Applicant:

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