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

14/9/2016

CASE NO: 20008/2015

Reportable: NO

Of interest to other judges: No

Revised.

In the matter between:

PHINDY M. MARAPE

First Applicant

And

MAABORE MAGDELINE MAGABE

First Respondent

THE MASTER OF THE HIGH COURT: POLOKWANE

Second Respondent

JUDGMENT

Carrim AJ

[1] This is an application for the removal of the first respondent as the executrix of the estate of the late Joel Ditaelo Marape ('the deceased') and for the reinstatement of the applicant as executrix of the deceased's estate. The applicant brings this application in terms of section 54(2) of the Administration of Estates Act 66 of 1965. ('the Act'), and seeks an order as if she was seeking an interdict contemplated in that section.

[2] The first respondent opposes the application. The second respondent has filed a brief report in these proceedings but abides the decision of the Court. The applicant did not file a replying affidavit.

[3] The matter was set down on the opposed roll by the first respondent and a notice of set down was served on the applicant. The applicant did not bother to index and paginate the court file nor were there any heads of argument filed by her legal representatives. By the time the matter was set down there was no certainty that there would be an appearance on behalf of the applicant. However on the day of the hearing Mr Dzimba put in an appearance on behalf of the applicant, submitted Heads and put up an argument that was quite frankly unhelpful to this court.

[4] I accepted the late submission of the applicant's Heads of Argument because in my view it was preferable to afford the applicant an opportunity to be heard given that the nub of her complaint to this court was she had not been granted that opportunity at the time of her removal as executrix and to expedite the resolution of this matter in the interests of the legitimate heirs of the deceased estate. However the conduct of the applicant in these proceedings is matter of serious concern, particularly in light of the very relief she seeks. I return to this matter later.

Background Facts

[5] The first respondent and the deceased were married to each other in terms of customary law in 1988. The marriage was not dissolved by divorce and existed at the time of the deceased's death on 17 August 2010.

[6] Five children were born from the marriage between the first respondent and the deceased namely Rudolf Marape, Tunase Obryn Marape, Morake Morgan Marape, Lekowa Marape and Maashika Marape.

[7] The deceased died intestate.

[8] Unbeknownst to the first respondent and her children the deceased entered into a civil union with the applicant on 7 April 2005. The applicant claims that this marriage was

in community of property but has not attached a marriage certificate to the founding affidavit. However the first respondent does not dispute that the applicant and the deceased may have had an intimate relationship.

[9] Upon the death of the deceased, the applicant reported the estate to the second respondent. The second respondent (hereinafter referred to as the Master) confirms that the applicant was appointed as executrix on the strength of a marriage certificate produced by her. She was appointed as executrix on 16 September 2010.

[10] A letter cancelling her appointment as executrix of the deceased estate was sent to the applicant on 17 September 2013 (record p 55) In that letter, the Master advises that he has decided to remove her as executrix in terms of section 54 (1) (v) because she had "failed to furnish him with the outstanding requirements as set out in the registered demand of 30 July 2013". The registered demand of 30 July 2013 was not attached to their papers by either the applicant or the Master.

[11] At the time of the appointment of the applicant as executrix of the deceased's estate, the Master was not aware that the deceased was customarily married to the first respondent.

[12] The fact of the customary marriage and the existence of the first respondent and the deceased's five children was subsequently brought to the attention of the Master whereupon he made enquiries and was satisfied of the existence of a valid customary marriage between the deceased and the first respondent. The Master then appointed the first respondent as executrix on 21 October 2013, more than a month after he had removed the applicant.

[13] On 12 November 2013 the attorneys of the first respondent wrote to the attorneys of the applicant requesting that a roundtable discussion be held in order to discuss the assets of the deceased which were still in the possession of the applicant.

[14] In this letter the attorneys confirm that they were writing on behalf of the first respondent as executrix of the deceased estate.

[15] On 15 November 2013, the attorneys of the applicant wrote back and advised that a liquidation and distribution (L&D) account was lodged with the second respondent and that same was lying for inspection at the Naphuno Magistrate's Court. They indicated that they will revert regarding the possibility of a roundtable discussion once they had taken instructions from the applicant. A copy of the L&D account was attached dated 4 October 2013.

[16] The applicant did not accede to the request for a roundtable discussion.

[17] On 22 January 2014 the first respondent's attorneys wrote back and put to the applicant, through her attorneys, that her appointment as executrix had been withdrawn by the second respondent, that she had no authority or power to submit the L&D account dated 4 October 2013 and that in any event the L&D account which was submitted was wrong as it made no provision for the customary wife (record p 62 - 64) and children born out of it. There was a demand made for the return of assets of the deceased estate.

[18] The applicant did not return the assets as a result of which the first respondent launched proceedings in the Tzaneen Regional Court for delivery of the assets. The Regional Court found in favour of the first respondent. An attempt was made by the first respondent to enforce the court order but to date the assets have not been located. The applicant has not taken the decision of the Regional Court on appeal or review and has retained possession of the assets in contempt of the court order.

Basis of the Application

[19] The applicant now seeks to challenge her removal as executrix by the Master on the basis that she had not received the letter of 17 September 2013 and in any event the Master had not sent her a notice as contemplated in section 54(2).

[20] It was not clear from the papers whether the applicant was relying on the former ground as a basis for seeking condonation from this court so as to exercise her rights under section 54(2) or that she was raising some general basis of review. However the fact that she makes out a case on the basis of an interdict suggests that she intended to

exercise her rights under section 54(2) to approach this court. The application was not brought under rule 53 or PAJA. At the hearing of the matter, counsel for the applicant confirmed that the application was brought in terms of section 54(2) and not section 95 of the Act.

[21] The Master's reasons, contained in the brief report filed in these proceedings confirm that the applicant was removed as executrix and that the first respondent was subsequently appointed as executrix. Significantly it is stated that at the time that the applicant was appointed (not removed) the Master was unaware of the customary marriage between the deceased and the first respondent and that this marriage was in the Master's view valid and came "before" the civil marriage to the applicant.

Applicable Law and Application to the Case

[22] The relevant provisions of Section 54 of the Act provide that:

"54 Removal from office of executor

(1) An executor may at any time be removed from his office-

...

(b) by the Master-

...

(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.

(2) 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.

...

(4) Any person who ceases to be an executor shall forthwith return his letters of executorship to the Master."

[23] The obvious purpose of section 54(2) is to provide the person who is being removed with the reasons therefore and to alert them to their rights to approach a court, within 30

days, if they wish to restrain the Master from doing so. The inherent principle embodied by the provisions of this section is ***audi alteram partem***.

[24] The applicant's complaint is that she had not received the reasons for her removal and that she was not directed to her right to approach a court. She now exercises this right.

[25] She asks the court to restrain the Master from removing her (and because of the lapse of time this would mean reinstating her) as executrix on the following grounds:

25.1 She is the lawful spouse of the deceased and was married to him in community of property. The customary marriage of the first respondent is not valid. She challenges both the customary marriage and the fact that the five children were born from it.

25.2 Following on from her civil marriage she alleges that she is entitled to half the estate. As a surviving spouse she is entitled to a child's share. The residue of the estate after all expenses are estimated as reflected in the L&D drawn by her on 4 October 2013 is valued at R241 526.00. Half of this accrues to her from marriage and the other half under section 1(a) of the Intestate Succession Act as the sole surviving spouse. Hence she is entitled to all the assets.

25.3 In other words she had a clear right to the assets of the deceased estate.

25.4 If she was not appointed as executrix she would not have use of the assets of the deceased estate (which she refers to as "my" assets in the founding affidavit) and would suffer irreparable harm.

25.5 She has no other remedy available to her.

[26] Under the scheme of the Act where a deceased dies intestate the Master is under no obligation to appoint the surviving spouse as executor of the estate. The Master however is under an obligation under section 18 to appoint a person he deems fit and proper to wind-up the estate of the deceased in the interests of the legitimate heirs. The

Master may make such appointment with or without notice to the public at large. The primary obligation of the Master is to the deceased estate and the legitimate heirs thereof and pursuant to that objective to entrust the affairs of the deceased to a fit and proper person. Once appointed the executor occupies a fiduciary role and enjoys wide powers under the Act and is under an obligation to not allow a conflict of interest between his private interests and his role as executor in a fiduciary duty. (Juanita Jamneck, Christa Rautenbach, et al The Law of Succession in South Africa 2nd Edition).

[27] As such there is no entitlement on the part of a surviving spouse or a close family relative of the deceased to be appointed as executor. The applicant therefore enjoys no right to be appointed as executrix.

[28] However in practice the Master is likely to appoint a close family member, on the assumption that they would be best placed to look after the interests of all the legitimate heirs of the deceased. Depending on the circumstances, this person could be the surviving spouse, the eldest adult child of the deceased, an uncle or other close family friend or a church elder. In this case the Master seems to have followed this route.

[29] Under the Intestate Succession Act 81 of 1987 the legitimate heirs of the deceased would be the five children born during his marriage to the first respondent and a share for the surviving spouse. Hence the applicant might at best have a claim (and I make no finding in this regard) against the deceased estate but that would be a right as a beneficiary of the estate, and would not translate into a right to be appointed as executrix.

[30] I now turn to consider the grounds upon which the applicant seeks to resist the Master's removal of her as executrix.

[31] The first ground she relies upon is her civil marriage in community of property as a basis to suggest that she, as opposed to the first respondent, would be better placed to act as executrix. The customary marriage between the first respondent and the deceased took place in 1998. The applicant's civil marriage took place in 2005. Under section 3(2) of the Recognition of Customary Marriages Act 120 of 1998 ("CMA"), a spouse in a customary marriage is not competent to conclude civil marriage during the

subsistence of the customary marriage. Such a civil marriage would therefore be unlawful. See **Nhlapo v Mahlangu and Others** (59900/14) [2015] ZAGPPHC 142 (20 March 2015) at para 25. See also **Mayelane v Ngwenyama and another (Women's Legal Centre Trust and Others as amici curiae)** 2013 (8) BCLR 918 [CC].

[32] The applicant attacks the customary marriage of the first respondent by the bald allegation of non-compliance with customary law traditions but puts up no supporting evidence to that effect. On the papers there is a weak attempt to suggest that the marriage had not taken place in 1998, prior to the commencement of the CMA but again no supporting facts or evidence was put up in the papers.

[33] The first respondent however was able to provide a certificate from the Bakone ba Mametja Traditional Council authority that the marriage had in fact been concluded, as well as affidavits from her mother and the brother of the deceased confirming that the marriage had taken place in 1998, the parties were above the age of 18, lobola had been paid and five children had been born from this wedlock. The birth certificate of each child has been attached showing the father of them was the deceased. I am satisfied that on balance of probabilities that the first respondent has amply demonstrated that the marriage occurred in 1998 and prior to the commencement of the CMA. I am satisfied that on the balance of probabilities the customary marriage between the deceased and the first respondent was validly concluded prior to the commencement of the CMA. I am satisfied that the five children are the direct descendants of the deceased.

[34] In terms of the section 3(2) of the CMA the marriage between the applicant and the deceased was therefore unlawful and void. Her claims that the half the estate belongs to her and that she has a right to the assets as alleged cannot be sustained.

[35] Since she is not entitled to half the estate she cannot claim that some or other injury or harm would accrue to her as a result.

[36] But I stress here that in my view the issue of the validity of the marriage does not determine whether the applicant is a fit and proper person to be appointed as executrix of the deceased estate. Even if she were for argument's sake entitled to half the

deceased estate, this would not necessarily render her a fit and proper person to serve in a fiduciary role as executrix. Ultimately it is the conduct of the applicant that informs this court whether she is a fit and proper person to be appointed - and in the applicant's case not to be removed - as executrix.

[37] In **Gory v Kolver NO and Others** (4928/05) [2006] 2 All SA 640(T) the court takes into account the following in arriving at the conclusion that the executor ought to be removed.

37.1. *"[26] What I find very disturbing, however, is that he failed to consider the applicant's claim that he is the heir. He was aware of the claim since 23 May 2005. He was invited to have a discussion and settle the matter. He bluntly refused to consider the applicant's claim."*

[38] In **Oberholster NO and Others v Richter** (A515/11) [2013] ZAGPPHC 99; [2013] 3 All SA 205 (GNP) (12 April 2013) the court at paras 11 traces the principles governing the application of section 54(1)(a)(v). Citing Margo J in **Die Meester v Meyer en Andere** 1975(2)SA 1(T) the court states that in that case the court lay down the broad principle that -

"In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated that their main guide must be the welfare of the beneficiaries."

[39] The Court goes on to trace the development of the guidelines for application of section 54(1)(a)(v) through **Grobbelaar v Grobbelaar** 1959 (4) SA 719 (AA) and a number of cases and concludes at para 15:

"In both the Grobbelaar and Webster matters referred to, the executor stood to benefit financially in his personal capacity, depending on what actions he took as executor. In such instances his personal interests are in conflict with the interests of the estate and his inability to be impartial may be a prima facie ground for his removal as executor. Section 54(1) (a) (v) gives the court a discretion and the

main consideration remains a consideration of the interests of the estate and the heirs. (Cf Die Meester v Meyer at p 17E)."

[40] Thus the main guide for this court in deciding whether the applicant ought to be reinstated as executrix in the present case is the interests of the estate and the welfare of the beneficiaries.

Conduct of the applicant

[41] The applicant was first appointed as executrix on 15 September 2010. It was alleged by the first respondent that at the time of her appointment she was aware of the customary marriage between the deceased and the first respondent as well as the children born of this union. Yet she did not bring this to the attention of the Master. She does nothing about the deceased estate. She is removed by the Master on 17 September 2013 on the basis that she had not furnished him with outstanding requirements, a letter she claims she did not receive. Yet it is clear from the 17 September 2013 letter that the Master had on-going correspondence with her and was under the impression that she was represented by an Advocate M. B. Popela. Even if we are to assume that she was not aware of the first respondent at the time of her appointment she certainly was made aware of her existence and the existence of the children in November 2013 when the attorneys on behalf of the first respondent wrote to her. She was invited to a roundtable discussion by first respondent but has shown the invitation out of hand. She suddenly on 4 October 2013 files an L& D account which purports to allocate the entire deceased estate to her.

[42] She treats the assets of the estate as her own and considers the fruits thereof to belong only to her as follows - .

- "1.1 2003 Toyota Hi-Ace minibus, with registration number CDH [...] L;
- 1.2. 2004 Toyota Hi-Ace minibus, with registration number CDH [...] L;
- 1.3. 2006 Toyota Hi-Ace minibus, with registration number BCV [...] L;
- 1.4. Livestock consisting out of approximately 22 cows and calves;"

"I submit an on-going harm is experienced by myself due to the fact that my source of

livelihood has been tempered with as a result of my dis-possession of my taxis, and further harm related to on-going depletion in value of my/our three taxis as they are currently generating income on a daily basis for the first respondent." (record p13)

[43] She is advised of the children's rights and is asked to return the assets of the estate but ignores the demand until she is sued in the Regional Court Tzaneen. To date she remains in contempt of that court order. Seemingly she remains in defiance of the Master's express request that she return the letters of executorship.

[44] The applicant has shown scant regard for the legitimate intestate heirs of the deceased estate, being the five children, let alone the first respondent as surviving spouse. She has acted in greed and self-interest and is willing to act in defiance of the law to achieve her ambitions. She has refused an invitation to meet and resolve matters in a conciliatory manner. She has demonstrated that her personal pecuniary interests are in direct conflict with her duties as executrix. Her conduct is unbecoming and bordering on mala fides. In my view she is not a fit and proper person to be appointed as executrix.

[45] Accordingly I make the following order -

45.1 The application is dismissed.

45.2 The applicant to pay the costs of the first respondent occasioned by opposition to this application.

Y. CARRIM

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

<u>Heard on:</u>	07 September 2016
<u>Delivered on:</u>	14 September 2016
<u>For the Applicant:</u>	Advocate Q. M. Dzimba
<u>Instructed by:</u>	TT Magabe Attorneys
<u>For the First Respondent:</u>	Advocate N. Breytenbach

Instructed by:

AB Burger Attorneys