

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1916/98

In the matter between

RITA SCIOLLA

APPLICANT

And THE MASTER OF THE HIGH COURT

1st RESPONDENT

J. POTGIETER FAMILY TRUST

COMPANY (PTY) LTD

2ND RESPONDENT

Coram

S.B. MAPHALALA – J

For the Applicant

MR. P. SHILUBANE

For the Respondent

MR. T. MASUKU

JUDGEMENT

(21/04/99)

Maphalala J:

The matter was brought on notice of motion with a certificate of urgency for an order inter alia calling upon the first respondent to show cause, if any, why the letters of administration issued by the first respondent in favour of the second respondent dated 27th January 1999, in the estate of the late Josea Potgieter should not be annulled or revoked. The first respondent should not be ordered to call a meeting of the next of kin and the creditors of the late Josea Potgieter within 14 days of the making of this order in terms of Section 24 (1) of The Administration of Estates Act No. 28/1902 for the purpose of appointing an executor in the estate of the late Josea George Potgieter.

The parties joined issue and the required affidavits were filed of record. The matter came for arguments on the contested motion of the 9th February 1999.

Mr. Shilubane for the applicant contends that the issue in this case is whether the Master of the High Court has the power to appoint a company as an executor. He referred to the provisions of The Administration of Estate Act No. more particularly to Section 23 which does not allow such a practice. Further he directed the court's attention to work of Meyerowitz on the Administration of Estates, Estate Duty and Capital Transfer Tax (sixth edition) paragraphs 8.3 and 8.5 to support his contention. It does not indicate in the company's memorandum of association that the

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administration of estates is one of its objects. Mr. Shilubane contends that the appointment of the company as the executor of the estate in this case was irregular and the letters of administration issued by the Master ought to be revoked.

On the other hand Mr. Masuku argued in contra. His submission is that The Administration of Estate Act does not have an interpretation section therefore recourse should be made to interpretation section of the Interpretation Act No. 21 of 1970 more particularly Section 2 where a "person" includes (a) a local authority (b) a company incorporated or registered as such under any law (my emphasis) (c) any body of persons corporate or unincorporated. He further directed the court attention to the deceased will and testament viz, annexure "R57" annexed in the applicant's founding affidavit, which reads as follows:

2.1. I hereby declare to nominate, constitute and appoint the J, Potgieter Family Trust Co, (Pty) Ltd to be the executor of my estate, with such power and authority as is required in law and especially the

power of assumption"

Further at paragraph 4 of the said will the testator bequeaths his entire estate to the trust in the following terms:

"4 subject to the foregoing specific bequests, I bequeath my entire estate, whatsoever situate, nothing whatsoever expected to the J. Potgieter Family Trust, a trust created during my lifetime, provided that the said trust terminate as a result of my death as provided in the deed of trust by which it was informed, then and in that event, I bequeath my (sic) to my children, Jacques Potgieter and Pierre Potgieter, in equal shares, share and share alike, provided further that should any of my children aforesaid pre deceased me leaving issue surviving (sic), and in that event (sic) I desire that the share which would have devolved upon such child should devolve upon such issue in equal shares, share and share alike".

Further more annexure "RS10" attached to the applicant's replying affidavit, viz the memorandum of association of J. Potgieter Family Trust Company Limited paragraph 3 which outlines the objects for which the company was established.

In reply, on points of law it is Mr. Shilubane's view is that the deceased was badly advised. Further Mr. Masuku has conceded that they should have passed a resolution and he wondered why the respondents do not concede the whole case.

These are issues for determination. The crux of the matter is whether The Administration of Estate Act allows a company to be an executor in a deceased estate or not. According to the Administration of Estates Act Section 23 only refers to a "person" as the one who can in terms of the Act be appointed as an executor. It is only when one takes recourse to the Interpretation Act Section 2 that it may be said that a "person" includes a "company". However, the question that begs an answer is whether the Act envisaged the appointment of a company as an executor. My answer to that is it did not because if it did it would have expressly said so. Meyerowitz on the Administration of Estates (sixth edition) paragraph 8.9 states that letters of executorship are only issued to individuals, so that if the executor appointed by a will is a corporation, they are issued not to the corporation itself, but to some officer of the corporation nominated by it and for whose acts as executor the corporation accepts liability. The board of directors of the corporation should pass a resolution nominating one of its officers as executor and accepting liability for his acts, and a certified copy of this resolution must be lodged with the Master together with the

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nominee's application. This seems to be the situation, which maintains in South Africa. Further, the articles of association of the corporation may contain provisions for the appointment of a particular officer as executor where the corporation has been appointed. Further more, in South Africa there is an Act viz, Act 23 of 1934 (now replaced by the Attorneys Act 53 of 1979). The Minister of Justice may make regulations defining the persons who may liquidate or distribute the deceased estates. Such regulation includes inter alia any trust company (see paragraph 8.4 of Meyerowitz (supra)). In Swaziland no such Act exists and it is not possible to form a company for that purpose.

Further, in the case in casu on perusal of annexure "RS10" of the respondent's replying affidavit viz, its memorandum of association it does not appear in respondent's objects that they may be appointed executor. In Swaziland a company can only be allowed to perform what is spelt out its memorandum of association.

I agree in toto with Mr. Shilubane that in South Africa as per Meyerowitz (supra) an ordinary company cannot be so appointed but a corporation with unlimited liability and this is to ensure that if anything goes wrong aggrieved parties are protected but in the present case we are dealing with a limited liability company. There is no way the company can be an executor of the estate.

Mr. Shilubane seems to be correct that with all the good intentions the deceased might have had he was badly advised in the present case.

In the premise, I grant an order in terms of prayers 2 of the applicant's notice of motion.

S. B. MAPHALALA

JUDGE