REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON APPLICATION FOR SUBSTITUTION

CASE NO: HC-MD-CIV-ACT-CON-2020/04219

In the matter between:

AUGUST 26 HOLDINGS (PTY) LTD	**FIRST PLAINTIFF**
MINISTER OF DEFENCE	**SECOND PLAINTIFF**
AUGUST 26 LOGISTSICS (PTY) LTD	**THIRD PLAINTIFF**

and

BROAD-BASED NETWORK	**FIRST DEFENDANT**
MATHEUS KRISTOF SHIKONGO	**SECOND DEFENDANT**
AUGUST 26 FOOD SERVICES (PTY) LTD	**THIRD DEFENDANT**

Neutral citation: *August 26 Holdings (Pty) Ltd v Broad–Based Network* (HC-MD-CIV-ACT-CON-2020/04219) [2022] NAHCMD 249 (18 May 2022)

Coram: SIBEYA, J
Heard: **21 April 2022**
Order: **13 May 2022**
Reasons: **18 May 2022**

Flynote: Administration of Estates Act – Requirements of section 54(1)(a) - removal of an executor by Court in terms of section 54 of the Act - This court only has powers to remove Executors in terms of section 54.

Fugitive from Justice – What constitutes a fugitive – Requirements to be met for one to be declared a fugitive from justice – Consequences of being declared a fugitive from justice.

Summary: Action was instituted on 13 October 2020. The parties were at the case planning stage when the second defendant passed away on 13 May 2021. The matter was subsequently postponed on several occasions for an executor to be appointed to the second defendant's estate.

Mr Maren De Klerk was duly appointed as the executor of the second defendant's estate on 18 August 2021.

Mr De Klerk by virtue of his appointment as the executor to the second defendant's estate, launched a Rule 43 application in terms of which he sought to be substituted in the main proceedings in the place of the deceased second defendant.

The plaintiffs do not oppose the applicant's application for substitution and opted to abide by the ruling of the court. Notwithstanding the above stance, the plaintiffs submitted brief notes of arguments. The remainder of the defendants did not oppose the application.

It was brought to the court's attention that a warrant for the arrest of Mr. De Klerk was issued on 29 April 2021. The court raised concerns about the appointment of Mr De Klerk as the executor in this matter.

Held that - the warrant or arrest was issued by a competent judicial officer and is upon mere production, admissible and this is a notorious fact of which judicial notice should be taken.

Held further that - the warrant of arrest of Mr De Klerk will hamper the execution of his duties as executor.

Held further that - it is undesirable for Mr De Klerk to continue to act as the executor in the estate of the late Matheus Kristof Shikongo (second defendant) on account of being a fugitive from justice.

ORDER

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1. It is undesirable for the applicant, Maren Brynard De Klerk N.O. to continue to act as the executor in the estate of the late Matheus Kristof Shikongo on account of being a fugitive from justice.

2. The applicant must return the letter of executorship of the late Matheus Kristof Shikongo to the Master of the High court.

3. The Master of the High court is directed to appoint an executor to replace the intervening applicant within a period of 30 days of this order.

4. There is no order as to the costs.

5. The parties must file a revised joint case plan report on or before 27 June 2022.

6. The matter is postponed to 30 June 2022 for a case planning conference hearing.

JUDGMENT

SIBEYA, J

Introduction

[1] This matter was set down for ruling on 25 March 2022, in respect of the application to substitute Mr Maren De Klerk for Mr Matheus Kristof Shikongo (second defendant) who passed away on 13 May 2022. Mr De Klerk was duly appointed by the Master of the High Court as executor to the estate of the second defendant upon his passing. However, it has since been brought to the court's attention that a warrant for the arrest of Mr De Klerk was issued on 29 April 2021.

[2] In light of the warrant of arrest being addressed to all peace officers to apprehend Mr De Klerk upon sight, this court in terms of Rule 103 out of its own initiative, varied its order and invited further submissions from the parties, on the effect, if any, that the warrant of arrest will have on the appointment of Mr De Klerk as executor.

The parties

[3] The applicant in the application for substitution is Maren Bynard De Klerk N.O, cited in his capacity as executor of the estate late Matheus Kristof Shikongo. Mr De Klerk will be referred to as the applicant hereinafter.

[4] The first plaintiff is August 26 Holdings (PTY) Ltd, with registration number 93/324, a private company registered in terms of the Companies Act, No 28 of 2004 and in terms of the laws of the Republic of Namibia and a public enterprise as contemplated by the Public Enterprises Governance Act, No. 1 of 2019 which is wholly owned by the Minister of Defence represented by the second plaintiff, and having its principal place of business at No. 11 Bessemer Street, Southern Industries, Windhoek, Republic of Namibia.

[5] The second plaintiff is the Minister of Defence, cited herein as a shareholder in the first plaintiff and the indirect shareholder in the third plaintiff through the first plaintiff, with offices at Reverend Michael Scott Street, Windhoek, Republic of Namibia.

[6] The third plaintiff is August 26 Logistics (PTY) Ltd, a private company registered in terms of the Companies Act, No 28 of 2004 and in terms of the laws of

the Republic of Namibia, with it principal place of business at No. 215 Industrial Road, Lafrenz Industries, Windhoek, Republic of Namibia.

[7] The plaintiffs are interrelated in that the first plaintiff is wholly owned by the second plaintiff and the third plaintiff is wholly owned by the first plaintiff. Accordingly, both the first and second plaintiffs are effectively public entities and established with public funds as contemplated in terms of the Public Enterprises Governance Act. The obligations owed by the defendants to the plaintiffs are effectively owed to the Government of the Republic of Namibia.

[8] The first defendant is Broad-Based Network (PTY) Ltd, a private company registered in terms of the Companies Act, No 28 of 2004 and in terms of the laws of the Republic of Namibia, with it principal place of business at No 114 Cobalt Street, Prosperita, Windhoek, Republic of Namibia.

[9] The second defendant is Matheus Kristof Shikongo, a major male person who passed away on 13 May 2021.

[10] The third defendant is August 26 Food Services NO. 2 (PTY) Ltd, with registration number 2014/0919, a private company registered in terms of the Companies Act, No 28 of 2004 and in terms of the laws of the Republic of Namibia, with its principal place of business at Unit 3, 2nd Floor, LA Chambers, Dr Agostinho Neto Road, Ausspannplatz, Windhoek, Republic of Namibia.

[11] The applicant is represented by Ms Lewies and the plaintiffs' are represented by Mr Nangolo.

Background and relief sought

[12] Action was instituted in *casu* on 13 October 2020. The parties were at the case planning stage when the second defendant passed away on 13 May 2021. The matter was subsequently postponed on several occasions for an executor to be appointed to the second defendant's estate.

[13] The applicant was duly appointed as the executor of the second defendant's estate on 18 August 2021.

[14] On 31 August 2021, the legal practitioners for the defendants filed a copy of the Letters of Executorship issued by the Master of the High Court, with Master's reference number E2190/2021.

[15] The applicant by virtue of his appointment as the executor to the second defendant's estate, launched a Rule 43 application in terms of which he sought to be substituted in the main proceedings in the place of the deceased second defendant.

[16] The relief sought in terms of the Rule 43 application was, *inter alia,* the following:

1. That MAREN BRYNARD DE KLERK N.O be substituted in the place of MATHEUS KRISTOF SHIKONGO as the second defendant.

2. That all references to "Matheus Kristof Shikongo" and the "Second Defendant" in the pleadings filed, be deemed to be reference to "Maren Brynard de Klerk N.O." where necessary.

3. Cost of this application if opposed.

4. Further or alternative relief.

[17] Rule 43(1) of the Rules of this court is the point of departure in this matter and provides that:

'Proceedings may not terminate solely because of the death, marriage or other change of status of a party unless the cause of such proceedings is at the same time extinguished by the death, marriage or other change of status'.

[18] It is common – cause that without the substitution of the executor for the deceased party, the matter cannot proceed because there is otherwise no person with standing before the court.

[19] It is also common - cause that a party to be substituted must have legal standing in the case.

[20] Subsequently, and on 26 November 2021, the applicant in his capacity as executor, launched the Rule 43 application.

[21] The plaintiffs' do not opt to oppose the applicant's application for substitution and will abide by the ruling of the court. Notwithstanding the above stance, the plaintiffs submitted brief written arguments which shall be reverted to as the judgment unfolds.

[22] The remainder of the defendants did not oppose the application.

Issue

[23] On 13 December 2021, the court ordered the parties to address it on the basis on which it should accept the appointment of the applicant as executor for the second defendant's estate considering that it is a notorious fact that the applicant resides at a place beyond the jurisdiction of this court.

[24] Submissions were heard and the matter was postponed to 25 March 2022 for judgment.

[25] On 22 March 2022, and after it was brought to the attention of the court that there is a warrant of arrest issued against the applicant, this court further made the following order:

'1. In light of the warrant of arrest issued for Mr. De Klerk, the applicant must file supplementary written arguments on or before 1 April 2022, on the effect, if any, that the warrant of arrest will have on the appointment of Mr De Klerk as executor..'

[26] Thus, the grave issue that has to be determined is the desirability of the appointment of the applicant as the executor and the effect that the warrant of arrest will have on the appointment of the applicant as executor.

Applicant's Arguments

[27] Ms Lewies' main argument emanated from Section 5(1) of the Civil Proceedings Evidence Act,[1] which stipulates that:

'(1) Judicial notice shall be taken of any law or government notice, or of any other matter which has been published in the Gazette or in the Official Gazette of the territory of South-West Africa.

[28] In this regard, she argued that the warrant of arrest is neither a 'law' nor a 'government notice', and furthermore, even though it is apparently uploaded on the eJustice system, it is not 'published in the Gazette', and as such, it cannot be considered a matter which can be taken judicial notice of in terms of section 5(1). It can also not be considered a 'notorious fact' of which judicial notice can be taken, so she argued.

[29] Ms Lewies further argued that even if it is found that the warrant of arrest is admissible as evidence, it still does not disqualify the applicant from holding the office of the executor to the second defendant's estate, nor from approaching this court in terms of the application for substitution.

[30] Ms Lewies emphatically concluded that it is only upon conviction of a crime of theft, fraud, forgery, uttering a forged instrument or perjury, and subsequent sentence to a term of imprisonment without the option of a fine or to a fine exceeding twenty Namibia Dollars, that the Master may remove the executor from his office.

Plaintiffs' Arguments

[31] As mentioned earlier in this judgment, Mr Nangolo who appeared on behalf of the plaintiffs' filed brief written arguments and at the hearing opted not to advance any further oral submissions but stuck to his written arguments.

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[1] Civil Proceedings Evidence Act 25 of 1965.

[32] What I can extrapolate from the plaintiffs' written arguments is that the plaintiffs contend that the issue of inadmissibility of the warrant of arrest does not arise. The plaintiffs argue that once it is accepted that the warrant was as a fact issued by a competent judicial officer, the warrant is, upon mere production, admissible.

[33] The plaintiffs further contend that the warrant of arrest that was issued against the applicant to appear in this court has not been executed as yet due to the applicant's absence from the jurisdiction of this court. The plaintiffs conclude their submission by stating that if this court were to ignore the absence of the applicant from this jurisdiction and simply admit him as a party, despite the fact that the applicant is being sought to appear in this very same court he has not so appeared, the administration of justice will be placed in disrepute.

Analysis

[34] From the onset, it should be mentioned that, Ms Lewies challenged the admissibility of the warrant of arrest and not its validity. I, therefore, deem it prudent to restate the provisions of s 43 of the Criminal Procedure Act[2] in its entirety which provides that:

'(1) Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police –

(a) which sets out the offence alleged to have been committed;

(b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence.

[2] Criminal Procedure Act 51 of 1997.

(2) A warrant of arrest issued under this section shall direct that the person described in the warrant shall be arrested by a peace officer in respect of the offence set out in the warrant and that he be brought before a lower court in accordance with the provisions of section. (own emphasis)

(3) A warrant of arrest may be issued on any day and shall remain in force until it is cancelled by the person who issued it or, if such person is not available, by any person with like authority, or until it is executed.' (own emphasis)

[35] S 44 then deals with the execution of warrants and provides that:

'A warrant of arrest issued under any provision of this Act may be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof'.

[36] S 1 defines a peace officer as follows:

'peace officer" includes any magistrate, justice, police official, correctional officer as defined in section 1 of the Correctional Service Act, 2012 (Act No. 9 of 2012), and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1), any person who is a peace officer under that section.'

[37] In light of the aforesaid legislation, it is apparent that a warrant of arrest need not be 'law' or a 'government notice', or be 'published in the Gazette' for it to be admissible in these proceedings. The warrant was as a fact issued by a competent judicial officer and is therefore admissible upon mere production. This is similarly a notorious fact of which judicial notice should be taken.

[38] Judicial notice can be taken if a matter is so notoriously or clearly established that evidence of its existence is unnecessary. I find it difficult to fathom Ms Lewies' argument, that the warrant issued for the arrest of the applicant is not a notorious fact.

[39] In the case of *Rex v Tager,*[3] it was held that "judicial notice can be taken if a matter is so notoriously or clearly established that evidence of the existence is unnecessary".

[40] The following statement by Watermeyer CJ in *Tager, supra*, is apposite:

"The doctrine of judicial notice is, by all the authorities on the law of evidence which I have consulted, e.g. Wigmore (secs. 2565-2570); Phipson (7th ed., pp. 19 et seq.); Taylor (12th ed., secs. 4-21); Best (10th ed., paras. 253 and 254); still to-day rightly confined within very narrow limits. Thus Phipson says that Judges and juries can only take notice of matters "so notoriously or clearly established that evidence of their existence is unnecessary. . . . Although, however, Judges and juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess . . . they may not . . . act on their own private knowledge or belief regarding the facts of the particular case." . . . Wigmore in sec. 2569 (a) draws the same distinction: "It is therefore plainly accepted that the Judge is not to use on the Bench, under the guise of judicial knowledge, that which he knows as an individual observer. The former is in truth 'known' to him merely in the peculiar sense that it is known and notorious to all man, and the dilemma is only the result of using the term knowledge in two senses. Where to draw the line between knowledge by notoriety and knowledge by personal observation may sometimes be difficult, but the principle is plain." I cannot help thinking that any knowledge used by the learned Judges in this case was knowledge which they possessed as the result of personal observation and not of notoriety. (own emphasis).

[41] I find that the warrant of arrest was issued by a judicial officer. It is valid and awaits to be executed on the applicant by a peace office upon sight. As stated before, the validity of the warrant of arrest is not in dispute in this matter. I find that the existence of the warrant of arrest issued constitutes a 'notorious fact' under the circumstances of this particular case.

[42] Another legal point raised by Ms Lewies is that, it is only the Master of the High Court that has the power to remove an executor from office. I shall now proceed to address this argument.

The court's power

[3] *Rex v Tager* 1944 AD 339 at 343

[43] S 54 of the Administration of Estates Act 66 of 1965 provides that:

'An executor may at any time be removed from his office –

(a) by the Court –

(i) ……

(ii) if he has at any time been a party to an agreement or arrangement whereby he has undertaken that he will, in his capacity as executor, grant or endeavour to grant to, or obtain or endeavour to obtain for any heir, debtor or creditor of the estate, any benefit to which he is not entitled; or

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

(iv) if he has accepted or expressed his willingness to accept from any person any benefit whatsoever in consideration of such person being engaged to perform any work on behalf of the estate; or

(v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned;' (own emphasis)

[44] The Supreme Court in *Mpasi NO v Master of the High Court*[4] at para 27*,* considered the above passage and remarked as follows:

'Undoubtedly, our High Court which is the court with the requisite jurisdiction in terms of the Act, has the power to remove an executor from office pursuant to s 54(1)(*a*). Similarly, s 95 of the Act empowers the court on appeal or review to confirm, set aside or vary the appointment by the Master. There is, however, no provision in the Act for appointment of an executor by the court. As no such authority can be derived from the common law either, it follows that the High Court has no such power. The power in question is vested in the Master. In light of this conclusion, I agree with counsel for the Ms Mpasi that the court *a quo* erred in appointing Mrs Hausiku. Consequently, the appointment of Mrs Hausiku ought

[4] *Mpasi NO v Master of the High Court* (SA 86-2016) [2018] NASC (17 August 2018); 2018 (4) NR 909. *Penderis v De Klerk* (HC-MD-CIV-MOT-GEN-2020-00203 [2020] NAHCMD (28 August 2020) para 125.

to be set aside and the matter remitted to the Master with the direction to appoint an executor/executrix in accordance with the law.'

[45] In the archaic case of *Sackville-West v Nourse and Another*,[5] which was cited in *Reichman v Reichman and Others*,[6] SOLOMON, WN. H. R, quotes a passage from Story, Equitable Jurisprudence... as follows:

'But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.' (Own emphasis)

He then proceeds to 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.'

[46] Although the above remarks were made regarding trustees I find that they carry the same force when one considers the suitability or desirability of appointment of executors. I share the same sentiments expressed in *Sackville-West* case *supra*, in that the broader issue, in *casu*, is, whether, in light of the warrant of arrest issued and not executed against the applicant who is not in the jurisdiction of this court, he will be able to properly execute his duties as executor. A question that begs for an answer is whether the applicant is a fugitive from justice or not?

[47] In *Escom v Rademeyer,*[7] Stegmann J had the occasion to consider the meaning of a fugitive from justice. He stated that: 'a "fugitive from justice" may be accepted as being one who is "wilfully avoiding the execution processes of the Court of the land" or as one who is avoiding the processes of the law through flight out of the country (voluntary exile) or hiding within the jurisdiction of the Court.'

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[5] *Sackville-West v Nourse and Another* 1925 AD 516.
[6] *Reichman v Reichman and Others* (2011/15348) [2011] ZAGPJHC 177; 2012 (4) SA 432 (GSJ) (23 November 2011).
[7] *Escom v Rademeyer* 1985 (2) SA 654 (T), at p658.

[48] I find that in *casu,* the warrant of arrest for the applicant issued by a competent judicial officer remains unexecuted due to the applicant's absence from the jurisdiction of this court. The said warrant was issued on 29 April 2021 and for over a year it remains unexecuted. The applicant, in my view, is avoiding the execution of the warrant of arrest, which he is aware that it should be executed by a peace officer on sight. This finding, at the backdrop of the *Escom* case *supra*, has the attributes of the applicant being a fugitive from justice. I, therefore, find that the applicant is a fugitive from justice.

[49] I further find that the current status of the applicant is harmful, detrimental, and unpleasant to the estate and the interests of the beneficiaries for the applicant to continue to hold office as the executor of the estate of the second defendant when he is clearly beyond the reach of this court and a fugitive from justice.

[50] Moreover, in *Mulligan v Mulligan,*[8] the court stated that "a fugitive from justice is not only not amenable to the ordinary criminal and civil processes of the Court, but, as far as this Court is concerned, it cannot call upon him to appear in person to give evidence under oath; it cannot order his arrest in case the facts testified to in his affidavit are proved to be false, whereas on the other hand he will be able to invoke the authority of the court to incept criminal proceedings for perjury proved to have been committed by his opponent. . ."

[51] I endorse the above remarks as I find them to be applicable to the facts of this matter. A question posed by the court to Ms Lewies about whether the applicant can be available to physically attend court if required attracted a response that she holds no instructions on whether the applicant can appear in court or not. This cements my findings.

Conclusion

[8] *Mulligan v Mulligan* 1925 WLD 164.

[52] In the circumstances of the findings and conclusions reached hereinabove, and in the exercise of my discretion in terms of s 54(a)(v) of Administration of Estates Act 66 of 1965, I hold that it is undesirable for the applicant to continue to act as the executor in the estate of the late Matheus Kristof Shikongo on account of being a fugitive from justice.

[53] I find that it is undesirable for the applicant to substitute the second defendant in this matter. I, therefore, hold the view that for the above reasons, it is in the interest of the administration of justice to refuse the application.

Costs

[54] Taking into account that the application for substitution was unopposed, I make no order as to costs.

Order

[55] In the result, it is ordered that:

1. It is undesirable for the applicant, Maren Brynard De Klerk N.O. to continue to act as the executor in the estate of the late Matheus Kristof Shikongo on account of being a fugitive from justice.

2. The applicant must return the letter of executorship of the late Matheus Kristof Shikongo to the Master of the High court.

3. The Master of the High court is directed to appoint an executor to replace the intervening applicant within a period of 30 days of this order.

4. There is no order as to the costs.

5. The parties must file a revised joint case plan report on or before 27 June 2022.

6. The matter is postponed to 30 June 2022 for a case planning conference hearing.

Sibeya J

JUDGE

APPEARANCES:

APPLICANT: R LEWIES

Instructed by Delport Legal Practitioners

PLAINTIFFS: E NANGOLO

Sisa Namandje and Co, Inc