

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: HC-MD-CIV-ACT-OTH- 2021/03237

In the matter between: fifth

CLERA IZEDIUNOR ADLER

PLAINTIFF

and

**MASTER OF THE HIGH COURT OF NAMIBIA
EXECUTOR OF ESTATE LATE J.G. ADLER**

**1ST DEFENDANT
2ND DEFENDANT**

Neutral citation: *Adler v The Master of the High Court* (HC-MD-CIV-ACT- OTH-
2021/03237) [2023] NAHCMD 128 (17 March 2022)

Coram: CHRISTIAAN AJ

Heard: 31 October 2022 and 03 November 2022

Delivered: 17 March 2023

Flynote: Administrative law - Administrative act - Invalidity of - Consequences of erroneous administrative decision - Until erroneous administrative action set aside by court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.

Administrative law - Administrative act - Invalidity of - Consequences of erroneous decision taken by the Master of the High Court – would Executor be entitled to disregard the Master’s decision and replace same with his own as a result of being

the Executor – Court held that the decision of the Master – even if irregular - would have to stand until set aside in proceedings for judicial review – until such time it continued to exist in fact and would have legal consequences. Administrative action – status of administrative decision improperly taken – decision remains effectual until properly set aside and cannot be ignored – application of *Oudekraal* judgment.

Summary: I was the plaintiff's case that she won a motor vehicle from the Jewel Casino in Windhoek during a visit to Namibia, and that this vehicle was registered in the name of her late husband who was paying insurance on the vehicle. The second defendant, who was the executor in the estate of her late husband, took possession of the vehicle, without her permission. Plaintiff lodged an objection, which was not considered by the first defendant. The first defendant issued a letter of non-objection and it was on that basis, that the second defendant disposed of the estate and sold the vehicle. The first defendant issued a letter to the plaintiff, informing her that the vehicle was sold and that she is *functus officio*. The plaintiff approached the court for an order declaring the inclusion of the vehicle as wrongful and unlawful and that the defendants are liable to reimburse her for the vehicle in the amount of N\$353,300.

Held that: In the absence of proceedings setting aside the Masters decision such decision could not be disregarded and had to be considered valid until set aside.

Held further that: the Executor, by virtue of his powers could not just second-guess the Master's decision, just because he may take the view that the Master's decisions in this regard WAS wrong and simply, through the stroke of the pen, correct them according to his perceptions – Court holding that he was not entitled to do so.

Held that In the circumstances of the case and where the decisions regarding the planned activities relating to the applicant's Bell helicopter thus continued to stand - and were to be regarded as legally valid - in the absence of any review challenging these decisions – court not prepared to grant the relief that was sought by the plaintiff – application accordingly dismissed with costs.

ORDER

1. The application is dismissed with costs, such costs are to include the costs consequent upon the employment of one instructed counsel and one instructing counsel.
 2. The matter is removed from the roll and regarded as finalised.
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JUDGMENT

CHRISTIAAN AJ:

Introduction and background

[1] The plaintiff in this matter is Clera Izediunor Adler, an adult female with her address care of Sisa Namandje & Co. Inc, 13 and 15 Pasteur Street, Windhoek West, Windhoek. I will for the sake of convenience refer to the plaintiff as Mrs Adler.

[2] The first defendant is the Master of the High Court (the Master), the second defendant is the Executor of the Estate Late J.G. Adler (the Executor).

[3] The plaintiff was the owner of a vehicle, to wit, a Mercedes Benz 200E with VIN WEE2130422A055852 and engine number 27492030742657. (I will for the sake of convenience refer to the vehicle as Plaintiff's vehicle).

[4] During January 2019, the Executor included the plaintiff's vehicle into the liquidation and distribution account of the estate of the late J.G. Adler which was then approved by the Master and publicly advertised on 13 December 2019, notwithstanding the fact that the plaintiff lodged an objection in terms of section 35 (8) of the Administration of Estate Act 65 of 1965 on 10 January 2020. The Master confirmed that there was no objection by the plaintiff to the liquidation and distribution account that was advertised, resulting in the liquidation and distribute of

the estate of the late J.G. Adler bring finalised to the prejudice and loss of the plaintiff.

[5] The plaintiff was informed by the Master that the Executor had in the meantime disposed of her vehicle on the basis of the Master's erroneous confirmation that there was no objection to the liquidation and distribution account. The plaintiff's vehicle was valued at N\$ 353 300.

[6] Following her efforts made since the 9th of April 2021 to get the executor return the vehicle, the plaintiff, during August 2021, approached this Court claiming (in her particulars of claim) that:

In the premises, the plaintiff seeks the following orders:

12.1 An order declaring that the inclusion of the plaintiff's vehicle in the estate of the late J.G. Adler and the disposal of the plaintiff's vehicle were wrongful and unlawful.

12.2 An order declaring that the defendants are liable to plaintiff, jointly and severally, the one paying, the other to be absolved, in the amount of N\$353,300.00.

12.3 An order directing defendants to jointly and severally pay to the plaintiff the amount of N\$353,300.00 within 30 (thirty) days of the orders.'

[7] The defendants entered a notice to defend the action and denied that the vehicle belonged to the plaintiff. They pleaded that the late Mr. J. G. Adler was the owner of the said vehicle. The defendants further pleaded:

(a) that the vehicle was correctly included in the liquidation and distribution account of the late Mr J G Adler.

(b) that the Master correctly approved the Liquidation and Distribution account;

(c) that the Master correctly approved the liquidation and distribution account, authorising the Executor to proceed and finalise the estate;

(d) that the Executor correctly disposed of the vehicle on the instructions of the Master.

The issues that the Court is required to resolve

Pre-trial order

[8] In the pre-trial order the issues of fact the court was called upon to adjudicate were the following:

1.1 Whether or not the plaintiff in fact lodged an objection in terms of section 35(8) of the Administration of Estates Act?

1.2 Whether or not the vehicle as set out under paragraph 4 of the Particulars of Claims belongs to the plaintiff?

1.3 Whether or not, as a direct result of the defendants wrongful and unlawful conducts the plaintiff suffered damages in the amount of N\$353,300.00, which is the value of the vehicle.

1.4 Whether the second defendant acted within his rights to finalise the estate late: J. G. Adler in terms of the non-objection letter dated 20 March 2020, received from the Master of the High Court.

1.5 Whether the letter of the Master of the High Court, dated 15 February 2021, binds the second defendant in light of the non-objection letter forwarded to second defendant on 20 March 2020.

1.6 Whether the letter of the Master of the High Court to the plaintiff's legal practitioner, dated 15 February 2021 is not an admission by the Master of the High Court of her negligence insofar it may be relevant, having regard to the fact that it was forwarded approximately eleven months after the non-objection letter was forwarded to the executor's agent eleven months after the non-objection letter was forwarded to the executor's agent.

1.7 Whether the second defendant was entitled to dispose of the Mercedes Benz motor vehicle, in light of the non-objection letter.

1.8 Whether the plaintiff lodged a formal claim in terms of Section 35(7) of the Administration of Estates Act, Act No. 66 of 1965 in time

1.9 Whether the Mercedes Benz motor vehicle was registered in the name of the late J. G. Adler.

1.10 Whether the value of the Mercedes Benz vehicle was N\$353 300.00.

1.11 The plaintiff objects to the inclusion of issues listed under paragraphs 1.1 and 1.8 above as they were not pleaded by the Second Defendant.

All issues of law to be resolved during the trial

[9] And the issues of law that the court should resolve at the trial is as follows:

2.1 Whether or not the second defendant unlawfully and wrongfully included the Plaintiff's vehicle into the liquidation and distribution account of the late J.G Adler?

2.2 Whether or not the plaintiff duly lodged an objection in terms of section 35(8) of the Administration of Estates Act?

2.3 Whether or not the first defendant notwithstanding the duly lodged objection by the plaintiff, unlawfully and wrongfully confirmed that there was no objection to the liquidation and distribution of the estate of the late J.G Adler?

2.4 Whether or not second defendant unlawfully and wrongfully publicly advertised the estate late J.G Adler on the 13th December 2019?

2.5 Whether or not the plaintiff is the legal owner of the vehicle, Mercedes Benz 200E with VIN WDD2130422A055852 and engine number 27492030742657?

2.6 Whether or not the confirmation by the first defendant, that there was no objection to the liquidation and distribution of late J.G Adler resulted in the liquidation and distribution of the estate?

2.7 Without derogating from the generality of the above, whether or not the defendants had the right(s) in law to include the plaintiff's vehicle in the estate of late J.G Adler?

2.8 The admissibility of the statement under paragraph 2 of the witness statement of Peter Kreybig.

2.9 Whether the second defendant acted within his rights to finalise the estate late: J. G. Adler in terms of the non-objection letter dated 20/03/2020, received from the Master of the High Court.

2.10 Whether the letter of the Master of the High Court, dated 15 February 2021, binds the second defendant in light of the non-objection letter forwarded to second defendant on 20 March 2020.

2.11 Whether the letter of the Master of the High Court to the plaintiff's legal practitioner, dated 15 February 2021 is not an admission by the Master of the High Court of her negligence insofar it may be relevant, having regard to the fact that it was forwarded approximately eleven months after the non-objection letter was forwarded to the executor's agent.

2.12 Whether the second defendant was entitled to dispose of the Mercedes Benz motor vehicle, in light of the non-objection letter.

2.13 Whether the plaintiff lodged a formal claim in terms of Section 35(7) of the Administration of Estates Act, Act No. 66 of 1965 in time.

2.14 The plaintiff objects to the inclusion of issues listed under paragraphs 2.2 and 2.13 above as they were never pleaded by the second defendant.

2.15 Whether or not the plaintiff must be granted the relief sought in the particulars of claim.'

Common cause facts

[10] The following facts appear to be common cause between the parties:

'3.1 Plaintiff is the surviving spouse of the late J.G Adler.

3.2 The facts pleaded under paragraphs 1.1, 2 to 3 of the Particulars of Claim.

3.3 The second defendant was appointed as the Executor of the late J.G Adler estate.

3.4 The citation of the respective parties.

3.5 The late J. G. Adler had a will.

3.6 On 20 March 2020 the Master for the High Court issued a non-objection letter to the second defendant.

3.7 On 15 February 2021 the first defendant informed plaintiff that first defendant erroneously issued the non-objection letter dated 20 March 2020.'

[11] What remains to be resolved in these proceedings are the issues of fact and the issues of law set out in paragraphs 8 and 9. This matter proceeded to trial and at the close of the plaintiff's case the defendants decided not to testify and closed their case. I proceed by starting off with the testimony presented by the plaintiff.

The plaintiff's evidence

[12] In her quest to prove her claim, the plaintiff testified as the only witness (The uncontested evidence presented in Court was summarised as follows:

Clera Izediunor Adler

[13] The plaintiff testified that she is a major female businesswoman from Germany and married to Johann George Adler on 3 November in the United States of America.

[14] In her further testimony she informed the court that she won a Mercedes Benz 200E with VIN WEE2130422A055852 and engine number 27492030742657,

at the Jewel Casino at the Country Club, Windhoek. The plaintiff further testified at the time she won the vehicle, she was visiting Namibia with her husband and they were due to return to Germany.

[15] Mrs Adler further testified that Metje & Ziegler (M+Z) facilitated the registration of the vehicle with the relevant authorities, and since she came to Namibia on a tourist permit and her husband is a permanent resident, she decided to have the vehicle registered in his name for convenience and did not donate or pass the vehicle to him. She further testified that she had full access and use of her husband's assets and he paid some expenses on her behalf, and he paid for the insurance premium on the vehicle.

[16] Mrs Adler testified that she had used the vehicle on two occasions and her husband passed away in 2018, and she came to Namibia to speak to the husband's lawyers to find out what the status of her late husband's estate was. The plaintiff testified that she returned to Germany and upon enquiry a few months later, she was informed that the Executor collected the keys and was in possession of the vehicle.

[17] Mrs Adler testified that she contacted the lawyer of her husband to establish where the vehicle was and to further inform the executor to return the vehicle as it is not part of her deceased husband's estate. The plaintiff testified that she gave consent for the Jewel Casino to provide all the information relating to the vehicle to the lawyer and that the same be shared with the Executor.

[18] Mrs Adler testified that the vehicle and keys were not returned, and the Executor included the vehicle in the deceased husband's estate. The plaintiff testified that she was later informed that the estate of the late husband was finalised and that a non-objection letter was issued by the Master despite the fact that she has raised an objection to the liquidation and distribution account.

[19] Mrs Adler further testified that the Master, in a letter dated 15 February 2021,¹ informed her that she erroneously issued the non-objection letter, although she had submitted a valid claim and that she instructed the agent of the Executor to amend the liquidation and distribution account. The plaintiff testified that whilst she was

¹ Annexure CIA 3.

waiting for the amendment of the liquidation and distribution account, the Master send her another letter² that the vehicle was sold by the Executor and that the Master can no longer assist her.

[20] Mrs Adler, in closing her testimony, informed the court that the vehicle was brand new and that the Master had no right to issue a non-objection letter to the Executor in light of the valid objection against the liquidation and distribution account. The plaintiff further testified that the Executor had no right to include her vehicle in the liquidation and distribution account of the estate of her late husband and further that the executor had not right to dispose of the vehicle.

[21] The plaintiff closed her case and the defendants elected not to testify in their defence and closed their case. I will now proceed and discuss the legal principles applicable in this matter.

Closing arguments

[22] I do not intend to repeat the arguments advanced by counsel as it would amount to a recap of the summary of the facts above. As expected, each counsel argued that the court should find in favor of their respective client.

Applicable legal principles

[23] Article 18 of the Namibian Constitution has been quoted in all the cases where decisions or actions of administrative bodies were impugned but I will nonetheless quote it here, it provides as follows:

'Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common-law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[24] The requirements that the above provision of the Constitution impose on the Master as an administrative official, is that she must act fairly and reasonably, and in

² Annexure CIA 5.

compliance with the law. I will now deal with important aspect that needs consideration, that is, the approach laid down by the Administration of Estates Act³ when an objection is lodged against a liquidation and distribution account with the Master and the approach to reviews of decisions taken by the Master.

The proper approach to lodge an objection against a liquidation and distribution account with the Master in terms of section 35 (1), section 35(7), section 35(8) and section 35(9) of the Administration of Estates Act

[25] Section 35(1) of the Act provides that the executor of a deceased estate shall lodge a liquidation and distribution account with the Master. The account will then lie for inspection at the Master's office and the executor shall publish a notice stating that the account is open for inspection. Any person interested in the estate may lodge an objection, giving reasons, with the Master, to the liquidation and distribution account.⁴ The Master will provide the executor with copies of the objection and the executor must respond to the objection within fourteen days⁵. Having received the response from the executor, the Master then determines whether the objection is well-founded or not, and may direct the executor to amend the account or give such other direction as she deems fit.⁶

The proper approach to reviews of decisions taken by the Master in terms of s 35(10) of the Act

[26] Section 35(10) then provides that –

'Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.'

³ Administration of Estates Act 66 of 1965.

⁴ Section 35(7) of the Administration of Estates Act 66 of 1965.

⁵ Section 35(8) of the Administration of Estates Act 66 of 1965.

⁶ Section 35(9) of the Administration of Estates Act 66 of 1965.

[27] It was held in the Supreme court judgement of *Kamahunga v Master of the High Court*⁷ that the correct approach in Namibia when considering the review jurisdiction conferred on a court by s 35(10), that it should be construed consistently with Article 18 of the Constitution, which would require a court reviewing a decision of the Master to determine whether the Master had acted reasonably, fairly and in compliance with legal requirements in her determination of the objection to the liquidation and distribution account.

Functus officio

[28] In the matter of *Witbooi and Others v Minister of Urban and Rural Development and Others*⁸ [12], Masuku J, said the following regarding the Minister being *functus officio*:

[71] I am of the view that this is a case where the Minister was *functus officio* and his office had fully and finally exercised its discretion. He had no lawful reason to revisit and thus reopen the issue. It would be a travesty of justice in such instances, to let a decision, which the Minister had no power to make when he did, to stand. This is especially so when the decision appears to run counter to the relevant law and more particularly, the Constitution, as will be apparent later.'

[29] In *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others*⁹ the Supreme Court expressed itself on the doctrine of *functus officio*. It again had a later opportunity to do so in *Hashagen*¹⁰, where it expressed in the following terms:

[27] An administrative decision is deemed to be final and binding once it is made. Once made, such a decision cannot be re-opened or revoked by the decision-maker unless authorised by law, expressly or by necessary implication. The animating principle for the rule is that both the decision-maker and the subject know where they stand. At its core, therefore, are fairness and certainty.'

⁷ *Kamahunga v Master of the High Court* (SA44-2013) [2015] NASC (13 November 2015).

⁸ *Witbooi and Others v Minister of Urban and Rural Development and Others* (HC-MD-CIV-MOT-REV-2022/2019) [2022] NAHCMD.

⁹ *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others* 2019 (3) 834 (SC).

¹⁰ *Hashagen v Public Accountants and Auditors Board* (SA 57/2019) (2021) NASC (5 August 2021).

[28] As Pretorius aptly observes:

The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter. This rule applies with particular force, but not only, in circumstances where the exercise of such adjudicative or decision-making powers has the effect of determining a person's legal rights or of conferring rights or benefits of a legally cognizable nature on a person. The result is that once such a decision has been given, it is (subject to any right of appeal or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.'

[29] What this means then is that once an administrative body has exercised an administrative discretion in a specific way in a particular case, it loses further jurisdiction in the matter. It cannot go back on it or assume power again in respect of the same matter between the parties.

[30] It appears that there are very few and circumscribed circumstances in which a decision-maker can be allowed to revisit or reopen his or her decision. This would be in circumstances where the law expressly provides that unusual avenue or where it impliedly allows a second bite to the same cherry.'

Oudekraal principle

[31] The decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others*¹¹ has been referred to with approval in a number of cases in this jurisdiction. The '*Oudekraal principle*' entails that once an administrator has made a decision, it has no power to change it or set it aside, i.e. that defective decisions of administrators remain binding until they are set aside through judicial review.

[32] In the case of *Minister of Finance v Merlus Seafood Processors (Pty) Ltd*¹² 2016(4) NR 1042 (SC) Mainga JA discusses the principle as follows:

'(27) The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter *Administrative Law* at 355:

¹¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA).

¹² *Minister of Finance v Merlus Seafood Processors (Pty) Ltd* 2016(4) NR 1042 (SC).

"There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled.

'At other times it has been explained on little more than pragmatic grounds. In *Haraker v Minister of the Interior 1965 (1) SA 372 (C)* Corbett J said at 381C that where a court declines to set aside an invalid act on the grounds of delay (the same would apply where it declines to do so on other grounds) (in a sense delay would . . . 'validate' a nullity. Or as Lord Radcliffe said in *Smith v East Elloe Rural District Council [1956] AC 736 (HL) at 769 - 70 ([1956] 1 All ER 855 at 871H; [1956] 2 WLR 88)*:

"An [administrative] order . . . is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

[33] The court in the *Oudekraal* matter essentially requires organs of State to apply for the review and setting aside of their own erroneous decisions upon learning of them, where applicants for the decisions wish to rely upon them. These principles are further in line with the principle underlying the term *functus officio*, which entails that once an administrator has made a decision it has no power to change it or set it aside.

[34] At this juncture, I will proceed and evaluate the evidence, against the background of the stated legal principles.

Evaluation of evidence

[35] Before dealing with the evaluation of the evidence, it is necessary to deal with the Master's failure to partake in the proceedings. It is common cause that the Master did not lodge a notice of intention to oppose, nor file a reply setting out her response to the issues raised in these proceedings. The records disclosed that there

had been proper service on the Master. It is a matter of concern to this court that it should make a determination on the issues on the basis of a record that does not include a reply from the Master. It is so that the record in this case contains a number of documents which clarify the Master's position, but the court could not address those issues where the conduct of the Master was questioned.

[36] The plaintiff informed the court that she won a motor vehicle from the Jewel Casino in Windhoek during a visit to Namibia, and that this vehicle was registered in the name of her late husband who was paying insurance on the vehicle. The husband died and the second defendant, who was the executor in the estate of her late husband, took possession of the vehicle, without her permission, and this vehicle formed part of the estate assets. The vehicle was part of the assets registered in the estate and that she lodged an objection, which was not considered by the first defendant. The first defendant issued a letter of non-objection and on that basis, the second defendant disposed of the estate and sold the vehicle. The plaintiff has now approached the court for an order declaring the inclusion of the vehicle as wrongful and unlawful and that the defendants are liable to reimburse her for the vehicle in the amount of N\$353,300.

[37] It is clear from the above legal principles and the arguments advanced by counsel for the plaintiff and defendant that the decision by the Master was an administrative decision performed by her in the ambit of the provisions of the Administration of Estates Act which guides the Master on how to deal with instances when an objection is lodged against a liquidation and distribution account. In terms of s 35(7) of the Administration of Estates Act, the plaintiff was required to lodge her objection against the liquidation and distribution account within 21 days from the date it lied open for inspection.

[38] The plaintiff in her particulars of claim¹³ states that the section 35 advertisement was published on 13 December 2019, and according to her evidence this date lapsed on the 3 of January 2020. The plaintiff further states in her particulars of claim,¹⁴ that she lodged her objection on 10 January 2020. The evidence reveals that the 21 days lapsed on 3 January 2020. It is clear from the facts

¹³ Paragraph 5 of the plaintiffs particulars of claim.

¹⁴ Paragraph 6 of the plaintiffs particulars of claim.

of the matter that the Master after considering the liquidation and distribution account issued a letter of non-objection to the Executor directing that he exercises his powers in terms of s 35(12) and section 35(13) of the Administration of Estates Act.

[39] The issuing of the non-objection letter by the Master constitutes an administrative action which remains valid until set aside and any act performed in terms of such letter remains valid until set aside. The decision made by the Master has legal consequences that affected the interest of an individual. The Executor acted in terms of the said letter and is therefore not the product of an unlawful act. The non-objection provided the lawful basis upon which the Executor was directed to liquidate and distribute the estate.

[40] The plaintiff proceeded and enquired from the Master regarding the objection that she lodged and the non-objection letter that was issued and the Master responded by first, informing her that she erroneously issued the letter of non-objection as she submitted a valid claim and therefore directed the Executor that he amends the liquidation and distribution account making provision for the fact that the vehicle will be removed from the liquidation and distribution account. The Master further informed the plaintiff that she has requested the return of the vehicle. Secondly, the Master, in another letter informs the plaintiff that the Executor informed her the vehicle was sold after the non-objection was issued and that the Master is *functus officio* and cannot be of further assistance with regard to recovering of the vehicle in question. The question that comes to mind is whether the Master could revisit and re-open the issue after she had fully and finally exercised her discretion, by issuing the letter of non-objection, and thereafter claim that she is *functus officio*.

[41] On the above question, Mrs Jankie and Mr Namandje appearing for the plaintiff argued that there was an objection lodged by the plaintiff for the inclusion of the vehicle in the liquidation and distribution account of the deceased. They further argued that the Master erroneously issued a letter of non-objection and instructed the Executor (agent) to amend the liquidation and distribution account and that such directive is extant and operative and it was ignored by the Executor's agent. It was their conclusion that the Executor acted unlawfully and in defiance of a directive from the Master and is liable to pay the amount of N\$ 353 300.

[42] Counsel for the second defendant on the other hand argued that the objection was lodged out of time, therefore a non-objection was issued, the vehicle was sold on the basis of such non-objection. It was further argued that there was no evidence that suggested that the vehicle was sold before for the non-objection letter was issued. Mr. Diedericks argued that the Master was *functus officio* when she issued the second directive to the Executor, therefore the Masters letter of 15 February 2021 cannot be of any legal significance. Mr Diedericks who appeared on behalf of the respondents submitted that the decision of the Master would have to stand and produces valid consequences, not only in view of the presumption pertaining to the validity of administrative acts and decisions until set aside, but also in view of the fact that the plaintiff did not seek the review and setting aside of the decisions complained of.

[43] Mrs Jankie and Mr Namandje's arguments in this regard can however not be upheld in the face of considerable authority to the contrary. I can do no better than to refer to the above decisions in the matters of *Witbooi, Pamo and Hashagen*¹⁵ and again to the South African Court of Appeal decision made in the *Oudekraal* case,¹⁶ cited with approval in *Member of the Executive Council for Health – Province of the Eastern Cape NO & Another v Kirkland Investments (Pty) Ltd t/a Eye & Laser Institute* and also in a number of Namibian cases¹⁷ and where the court stated:

[26] For those reasons it is clear, in our view that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper

¹⁵ Paragraph supra.

¹⁶ *Oudekraal Estates v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1).

¹⁷ See for instance : *Auas Diamond Co (Pty) Ltd v Minister of Mines and Energy* 2006 (2) NR 406 (HC) at 413, *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC) at 529 or *Black Range Mining (Pty) Ltd, Minister of Mines and Energy and Another v* 2011 (1) NR 31 (SC) at paras [21] – [22].

functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.¹⁸

[44] What the plaintiff, in its continued quest for relief, continues to overlook, in my view, is that the Master's decision, relating to the non-objection and the amendment of the liquidation and distribution account, is that the perceived unlawful administrative decision, taken by the Master, is producing legally valid consequences, for as long as that decision have not been set aside on review. It is furthermore clear from the cited authorities that the Executor and his agent cannot just second- guess those decisions simply because he may take the view that the Master's decision in this regard was wrong and simply through the stroke of the pen correct them according to his perceptions.

[45] It is my considered view that the Master could not revisit and re-open the issue after she had fully and finally exercised her discretion, by issuing the letter of non-objection and issue a conflicting directive which was contrary to an earlier decision that she has taken, that surely would amount to a review and setting aside of her own decision, in which she was *functus officio*. The Master should have done what is suggested in the *Oudekraal* matter, and that is to apply for the review and setting aside of their own erroneous decisions upon learning of them. This was not done and therefore it is my considered view that best possible remedy that was available to the plaintiff was what is provided for by the provisions of section 35(10) for the Administration of Estates Act. Section 35(10) allows any person aggrieved by any direction of the Master or by a refusal of the Master to sustain an objection so lodged, to apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.'

Conclusion

¹⁸ *Oudekraal Estates v City of Cape Town and Others* at 24 -242.

[46] After addressing the above questions the court must deal with the question of whether the relief asked by the plaintiff is relief that can be granted eventually by the court. The result of the determination of the above issues is that the court finds that the matter is indeed one that merits a review and that the relief sought by the plaintiff in this matter is unattainable and granting the orders sought, would transgress these fundamental principles.

[47] Given the circumstances - and where the decision regarding the non-objection and the amendment of the liquidation and distribution of the account continue to stand - and are to be regarded as legally valid - in the absence of any review challenging these decisions - I cannot see my way clear to accede to the relief that is sought by the plaintiff.

Costs

[48] No reasons were placed before this court why the well-established principle that costs should follow the event should not be endorsed in this matter. The court could also not find compelling reasons to depart from such principle.

Order

[49] It is therefore ordered as follows:

1. The application is dismissed with costs, such costs are to include the costs consequent upon the employment one instructing and one instructed counsel.
2. The matter is removed from the roll and regarded as finalised.

CHRISTIAAN P
Acting Judge

APPEARANCES

PLAINTIFF: S Namandje (assisted by M Jankie)
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