

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

HPP Action No. 04 of 2017
IN THE ESTATE OF
MOHAMMED AZIZ, deceased

BETWEEN : **JAHURAN** aka **JAHURAN BI** aka **JOHURAN** as Executrix and
Trustee in the Estate of **MOHAMMED AZIZ**

APPLICANT

AND : **MIRZA MOHAMMED NASIM** as Executor and Trustee in the
Estate of **MOHAMMED AZIZ**

RESPONDENT

CORAM: The Hon. Mr. Justice David Alfred

COUNSEL: (At Suva) : Mr A Kohli for the Applicant
Mr. A Nand for the Respondent

(At Labasa): Mr A Kohli for the Applicant
Mr H Robinson for the Respondent

Dates of Hearing: 9 October 2017 and 27 June 2018

Date of Judgment: 28 June 2018

JUDGMENT

1. This is the Application of the Applicant (Application) by way of Notice of Motion for an Order that the Respondent be removed as executor and trustee of the estate of Mohammed Aziz (deceased) and that Mirza Rahim Buksh aka Rahim Buksh No 2 (Rahim) be appointed as trustee of the said estate, and for such other orders as the Court deems just.

2. The Application is supported by the affidavit of the Applicant sworn on 24 January 2017. Therein she deposes as follows:

The deceased, her late husband, died on 14 September 2001 and probate was granted on 27 February 2002 to her and the Respondent. Rahim has been maintaining her and the only source of income is from the shop run by him. In order to enhance the business, Rahim has been trying to install a bowser which would require the approval of the Divisional Health Office. The Health Office will not give approval until the consent of both the trustees is obtained. Rahim has informed her that he has been trying to get the Respondent to give his consent but the latter is refusing to do so. Her other sons have agreed to have the Respondent removed as the trustee and Rahim appointed in his place. The Respondent had left them and gone about his own business and has not taken any part in the administration of the estate. She therefore prays that the Respondent be removed as executor and trustee and Rahim be appointed as the trustee of the estate.

3. The Respondent in his affidavit in opposition sworn on 9 August 2017 deposes as follows:

The shop is the only place from which income is derived. Rahim was permitted to run the business on the basis he look after the Applicant and the four children of one of the beneficiaries, Mirza Mohammed Yasin who had died. He has no objection to the installation of a bowser and the application for the approval of the health office has to be obtained. The Applicant and him should be making the application for approval. There were six of them. The business was an on-going one and they decided that Rahim be permitted to run the shop. He advised the Applicant and Rahim that he would sign the consent letter after making the necessary enquiries. He therefore prayed that the Application be dismissed and he remains as executor and trustee together with the Applicant.

4. The Applicant in her affidavit in reply deposes as follows:

Rahim has been running the business since the death of the deceased, has been looking after her and the four children of the deceased son, and is a fit and proper person to be a trustee. The Respondent has not taken any part in the running of the business or looking after the assets of her late husband. Rahim and herself are quite capable of looking after the interests of the other beneficiaries and have been doing so since the death of the deceased. The Respondent only started visiting the shop since she made the Application.

5. At the hearing before me in the High Court at Suva on 9 October 2017 Mr Kohli had made his oral submission. Mr Nand had then requested for the matter to be transferred to Labasa. I had therefore by consent of both counsel, ordered the matter to be fixed before the Master at the High Court in Labasa for mediation, and if that failed, I would hear the matter at Labasa. The Master was unable to conduct the mediation due to the absence of the Respondent. Ultimately it came up before me yesterday (27 June 2018).

6. The hearing commenced with Mr Kohli submitting that he was making the Application pursuant to s.35 of the Succession, Probate and Administration Act 1970 (SPAA) and O. 85 r. 4 of the HCR. He said the mother wants to remove one son and appoint another son to be co-administrator of the estate. The will is not challenged. The Respondent is not acting in the interest of the estate and is still refusing to sign the Application to the local authority (Health Office). The other four sons consent to the removal of the Respondent as executor.

7. Counsel then called his sole witness (PW1) who was Rahim Buksh No. II (Rahim). He said he was the son of the deceased who had a shop business which PW1 was now running. The Respondent never came to assist, never showed any interest in the business and never came to ask for the accounts or expenses of the shop. PW1 has an accountant who files the tax returns which he signs. He is single-handedly running the business with the consent of the Applicant (his mother) and his brothers. In 2017, he made an application to the local authority which was signed by one, Nirmal Singh, a plan drawer. The application for

permission to erect etc. was also signed by Nirmal Singh. The Respondent went to the Health Office and informed that they were trying to install the bowser without his consent. The Applicant and PW1 went to see the Respondent but he did not give his consent.

8. At this juncture PW1 informed the Court that somebody had served a document on him the previous day (26 June 2018) at 1pm. On perusal of the documents, Mr Robinson informed the Court he was taken by surprise. PW1 said it was served on the Applicant who then gave it to him.
9. I ruled that the document could not be received as evidence unless and until the Applicant tendered it as an exhibit.
10. PW1 continued that he was willing to act as a trustee and the Applicant and brothers are happy with this.
11. Under cross-examination PW1 said (in answer to the Court) that there was no other application other the instant one that required the Respondent's signature. The Respondent should have been the applicant for the application and there would have been no need for him to give consent. Whatever they asked him, the Respondent is not doing.
12. During re-examination PW1 said since August 2017, the Applicant and him have gone to see the Respondent 2 to 3 times but he did not give consent. There is a misunderstanding between the Respondent and PW1, because of the dispute over the bowser. With this the Applicant closed her case.
13. Mr Robinson now informed the Court he would not be calling any witness and would be submitting and relying on the affidavits filed. He provided the Court with a written Submission. He said this was a dispute between a mother and son and another son who is a co-trustee. The argument is over a right given under a will. The Application was filed 15 years (2017) after the probate was granted in 2002. He said no other applications were sent to the Respondent except this application to the local authority. The mother (Applicant) and the Respondent should have been the applicants and no consent would be required from the

Respondent. This is the misunderstanding from which this Court application arose. The issue is whether the Applicant can remove the Respondent i.e. can one trustee remove the other. The Applicant has a life interest in the estate and is not affected by the bowser. It is the beneficiaries who are affected. Counsel concluded by saying the Applicant has no standing to make this Application, and even if she has, there is no valid reason to remove the Respondent.


14. Mr Kohli then submitted. He said under s. 35 of the SPAA, any person interested includes the Applicant who has a life interest. The Respondent has not taken any interest in the running of the business for the last 16 years. He is not present in Court today and he has no interest in the administration of the estate. Counsel concluded by saying the other sons/beneficiaries consent to the removal of the Respondent and the appointment of Rahim in his place.
15. Mr Robinson in his reply said there is no evidence why the Respondent should be removed nor that the welfare of the beneficiaries will be adversely affected if the Respondent is not removed.
16. Mr. Robinson in his written Submission objects that the Plaintiff should not have brought the proceedings by Notice of Motion.
17. At the conclusion of the arguments I said I would take time for consideration and would deliver my judgment the next day. I now proceed to do so.
18. I start by considering the exhibits that are relevant for me to come to a decision. The first is the will of which the Applicant and the Respondent were granted probate as executrix and executor and trustees. The will grants the Applicant, what the counsel have called a life interest until her death or remarriage or the date the deceased's youngest child shall attain the age of 25 years, whichever is the latest, whereupon the residue of the estate will go to the deceased's 6 sons.
19. The trustees are also empowered to raise money for, inter-alia, "the continuance and expansion of any business of mine" (see para 4 (f) (d) of the will).

20. I turn next to the two applications to the Health Office/Local Authority. These are stated to be made by "W. Mohammed Aziz" which I am prepared to accept refers to the estate of the deceased, after I have perused the application for development permission and the lease concerned.
21. Finally, I have perused the signed consents of the other 4 sons of the deceased, which consent to the removal of the Respondent and the appointment of Rahim in his place.
22. With that out of the way I shall come to the law applicable to this matter, starting with s.35 of the SPAA. The removal of an executor according to the legislative intention appears to be at the discretion of the Court itself which has to decide for any reason which appears sufficient to it to :
 - (a) remove any executor of the will and revoking any grant of probate already made to him; and
 - (b) to appoint an administrator with the will annexed of such estate.
23. The application can be that of any person interested in the estate or of the Court's motion and either before or after a grant of probate has been made.
24. I am of opinion that the Applicant is undoubtedly a person who is interested in the estate by virtue of her life interest and therefore entitled to make this Application.
25. The applications made by Rahim to the Health Office/Local Authority, should in my view have been made by the Applicant and the Respondent as executors/trustees of the estate. These could not have been made by Rahim nor could they have been signed by Nirmal Singh. Consequently I find and I so hold that as the applications were not properly nor validly made, the Respondent was perfectly entitled to refuse to sign the same. Thus the Applicant cannot rely on the Respondent's refusal to sign as a ground for having him removed as an executor/trustee.

26. In reaching my decision I am relying on the words of Dixon J in the High Court of Australia in: *Miller v. Cameron* (1936) 54 CLR 372, that “The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries.....”. Here the Respondent is a trustee and the beneficiaries want him removed.
27. However, that is not the end of the matter. To my mind the evidence led by the Applicant and the absence of the Respondent from the start to finish of this matter, both before the Master and this Court, evinces his desire to have no part with the Applicant and by extension to his siblings in the running of the business and in the administration of the estate. In these circumstances it would appear to be in the best interests of all the beneficiaries that he be relieved of his responsibilities which from all the evidence before this Court, which has not been rebutted by him, are obviously both unwelcome to and too onerous for him.
28. The Respondent’s objection that the Application was made by an improper mode cannot stand as the Court is making its decision pursuant to S.35 SPAA. In any event technical objections do not merit any further consideration.
29. Pursuant to s. 35 of the SPAA, I find and I so hold that there is sufficient reason for this Court to order the removal of the Respondent as executor and the revoking of the grant of probate to him only and to further order that Rahim Buksh No II be appointed administrator with the will annexed of the estate of Mohammed Aziz, and I so order.
30. In the circumstances of this case, I shall order each party to bear her/his own costs.

Delivered at Labasa, this 28th day of June, 2018.




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DAVID ALFRED
JUDGE
HIGH COURT OF FIJI