

NOT REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/26572

DATE: 22/11/2010

In the matter between:

ALAN MICHAEL JUDIN N.O.

**In his capacity as duly appointed Executor
in the Estate of the Late HAROLD MONTAGUE JUDIN
Identity No. , Master's Ref: 26427/2009**

Applicant

and

MICHAEL CHARLES JANKELOWITZ

First Respondent

SHEENA MARCELLE HEIKEL

Second Respondent

J U D G M E N T

LAMONT, J:

[1] The applicant in his capacity as the duly appointed executor in the estate of the late Harold Montague Judin launched an application against the first and second respondents as a matter of urgency seeking to interdict the first and second respondents from alienating, selling, disposing of or dealing with a variety of items and requiring them to deliver possession of certain immovable property by delivering the keys thereof to the applicant. The first

and second respondents (the respondents) opposed the application and in a counter-application sought the removal of the applicant as the executor of the estate. There are a number of trusts to which reference will be made below. The applicant did not launch the application *qua* trustee of those trusts and it is common cause before me that to the extent that this application deals with trust matters that such matters are not properly before me.

[2] This application is the product of a set of unfortunate circumstances which have produced severe pain to persons who are related to each other by marriage. It is apparent from the affidavits before me that emotions have run high and that there is a degree of hostility and distrust between the families

[3] In order to place the application in context and understand the unfortunate set of factors which operate upon the persons before me it is necessary to traverse the historic relationship between their parents. Two families were neighbours, the Judin family and the Jankelowitz family. The parents of the Judin family consisted of the deceased (referred to hereafter as the applicant's father), his then wife and their children including the applicant. The Jankelowitz family comprised the respondent's mother, her then husband and their two children, the two respondents. There was a divorce in each of the Judin and Jankelowitz families. The divorce was occasioned by the discovery of the then wife of the applicant's father that the applicant's father was conducting an extramarital relationship with the respondent's mother. The applicant's father and the respondent's mother married each other. During the marriage the applicant's father formed two trusts; one trust was the

Harold M Judin Associates Trust, Trust No. IT6791/96 (the Business Trust); the other was the Harold and Dolly Judin Family Trust, Trust No. IT2347/97 (the Family Trust). The relationship between the Trusts was that they were discretionary in the hands of the trustees who had far-reaching powers including the power to remove existing beneficiaries, select other beneficiaries, receive payments of various monies and generally re-adjust the Trust affairs so that, at the instance of trustees existing beneficiaries could be substituted with other beneficiaries and the rights to receive monies could be varied. The Business Trust which was the income-earning vehicle of the applicant's father as well as the asset protection Trust of the applicant's father had as a beneficiary the Family Trust.

[4] The capital beneficiaries of the Family Trust included the applicant's father, the respondent's mother, various members of the Judin family and the Jankelowitz family. It is not clear from the papers whether or not there were additional beneficiaries however this is of no consequence in the present matter. This detail is set out purely for the purposes of background.

[5] The applicant's father died. The applicant's father left a Will under and in terms of which all his assets were left to the respondent's mother. The applicant's father's Will appointed the respondent's mother and/or one Davey and/or the applicant as joint executors. On 16 September 2009 the respondent's mother wrote a letter to the Master notifying him of the death of the applicant's father, enclosing various documents and seeking to be appointed as executor. It is apparent that the applicant also wished to be

appointed as an executor. The third person referred to in the Will one Davey indicated in advance that he would decline any appointment. There were wide-ranging on going disputes between the parties as to whom, if anyone, the third executor should be. Subsequent to the death of the applicant's father the respondent's mother paid out various monies including monies from the Business Trust. It seems that these monies were on the papers probably used to pay the mortgage bond over the common home occupied by the applicant's father and the respondent's mother (the common home) and various other debts of the applicant's father's estate and of the Trust. At the time of these payments the respondent's mother was not authorised to make them in that the number of trustees of the Business Trust was insufficient to authorize such payment and as she had not yet been appointed as the executor in the estate of the applicant's father. The respondent's mother in addition paid her own living expenses out of the Business Trust without the relevant authority. The respondent's mother subsequent to the death of the applicant's father found an Investec policy. There was no linked beneficiary to the policy. The evidence of the respondent is that in cases where the policy does not identify a beneficiary it is usually paid out to a dependant, usually the spouse or the heir of the deceased. Investec made a decision to pay the respondent's mother and in April 2009 advised her accordingly. Prior to the payment under and in terms of the policy the respondent's mother died. Investec indicated that they would pay the heirs of the respondent's mother. The heirs under and in terms of the Will of the respondent's mother are the two respondents. Investec paid the two respondents the amount of the policy.

[6] Over the period the relationship between the two families' surviving relatives remained extremely poor.

[7] The applicant unbeknown to the respondents applied to be granted letters of executorship in the applicant's father's estate and such letters were granted. He made this application at a time when he must have been aware that the respondents wished to participate in matters concerning the winding up of both the applicant's father's estate and the respondent's mother's estate. They were the sole recipients of all the assets of both estates.

[8] At the time of the appointment of the applicant as executor to the applicant's father's estate he had no interest as an heir in the estate.

[9] After the applicant had been appointed as an executor to the estate of the applicant's father the relationship between the respondents and the applicant appears to have deteriorated even further. The applicant claimed that the respondent's mother had not taken adequate or proper steps to wind up the estate of the applicant's father and that in particular there were debts which needed to be paid. These debts in the result were identified as being, in the context of the particular estate, of a relatively small amount. The applicant claimed that the monies paid to the respondents by Investec should form part of the estate and that the monies should be returned to the estate. The estate is well solvent and any return of these monies had no effect upon the distribution of the estate save for the need to value them to pay the fisc taxes and to inconvenience the respondents. There were policies which could

have been used to pay the debts relatively quickly and without hardship to anyone. In particular there was a policy in existence in respect of the applicant's daughter which had a cash value which could have been used to make payment; there were other insurance policies which could have been cashed and were not. There are also apparently valuable movables and the common home is valuable and no money is owing under the bond. In turn the second respondent has been paying a variety of debts of the applicant's father's estate including monies due to the housekeeper and insurance over the common home.

[10] Notwithstanding that the disputes and distrust between the respondents and the applicant had continued for a very long period of time the applicant launched the present application as a matter of urgency. The matter was not urgent. There was no threat to the estate which needed urgent attention. Even assuming the Investec issue fell to be decided in favour of the applicant there were other assets under the applicants control to cover any short term issue. In addition the respondents were not going anywhere; they were the heirs who were to be paid significant sums of money in due course.

[11] In the application the applicant sought a variety of relief which relates to questions concerning the Trusts. One of the major complaints of the applicant was that he required books, records and documents and had been kept out of these by the respondents. It transpired that the books, records and documents were documents concerning the Trust which were kept within a room in the common home. This relief patently is a matter which relates to

the Trust and not to the estate. At the time of the application there was no threat to any of the movable assets contained within the common home. The bulk of the movable assets had been there continuously over the period, to the end they were depleted and there was no indication when they were removed or by whom. There was certainly no imminent threat by the respondents to remove any of the movables. As at February 2010 the parties were at such loggerheads that the first respondent was not prepared to meet with the applicant unless legal representatives were present. During April 2010 the first respondent notified the applicant that he required correspondence to be directed through his attorney. During May 2010 the applicant asked the respondents' attorneys when access would be given to the documents in the flat so that the accounts relative to the estate could be prepared. When the annexure referred to is consulted it is apparent that the request concerned information and details, accounting records and other information already requested. The documents and information already requested related to the Trust as appears more fully from the email dated 2 February 2010 in which the following appears:

"Accordingly and again I am asking you to please let me have copies of the Trust documents and the bank accounts and the documents relating to the business which is owned by the Trust so as to enable Allan to obtain advice and understand what his position is."

[12] The respondents at a point in time agreed for joint access to take place to the contents of the common home. Such access did take place. Continued

joint access has been tendered. The common home appears to contain movables belonging to the estate and the trust.

[13] There was no threat to deal with the common home. The applicant was not entitled to the interdicts which he sought in paragraph 2 of the notice of motion. To the extent that the applicant sought delivery of the keys of the common home he was from time to time afforded rights of access and did not require sole and exclusive possession. There was no reason why joint possession to the common home could not have remained as was the position prior to the application. The fact that the primary objective of the applicant was to obtain data concerning the Trust is apparent from the additional prayers contained in the second part (the B part) of the notice of motion in which the applicant seeks records relating to the Trust affairs. In that portion the applicant seeks relief concerning the Investec annuity (in paragraph 4). The respondents explained how the Investec annuity was not part of the estate and that dispute patently cannot be resolved on these papers. It follows in my view that the applicant is not entitled to the relief which he sought and which he obtained *pendente lite* and is also not entitled to the relief he seeks now.

[14] The respondents launched a counter-application. In the counter-application the respondent sought the removal of the applicant as an executor to the estate of the applicant's father. Their submissions commenced with a consideration of the factual position of the estate. The Will of the applicant's father contemplated appointment of joint executors of whom the respondents'

mother would be one. The second submission was that the applicant had no interest in the estate whatsoever as the entirety of the applicant's father's estate had been bequeathed to the applicant's mother who in turn had bequeathed it to the respondents. The third submission concerned wide ranging matters dealing with the relationship of the parties, the distrust between them, the manner in which the applicant had excluded them when he applied for appointment, the manner in which he was dealing with the estate which they perceived as being without consideration of their interests as heirs as also his conduct of mingling trust affairs and estate affairs. The only persons with any interest in the estate were the respondents. The applicant's submission as to why he should remain as an executor was that he had not misconducted himself; the estate had not been well handled by the respondents' mother as there were debts to be paid which had not been paid. It appears that in the interim the applicant also has been supine and not paid the debts. There were funds within the estate to enable the debts to be paid. The applicant when he sought his appointment as an executor, on the evidence placed before me by the respondents, did so without notifying them of his intention to do so. The applicant further applied to the Master to be appointed the executor at a time when the disputes between the applicant and the respondents were wide-ranging, when there was no personal trust between them and when the relationship between them had completely collapsed. The applicant relied on the authoritative statement contained within *Sackville West v Nourse and Another* 1925 AD 516. The case is authority that in the case of positive misconduct trustees who have abused their trust will be removed. It is however not every mistake or a neglect of duty

or inaccuracy of conduct of trustees which will result in such course being adopted. If the acts or omissions are such as to endanger the Trust property or show a want of honesty or a want of proper capacity to execute the duties or a want of reasonable fidelity then the trustee will be removed. The broad principle is that the court:

"If satisfied that the continuance of the trustee would prevent the Trust being properly executed might remove the trustee ... 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 guard must be the welfare of the beneficiaries."

The authorities approving of the *Sackville West* case are collated in *Ex Parte Executive Officer of the Financial Services Board; In Re Joint Municipal Pension Fund* [2003] 4 All SA 603 (T) at 612 paras [38] to [39].

[15] In the *Sackville West* matter it was considered whether or not hostility was a relevant feature (page 528):

"Counsel for the appellant West, however, relied strongly upon the hostility which he alleged existed between the trustees and the beneficiary. But here again it is said in the judgment in the Letterstedt case: "It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustee." And as pointed out by counsel for the trustees, the hostility, judging from the correspondence, seems to have been entirely on the side of the beneficiary, while the trustees, on the other hand, have advanced him a considerable sum of money in excess of the interest which they received from the investment. Considering, therefore; the nature of the functions to be discharged by the trustees, I am by no means satisfied that such feeling as exists is likely to prevent the trust being properly executed by them."

[16] At the time the *Sackville* judgment was delivered section 54(1)(a)(v) had not been enacted. Section 54(1)(a)(v) of the Administration of Estates Act No. 66 of 1965 reads as follows:

“54(1) An executor may at any time be removed from his office – (a) by the court – (v) if for any other reason the court is satisfied that it is undesirable that he should act as executor of the estate concerned; ...”

[17] Apart from the friction and hostility which exists between the parties which I have noted earlier in this judgment it came to my attention when an open with prejudice tender was made by the applicant that the applicant had an agenda. The applicant in fact has a hope that he will be able to purchase and obtain for himself assets in the estate. In the proposed order which was submitted to me with prejudice there are set out a variety of provisions which will result in the respondent valuing various assets in the estate of the applicant's father and the applicant having the right to purchase such assets at the value. This wish of the applicant is not surprising. It is understandable that as a son he wishes to obtain certain of the assets owned by the applicant's father. This attitude towards estate assets has consequences in my view. The applicant will not appear to be impartial in his actions in relation to the management of the estate. It cannot be in my view that the applicant will be seen to be impartial and will be able to exercise a completely impartial mind when he as part of the agenda he wishes to impose seeks pre-emptive right in respect of certain assets on the respondents. I emphasise that I do not regard this as misconduct on the part of the applicant. I regard it as

undesirable that the applicant when he has this approach (which appears to be emotionally driven) towards assets in the estate should be the person who winds up the estate. It is not difficult to detect the applicants: - grief at having been disinherited by the applicant's father and hostility towards the recipients of those assets namely the respondents. The applicant without notice sought and obtained his appointment as the executor. This conduct on the part of the applicant is perceived by the respondents as being a hostile act and an act which they see as evidencing bias. The applicant for no economic reason affecting the winding up of the estate seeks possession of the very movables he wishes to acquire and seeks to embroil the estate in litigation against the respondents over the Investec payments. All of these actions of the applicant and his appearance of bias make it undesirable for him to continue as executor.

[18] In my view it is desirable that the Master appoint an appropriate executor who is neither the applicant nor the respondents.

[19] It follows that the applicant should not have brought the application either as a matter of urgency or at all and that that application falls to be dismissed with costs. Insofar as the counter-application is concerned the respondent established a right to relief. The costs however in my view of that application should be paid out of the estate of the applicant's father.

[20] I accordingly make the following order:

1. The applicant's application in his representative capacity is dismissed with costs including any reserved costs.
2. All interim orders are set aside
3. The applicant is removed as the executor of the estate of the late Harold Montague Judin.
4. The Master is authorised and directed to appoint one or more executors as he may decide to the estate of the late Harold Montague Judin.
5. The parties are afforded 14 days to deliver to the Master a notice setting out names of persons they propose as an executor.
6. Should the Master timeously receive the notice referred to in 5 then the Master shall have due regard to the wishes of the parties and consider such persons who have been proposed as an executors.
7. In the event that the heir of the estate of the late Harold Montague Judin and/or the heir as represented by the executor to the estate of such heir so direct then such person and/or persons as the Master may appoint as executor shall be released from the obligation to furnish security.
8. The costs of the counter-application are to be paid by the estate late Harold Montague Judin.

**C G LAMONT
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG**

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Attorneys for Applicant : Adam Creswick Attorney

Counsel for Respondent : Adv. M B G Da Costa
Attorneys for Respondent : Litsa Skylakis Attorneys

Date of hearing : 26 October 2010

Date of Judgment : 22 November 2010