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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 54318/2021

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

DATE: 2024-11-16

SIGNATURE

In the matter between:

AFRIFORUM NPC

First Applicant

SOLIDARITY TRADE UNION

Second Applicant

JOYCE KATHRYN JANSEN VAN RENSBURG

Third Applicant

(ID: 5[...])

IJAY VAN DER WALT

Fourth Applicant

(ID: 9[...])

BABSIE SHARON KRUGER

Fifth Applicant

(ID: 7[...])

IGNATIUS JOHANNES DU PREEZ N.O.

Sixth Applicant

(ID: 6[...])

MARIUS WYNAND SCHOEMAN N.O.

Seventh Applicant

(ID: 6[...])

and

FREDERICK JOHANNES VAN DER WALT

First Respondent

(ID: 6[...])

IGNATIUS JOHANNES VAN DER WALT

Second Respondent

(ID: 6[...])

ENGELA CAROLINA NEL

Third Respondent

(ID: 6[...])

THE MASTER OF THE HIGH COURT, PRETORIA

Fourth Respondent

WILLEM FRANCOIS BOUWER

Fifth Respondent

(ID: 5[...])

WILLEM ANDRIES FILMALTER

Sixth Respondent

(ID: 5[...])

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 16 January 2024.

JUDGMENT

POTTERILL J

Introduction

[1] The applicants are seeking that the first respondent, Mr Frederick Johannes van der Walt [Mr van der Walt] be removed as executor of the estate of his late

father in terms of s54(1)(a)(v) of the Administration of Estates Act 66 of 1965 [Estates Act], and also as a trustee of the Van der Walt Testamentary Trust [the Trust] in terms of s20(1) of the Trust Property Control Act 57 of 1988 [the Trust Act]. Prior to Mr van der Walt being appointed as executor PSG Trust was in the will appointed to administer the estate. It did so from May 2014 to October 2014 and then resigned as executor. Mr van der Walt was appointed as executor, supported by his brother and sister in October 2014.

[2] The deponent to this application is the Chief Financial Officer of the second Applicant, Solidarity Trade Union [Solidarity] with supporting affidavits from the other applicants. Mr van der Walt is the only respondent opposing the application.

[3] Mr Willem Francois Bouwer, the fifth respondent [Mr Bouwer] filed an explanatory affidavit upon the insistence of the applicants. It is common cause that Mr Bouwer is an attorney with extensive experience in the administration of estates. He has been administering the estate since 23 May 2017, thus for five years, after Mr van der Walt appointed him as his agent to assist. The Master of the High Court, the Fourth respondent, [the Master] filed a report, also on insistence of the applicants.

[4] The applicants further seek that the seventh applicant, Marius Wynand Schoeman N.O. be appointed as the executor to substitute Mr Van der Walt. At the commencement of the hearing counsel for the applicants indicated to the Court that the applicants were not proceeding with this prayer. Furthermore, interdictory relief is sought against the Master; not to make any interim or final payment to Mr Van der Walt pending submissions made to the Master by the applicants. And, that the Master within 10 days of receiving the notice of motion make available to the applicants all documents “constituting the record of interaction” between the Master and Mr Van der Walt pertaining to the administration of the estate and any fees payable to Mr Van Walt. At the end of the hearing counsel for the applicants informed the court that it was not persisting with prayer 7; the Master providing the “record of interaction” between the Master and Mr Van der Walt.

[5] The deceased passed away on 8 May 2014 leaving behind a vast estate with assets valued at R46 million. The deceased estate comprises of 21 immovable properties and 18 actively trading close corporations.

[6] The will provided that all the assets in the estate excepting for three legacies, be transferred to the Trust where seven beneficiaries would share the income generated, and ultimately be the capital beneficiaries. The deceased was divorced and had three children from that marriage. Thereafter he had a life partner and from that union a son was born. There is not much love lost between these two families.

[7] The first applicant, Afriforum NPC [Afriforum] and the second applicant Solidarity Trade Union [Solidarity] receive 20% each. The life partner, the third respondent, receives 10% and her son, the fourth respondent, receives 17,5%. The deceased's three children from his marriage inherit as follows; the brother and sister of Mr Van der Walt each receive 12,5% with Mr van der Walt receiving only 7,5%.

[8] I find it necessary to at the outset remark that the applicants made much of the appointment of Mr Van der Walt as executor as irregular with Mr Bouwer having persuaded the Master to do so. This is a bald statement against an officer of the court, with no facts to support such submission. The deponent on behalf of the applicants would not know why PSG did not proceed to administer the estate. None of the confirmatory affidavits set out any factual reasons why PSG did not proceed to act as executor. Mr Bouwer and Mr Van der Walt inform the Court that PSG did not have the expertise to administer this expansive estate which, if I needed to make a determination thereon, in terms of *Plascon Evans*¹ I would have to accept their version. I make no finding on this submission made. I am not asked to determine whether the appointment of Mr Van der Walt 7 years ago was irregular.

[9] Similarly, I need not take note of the surrounding circumstance, strongly advanced, that the will clearly reflects the testator did not want a child or family member to be an executor or trustee. This would only be relevant with regards to the

¹ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints Ltd* 1984 (3) 623 (A); *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)

irregular appointment of Mr Van der Walt, not his removal in terms of s54(1)(v) of the Estates Act. But, in any event, his two siblings, full well knowing that Mr Van der Walt inherits the least, supported his appointment as executor.

[10] The fact that Mr Van der Walt did not file security is again perhaps a factor to consider if his appointment was irregular. But, in any event, section 23 of the Estates Act does not require a child of a deceased to furnish security “unless the Master specially directs that he shall do so.” No blame can be placed at the door of Mr Van der Walt, if the applicants felt the Master should have so directed their remedy is against the Master. Not filing security is not a ground for his removal.

[11] I understand the argument that these factors were raised as a broad picture to assess the reasons for the removal, but its only value is atmospheric garnishing. Unfortunately, the animosity between the parties had crept into the affidavits of the deponents and the Court cannot make findings on atmosphere created and unsubstantiated facts not relevant to the question to be determined.

The grounds for the removal as executor

[12] In essence the applicants aver that Mr Van der Walt is aggrieved that he is inheriting the least and therefore he is not acting impartial and in the best interests of the beneficiaries. It has been 8 years since the death of the deceased and the estate is still not wound-up. They have raised four grounds to sustain this argument, but in argument only two were relied on.

Mr van der Walt is biased against Solidarity, Afriforum, the life partner of the deceased and her son [First to fourth applicants].

[13] The heart of the averred bias lies in the fact that once the assets are in the Trust, any trustee not involved in the day-to-day business of the close corporations may elect to sell trust assets and pay proceeds of such a sale to the trust beneficiaries in the pro rata percentages as set out above. Mr Van der Walt is preventing this from happening by not passing ownership to the trustees where he is to receive the least.

[14] It is argued that Mr Van der Walt's bias against Afriforum and Solidariteit is patent because in his affidavit he resorts to submitting that "both entities who are well-known for their outspoken protection and rights for Afrikaners and Afrikaans rights." He goes further and tells the Court that the first respondent, Mr Van der Walt lives in Orania, has his business in Orania and is the chairman of the Orania CVO school body. This shows that Mr Van der Walt does not align himself with the wishes of the deceased.

[15] On behalf of Mr van der Walt it was argued that even if he has bias a competent attorney with many years of experience is in fact administering the estate in accordance with the will as the final liquidation and distribution reflects. Mr Boucher has no personal interest in the matter and has no animosity towards any of the applicants. Because Mr Boucher is administering the estate there is no risk that due to bad relationships the administration of the estate would be prevented.

[16] It was also submitted that bias is not a ground for removal and reliance for this was placed on the Full Court decision of *Oberholster N.O. and others v Richter* (A515/11) [2013] ZAGPPHC 99; [2013] 3 All SA 205 (GNP) (12 April 2013).

Conflict of interest.

[17] On behalf of the applicants it was submitted that the estate *inter alia* comprises of various liquor stores and Mr Van der Walt is administering these as well as his own liquor stores. He is also selling liquor that he produces himself and the income from these sales are kept separately. This situation created a conflict of interest and he should be removed.²

[18] On behalf of Mr Van der Walt it was argued that these averments were based on hearsay, but in any event, on the applicants' own version the liquor products complained of are not ordinarily available on the open market and is therefore not in competition with the products sold by the deceased's estate business.

Reasons for decision on removal of Mr Van der Walt as executor

² *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A)

[19] I have no doubt that there is no love lost between the applicants and Mr Van der Walt. Unhappily this can be seen from the unfortunate act in which counsel are involved in calling counter-parties directly and the tenure in which the affidavits of both the applicants and the respondent were drafted. Whether this constitutes bias is debateable, but more importantly the question to be answered is whether this fact has an undesirable effect on the administration of the estate.

[20] Section 54(a)(1)(v) provides as follows:

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

(a) by the Court

(i)

(ii)

(iii)

(iv)

(v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned.”

The applicants submit it is undesirable that Mr Van der Walt administer the estate as executor because he is bias against Solidariteit, Afriforum, the partner of the deceased and the son born from that union. I have no doubt that Mr Van der Walt is no fan of the two organisations and that there is no love lost between the two families. It is clear that the two organisations and the second family of the deceased have the same dislike for Mr Van der Walt. The dislike of Mr Van der Walt is then branded as bias manifesting in the fact that the estate has taken extraordinary long to administer, while being an uncomplicated estate. The administration is frustrated because Mr Van der Walt does not want to transfer the assets to the trust, where if the assets are sold, he would be compromised.

[21] The first submission that is rejected is that it is a simple estate to administer. This submission defies all logic and reality; 21 fixed properties and 18 actively trading close corporations constitutes a great deal of administration. Not only objectively is this statement to be rejected, but Mr Bouwer, with vast experience of administration of estates explains that this estate is by no means straightforward and

due to its assets is akin to 38 estates being administered. This view is fortified by the report of the Master as follows:

“I must emphasize the fact that this is not a straight forward estate as it is alleged. The facts that must be considered are that:

- The estate is huge with a lot of assets and businesses that are ongoing; tax and vat matters and including estate duty that must be considered for both the businesses and the individual's income tax
- Some of the assets were not disclosed onset, various valuations were also required with SARS guidance etc.
- I must emphasize that to this far no executor has endured execution of his duties in this estate. There is recurring family feud that always interfere with executor duty to serve in the office the executor that is one of the reasons why it is and will take time to finalize this estate. It will be unfair to pin the delay on the executors, for as long as beneficiaries do not find a common ground with a view to finalize the estate; this kind of delays will recur.
- Be reminded of resignation of PSG (a trust company with such a huge reputation) but failing to proceed with the administration of the estate due to non-cooperation from the beneficiaries;
- The current executor was nominated by the interested parties prior to appointment by the master.

In terms of Section 23 of the Administration of Estates Act the current executor as a son of the deceased qualifies to be exempted from furnishing a bond of security.”

Mr Bouwer attached the volumes of files that this estate's administration has generated. Ironically the bulk attached is then complained off by the applicants, yet they demanded he advise what has been done pertaining to the administration.

[22] Although the estate has indisputably taken a long time there has been two occasions where litigation has stayed the administration for at least two years. The Master confirms this in his report. COVID disrupted the administration of the estate with a total lockdown and then unfavourable circumstances where the Master's personnel "worked" from home. COVID also hampered obtaining clearance certificates from the various municipalities. A claim for maintenance by the partner of the deceased caused a further delay. The Master opines that the blame for the delay in the administration of the estate cannot be laid at the door of the executor.

[23] There is nothing concrete to gainsay the submission by Mr Bouwer that the estate can now be finalised. The Liquidation and Distribution account has been advertised and most of the clearance certificates have been obtained. Only transfer of the assets needs to be completed.

[24] As for the bias I am unconvinced that the dislike constitutes a bias that renders Mr Van der Walt undesirable to finalise the estate. In the Oberholster matter the Full Court found that a breakdown in the relationship between the heirs and the executor is "insufficient for the discharge of the executor in terms of section 54(1)(a)(v) of the Act. In order to achieve that result it must be shown that the executor conducted himself in such a manner that it actually imperilled his proper administration of the estate. Bad relations between an executor and an heir cannot lead to the removal of the executor unless it is probable that the administration of the estate would be prevented as a result."³ Except for the administration of the estate taking a long time, which is sufficiently explained there is nothing to show that the conduct of the executor actually imperilled the property administration of the estate. Except for the executor's fee there is nothing for Mr Van der Walt to gain in delaying the process; the Trust is an inevitable.

³ Paragraph 17

[25] The estate is close to finalisation. The liquidation and distribution account was finalised and approved in accordance with the will. Mr Bouwer is an independent agent and he has taken on the bulk of the work. The Master will ensure that the administration is finalised. Appointing a new executor will inevitably cause extensive further delay, exactly that which the applicants are seeking to contain. If the applicants are not happy with the liquidation and distribution accounts, they had remedies in terms of the Estates Act. The Master, Mr Bouwer and Mr Van der Walt will be aware that their actions will be scrutinised by the applicants.

[26] As for the conflict of interest raised I am unconvinced that this renders Mr Van der Walt undesirable to continue with his executor duties. It was submitted that the mere fact that he has liquor stores, as does the estate, renders him in competition and *per se* renders it undesirable for him to continue as executor. When he was appointed 7 years ago the applicants knew this. The applicants have not set out a single fact as to how this fact has imperilled the administration of the estate. A bald statement of fact is insufficient to sustain such a conclusion.

[27] The fact that he produces his own alcohol, not alcohol sold by the stores in the estate, cannot create competition and there is no conflict of interest. If indeed he sells this alcohol from the estate stores for cash he is not hampering the administration of the estate.

[28] The applicants have not proven that it is undesirable for Mr Van der Walt to execute his duties and must be removed.

Must Mr Van der Walt be removed as trustee of the Trust?

[29] It is common cause that my brother Ranchod J had suggested that an independent trustee, one of the applicants and one of the respondents before him, be appointed as trustees. This is how Mr Schoeman, Mr du Preez and Mr Van der Walt were appointed as trustees of the Trust. It is also common cause that two of the trustees will constitute a majority and can take a lawful decision in terms of clause 7.3.3 of the will.

[30] The applicants are seeking the removal of Mr Van der Walt and placed reliance on the affidavit of Mr Schoeman N.O. as to why Mr Van der Walt needed to be removed. It was submitted the reasons are that the trustees as a body are dysfunctional because of the obstructive behaviour of Mr Van der Walt “in not bringing the administration of the estate to a conclusion.” He has frustrated the operation of the trust by refusing to sign a document to enable the trustees as a body to open a bank account in the name of the Trust. He failed to attend a meeting on 8 December 2020, a date that was arranged to suit Mr Van der Walt. Mr Van der Walt did not arrange for a report by liquor license experts with respect to the status of the liquor licenses of the businesses. He failed to report to the trustees as executor. He had failed to provide a report on the businesses to the trustees. He did not secure the attendance of Mr Josef de Beer, the accounting officer of all the businesses, to attend a meeting and to file a report. He challenged the accuracy of a meeting minute despite attesting to the accuracy thereof. Mr Van der Walt has failed to provide financial statements of the various close corporations to the trustees.

[31] Mr van der Walt is doing all of this as a concerted effort to frustrate the transfer of the assets in the estate to the trust. This is so because Mr Van der Walt had raised that the assets may be transferred from the trust to potential buyers which will leave him with only 7.5% of his father’s estate. An averment is also made that “I am advised that he took cash from the estate ...”

[32] On behalf of Mr Van der Walt it was submitted that most of the facts relied upon are in dispute, or are vague and unsubstantiated. Furthermore, the trustees wanted to use their trustees’ capacity to interrogate the duties of Mr van der Walt not as trustee, but as executor. Reliance was placed on the matter of *Land and Agricultural Development Bank of SA v Parker and Others* [2004] 4 All SA 261 (SCA) wherein it was found that a trust estate is a separate entity and trustees must administer the property in the trust. As there is no property in the Trust what purpose would meetings and reports serve except to interrogate the administration of the deceased estate.

Reasons for decision on the removal of Mr van der Walt as trustee.

[33] A court can remove a trustee on application if such removal will be in the interests of the trust and its beneficiaries.⁴

[34] It is common cause that the trust capital has not been received from the estate. The Master reports that “At this juncture the Trustees powers cannot be executed.” I thus agree with the submission made on behalf of Mr Van der Walt that the two trustees are effectively using their powers not for the trust, but to interrogate Mr Van der Walt as the executor of the estate on the administration of the estate. This is supported by the applicants’ own submission that the trustees as a body is dysfunctional due to Mr Van der Walt not bringing the administration of the estate to conclusion.

[35] The trustees cannot fulfil their functions pertaining to the trust as yet and this application centres not about the duties of the trustees pertaining to the capital assets that they have to manage, but to their frustration that they cannot do so. This is thus no basis to remove Mr Van der Walt as he has not effectively started with his duty as trustee of the capital assets. I cannot find that it would be in the in interests of the trust and its beneficiaries to remove Mr Van der Walt as trustee.

[36] I find it quite disconcerting that a bold statement is made that Mr Van der Walt took cash from the estate framed as follows: “I am advised that he took cash from the various businesses of the estate. It is supported by the liquidation and distribution accounts.” This serious accusation constitutes hearsay evidence, we do not know who advised him and there is no affidavit from this person. No indication is given to the Court on what in the liquidation and distribution account is relied on to sustain this averment. The Court does not have a duty to search through accounts looking for such evidence and did not do so. But in any event, this was not the ground, or a factor raised, as to why he should be removed as executor. The fact that this was not denied does not render it not to be a hearsay statement.

⁴ Section 20(1) of Trust Property Control Act 57 of 1988: “A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.

Interdict against the Master to not authorise the executor fees of Mr Van der Walt pending submissions made by the applicants

[37] On behalf of the applicants it was argued that because cash has disappeared and Mr Van der Walt did not answer as to what remuneration he had received; this order is necessary.

[38] On behalf of Mr Van der Walt it was argued that the Estates Act does not provide that a party can make submissions to the Master pertaining to remuneration. Remuneration is authorised by s51(1) of the Estates Act and is in the discretion of the Master. If a party is not happy with a decision of the Master pertaining to the exercising of his discretion a review can be brought in terms of s95 of the Estates Act. The applicants did not prove one of the three requirements to obtain a final interdict.

[39] In the Master's report the Master supports the version of Mr Van der Walt that he had not asked or received any interim payment. The Master opines that this interdict against him is unnecessary because Mr Van der Walt would be entitled to remuneration as soon as permission is granted in terms of s35 of the Estates Act.

Reason for decision on whether a mandatory final interdict must be granted against the Master

[40] I cannot find that because PSG gave an undertaking to receive less remuneration for the administration of the account anybody else fulfilling the function is bound by PSG's undertaking. There is no basis on which this Court can thus limit executor fees or the applicants can submit same to the Master. The deceased did not make provision for the situation where an alternative executor is appointed. Mr Van der Walt would not be allowed to claim more than that provided for by law. He has not done so.

[41] The Master has a discretion to tax the remuneration and may allow or disallow fees when appropriate.⁵ There is no provision that heirs or legatees can make

⁵ Section 51(3) of the Estates Act

submissions pertaining to remuneration being paid out. The applicants do not have a clear right for a final interdict.

[42] If the Master acts lawfully in terms of the Estates Act then there can be no injury committed.

[43] The applicants can take the Master on review if they find the exercise of his discretion to be unlawful or irrational or unreasonable. The applicants thus have an alternative remedy.

[44] I had asked for additional heads but both parties agreed that the suggested remedy is inappropriate. I agree with these submissions and accordingly do not address this aspect.

[45] I accordingly order:

[45.1] The application is dismissed with costs with the applicants to pay the costs jointly and severally.

S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NO: 54318/2021

HEARD ON: 20 October 2023

FOR THE APPLICANTS: ADV. Q. PELSER SC

INSTRUCTED BY: Hurter Spies Attorneys

FOR THE FIRST RESPONDENT: ADV. A. COERTZE

INSTRUCTED BY: WF Bouwer Attorneys

DATE OF JUDGMENT:

16 January 2024