FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5410/2011

In the matter between:-

ELAINE ERASMUS Applicant
(Identity number:)

and

KOBUS JACOBS 1st Respondent
(Identity number:)

THE MASTER, FREE STATE HIGH COURT 2nd Respondent

HEARD ON: 24 MAY 2012

JUDGMENT BY: MHLAMBI, AJ

DELIVERED: 7 JUNE 2012

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[1] This is an application to remove an executor from office in terms of section 4 of the Administration of Estates Act, No. 66 of 1965.

[2] The Applicant seeks to remove his brother, the First Respondent, from the office of executor by reason of the fact that he is not a fit and proper person to be responsible for the administration of the estate; and that an independent executor should be appointed to investigate the circumstances regarding

the conclusion of the sale of the farms forming the subject matter of their deceased mother's will.

[3] The sale agreement was concluded on 13 April 2006 between the Applicant's late mother, who died on 22 May 2009 and Davis Guitars (Pty) Ltd and signed by the First Respondent, as sole director of the company. The purchase price was R1 500 000.00 (one million, five hundred thousand rand).

[4] Both Applicant and First Respondent were the only beneficiaries in equal shares under the will, which was made and dated 1 December 2005. First Respondent was duly appointed as executor of the estate in terms thereof.

[5] The thrust of the Applicant's claim, according to her, was the dishonest manner in which the sale agreement between her late mother and First Respondent's company was concluded, which she viewed as an orchestrated effort to prejudice her as a beneficiary.

[6] She based her conclusion on the following:

1) She never knew of the will of 1 December 2005.

2) Both the will and sale agreement were concealed from her and she had no knowledge of their existence until after her mother's death.

3) The purchase price of R1 500 000.00 was suspect as it was significantly lower than the valuation of the property as at the time of the sale.

4) Her late mother was diagnosed with Alzheimer's disease, a considerable period before her death. It was, according to the applicant, unlikely that her deceased mother could have been of sound mind as at the time of the sale.

[7] An objection was lodged with the Master, the Second Respondent, on her behalf. The correctness of the valuation of the property in question was assailed as well as the apparent conflict of interest of the First Respondent, as the director of the company that purchased the property. Second Respondent rejected the objection.

[8] The First Respondent admits having purchased the farms from his late mother on 13 April 2006. Applicant and her spouse have been staying on the farms for free since 2003. He

contends that the sale of the farms to himself occurred three years before their mother's death and had nothing to do with the deceased estate.

[9] First respondent further maintains the amount owing to the Applicant by virtue of the Liquidation and Distribution Account was paid to her on 16 or 18 November 2011.

[10] He, furthermore, holds that the application to remove him as an executor of the deceased estate is as a result of the Applicant's dissatisfaction with the Sale Agreement concluded by him with their late mother, a transaction she was fully aware of.

[11] Counsel for Applicant referred me to various authorities(for which I am grateful) and seeks an order in terms of section 54(a)(v) for the removal of First Respondent as an executor of the estate and the costs of the application.

[12] Section 54 reads as follows:

54. Removal from office of executor.-

(1) An executor may at any time be removed from his office-

(a) by the Court-

(i) ....

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

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

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

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

[13] "The office of the executor should not be used in order to pursue a private agenda".

VAN NIEKERK v VAN NIEKERK 2011 (2) SA 145 on page 150G.

[14] In **HARRIS V FISHER, NO** 1960 (4) SA 855 (A) on page 862E, it was said

> "Executors or Administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate."

[15] The Court has a discretion on removing an executor in terms of section 54(a)(v) of the Act and the main guide must be the welfare of the beneficiaries. **DIE MEESTER v MEYER EN ANDERE** 1975 (2) SA 1 (TPD) at 17E - F.

[16] However, Solomon ACJ, in **SACKVILLE-WEST v NOURSE AND ANOTHER** 1925 (A) 516 on page 527, quoted as follows from Story's Equitable Jurisprudence (par 1289)

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

He then proceeds to lay down the broad principle that the Court

> "if satisfied that the continuance of the trustee would prevent the trusts being properly executed,"

might remove the trustee.

[17] The cardinal question is: Can the First Respondent be said to have acted, in his capacity as Executor, dishonestly or in an untrustworthy manner? In my view, this question should be answered in the negative. The conduct complained of falls outside or took place before First Respondent took office.

[18] Applicant has not furnished an iota of evidence or factual basis

in support of the allegations she makes against the First Respondent. She has received her portion of the inheritance in terms of the Liquidation and Distribution Account and accordingly there is no indication that she was concerned with the manner the estate was being administered. I am inclined to agree with First Respondent's Counsel that the Applicant's main purpose is to achieve the setting aside of the Sale Agreement.

[19] Respondent's Counsel advanced the following further arguments which, in my view, are sound:

(a) The contract was concluded three years prior to the parties' mother's death.

(b) There was no medical report or evidence to confirm that Applicant's late mother was of unsound mind as at the conclusion of the contract of sale. Equally strange is applicant's statement in her replication that, she handed the deceased the contract document for signature.

(c) There are no prospects of success with Applicant's envisaged action against First Respondent even in the event another executor is appointed.

(d) In replication, Applicant admits her signature on the contract, despite her having stated in the Founding Affidavit that it was concealed from her.

[20] In respect of costs of the application, both Counsel referred me to **GROBBELAAR v GROBBELAAR** 1959 (4) SA 719 (A) and agree with the legal position as set out therein that a person in a fiduciary position and the unsuccessful litigant, should not pay costs *de bonis propriis*.

ORDER:

[21] In the result, the application is dismissed with costs.

J.J. MHLAMBI, AJ

On behalf of applicant:	Adv. J.J.F. Hefer Instructed by: McIntyre & Van der Post BLOEMFONTEIN (Ref. PH HENNING/EAL013/CB)
On behalf of respondent:	Adv. C.L.H Harms Instructed by: Honey Attorneys BLOEMFONTEIN (Ref. BM JONES/I20869)

JJM/sp