

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

JUDGMENT BY:

DAFFUE, J

HEARD ON:

24 AUGUST 2012

DELIVERED ON:

20 SEPTEMBER 2012

[1] Applicant unsuccessfully applied for an order in accordance with the provisions of section 54 of the Administration of Estates Act, 66 of 1965 for the removal of her brother, the first respondent, as executor in the estate of their late mother, Catharina Elizabeth Jacobs. On 7 June 2012 Mhlambi, AJ dismissed the application with costs.

[2] Applicant now seeks leave to appeal. Several grounds of appeal are relied upon. I do not intent to quote all grounds of appeal which can be summarised as follows:

1. The court *a quo* erred in not considering the conflict of interest between first respondent as executor of the estate on the one hand and his position as director of the private company that purchased the deceased's farms three years prior to her death at a purchase price much lower than the market value thereof and in doing so without disclosing the purchase (herein later referred to as "the transaction") to applicant.
2. Applicant's wish that the circumstances pertaining to the conclusion of the transaction be considered by a newly appointed executor was not properly considered by the court *a quo*.
3. The court *a quo* also erred in not finding that the transaction on all probabilities constituted an orchestrated effort by first respondent to prejudice applicant as a beneficiary in the estate of their late mother.
4. The court *a quo* incorrectly dismissed allegations by

applicant that their late mother suffered from Alzheimer's disease and on probabilities was unsound of mind at the time of the transaction and in so doing the court erred in finding that there was a lack of evidence or factual basis in support of the allegations.

5. The court *a quo* erred in finding that the decisive question was whether first respondent acted dishonestly in his capacity as executor without considering his alleged improper action when the transaction was concluded.

[3] Section 54 of the Administration of Estates Act deals with the removal of an executor from office. The only possible subsection that might be applicable in *casu* is section 54(1)(a)(v): "An executor may at any time be removed from his office if for any other reason the court is satisfied that it is undesirable that he should act as executor of the estate concerned;"

[4] In *casu* the administration of the deceased's estate is basically finalised. The first and final liquidation and

distribution account has laid for inspection, but applicant objected thereto. However, she has already received what was awarded to her as beneficiary in accordance with this account.

[5] The following facts are common cause:

1. The private company of which first respondent in his personal capacity is the sole director, Davis Guitars (Pty) Ltd, purchased the deceased's farms in terms of a written Deed of Sale dated 13 April 2006 ("the transaction");
2. The deceased signed the Deed of Sale at Petrusburg on 13 April 2006 in the presence of applicant. [First respondent signed it on behalf of his company in Pretoria on the same day *ex facie* the Deed of Sale, although this is not common cause.]
3. Just over four months prior to the transaction being entered into the deceased executed a will in terms whereof she appointed first respondent as executor and applicant and first respondent's trust as heirs in equal shares.

4. The deceased passed away on 22 May 2009, more than three years after the transaction was entered into.
5. It is uncertain when registration of transfer of the farms was effected in the name of the purchaser, but it was apparently done prior to the death of the deceased.
6. The purchase price agreed upon was R1,5 million which was payable in terms of an interest free loan granted by the seller to the purchaser, which loan agreement did not form part of the written Deed of Sale.
7. The amount due and payable by first respondent to the deceased's estate in respect of the loan is indicated in the first and final liquidation and distribution account to be R1 293 352,79. An amount of R620 194,13 was allocated to each of applicant and first respondent's trust after provision was made for costs of administration and estate liabilities.

[6] Several aspects are in dispute, *inter alia* whether

1. applicant was aware of the transaction;
2. first respondent was present in Petrusburg when the Deed of Sale was signed by the deceased;
3. the deceased suffered from Alzheimer's disease and if so, whether she was *doli incapax* and could not form any intention to sell the farms to first respondent's company.
4. first respondent should be removed as executor and whether an objective and independent executor should be appointed in order to investigate the transaction and to establish whether it should be set aside or not, and/or what remedies are available to applicant.

[7] Applicant claimed that she was unaware of the existence of the deceased's will dated 1 December 2005 and the Deed of Sale entered into on 13 April 2006. Her version that she was unaware of the existence of the Deed of Sale is denied by first respondent and his reasons appear to be acceptable and probable. Applicant sought to persuade the court that the transaction was suspect insofar as the purchase price is significantly lower than the valuation of

the farms at the time. The fact of the matter is that first respondent was the deceased's only son and at all relevant times he was the sole director and shareholder of the company that purchased the farms. There is nothing strange in parents selling their assets to children below market value and even donating assets to them.

[8] Applicant sought to persuade the court *a quo* that the deceased was diagnosed with Alzheimer's disease before her death and that it was unlikely that she could have been sound of mind at the time of the transaction. However applicant confirmed that she had accompanied the deceased to the bank during the same period – April 2006 - in order to open a bank account and to register for VAT purposes. Surely it would have been irresponsible of her to act accordingly if she knew that her mother was not sound of mind at the time. No acceptable evidence whatsoever was placed before the court and applicant's averment is based on an unfounded hypothesis.

[9] The case law relied upon by Mr Hefer on behalf of the

applicant in the court *a quo*, although confirming established principles, does not support applicant's case.

In **VAN NIEKERK v VAN NIEKERK** 2011 (2) SA 145 KZP

the executrix and former spouse of the deceased resisted a claim of the deceased's surviving spouse. The executrix

was also the sole heir of the estate and it would obviously

be to her benefit to ensure that the claim of the surviving

spouse was dismissed or accepted in a much lower

amount. Wallis J (as he then was) found that the attitude of

the executrix constituted good cause for her removal in

terms of section 54(1)(a)(v) as "(t)he office of executor should

not be used in order to pursue a private agenda." See para [12] at

150G. A similar situation arose in **GROBBELAAR v**

GROBBELAAR 1959 (4) SA 719 AD. The court found that

an executor should be removed from office on the ground

that he filed a claim against the estate which was disputed

by the heirs. The court found that at that stage of the

proceedings it was not necessary to establish the validity of

the claim as the question who was right and who wrong

was irrelevant. Both judgments are distinguishable from

the facts in *casu*. There is in this instance no dispute

regarding any claims filed against the estate or the administration of the estate.

[10] No evidence was placed before the court to show that first respondent was a dishonest, grossly insufficient or untrustworthy person whose future conduct in the administration of the deceased's estate would be such to expose the estate to risk of actual loss or of administration in a way not contemplated by the will of the deceased.

[11] Although not specifically stated the court *a quo* accepted first respondent's version for purposes of adjudication of the application in line with the requirements stipulated in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 A at 634-5. The court *a quo*'s evaluation of the evidence and conclusions in that regard cannot be faulted. It was shown that the transaction was entered into three years prior to the deceased's death, that applicant, although initially denying knowledge of the Deed of Sale, confirmed in reply her handwriting on the Deed of Sale in respect of the place and date of signature.

In addition no medical evidence was placed on record indicating that the deceased was probably unsound of mind at the time of conclusion of the transaction. On the assumption that first respondent is removed as executor and a new independent executor appointed, there appears to be no reasonable prospect of success with the envisaged legal action to have the Deed of Sale set aside, or with any other remedies that might be available.

[12] Consequently I am of the view that there are no reasonable prospects that another court may come to a different conclusion and therefore the application is doomed to fail.

[13] Therefore the following order is issued:

1. The application for leave to appeal is dismissed with costs.

J. P. DAFFUE, J

On behalf of the Applicant:

Adv. J J F Hefer

Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of the respondents:

Adv M H van Twisk
Instructed by:
Klagbruns De Vries
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