



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number 3457/2023

In the matter of:

ELIZABETH MARGARETHA MAREE

Applicant

and

**THE MASTER OF THE FREE STATE HIGH
COURT BLOEMFONTEIN**

First Respondent

MAGIEL DAVID MAREE

Second Respondent

WILLEM LODEWYK SEYFFERT N.O.

Third Respondent

CORAM: NAIDOO, J

HEARD ON: 15 FEBRUARY 2024

DELIVERED ON: 17 MAY 2024

JUDGMENT

- [1] This matter arises from the administration of the deceased estate of the late Leon Pieter Maree (the deceased), to whom the applicant was married during his lifetime. The deceased died on 7 October 2014, and the third respondent (the Executor)), was appointed by the first respondent (the Master) as the executor of the deceased estate. The applicant brings this application in terms of section 35(10) of the Administration of Estates Act 66 of 1965 (the Estates Act), for the setting aside in terms of section 35(10) of the Estates Act, alternatively, the review and setting aside of the Master's decision dated 12 May 2023. Adv CD Pienaar represented the applicant and Adv R Van Der Merwe represented the second respondent. The Master and the Executor played no part in these proceedings.
- [2] The applicant seeks the following relief:
- 2.1 Condonation be granted to the applicant for non-compliance with the time period prescribed in section 35(10) of the Administration of Estates Act 66 of 1965 and that the time period prescribed in terms of section 35(10) be extended until the date of the institution of this application.
- 2.2 The decision of the first respondent, dated 12 May 2023, to uphold the second respondent's objection against the first and final liquidation and distribution account dated 5 July 2022 in respect of the applicant's claim for *habitation* be set aside in terms of section 35(10) of the Estates Act, alternatively be reviewed and set aside.
- 2.3 The first respondent's decision be substituted with a decision in terms of which the second respondent's objection against the first

and final liquidation and distribution account dated 5 July 2022 be dismissed.

2.4 The third respondent be directed to amend the first and final liquidation and distribution account dated 5 July 2022 to include and reflect the applicant's claim in respect of the applicant's *habitatio* in the amount of R1 113 481.50 as a claim for habitation in terms of clause 5.2 of the last will of the late Leon Pieter Maree, read with clause 5 of the antenuptial contract, registered on 27 November 1997 under number H1751/1997.

2.5 The costs of this application be paid from the estate of the late Leon Pieter Maree, alternatively if the application is opposed by any of the respondents, such respondents be ordered to pay the costs of this application.

With regard to condonation, the second respondent did not oppose that relief, and condonation as sought in para 2.1 above was granted.

[3] As indicated, the applicant was married to the deceased, such marriage having subsisted for approximately seventeen years. The applicant and deceased entered into an Ante-Nuptial Contract, with exclusion of the accrual system, prior to their marriage in 2017. The clause which is relevant to this matter is clause 5, in terms of which the deceased undertook to cede to the applicant the right of *habitatio* in respect of their communal home, upon their becoming divorced or upon his death. In clause 5.2 of his last Will, the

deceased gave effect to clause 5 of the ante-nuptial contract by bequeathing to the applicant the right of *habitatio* in respect of the communal home at the farm Diepwater, which is situated on the outskirts of Bloemfontein.

- [4] After the applicant accepted the bequest, the Executor (third respondent), advised her that the farm had to be sold to facilitate the due and proper administration of the deceased estate. She was required to sign a consent for the sale of the farm, free of the right of *habitatio*. She submitted a claim to the Executor for the value of the right of *habitatio*, in the amount of R1 113 481.50, which was accepted by the Executor on 9 November 2017. She signed the consent for the sale only after her claim in respect of the *habitatio* was accepted by the Executor. The latter thereafter included the applicant's claim in respect of the *habitatio* and her claim for spousal maintenance of R3 445 862.72, in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (the MSSA), in the First and Final Liquidation and Distribution Account (the L&D account), which he submitted to the Master and which lay open for inspection in terms of the Estates Act
- [5] The second respondent, who is the nephew of the deceased and a beneficiary in the deceased estate, objected to the applicant's claim for *habitatio* and maintenance as reflected in the L&D account. The Master upheld the second respondent's objection and directed the Executor to amend the L&D account in respect of the *habitatio* claim. The dispute between the parties is whether the Master upheld the objection to the *habitatio* claim only, as contended by the applicant, or the whole objection in respect of the

habitatio claim and the claim for maintenance, as contended by the respondent. I will deal further with this later.

- [6] Clause 5 of the ante-nuptial contract reads as follows:

“Dat voormelde LEON PIETER MAREE onderneem verder om te sedeer aan voormelde ELIZABETH MARGARETHA JACOBS die reg van Habitatio van die gemeenskaplike woning wat hulle mag okkupeer op die tydstip van egskeiding of op die tydstip van dood van voormelde LEON PIETER MAREE. Hierdie reg van Habitatio slegs sal geld tot die dood of hertrou van voormelde ELIZABETH MARGARETHA JACOBS wat ookal eerste mag plaasvind”.

Loosely translated it reads:

That the aforementioned Leon Pieter Maree undertakes to cede to the aforementioned Elizabeth Margaretha Jacobs the right of Habitatio to the communal home which they may occupy at the time of divorce or at the time of the death of the aforementioned LEON PIETER MAREE. This right of Habitatio will be valid only up to the death or remarriage of the said ELIZABETH MARGARETHA JACOBS, whichever shall occur first.

- [7] The deceased confirmed, in his Will, the provisions of clause 5 of the ante-nuptial contract, and stipulated certain conditions upon which the applicant may exercise the right of *habitatio*. The relevant clauses of the Will are as follows:

“5.2 Ek bevestig dat in terme van die Huweliksvoorwaarde kontrak aangegaan tussen ek en my eggenote, ek aan haar 'n reg van habitatio van ons gemeenskaplike woning verleen het en is dit ook my wens dat sy van hierdie reg gebruik sal maak onderworpe aan die volgende:

5.2.1 Haar reg van habitatio sal beteken dat sy die gebruik sal hê van ons gemeenskaplike woning met motorhuise te “Diepwater”, dog sal sy nie geregtig wees om enige huurders in te neem of 'n gratis bewoningsreg aan derdeparty toe te ken nie.

5.2.2 As indien my eggenoot sou besluit om haar reg van habitatio te beëindig, sal sodanige reg onherroepbaar verval, dog sal die ELMAR TRUST in sodanige geval verplig wees om vir my eggenote 'n redelike en aanvaarbare drieslaapkamer meenthuis/duethuis/huis te verskaf in die noordelike voorstede van Bloemfontein en sal my eggenote inspraak hê om saam met die trustees van die ELMAR TRUST sodanige verblyfpleg te bekom.

Indien die Trust genoodsaak is om sodanige huisvesting aan te koop, sal die eiendomsreg van sodanige meenthuis/ duethuis woonhuis die eiendom bly van die ELMAR TRUST.”

[8] The grounds upon which the second respondent objected to the L&D account are:

8.1 Claim in respect of habitatio – the second respondent alleges that this claim is not permissible in law for the following reasons:

8.1.1 the ante-nuptial contract entered into between the deceased and the applicant amounts to nothing more than an agreement to agree in future, which is enforceable only in limited circumstances. Such circumstances are not present in this matter, and the agreement between the deceased and the applicant is not valid and enforceable;

8.1.2 The deceased could not prior to his passing cede any right to habitation, nor was there any agreement ever concluded in terms of which the applicant acquired a right of habitation;

8.1.3 No limited real right of habitation was registered against the communal home in terms of the Deeds Registries Act 47 of 1927, therefore the applicant's purported right of *habitatio* is not enforceable against third parties;

8.1.4 the ante-nuptial contract does not create any legally enforceable claim the deceased estate and the executor's recognition of that claim is bad in law.

8.2 Claim for Spousal Maintenance: The second respondent does not dispute that the applicant has a right to claim spousal maintenance. He only takes issue with the quantum thereof, and complains that despite numerous requests, he was not furnished with a proper breakdown of how the maintenance value reflected in the L&D account, was calculated. He accuses the executor of accepting a claim which the applicant has inflated to derive a similar amount to that which she would have received if the proceeds of the insurance policies bequeathed to her in the deceased's Will, had been paid to her. The policies were ceded to Nedbank and the proceeds could not be paid to her could not be paid to her.

[9] The Master's decision, communicated in a letter dated 12 May 2023, to the firm of attorneys at which the Executor practices, was couched in the following terms:

- "1. Please note that Objection by Honey Attorneys is upheld.
2. Kindly amend the account in respect of claim for Habitatio.
3. Please note that the surviving spouse can still approach Elmar Trust if she need (sic) to enforce clause 5.2.2 of the Will"

The Master subsequently furnished reasons for his decision, dated 24 July 2023, together with a record of proceedings. In essence, the Master appears to agree with the second respondent's

contention that the real right of *habitatio* was not registered against the title deed of the communal property and was therefore not enforceable in law. The Master also referred to clause 5.2.2 of the deceased's Will, asserting that the applicant, in his view, waived her right to *habitatio* when she consented to the sale of the farm Diepwater on which the communal home was situated. She was therefore able to approach the Elmar Trust in terms of clause 5.2.2 of the Will to provide accommodation for her. The Master therefore asserted that his decision should not be reviewed. The Master did not mention or deal with the claim in respect of spousal maintenance at all, and gave direction to amend the L&D account only in respect of the *habitatio* claim.

[10] The applicant therefore proceeded on the basis that the maintenance claim was upheld by the Master, and launched this application for review only in respect of the Master's decision relating to the *habitatio* claim. Therefore, the issues for this court to adjudicate are whether:

- 10.1 the Master upheld the second respondent's objections in respect of both the *habitatio* and maintenance claims lodged by the applicant or only the objection in respect of *habitatio* claim;
- 10.2 the applicant's claim in respect of *habitatio* is enforceable and whether it can be quantified in the money terms as claimed by the applicant.

[11] In support of her contention that the Master upheld only the objection in respect of *habitatio*, the applicant contends that the

Master did not mention the maintenance claim in his decision communicated on 12 May 2023, nor did he mention or give any direction in respect thereof in his reasons dated 24 July 2023. The Master's reasons were filed after the founding papers in this application were served on him, hence he was eminently aware that the applicant sought to review and set aside only his decision in respect of the *habitatio* claim.

- [12] The second respondent prefaces his assertions in his Answering Affidavit, by pointing out that in terms of section 35(10) of the Estate's Act, the review contemplated in this application, is not confined to the record before the Master, but is a complete re-hearing of the matter and a fresh determination of the merits, with or without additional information or evidence. Therefore, the applicant's contention that the parties are confined to the documentation sent to the Master prior to his decision is wrong. The applicant is also wrong in contending that that the court is confined to considering the merits of the matter on the basis of the express findings of the Master, as the court may make any finding it deem meet on any matter relating to the issues which were to be considered by the Master.
- [13] The second respondent contends that the applicant's intention in lodging the claims she did, is to derive a financial benefit from the estate, whereas he does not have such an intention. The second respondent contends further that claim in respect of *habitatio*, which was accepted by the Executor, is a claim based on compensation for the waiver of a limited real right "ostensibly" created in terms of the Ante-nuptial contract and not in terms of the deceased's Will. The Master's finding in respect thereof was confined to the L&D

account as not being competent in law, and such finding was correct.

- [14] The second respondent's further contention is that at the time of the sale of the property, the applicant had not yet acquired a right of *habitatio*, and had only a right to claim registration of the limited real right of *habitatio* from the estate as at date when such right would vest. When the property was transferred from the estate, the applicant's right to claim registration of the right of *habitatio* became unenforceable. On account of the applicant's waiver of her right to claim registration, she was not entitled to claim compensation as a *quid pro quo* for such waiver, in the absence of an agreement to that effect between her and the Executor. The respondent alleges that the applicant and the Executor did not enter into such an agreement prior to the sale of the property, hence the applicant had no enforceable right of *habitatio* after the sale of the property was concluded.
- [15] With regard to the applicant's claim for maintenance, the second respondent alleges that the Master's decision incorporates his objection to the maintenance claim. However, if it did not, then that amounts to a vitiating misdirection. He then relied on the court's wide discretion in this matter to decide the matter afresh, taking into account all the facts and circumstances, and not merely those that were before the Master. I shall return to this aspect later.
- [16] In reply, the applicant reiterated what she had said in Founding, namely that her claims in respect of *habitatio* and maintenance were submitted to the Executor by her attorney on 30 March 2016. This

was after she was advised that the farm would have to be sold to meet the expenses of the estate, whereupon she sought legal advice regarding her position with regard to her right of habitation. When it became clear to her that the proceeds of the insurance policies bequeathed to her in the deceased's would not be paid to her, she sought advice on a claim for maintenance, which ultimately resulted in the claim for maintenance being submitted. With regard to the calculation of the value of the right of habitation and the quantum of the maintenance, she asserted that this was in accordance with methods usually used in the administration of estates.

- [17] I mention further that the applicant attached to her Replying Affidavit confirmatory affidavits by her attorney as well as Mrs Hester Johanna Catharina Du Plessis, who is an attorney in the firm of the Executor and who was involved, as a representative of the Executor, in the administration of the deceased estate in this matter. She gave a detailed explanation with regard to the role of the second respondent in the sale of the farm Diepwater, as well as the communications between her and the second respondent's attorney, from which it was clear that he was aware that the property would be sold without the right of habitation encumbering the property, as the Executor had accepted the claim of the appellant for payment of the value of that right, to enable her to consent to the sale to Raubex.

- [18] Section 35(10) of the Estates Act provides that

“Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit.”

The parties correctly referred to the matter of *Friedrich and Others v Smit NO and Others 2017 (4) SA 144 (SCA)* as authority for the proposition that an application for the review of the Master's decision in terms of this section was an appeal in the wide sense, where the court could consider the matter afresh and make any order it deemed fit (see para [14] of the judgment). (my underlining). While the discretion of the court is wide, it must still be judiciously exercised, taking all the relevant facts and circumstances into account.

- [19] The powers and duties of an executor in a deceased estate are clearly stipulated in the Estates Act. The legal position of the Executor, briefly, is that he is not the agent or representative of the heirs. He is tasked with administering the deceased estate, is vested with the assets and liabilities of the estate and he alone has the power to deal with them. This responsibility means that the position of the Executor is a fiduciary one and requires of him to act at all times in good faith, in terms of the deceased's Will and to act in accordance with the law. In respect of a number of aspects, the Executor is subject to the supervision of the Master. Where the Executor acts legally and in terms of the law, a court will be slow to interfere with the exercise of his discretion, unless improper conduct on his part is clearly established. (See *Meyerowitz on Administration of Estates and Their Taxation*, 2023 edition, 12.14, pages 148/149).

- [20] The basis of the second respondent's objection to the claim for *habitatio*, was that the ante-nuptial contract did not create any legally enforceable claim against the estate. The deceased could not cede any right of *habitatio* to the applicant nor was any agreement concluded in terms of which the applicant acquired a right of habitation. Further, that no real right of *habitatio* was ever registered against the property as required by sections 65 and 67 of the Deeds Registries Act 47 of 1927. Therefore, the applicant's "purported" right of habitation is not enforceable against third parties.
- [21] The second respondent expanded these objections in this application, alleging that the deceased's Will created a right to claim registration of the right of *habitatio* in favour of the applicant. Put differently, the effect of the bequest is that it created a personal right to claim performance by delivery of the servitude, namely registration of the right against the title. The second respondent further contends that the applicant waived such right when she consented to the sale, which resulted in the transfer of the property to Raubex, whereupon her right was unenforceable. The second respondent correctly points out that the right is enforceable against third parties only upon registration of the right, and he acknowledges that it remains enforceable between the parties to the agreement, which, in this case, would be the deceased and the applicant. It is common cause that the right of habitation was not registered. The right to habitation as a servitude is a limited real right which confers on the holder the right to dwell in the house of another, without detriment to the substance of the property. (See: *PJ Badenhorst et al, Silberberg and Schoeman's The Law of Property, 5 ed at 341.*)

- [22] The other issue that the second respondent raised is that it was impermissible for the Executor to agree that the applicant would be compensated as a *quid pro quo*, for her waiver of her right to *habitatio*. The second respondent, as an heir in the deceased estate, was not consulted nor was his consent obtained for the sale to be subject to such a condition. Hence the conduct of the Executor was unlawful. The second respondent also took issue with the method of calculation of the quantum in respect of the *habitatio*, arguing that one of the conditions in the deceased's Will was that she was prohibited from renting out the property, or giving anyone the right of occupation of the property. She was, therefore, not permitted to use the amount of rental that she could obtain for the property as a basis for calculating the value of the *habitatio*. In this regard, it has been an established principle in our law, from time immemorial, that the holder of a right of *habitatio* is permitted to let the property over which such a right is held.
- [23] It is also well established in our law that the wishes of a testator, as expressed in his Will, must be given effect to, unless the law prevents the executor from doing so. It may well be argued that the prohibition placed by the deceased, in his Will, upon the applicant against letting the property may be unlawful. Although the validity of the deceased's Will or parts thereof is not before me, the second respondent's argument that it was impermissible for the applicant to calculate the value of the *habitatio*, based on the amount of the rental that could be obtained for a property similar to the communal home, cannot be sustained, as she is allowed in law to have derived rental from the property. In any event, as I understood it, the reason for obtaining a rental value for a similar property, is to determine how

much she would have been required to pay in rent, should she have leased a similar property. Even if she wanted to ascertain how much she would be entitled to charge as rent for the communal property, she would not be acting unlawfully, as the law permits her to let the property to others. The calculation of the right of habitation is, to my mind, a fair and logical method of determining the value of the applicant's right of *habitatio*

- [24] The second respondent also appears to have overlooked the established position in our law, as repeated and expounded in *Kidson and Others v Jimspeed Enterprises CC and Another Case 38574/08, North Gauteng High Court, delivered on 20 April 2009*, where the court, in examining numerous historical legal texts and relevant case law said in para [9]:

"When the person who has the right of *habitatio* abandons the right, it lapses. As a personal servitude it also lapses on the death of the holder of the *habitatio*. Before that the holder of the right may, of course, reach an agreement with the owner of the burdened property to abandon his limited real right and to accept as a *quid pro quo* some compensation for this waiving of his limited real right. This does not amount to a "transfer" of the limited real right to the owner, but will have the consequence that the erstwhile burden encompassed in the limited real right falls away and the entitlements of the owner of the then unburdened ownership will automatically return to the original unburdened position, thanks to the elasticity of the real right of ownership." (my underlining)

- [25] The applicant had always expressed the intent to enforce her right of habitation and at no stage did she either expressly or by her conduct manifest an intention to waive such right. The second respondent's argument that the Executor was not permitted to agree that the applicant would be compensated for the value of her right of *habitatio* is misplaced. The Executor stood in the place of the

deceased, as owner of the property, and was authorised by virtue of his statutory powers as Executor to make such an agreement with the applicant. In addition, it was also his duty to entertain all claims against the estate, to consider them carefully and to either accept or reject such claims. As he alone has the power to deal with the assets of the deceased estate, he does not need the consent of the heirs to admit or deny a claim lodged against the estate. The applicant's claim for *habitation* was a claim against the estate, which she lodged with the Executor. It was a fully motivated claim which set out in detail the methodology employed in arriving at the figure that she claimed. The Executor considered and admitted the claim, as he was entitled to do.

- [26] The agreement to compensate the applicant for her right of *habitation* was not a condition of the sale of the property, as the second respondent argues, rendering that argument of the second respondent also without merit. The Executor accepted the offer to purchase and then approached the heirs for their consent to the sale. It was then that the applicant raised the issue of her right of habitation, which resulted in the agreement that she would be compensated for the value of such right, in return for which, she would consent to the sale of the property. This would enable the Executor to effect the sale of the property, free of encumbrances, which was achieved. Second respondent was made aware of this, via his legal representatives. He, however, embarked on a long, unnecessary and irrelevant discourse of the law relating to the rights of the heirs and duties of the executor in relation to the sale of immovable property in a deceased estate. The argument of the second respondent that his consent was required for the Executor

to admit the applicant's *habitatio* claim cannot be sustained.

- [27] It appears from the Master's reasons that he relied on the reasons tendered by the second respondent for his objections to the *habitatio* claim and paid little or no heed to the Executor's reasons for admitting the claim. The Master's reasons do not reflect a careful examination or consideration of the legal position relating to the right of *habitatio* in the light of the second respondent's objections and the Executor's response thereto. Such an exercise would have assisted the Master to conclude that the grounds of the second respondent's objections, as I have set out above, were misplaced. Paragraph 9 of the Master's reasons bear out the point I make that he merely accepted and repeated the objections of the second respondent, without properly considering the merits thereof, in the light of the applicable legal principles. He avers that the applicant waived her right of habitation by consenting to the sale of the property, which I have shown is not the position.
- [28] In addition, the Master did not consider the enforceability of clause 5.2.2 of the deceased's Will, which stipulates that in the event of the applicant terminating her right of habitation, she could approach the Elmar Trust, which would be obliged to purchase a three-bedroomed dwelling for her in the northern suburbs of Bloemfontein. The applicant alleged that she is not a beneficiary in the Elmar Trust, nor is there any apparent legal duty upon the Trust to purchase a house for the applicant. This aspect was pointedly raised by the applicant in her Founding Affidavit, which was served on the Master, prior to his providing his reasons for upholding the second

respondent's objections to the *habitatio* claim. It was expected of him to indicate why, after considering her allegations in the Founding Affidavit, the applicant was wrong in her assertions in this regard, leading him to stand by his view that the Elmar Trust was legally obliged to purchase a house for her, should she have requested it to. It is difficult to avoid the conclusion that the Master misdirected himself by not giving proper consideration to the circumstances of this matter as well as the law applicable to the right of *habitatio*, and in failing to assess the validity of the second respondent's objections in the light thereof. For the reasons set out above, I am of the view that there is no merit in the objections of the second respondent in respect of the applicant's *habitatio* claim, and that the Master ought not to have upheld such objections.

- [29] With regard to the applicant's claim for maintenance, the claim was fully set out and motivated in respect of the applicant's needs. It is clear that the Executor considered the claim carefully and ensured that it complied with the requirements of the Maintenance of Surviving Spouses Act 27 of 1990 (the MSSA). In his response to the second respondent's objections to this claim, the Executor states that the "*maintenance claim contains a comprehensive motivation and calculation of the claim and complies with the provisions of the Maintenance for Surviving Spouses Act*" He then proceeded to set out the factors stipulated in the MSSA to be taken into account in determining the reasonable maintenance needs of a surviving spouse , and concluded by saying that he was and still is of the view that the claim complies with the MSSA.

[30] The Master's decision nor his reasons make any mention of the second respondent's objection to the maintenance claim. In his decision he explicitly mentions only the *habitat* claim and directs the Executor to amend the L&D account only in respect of the *habitat* claim. He was aware that in her Founding Affidavit, the applicant sought to review and set aside only his decision in respect of the *habitat* claim (refer to paras 23, 77 and 88 of the Founding Affidavit). If he had in fact upheld the objections in respect of the maintenance claim, he would have mentioned that in his reasons for his decision. It is clear that the Master considered the claim in the light of the objections raised by the second respondent and agreed with the Executor's reasons for admitting the claim, as set out in the latter's response to the objections. The respondent's contention that Master's indication that his "objections" were upheld also encompassed the objections to the maintenance claim are without merit and do not require any further discussion. As I indicated, the salutary practice in our law is that a court will be slow to interfere with the discretion of the Executor if he has not misdirected himself or exercised his discretion improperly in administering an estate. I cannot find that the Executor in the present matter conducted himself in a manner that warrants this court's interference.

[31] Two final points that bear mention are, firstly, that the second respondent argues that if the Master did not uphold his objection to the maintenance claim, then such is a "vitiating misdirection". From what I have said in respect of the Master's decision and reasons on this aspect, it ought to have been plain that the Master did not uphold the objection to the maintenance claim. The second respondent made no attempt to apply in terms of section 35(10) of the Estates Act to review the Master's refusal or failure to uphold that objection. It does not assist him now to proverbially sneak in the

back door and expect this court to do so, under the guise of exercising its wide discretion in this matter.

[32] Secondly, the second respondent repeatedly made allegations and insinuations of improper and unlawful conduct on the part of the Executor, even going as far as saying that the Executor behaved as though the applicant was his client, and insinuating that the Executor was prejudicing the rights of other heirs by colluding with the applicant in accepting an inflated maintenance claim to make up for her not receiving the amount of the insurance policies bequeathed to her in terms of the deceased's Will but which were ceded to Nedbank. Other than his criticism of certain of the applicant's expenses and his perception of what he alleges she did not disclose, he puts forward no concrete basis for these assertions. The conduct he accuses the Executor of are serious enough for the Executor to be removed from his position as Executor. The second respondent has not availed himself of the procedure in the Estates Act to have the Executor removed. It therefore does not lie in his mouth to make such untenable accusations.

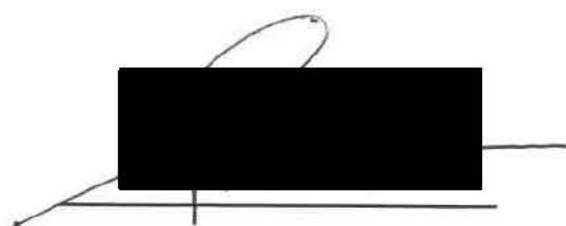
[33] In summary, the grounds of the second respondent's objections against the applicant's *habitatio* claim are without merit and fall to be dismissed. Similarly, the Master was correct in his refusal to uphold the objection in respect of the applicant's maintenance claim.

[34] In the circumstances I make the following orders:

34.1 The applicant's non-compliance with the time period prescribed in section 35(10) of the Administration of Estates Act 66 of 1965 (the

.Estates Act) is condoned and such period is extended until the date of issue of this application;

- 34.2 The decision of the first respondent dated 12 May 2023 to uphold the second respondent's objections to the applicant's claim for *habitatio*, as reflected in the First and Final Liquidation and Distribution account dated 5 July 2022, is set aside in terms of section 35(10) of the Estates Act;
- 34.3 The second respondent's objections to the First and Final Liquidation and Distribution Account are dismissed;
- 34.4 The third respondent is directed to amend the First and Final Liquidation and Distribution Account dated 5 July 2023 to include and reflect the applicant's claim in respect of her right of *habitatio* in the amount of R1 113 481.50, as a claim for *habitatio* in terms of clause 5.2 of the Last Will and Testament of the late Leon Pieter Maree, read with clause 5 of the ante-nuptial contract, entered into between the late Leon Pieter Maree and the applicant and registered on 27 November 1997 under number H1751/1997;
- 34.5 The second respondent is directed to pay the costs of this application.



S NAIDOO J

On Behalf of the Applicants:

Instructed by:

Adv CD Pienaar

Kühn & Associates

9 Kenneth Kaunda Road

Bayswater

Bloemfontein

(Ref: TM Kühn)

On Behalf of the 2nd

Respondent:

Instructed by:

Adv R Van Der Merwe

Honey Attorneys

Honey Chambers

Kenneth Kaunda Road

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(Ref: CH du Plessis)