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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

CASE NUMBER: 13157/2024

In the matter between

D[...] B[...]

FIRST APPLICANT

and

ECKERT BRAND

FIRST RESPONDENT

**MASTER OF THE HIGH COURT,
CAPE TOWN**

SECOND RESPONDENT

JUDGMENT

Date of hearing: 13 September 2024

Date of judgment: 26 September 2024

BHOOPCHAND AJ:

1. When love of connubial bliss abates and separation morphs into anger of an aged man scorned, living transmutes to hate, and death be no end for lust of reprisal prolonged. As the candle of existence flickers and ends, he perpetuates the loathing that knows no close from the depths of the earth below. The death wish is carried through agency and the promise of handsome rewards.

“I direct my executor to, should the said D[...] T[...] put in a claim of whatsoever nature against either my South African or my German assets, resist those claims with all means necessary and to all extents possible. My executor will be entitled to his reasonable fees for work related to the opposition of any claims mentioned above.”

2. Thus ends the final paragraph of the last will of M[...] B[...], a man who found solitude in the arms of the Applicant amidst the arid landscapes of the Klein Karoo, a destination where he breathed his last breath far from his land of birth on 29 January 2024. The Applicant, D[...] B[...], married M[...] B[...] (“the deceased”) on 6 February 2006 at Oudtshoorn, South Africa. She has two sons from him. She is the third wife of the deceased. The deceased had children from his other wives. The Applicant instituted divorce proceedings against the deceased on 24 January 2014. The marriage was declared by court order in 2014 to be one in community of property. The divorce was not finalised when the deceased died.

3. The First Respondent is the Executor of the joint estate. He was nominated Executor testamentary and appointed by the Second Respondent on 23 May 2023. The Second Respondent plays no part in this application. For ease of reference, the First Respondent shall be referred to as the Respondent and the Second Respondent by the office title. The Respondent has been the deceased's attorney since 2013. He acted on behalf of the deceased in the divorce proceedings and further related litigation instituted by and against the Applicant.

4. The Applicant seeks to remove the Respondent as the Executor in terms of section 54(1) (a) (v) of the Administration of Estates Act, 66 of 1965 (“the Act”). The Applicant also relies belatedly on section 54(1)(a) (ii) of the Act. The Applicant seeks,

in addition, an order that the Respondent is precluded from receiving any remuneration for services rendered whilst he was Executor, that the Second Respondent appoint a new Executor, and costs on an attorney-client scale.

5. At the time of his marriage in 2006, the deceased owned several properties in Germany and South Africa. His German portfolio included several units (“the units”) in a mixed-use apartment and commercial block in Munich (“the German properties”). The Applicant values those units at approximately R160m. The deceased’s South African property interests included a one hundred per cent member’s interest in a close corporation, Droogekraal Meulenrivier Farm CC, that owned the farm Droogekraal (“the close corporation”, “Droogekraal”, “the CC”) and two freestanding properties, Ouplaas and the Oaktree guesthouse. Ouplaas has been released to persons rent-free, and Oaktree has been empty and is at risk of illegal occupation.

6. The Applicant asserts that she was involved in acrimonious divorce litigation with the deceased. The Applicant provided a list of twenty-four cases involving litigation between her and the deceased since 2014. The deceased died after a protracted illness with cancer. She avows that the Respondent assisted the deceased in compiling and drafting his final will. The Respondent denies any involvement in formulating the will, contending that his only role was translating the document from German to English. Examining the deceased’s will is a good starting point in adjudicating this application.

THE LAST WILL OF M[...] B[...]

7. The deceased nominated the Respondent as his Executor. The will first deals with the disposal of the deceased’s properties in South Africa. He directed that the close corporation and the guesthouse be retained. The Executor was instructed to determine the value of the Applicant’s half-share in these properties and raise funds to pay her out. He further directed the Respondent to sell his share in Ouplaas and pay the proceeds to his daughter, Sandra Martinez (“Sandra”). The member’s interest in the close corporation was bequeathed as follows: Sandra: 51%, Harald B[...] (a son from the deceased’s first marriage): 15%, J[...] W[...] B[...] (the first son

with the Applicant): 15%, M[...] B[...] (M[...] Jnr, the second son with the Applicant): 15%, Eckert Brand, the Respondent: 4%.

8. The Respondent was instructed to manage the member's interests of J[...] and M[...] in the close corporation until they reached the age of 25. The Respondent was to buy out the Applicant's 50% share in the guesthouse and transfer the property to GRG (Pty)Ltd (a company in which Sandra held the shareholding). He bequeathed the balance of his South African assets to Sandra. He excluded the jewellery and the house content at Droogekraal from his will as he had already gifted it to Sandra. He directed the Respondent to recover the jewellery he gave the Applicant and bequeathed it to Sandra.

9. in paragraph 6.2, the deceased asserted that the Applicant had already received more than her due share through the lengthy and disgraceful divorce proceedings. He believed any inheritance to his minor sons would not be in their best interests as the Applicant's greed would subsume them. Therefore, he chose not to leave his assets to them, entrusting Sandra and the Respondent to safeguard their financial interests.

10. The deceased then turned his attention to his German assets. He referred to the six units registered in the Applicant's name, which he considered part of the joint estate. He stated that three were transferred to her for safekeeping for his sons, J[...] and M[...] Jnr, and his daughter Sandra. He directed the Respondent to take all necessary legal steps to enforce the transfer of the three units to his children if the Applicant resisted. He further directed the Respondent to sell the three remaining units and distribute the balance of his German assets equally between Sandra, J [...], and M[...] Jnr.

11. The deceased finally directed the Respondent to ensure that the Applicant did not benefit from his will at all and that she was totally disinherited. He states the reasons for disinheriting her. The Applicant promised to tend to him in his old age when she announced her intention to divorce him but shamefully neglected to do so. She made wrongful, malicious and false accusations of rape and assault against him, which she was unable to substantiate. She refused, through her greed, to

accept settlement offers made in the divorce proceedings that were way beyond what she was entitled to and protracted the proceedings to the extent that she stole 10 percent of his life and destroyed his wealth and his children's inheritance. The will ends as quoted in paragraph 1 of this judgment.

12. The will directed at the Applicant in the deceased's will is unpalatable. The final clause would make it difficult for any Executor to ensure that the Applicant received a fair and equitable half-share of the joint estate. The Executor is well taken care of, and his fees for managing the interest of the minor sons in the German and South African properties and his fees to resist the Applicant's half share in the joint estate are ensured. It is difficult to believe that the Respondent, who was the deceased's lawyer for at least ten years, did not have a hand in drafting the will. It is rather convenient that the will makes provision for the legal and further management fees in the manner it does, as well as the inheritance of the 4% member's interest in the close corporation, all of which benefit the Respondent. It is apparent that an attorney, if not the Respondent, drew up, or at least assisted in drawing up the will.

13. As for the totality of the property owned by the deceased in Germany, the Applicant has expended considerable effort in challenging the deceased's right to alienate property allegedly owned by the joint estate before the divorce proceedings began. The Applicant alleges that the deceased, in concert with the Respondent, transferred the bulk of the units in the Munich building in November 2013 to his son from his first marriage, Hölger B[...] ("Hölger"). The Applicant declared her intention to divorce the deceased about one month later.

14. The Applicant alleges that the transfer occurred when the marital relationship between her and the deceased floundered and the deceased realised that they were married in community of property. The deceased described the transfer as donations over which he retained usufructuary rights to the rentals from the units. Further units were transferred to the deceased's other children as a part of their inheritance. The Applicant has not challenged the transfer of those units. The Applicant has been embroiled in protracted litigation with Hölger and his wife, Ina. The decision in the litigation involving Hölger's wife ended unsuccessfully for the Applicant in February

2017. The Applicant still favours her chances of prevailing against Hölger in the German courts.

15. The Respondent has compiled a draft liquidation and distribution account since being appointed Executor. The Respondent has approached the German courts regarding the ongoing litigation between the Applicant and Hölger. He has also applied unsuccessfully to intervene in the German litigation. The Respondent has successfully interdicted the Applicant from interfering in the administration of the estate and the Applicant's transfer of property from the estate. There has been a regular exchange of correspondence on behalf of the Applicant and the Respondent, much of which is intemperate.

THE APPLICANT'S COMPLAINTS AGAINST THE RESPONDENT

16. The Applicant provided more than twenty reasons to support the removal of the Respondent as the Executor of the joint estate. The facts supporting each reason are even more numerous and often repeated. The Respondent's answers to these allegations are provided. Almost every fact is disputed, and there is little of common cause between the parties. Motion proceedings are unsuitable to adjudicate the scale and substance of these disputes, but the parties have chosen the application route, and the Court shall endeavour to reach a decision.

The Last Will

17. The Applicant alleges that the Respondent assisted the deceased in drafting the will. She cites the deceased's protracted illness, his proficiency in English, the attention to minute details in the will, and the inclusion of 'vindictive and toxic' instructions as factors pointing to the Respondent's hand in drafting the testament and implementing its provisions unwaveringly.

18. The Respondent denies preparing, recording, formulating, or having any other input in the will. He merely translated it from German to English as the document in the German language would not have sufficed in South Africa. Respondent asserts elsewhere in his affidavit that the deceased dictated the content of the will to him.

Respondent advised the deceased on the legalities of certain aspects. The deceased insisted that they stay. He asserts that the will would have looked different had he been the author. The Applicant has not sought to set it aside. It is not unknown that ill feelings creep into wills when they are drafted. On acceptance of his nomination as Executor, he made it clear that he could only follow lawful directions given by the Testator. He will not adhere to unlawful or ethically untenable instructions.

19. The Applicant alleges that the deceased had been ill for a lengthy period before his death and could not have drafted the will. Alternatively, he required the Respondent's assistance to do so. The Applicant alleges that the deceased had been unwell and intermittently hospitalised since January 2022. His state of health deteriorated, necessitating longer periods of hospitalisation from August 2022. The deceased's mental faculties and physical abilities were impaired when the will was drafted and finalised on 19 April 2022. The deceased could barely speak when she tried to communicate with him. Her sons informed her that the deceased was always sleeping.

20. The Respondent denies knowledge of the deceased's ill health. The deceased did not disclose that he had cancer or that he was terminally ill. The Respondent knew that the deceased suffered from a lung and liver issue and had to be treated in hospital from time to time but was otherwise in good health until shortly before his death. The Respondent believed that the deceased died of old age. During April 2022, the deceased was well and of sound mind. The deceased regularly attended his office and travelled by car from his farm in Oudtshoorn, driving the 180 km to George and back. His mind was clear. The parties were litigating continuously. The Respondent contends that had he or the deceased's adult children felt that the deceased was not of sound mind, they would not have allowed him to depose to affidavits or provide instructions. They would have approached the court for the appointment of a curator. In late February 2022, the deceased appeared in a criminal matter instituted by the Applicant against him. The deceased made arrangements for visits of his minor children as well as arranging their passports at the German consulate.

21. The Applicant refers to the deceased's proficiency in English. The deceased could barely read, write, or communicate in this language. The deceased communicated with the Respondent in German. The Applicant deduces that the Respondent prepared the document as it was in English. The deceased could not have provided the minute and precise details incorporated in the will. The Applicant contends that the Respondent had a free hand to include what he preferred in the testament.

22. The Respondent answered that the deceased's grasp of English was satisfactory and his communications understandable. He performed his farming activities with English and Afrikaans-speaking people without difficulty. The Respondent included an email dated 27 February 2022, which was copied on him by the deceased. The deceased, the author, wrote in English to M[...] Jnr's school. The opening paragraph states the deceased took rather ill unexpectedly on 20 February 2022, his birthday. The deceased states that he obtained an appointment for a breast operation on 1 March 2022. The doctors discovered more complications after doing investigations. In her replying affidavit, the Applicant alleges (without foundation) that Sandra must have written the letter to the minor's school.

The litigation over the German properties

23. The Applicant alleges that the deceased, upon being advised that their marriage was one in community of property and when she was on the brink of initiating divorce proceedings, alienated most of the units in the Munich building to Hölger. The transfer to Hölger was surreptitiously expedited whilst the deceased secured usufructuary rights to use the properties and receive rental income from them. The deceased did not seek her consent to alienate the units, which consent she would have denied. In concert with Hölger, the deceased's actions aimed to defraud her and denude her claims against the joint estate.

24. The Respondent admits that the Applicant intended to institute divorce proceedings against the deceased at the end of 2013. The Respondent admits further that he represented the deceased in the divorce matter. The deceased's instructions were that the parties had reconciled. The marriage relationship lasted

until December 2013, when the Applicant voluntarily left the common home. The Applicant instituted divorce proceedings in January 2014.

25. The Respondent denies the remainder of the Applicant's allegations regarding the disposal of the units. He alleges, in turn, that since the deceased ceased to practise as an Architect and property investor and began a world tour on his sailboat, he stumbled from one liquidity crisis to another. The Respondent sold his properties to pay his debts but simultaneously lost out on rental income. The deceased and the Applicant lived above their means until the German banks declined to release properties they held as security for the deceased's debts. The Applicant did not challenge the latter assertions.

26. The units were transferred to Hölger to restructure the deceased's debts. Hölger would pay off the deceased's debts and allow the deceased usufructuary rights until his passing. The bond at one of the German banks amounted to €1801 567.72. The Respondent alleges Hölger registered a new bond over the properties transferred to him on 7 June 2016. The deceased did not accept that his marriage to the Applicant was in community of property. The Applicant had also learnt belatedly in about 2014 that her marriage was in community of property when the transfers had already occurred.

27. The title deeds of properties purchased in South Africa reflect that the parties were married under German laws (out of community of property). The deceased accumulated his wealth by dealing with property. He did not get the Applicant's consent for their sale. The deceased transferred six of the units to the Applicant in October 2012. The Respondent reasoned that the deceased would not have transferred the units to the Applicant, nor would the Applicant have accepted them had they known they were married in community of property.

28. The deceased thus denied needing the Applicant's consent to alienate properties. The transfer to Hölger benefitted the joint estate by reducing its debt. The Respondent provided an Accountant's letter dated 9 April 2019 to support the allegation that the transfer to Hölger occurred as part of the debt restructuring. The Accountant refers to Hölger's sale of three residential units and a parking bay, the

proceeds of which were applied to finance the restructuring.¹ It is also unclear whether the deceased or Hölger borrowed funds from two persons between April 2014 and March 2016, totalling €622 628.98. From 2013 to 2015, Hölger advanced €450 969.50 Euros to the deceased. The discounted value of the units as of November 2013, when the transfer occurred, was approximately €5 731 000. Hölger paid €358,000 for maintenance and improvements of the units in 2014. The Accountant factored in maintenance costs and improvements to reduce the net value of the units transferred to €5 373 000.

29. Although the Respondent purports considerable knowledge regarding the 2013 transfer, he has not answered the allegation that the transfer of the units occurred within four days when the normal time would be six weeks. The Applicant, in reply, brushes off the Accountant's report as hearsay yet includes numerous annexures that fall within the same category. She also includes new material and annexures in her replying affidavit.

30. The Applicant instituted proceedings in Munich to correct the land registers against Hölger and Ina, who were reflected as titleholders and holders of preferential rights over the transferred units. The Applicant alleges that she obtained an interim injunction, a caveat, against the land register to ensure that Hölger could not alienate the units. The Respondent denies knowledge of this part of the litigation between Hölger and the Applicant, alleging that he played no role in it. He alleges that his role was restricted to advising the deceased on matters raised in such proceedings, which had a bearing on the divorce action. The Respondent then states he has been advised that the Applicant's proceedings against Ina B[...] were unsuccessful.

Letter to the German judge

31. The Applicant deals with the Respondent's intervention in the German litigation to support her contention that the Respondent continues in his role as Executor as an agent of the deceased. The Applicant refers to the twenty-four cases involving her and the deceased. The Applicant alleges that although the Respondent

¹ It is unclear whether the sale involved the units transferred to Hölger in November 2013.

was not formally on record as the legal representative of the deceased in Munich, he attempted to interfere in that litigation. She alleges that the litigation is still pending in the Munich Courts. The Respondent has acted as the representative of and in the interest of Hölger. The Respondent attempted to halt the litigation in Germany. If it proceeded and concluded in her favour, it would expose both the deceased and Hölger as fraud perpetrators against the joint estate.

32. The Applicant provides a copy of an unsolicited letter written by the Respondent on 13 July 2023 to the Judge of the German Court deliberating the matter between the Applicant and Hölger. The Respondent informed the Judge that he had been appointed Executor of the joint estate. He states, "We have been made aware that D[...] is pursuing a claim against Mr Hölger B[...] made in her personal capacity for the transfer of certain properties that previously belonged to the joint estate."

33. The Respondent believed that the Applicant did not have legal standing to pursue the matter in a German Court as her divorce proceedings were instituted in South Africa. All issues relating to the divorce had to be pursued in South Africa. He stated in the letter that since the deceased's death, the Applicant had no legal standing in either Germany or South Africa to pursue any claim relating to assets that belong to the joint estate. Only the Executor may pursue such claims. If the Applicant loses the litigation in Germany, an adverse costs order against her could form part of a claim against the joint estate. He concluded by saying that he had to assess the merits of the Applicant's claim. If the Court pursued the matter, he would have to appoint lawyers in Germany to apply to postpone it, pending his decision on whether to continue with the matter in the Applicant's place. He states that the decision could only be made once he assessed the estate's liquidity and the prospects of success.

34. The German Court rejected the submissions made by the Respondent. The Applicant was found to have standing to raise the litigation in Germany. Hölger was allegedly dissatisfied with the finding and appealed against it. The judgment was due at the end of 2023.

35. Respondent subsequently applied without notice to her to join the litigation against Hölger. The Applicant alleges that the Respondent wished to substitute the Applicant in the proceedings. Once substituted, he intended to withdraw the proceedings against Hölger. The Applicant asserts that the Respondent made the application in the interest of and for the benefit of Hölger. The German Court subsequently found on 30 November 2023 that the Respondent could not participate in the proceedings in her place as Plaintiff and withdraw the action. The Applicant's legal representatives had argued that the powers of the Executor may not extend further than the powers of the testator. If the deceased could not circumvent her consent and withdraw the action, the Executor could not succeed.

36. The Respondent answered the allegations concerning his intervention in Germany after he was appointed Executor. He denies that he was the agent of the deceased. It is a common and good practice for the deceased to retain his services in his divorce action and ancillary matters. He advised the deceased on several other matters that had no bearing on the divorce.

37. The Respondent asserts that the Applicant's refusal to be reasonable protracted the German matters. The Applicant refused to consider the explanation relating to the transaction with Hölger. The German court found against her in her litigation against Ina. The finding was confirmed on appeal. The Respondent attached a copy of the judgment to the answering affidavit. The Respondent was unaware of any litigation pending in Munich that involved the deceased. He could not have swayed the courts in any way, nor did he seek to influence the German courts against the Applicant in her litigation against Hölger but sought to intervene in his capacity as Executor.

38. He addressed the letter to the Judge as Executor. He did not deem it inappropriate to address the Court in Germany. The continuance of litigation has a substantial impact on the joint estate on the issue of costs. He must safeguard the estate's assets for the heirs. As far as he could establish, the Applicant seeks an order that the properties transferred to Hölger are to be re-transferred to the deceased and thus to the deceased estate. It means that the joint estate is directly involved in the litigation. The Court found that Hölger had not been aware of any

attempt to defraud the joint estate, and any further litigation against Hölger would suffer the same fate. The Executor is the only person with *locus standi* to sue and be sued on behalf of the joint estate.

39. The Respondent denies that the letter was written at the request of Hölger but rather out of concern for the estate's assets and out of his obligation to take over the estate in its entirety. After reading the papers, he had formed the view that the continued litigation against Hölger is without merit, and the likelihood of success is negligible. A credit application by the deceased in July 2013 for €40,000, of which Hölger stood surety, came to his attention. Hölger's claim against the estate is substantial. It is worthwhile considering the withdrawal of the matter on condition that Hölger pays his costs and withdraws his claim against the estate. It could not be done without a substantial *quid pro quo* on the Applicant's part.

40. The Respondent confirms that he asked to be joined as a party to the proceedings in Germany as he was intent on withdrawing the case against Hölger for the reasons he provided in the preceding paragraph, i.e., withdraw the case, and Hölger will withdraw his claim against the estate. The Respondent reminds the Applicant that she is not the only one with an interest in the outcome of the litigation. He cannot act as the Applicant would have him do. He is duty-bound to also look after the interests of the other heirs.

41. The Respondent denies that he cannot be impartial in assessing the claims against the estate. He states that upon proper consideration of the judgment in German courts² Hölger was found not to have acted fraudulently. He acquired the subject's properties in good faith. The Court found that Hölger did not know that the Applicant and the deceased were married in community of property. He has no reason to believe another German Court will come to a different finding.

42. In reply, the Applicant alleged that her case against Ina B[...] had limited effect³ and did not disturb the ongoing proceedings against Hölger.⁴ Applicant

² The judgment was delivered on 5 July 2019

³ It related to the Hölger's gift of one of the units to his wife in 2014

expressed surprise that the Respondent was unaware of any litigation that the deceased had pending in Munich, and that he could not have swayed the Courts.⁵

43. Respondent sought an interdict to prevent her from interfering in the estate. She had begun the transfer of three of the six units registered in her name to the designated beneficiaries when the Respondent initiated the proceedings. The Respondent sought to use her transfer of the units to his advantage in his answer yet tried to block her when she attempted to do so. The Respondent needs her cooperation, but he has not sought it as yet. She alleges that properties belonging to the joint estate in Plettenberg Bay were sold without the Applicant's knowledge.

44. Respondent decided sometime in September 2023 not to pursue the litigation against Hölger in Germany.

The Respondent's bias towards Hölger

45. The Applicant refers to the litigation instituted on behalf of the deceased on 8 December 2022, six weeks before the deceased's passing. The deceased applied for a declaratory order to the effect that the transfer of units to Hölger occurred in the normal course of business as envisaged in section 15(6) of the Matrimonial Property Act 88 of 1984 and that the transfer is ratified due to the Applicant's refusal to consent to it.

46. The Applicant states that the supporting affidavit in the application for declaratory orders was deposed to on 7 December 2022, when the deceased was incapable of forming opinions or understanding the proceedings. The Respondent was the deceased's attorney. The Applicant alleges (without proof) that the initiative behind the application could have only emanated from the Respondent to protect Hölger's interests. The Respondent would have known that the deceased was terminally ill and his passing imminent. The relief sought, if granted, would have had a lasting and permanent benefit for Hölger. The Applicant accuses the Respondent

⁴ After reading the German judgment, the Court does not share the Applicant's optimism regarding her case against Hölger.

⁵ The judgment delivered in Germany was between the Applicant and Ina B[...].

of conjuring up ways to scupper her claims in the interest of Hölger. The Respondent launched this application when he was already aware that he had been nominated as the Executor of the estate and that he intended to accept the nomination when required. His inclination to favour Hölger was a preconceived and deliberate decision.

47. Respondent's response to a letter written on behalf of the Applicant on 9 March 2023⁶ allegedly threatened the Applicant if she continued her legal proceedings against Hölger. The Respondent asserted that he would join any proceedings that she would start against one Königseder⁷ in Germany, and would interdict her locally from interfering in the administration of the estate and lay criminal charges against her.

48. The Respondent admits that the application founded on the Matrimonial Property Act was brought at the instance of the deceased. The deceased was able to understand the content of the application and gave full and proper instructions. The deceased signed the founding affidavit before an independent Commissioner of Oaths.⁸ The deceased wished to settle the contentious issues relating to the divorce. The resolution of the outstanding matters was slow, largely due to the Applicant's repeated requests for postponements. He admits to advising the deceased as an attorney is obliged to do.

49. The Respondent denied that the initiative for the application was his. Given the longstanding dispute between the parties, he saw no reason why the deceased should not have pursued the application. He denies conjuring up ways to favour the interests of Hölger. The deceased's imminent death was not foreseeable, and the suggestion that he acted in that knowledge was ludicrous. The Applicant did not make defamatory allegations when the application was initiated. The Respondent had addressed why he believed the litigation against Hölger should be withdrawn. He admits to threatening the Applicant to cease litigating against Königseder as the

⁶ Many of the Respondent's letters bore an incorrect date. However, the body of the letter referred to the date of the correspondence the letter addressed.

⁷ Königseder collected the rentals from the German units

⁸ The Applicant failed to include the page with the stamp of the Commissioner of Oaths

Applicant sought to have the rental income paid to her. He made the threat and had to follow up on it with success in this Court.

50. In her reply, Applicant alleges that the interdictory proceedings were decided on the Respondent's version. She had no time to answer the Respondent's allegations comprehensively.

The rental income from the German units

51. The Applicant's attorney inquired about the rental income from the German units and the South African property, as none had been paid into the estate account or towards her and the boy's maintenance. The Respondent appointed Hölger to collect the rentals from the German units and to keep them in a separate account pending the receipt of his letters of executorship. The Respondent indicated he would ask Hölger to transfer the funds to him once his appointment as Executor was confirmed.

52. In response to a letter dated 24 August 2023, the Respondent confirms that he directed the managing agent of the immovable property in Germany to pay the rental into a special account pending his appointment. The funds had been collected and were transferred to the estate account. The printout provided by the Respondent reflected that the first deposit in the account was made on 21 August 2023, three months after his appointment, due to the necessary legal processes and administrative procedures. The first two deposits were made from an account carrying Hölger's name. The Respondent could not present any accounting explaining the inward and outward movement of funds from the special account of Hölger.

53. In an email dated 22 February 2023 (three weeks after the deceased's demise), the Respondent assured the Applicant's attorney that he had already arranged for the rent to be paid into a safe account. The Applicant alleges (without proof) that the amounts paid over by Hölger reflected marginal portions of the rental income generated by the properties. The Respondent has not received any accounting for the rentals paid over by Hölger.

54. On 12 January 2024, the Applicant's attorneys received a letter from the Respondent informing them that he is not in a position to pay the month's instalment as there are insufficient funds in the estate account. The rental income had been withheld for the mandated maintenance of the units. The Applicant contends that how the Respondent administered the estate's finances reflects his reluctance to discharge his duties properly, transparently, objectively, and neutrally. It also reflects on the Respondent's leanings towards Hölger.

55. The Respondent alleged that the Applicant had made no claims against the estate in which he could disfavour her. He repeated that he had explained why he believed the matters against Hölger and his wife should be withdrawn. The Respondent documentary proof which accounted for the rentals. He contended that his impartiality as Executor speaks for itself and that the alleged fraud was not substantiated with concrete evidence.

56. Hölger collected the rentals before the deceased passed on and paid them into the deceased's account. It was natural to ask Hölger to continue collecting the rentals and account for them once he could accept the funds. He had no reason to believe that Hölger acted fraudulently. He confirms that the managing agent was directed to pay over the funds into a special account managed by Hölger. The letters of executorship were issued on 23 May 2023 but only delivered to his office towards the end of July. He opened the estate account on 3 August 2023. Hölger instructed his bankers to release the accumulated rentals. The Reserve Bank confirmed that the funds had arrived on the 9 August 2023. The funds were paid into the estate account on 21 August 2023. The Respondent told the Applicant that the full amount was accounted for. The Applicant accepted this without seeking proof thereof.

57. Respondent claims that he always explained why the special account held by Hölger was used. The reconciliation of rentals shows that Hölger paid €660.23 more than was due to the estate. Respondent repeats that Hölger was not complicit in any fraud against the Applicant. The rental income withheld was used to pay for the mandated maintenance of the public open spaces of the building. The Body Corporate authorised the maintenance in December 2023. The document setting out

the mandated payments was sent to the Applicant's attorney. The Applicant would have been aware of it. He arranged with the managing agent to use the rentals to pay for the maintenance until it was fully paid and then to resume payment to the estate account. This was a practical arrangement to save money on fluctuations in the exchange rate and time on forex transfers and was in the estate's best interest.

58. The Respondent asserts that he has requested the cooperation of the Applicant more than once, but she has not responded to date. He has been stonewalled and, therefore, unable to make progress with the finalisation of the estate, which has been a source of frustration and hindrance in its administration.

59. In reply, the Applicant states that her litigation against Hölger is premised upon fraudulent conduct on his part. The Respondent denied that Hölger acted fraudulently, leading to significant tension and disagreement in the legal proceedings. The Applicant denies that she never required accounting for the rentals from the Respondent. He responded that since the rental properties fell within the deceased estate, she was not entitled to demand any particulars of their income. It was also alleged that her seeking such information constitutes interference in estate administration. The Respondent obtained an order to prevent her from directly or indirectly interfering with the administration of the estate. The Applicant refers to the Respondent's reaction to her intention to institute proceedings against Königseder. She alleges that she had to institute legal proceedings in Germany to get information concerning the accounting of such funds. Applicant disbelieves the report accounting for the rentals paid (without countervailing evidence) and raises the issue of the rentals collected before February 2023.

60. The Applicant challenges the contention of the Respondent that the rentals were withheld to pay for maintenance and improvements. She alleges (without proof) that there is an ongoing specific fund to cater to extraordinary costs and expenses sought for mandated maintenance that could be used for other purposes. The document sent to her allegedly explaining the maintenance indicated that her amount of €130 000 (R2 548 000) was required to contribute to the purported maintenance expenditure. The Applicant brushes off the claimed amount as absurd and unjustifiable. The Applicant contends that the payment of body corporate

expenses is not a financial market where upfront excessive charges could be demanded from property owners to hedge the body corporate against fluctuations in the exchange rate.

The cost of Hölger's litigation in Germany is paid from the joint estate's resources.

61. The Applicant alleges that the joint estate pays Hölger's legal expenses. The Applicant relies upon an alleged WhatsApp message the deceased sent to her objecting to her ongoing litigation against Hölger and the legal costs he had to pay Hölger's attorneys to defend the same. The Respondent denies the allegation. He expresses surprise that the deceased paid for Hölger's attorneys in Germany to defend a matter against himself. The Respondent did not manage the deceased's financial affairs. The Respondent asserts that nothing was deducted from the rentals to cover legal or other expenses.

The Respondent's intention to admit the claim of Hölger and effectively condone the transfer of the German units

62. The Applicant referred to Hölger's claim of €1 141 882 (approximately R23 million) against the estate. She asserts that the Respondent considered it a valid claim as the deceased signed off on it on 27 June 2022. The Respondent could not say how the claim arose but was willing to trade off the settlement of the claim if the Applicant withdrew her litigation against Hölger. Applicant alleges that this is an attempt by the Respondent to eliminate her litigation against Hölger and to exonerate him from any liability to her or the joint estate. Hölger's liability far exceeds his claim. The Applicant alleges (without proof) that the Respondent would vicariously do his client Hölger a substantial financial favour by doing so. The Applicant submits that the Respondent's conduct is egregiously unconscionable and unacceptable. It demonstrates an inability of substantial proportions to discharge the duties of an Executor in a transparently neutral and unbiased manner.

63. Respondent admits that Hölger filed a €1 141 882 claim against the estate.⁹ The Respondent refers to the letter in which he informed the Applicant of it. In the letter, he expanded further on the 2019 judgment between the Applicant and Ina B[...], who decided against the Applicant. He referred to the unsuccessful appeal, suggesting that it was unlikely that another German Court would come to a different conclusion (on certain material facts common with Applicant's case against Hölger). The Respondent denies any agenda to eliminate the Applicant's litigation in Germany.

64. The Respondent asserts that there is nothing egregiously unconscionable or unacceptable in resolving a dispute that has been ongoing since 2014, and the chances are negligible. He is not prepared to tie up the estate by waiting for the Applicant's vexatious ongoing litigation to end. He reiterates that he has no special relationship with Hölger and is not acting as his agent in any way or form. He is concerned about the cost of litigation in Germany and its impact on the joint estate.

The South African properties

65. The South African portfolio of properties included the farm at Droogekraal in Oudtshoorn. Droogekraal was registered as an asset of the close corporation in which the deceased held a one hundred per cent member's interest. The deceased lived and farmed at Droogekraal till his death. The deceased bequeathed four percent of the member's interest in the close corporation to the Respondent. The Applicant alleges that the joint estate holds a R35 million loan account against the closed corporation. The Applicant accused the Respondent of selling Droogekraal's assets and refusing to disclose the sales proceeds.

66. The other South African properties of relevance include Ouplaas and the Oak Tree guesthouse. The Applicant states that Ouplaas had been let out rent-free to a couple, and there is no rental income from the guesthouse, which runs the risk of illegal invasion. A loan account of R5.8 million was also made available to Sandra,

⁹ This emerges from the content of a letter written by the Respondent to the Applicant's attorney. The letter is incorrectly dated 17 February 2023, but is a reply to a letter dated 13 September 2023

and the Respondent is allegedly reluctant to act on the loan. He is also accused of unduly favouring Sandra in the administration of the joint estate.

67. The Applicant moved this Court in 2016 to interdict the deceased from dealing with the assets of the joint estate, including Droogekraal, without her express and written consent. After the order was obtained in January 2017, Applicant alleges that the Respondent disregarded the order by assisting the deceased in selling a substantial number of assets, mostly trucks and farm equipment. The Applicant alleges that the proceeds of the sale were paid into an account at the Respondent's attorney firm and then went to the deceased. The Respondent assisted in translating the contract for the sale of a Unimog vehicle. The Respondent assisted the deceased in alienating assets over R250 000.

68. In the application for final interdictory relief granted by this Court on 27 February 2017, reference is made to the Buffelsbosch Rivier farm, Droogekraal, a residential property situated at 4[...] V[...] d[...] R[...] Street, Oudtshoorn, and property in K[...] Street, George. The order interdicted the deceased from dealing with the assets of the joint estate in any manner without the express and written consent of the Applicant. The order applied with equal force to the properties listed above and included five Toorenvliet paintings. (Toorenvliet was a Dutch golden age painter who survived into early 1917. His paintings are sought and displayed in major art galleries internationally). The order was to remain in place pending the finalisation of the divorce proceedings.

69. The Respondent accuses the Applicant of misreading the order. The Respondent, in answer, alleges that the order granted by this Court in February 2017 did not prevent the deceased from trading and farming, as this was part of his livelihood. Assets not in use or beyond repair were sold and replaced with better ones. Assets higher in value were purchased than those sold. The Unimog was sold as it was deteriorating. The Respondent admits to translating documentation relating to the specifications of the vehicle. No funds from those sales during the deceased's lifetime could be paid into the deceased estate account. The proceeds would be paid into the account of the close corporation. Respondent denies that he assisted the deceased in acting contrary to a court order. The Respondent denies that the

interdict constrained the deceased from dealing with the assets of the joint estate without the express or written consent of the Applicant. He disagrees that the order was to operate until the final division of the estate.

70. In reply, the Applicant refers to the liquidation and distribution account and notes no reference to any transactions she recorded in her founding affidavit. There is also no indication of how the Respondent deals with the sales of such assets. Applicant correctly states that the court order prohibited any sales or transactions involving the assets of the close corporation without her express or written consent.

71. The Applicant refers to the loan account claim of approximately R35 million against the close corporation. The Respondent confirmed the amount. The Respondent failed to indicate how he intended to deal with the loan account despite her attorneys insisting that he do so. Her attorneys repeatedly reminded the Respondent that the four percent member's interest in the close corporation bequeathed to him by the deceased represented a major conflict of interest. In September 2023, the Respondent indicated he did not know the final figures relating to the close corporation. The Respondent denied that the four percent bequest had any bearing on his decision-making process or that there was a conflict of interest. The Applicant alleged that the Respondent feigned surprise at the bequest made to him.

72. The Applicant suggests the Respondent is aware that attaching a lower value to the loan account would yield a higher value to the four percent held by the Respondent. The Applicant is concerned about the Respondent's inaction in enforcing the claim. The glaring conflict of interest is evident. In March 2024, the Respondent stated that he had not considered the loan as he did not know whether it would be necessary to liquidate the close corporation. The Applicant contends that independent of the question of whether the Respondent failed to deal with the loan account, the mere fact that he is a beneficiary in the estate should, in the circumstances, disqualify him from being the Executor of the estate.

73. In his answer, the Respondent denies the allegations relating to the loan account and his alleged conflict of interest. He asserts it is a 'blatant lie'; he did not

indicate how he intended to deal with the loan account. He clarified his position in correspondence dated 2 October 2023 directed at the Applicant. (The Respondent's position concerning the loan account is briefly stated. He reiterated that the intent is to recover the loan account as far as it is legally recoverable). The Respondent alleges that he did not intend to place the close corporation into liquidation as he wanted to discuss a distribution plan without selling everything. The plan would enable the Applicant to get fifty percent of the estate's value and the heirs the balance. The financial statements indicated that the loan account amounts to R35 million, substantially more than that estimated by the Applicant.

74. The Respondent alleged that he could not be forced to take steps for the recovery of the loan until he had a distribution plan for all of the estate's assets. Droogekraal owns fixed assets alone. He is not reluctant to enforce the claim. He needs the Applicant's cooperation to formulate the distribution plan, which has, despite numerous requests, been completely lacking. Respondent repeats that the draft liquidation and distribution account was a guideline for discussions he had with Applicant's Counsel. He has no issue in liquidating Droogekraal if required. The deceased wished that Droogekraal would not be sold and that Sandra would continue farming there. He has tried to establish whether he could compensate the Applicant for her share through other available assets and funds.

75. The Respondent denies any conflict of interest. He states that he is unaware of any legal hindrance to his being a beneficiary of the estate. He contends that the benefit he stands to receive is probably worth nothing.

76. The Applicant alleges that the Respondent paid rental income from the Ouplaas farm, a property owned by Droogekraal, into his account. The Respondent did the same with the rental income from the Oak Tree guesthouse. No rental payments from the Oak Tree guesthouse are reflected in the estate account. The Respondent answered these allegations by stating that he has received no rental income from either property. The deceased entered into an agreement with a couple to live rent-free in the residence of Ouplaas on the condition that the residence be renovated. He is satisfied that the renovations are taking place as envisaged and will negotiate a market-related rental with the tenants once the two years have run their

course. The Oak Tree guesthouse was rented, but the tenant failed to pay his rent even before the deceased passed away. The tenant was substantially in arrears and has been evicted from the property. The property is in a total state of neglect. He requested the Applicant to agree to its sale. The heir to the property, Sandra, has agreed to its sale. The Applicant did not respond. In reply, the Applicant states that the arrangement made with the coupe living rent-free at Ouplaas was not made with her consent. No particulars regarding the renovations or the progress thereof have been provided to her. The close corporation pays for the electricity and water usage at Ouplaas, an unnecessary expense which the Respondent ignores.

77. The Applicant refers to a further loan account of R5.8 million to benefit Sandra in the GRG company and the Respondent's alleged reluctance to address the loan. He is also accused of unduly favouring Sandra in the administration of the joint estate. As the bulk of the allegations against Sandra were canvassed for the first time in the replying affidavit and the heads of argument filed on behalf of the Applicant, the Court declined to consider them to adjudicate this application.

The maintenance of the applicant and her sons

78. Applicant was informed on 12 January 2024 that the Respondent could not pay her maintenance due to insufficient funds in the estate. The situation had arisen from the diversion of the rental income to pay for the mandated maintenance of the German units. The Respondent had failed to pay her long overdue maintenance claim against the joint estate of R1 415 148.19

79. The Respondent asserted that a portion of the monthly rental from the German properties would be utilised to pay for the arrear maintenance. The estate was not in a financial position to immediately pay the Applicant's arrear maintenance claim as there was insufficient money. He could not liquidate assets to obtain cash flow as the Applicant refused to cooperate with him. He had to attend to a competing claim for maintenance from the deceased's second wife, Maria B[...], whose payments were also in arrears.

80. He denies that he refused to make payment of the Applicant's arrear maintenance. An agreement was reached in court on how the maintenance would be paid. The agreement was honoured to the point where the estate ran out of money because the rent was used to pay for the maintenance of the public spaces in the building in Germany

Respondent has not fulfilled his duties as executor.

81. The Applicant repeatedly reminded the Respondent that he administers a joint estate and must protect her half-share of the estate. She accuses the Respondent of administering the estate in an unprofessional, unobjective, partial and secretive manner. The Applicant accuses the Respondent of benefitting Hölger, a third party to the estate, to the detriment of the other parties having an interest in the funds and assets of the estate. The Respondent favours Sandra by ensuring that he conceals her acquisition of properties acquired with the funds of the joint estate.

82. The Respondent asserts in reply that he acted professionally and in compliance with the Act. Respondent denied all grounds raised by the Applicant for his removal as the Executor and provided several reasons for his continuation. The Applicant has taken time to complete her side of the inventory and had to be requested to supply it several times, and on receipt thereof, it was incomplete. The Applicant had tried to convince the rental agent to pay the rental income of the German properties to her based on her alleging that the properties are registered in her name, although knowing that they belong to the joint estate as does the income derived from them. The Applicant had caused the rental agent to resign, making the rent collection infinitely more difficult.

83. The Applicant has initiated litigation regarding payment of arrear maintenance to her, causing the estate to expend legal costs, which could have been easily saved had she communicated with him. Applicant litigates against a third party in her name in Germany to try and recover immovable assets for the estate that were transferred to the third party by the deceased without care about the cost implications this may have for the estate and without consulting with him, knowing that he did not support her action. The applicant has not filed her alleged claim against the estate despite

being requested to do so and the time for filing claims having lapsed long ago. The applicant was requested to agree to the sale of a property of the estate in Oudtshoorn, which stands empty and is at risk of being illegally invaded. The Applicant has not responded to or acknowledged the request and has failed to engage with him regarding the sale.

84. Although the estate's value is substantial, it does not exceed the amount of R130 million. A valuator assessed the value of the German properties to be approximately R67m and the South African properties to be approximately R19m. The Applicant was offered approximately R40m during the divorce proceedings to settle her claim. The Respondent believes that the value of the assets transferred to Hölger should be excluded, leaving the approximate worth of the estate at R46m. The loan account claim substantially exceeds the value of the CC's assets. It needs to be considered whether the biggest part of the loan account has not prescribed, and is therefore not recoverable from the estate.

85. The Respondent declares that he does not intend to institute further applications in Germany. He was denied participation in the litigation between the Applicant and Hölger and did not intend to exercise that option again. He agrees that the legal costs in Germany are excessive. He believes that any other Executor will encounter the same problems he did and find it difficult to manage the estate. He has the advantage of being fluent in the German language. It is not only the Applicant but also the joint estate that has limited funds to meet the costs.

86. In reply, the Applicant contends that when she attempted to provide input in the administration of the joint estate by querying aspects of the administration, her attempts were branded as unlawful and an interference with the duties of the Respondent as Executor. The Respondent interdicted and restrained her from providing such input. Applicant alleges that the Respondent blatantly disclosed the amount offered to her in settlement negotiations, i.e., the R40 million. She asserts an ethical and common law obligation prohibiting such disclosure. The Applicant waived her privilege and attached DB18, a copy of the draft settlement agreement of which the relevant parts were proposals insisted upon by the Respondent as representative of Hölger, Ina, and Sandra.

87. She was unaware that her claims had not been filed against the estate. She has dealt with the consent to sell certain assets. She is prohibited from interfering when she wants to cooperate with the Respondent. She accuses the Respondent of being ignorant of the provisions of the Close Corporation Act as it applies to the transfer of a deceased member's interest. She accuses the Respondent of contradicting himself. She refers to the interdict application where he accused her of transferring assets from the estate. The Applicant had commenced the process of transferring three of the units to the designated heirs. She refers to the claim of Hölger being signed off by the deceased before his demise. She is concerned that the Respondent intends to pay off the son prematurely. She is concerned that the Respondent will pay Hölger and give him approval to transfer the units in his name

88. The Respondent states that she is litigating against a 'third party', finding it difficult to even mention the third party, Hölger, by name. She repeats her allegation that the son is the Respondent's client. The Respondent represented the son and his wife in settlement negotiations in 2019 (the Respondent did not disclose this, alleging that he had no link with the son). The Respondent has attempted to conceal where his real and true allegiances lie.

DRAFT LIQUIDATION AND DISTRIBUTION ACCOUNT

89. The deceased applied for a temporary residence permit in 2003. He was required to confirm the value of his net worth. In a letter dated 12 August 2003, his net worth was approximately €5.7 million (The Rand Euro exchange rate for 12 August 2003 was 8.3126), translating at that time to a rand value of approximately R47 381 820. The calculation was based on the value of thirty-one residential units, five commercial units, one basement, eleven parking bays, and a bicycle parking space in a building complex in Munich, Germany. The deceased's annual income in 2003 amounted to approximately R800 000 from the properties and R66 500 from a private pension.

90. The Applicant acquired a valuation of the German properties during the litigation. It was dated 7 December 2017 and obtained in response to the court-

ordered valuation. The building, which holds the units, includes 8 garages, a fitness centre, workshops and offices, practice shops, other offices, stores with showrooms, and 13 flats with cellars. The Court valuation was for approximately R30 779 596. The valuation obtained by the Applicant amounted to R55 348 568. The usufruct value of the units enjoyed by the deceased through rentals amounted to R3 137 491 (The Rand/Euro exchange rate on 7 December was 16,0897).

91. The undated draft liquidation and distribution account compiled by the Respondent was attached to the answering affidavit. The value of the units in the Munich building was reflected as R4 500 000. The Applicant's three units would amount to a total value of R13 500 000. Two erven, one in George and another in Oudtshoorn, were valued at R1 100 000 and R1 200 000. The deceased's membership in the close corporation owning Droogekraal was valued at R15 000 000. Rental income was reflected as R1 516 679.22 for the German properties and none for the South African properties. A loan account of R6 000 000 was shown against the close corporation. The value of the total assets amounted to R52 547 785.20.

92. The liabilities included the Executor's remuneration of 3.5% of the value of the assets, amounting to R1 839 172.48. The son Harald claimed R122 164.93, Maria B[...], approximately R8 000 000 largely for past and future maintenance, Hölger B[...], R23 328 649.26, Claassen Law, R1 050 000. The Executor's law firm claimed R301 252.96. A law firm, Taylor Wessing, claimed R478 816 against the estate for litigation in Germany. The special levy for the units is shown as R212 610. The total liabilities amounted to R36 243 442.42, leaving R16 304 342.78 for distribution. Respondent emphasised that the account was in draft form.

93. Section 35 of the Act requires an Executor to submit an account of the liquidation and distribution of the estate within six months after letters of executorship have been granted to him or such further period as the Master may in any case allow. The draft account was prepared for a meeting between the Respondent and the Applicant's legal representatives. The Respondent did not prepare a timeous account as prescribed by the Act. There is no indication that any liquidation and distribution account has been submitted to the Master or that the Respondent has

sought an extension to submit the account. Failure to submit an account timeously carries a penalty against the Executor costs *de bonis propriis*.

94. The Executor of a joint estate must deal with the indivisible estate, including the surviving spouse's legal entitlement to it. The surviving spouse in the position of the Applicant has a right to claim a fifty percent share of the estate once the Executor has finalised the estate.

THE APPLICABLE LAW

95. Each spouse's assets before entering into a marriage in community of property, as well as those accumulated during the marriage, form part of an indivisible joint estate. Upon the death of a spouse married in community of property, the whole joint estate falls under the administration of the deceased's Executor.

96. Chapter 3 of the Matrimonial Property Act 88 of 1984 ("the Matrimonial Property Act") governs property matters in marriages in community of property. Section 15(2) of the Matrimonial Property Act prohibits, among others, the alienation of any real right in an immovable property,¹⁰ and artworks and jewellery held as investments¹¹, which form part of the joint estate without the other spouse's written consent. Without the other spouse's consent, a spouse shall not alienate, among others, furniture or other effects forming part of the common household.¹²

The duties of an Executor

97. An executor is legally vested with the administration of the estate. This means that the deceased estate's assets, liabilities, rights, obligations, and powers vest in the Executor, and he alone can deal with them. The job of an Executor cannot equate to that of an agent, as he has no principal to give him instructions.¹³ An Executor is not free to deal with the assets of an estate in any manner he pleases.

¹⁰ s15(2)(a) of the Matrimonial Property Act

¹¹ s15(2)(d) of the Matrimonial Property Act

¹² s15(3)9a) of the Matrimonial Property Act

¹³ Van Den Bergh v Coetzee 2001(4) SA 93(T)

His position is fiduciary; therefore, he must act legally and in good faith.¹⁴ A party instituting litigation against an estate has to join the Executor as a party to the litigation.¹⁵ No person except the Executor can institute proceedings on behalf of the estate.¹⁶ When a legal process is issued during the deceased's lifetime, the executor must be substituted on the record when appointed.¹⁷ The Executor who takes control of a joint estate is the only person with legal standing to sue on behalf of the estate or be sued.¹⁸

98. The duties of an Executor relevant to this application shall be briefly considered. The Executor must take the deceased estate into his custody or under his control immediately after the grant of letters of executorship. The Executor must provide for the subsistence of the deceased's family or household.¹⁹ The Executor must determine the solvency of the estate.²⁰ If an Executor considers a claim lodged against the estate to be of doubtful validity, it should be tested under the procedure provided in the Act.²¹ The Executor manages an insolvent deceased estate under section 34 of the Act. The Executor must open a bank account in the name of the estate.²² The lodgement of a liquidation and distribution account with the Master must occur within six months of the date on which letters of executorship have been issued to the Executor.²³

99. The Executor of a joint estate must discharge all its liabilities and half of the net balance of the joint estate vests in the surviving spouse.²⁴ Does an Executor have a duty or obligation to the surviving spouse who is neither heir nor beneficiary of the deceased's will, as is the case with the Applicant in this application? The answer has to be in the affirmative. The spouse surviving a marriage in community of property is entitled to half the net balance of the joint estate. Stated differently, the surviving spouse is an automatic heir to half of the joint estate once its debts have

¹⁴ Ries v Ries's estate 1912 CPD 390

¹⁵ Booysen v Booysen 2012 (2) SA 38 (GSJ)

¹⁶ Jacobs & Another v Baumann NO and Others [2019] JOL 45880 (SCA)

¹⁷ Rule 15(3) of the Uniform Rules of Court, Rule 52(4) of the Magistrates Court Rules

¹⁸ Hare v Est Hare 1961 (40 SA 42(W))

¹⁹ s26(1)(a) of the Act

²⁰ s34(1) of the Act

²¹ s32 of the Act

²² s38 of the Act

²³ s35 of the Act

²⁴ Hare v Hare supra

been liquidated, even if she is not an heir or beneficiary of the deceased's spouse's will. The Executor has a fiduciary duty towards her.

100. An Executor does not have the right and is not under a duty to realise more of the estate's assets than is necessary to pay debts, administration expenses, death duties, and cash legacies.²⁵ An Executor must decide whether the estate has any claim against a third party and the advisability of instituting an action to recover the claim.²⁶ An Executor can cede the estate's rights to any assets or claims capable of cession to the beneficiaries or third parties. There is no duty upon an Executor to sue for foreign assets.²⁷

101. An executor receives his mandate from his appointment by the Master, not under the will, and the liquidation proceeds under this authority until it is replaced.²⁸ Suppose an heir or other interested person maintains that an executor should take steps to recover assets in an estate. In that case, if such action is not instituted, the proper remedy is to move the court to remove the executor for breach of duty or to take such action himself and cite the executor as a nominal defendant. It is submitted that the latter course is not open to a beneficiary because only the executor can vindicate the estate's assets. To satisfy the court that an executor's failure to institute action constitutes a breach of duty, the application for removal must satisfy the court that the probabilities favour the success of such action.

102. If the interested parties fully indemnify an Executor against an unsuccessful outcome, it could be regarded as unreasonable conduct on the Executor's part not to pursue the action without good reasons beyond the mere fact that the probabilities of success are doubtful.²⁹ It should be accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the Executor and that normally, a beneficiary in the estate does not have *locus standi* to do so.³⁰

²⁵ Ex Parte Misselbrook, N.O.: In Re Estate Misselbrook 1961 (4) SA 382 (D) at 384 A-B

²⁶ Jones v Pretorius NO [2020] JOL 48640 (SCA)

²⁷ Segal v Segal 1979 (1) SA 503 (C)

²⁸ Mngadi v Ntuli 1981 (3) SA 478 (D)

²⁹ Meyerowitz, page 156, footnote 193

³⁰ Gross & others v Pentz 1996 (4)SA 617 (A), Breetzke and Others NNO v Alexander & Others [2020] 4 AllSA 319 (SCA)

103. An Executor can liquidate assets in an estate by awarding an asset *in specie* (in its actual form or in kind), a partial disposal of the asset, a total disposal of an asset or assets, takeover by a spouse, and redistribution between heirs. Unless the will directs him to do so, it is not the executor's duty to convert all the estate assets into cash, but only those sufficient to pay the liabilities.³¹ If an asset is specially bequeathed, the executor must first exhaust the assets which fall into the general residue before realising the assets specially bequeathed.³²

104. Section 35 of the Close Corporations Act 69 of 1984 provides that subject to any other arrangement, an executor of the estate of a deceased member of a close corporation must (a) cause that member's interest in the CC to be transferred to a person qualifying for membership who is entitled to it as legatee or heir (or under a redistribution agreement) if the remaining member or members (if any) consent to the transfer. If such consent is not given within 28 days of the Executor's request, he may sell the deceased member's interest. The deceased's member's interest in the closed corporation falls within the joint estate, and the Applicant is entitled to the half-share of its realisation. That much is at least acknowledged in the will of the deceased *in casu*.

Section 54(1) of the Act

105. Section 54 of the Act permits a Court or the Master to remove an Executor under certain conditions. Section 54(1) concerns the removal of an Executor by the Court. The sub-sections relevant to the determination of this application read as follows:

An Executor may at any time be removed from his office by the Court-

s 54 (1) (a) (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

³¹ Lockhats Estate at 302

³² Van Der Lith's estate v Conradie 13 CTR 399

any heir, debtor or creditor of the estate any benefit to which he is not entitled;
or

(s 54(a) (v)): if for any other reason, the Court is satisfied that it is undesirable that he should act as the Executor of the estate concerned.

106. The Applicant relies on sections 54(1)(a)(ii) and 54(1)(a)(v) in her bid to remove the Respondent. Section 54(1)(a)(ii) is a factual determination dependent upon the evidence provided by the party seeking the removal of an Executor. Section 54(1)(a)(v) requires a discretionary exercise involving two threshold requirements, i.e., the court is satisfied with the reasons given, and it is desirable for the Executor to be removed. The party seeking an Executor's removal has to provide evidence of one or more substantial and compelling reasons beyond that mentioned in the other sub-sections of section 54(1) of the Act that makes an Executor's continued tenure untenable. Section 54(1)(iii) and (iv) find no application in this matter.

107. A court must consider the consequences inherent in a decision of this nature. The decision involves an assessment of current and future effects that the removal would have on the administration of the estate, the attendant costs of paying two persons to perform the task that was bestowed on one, and the length of delay that may ensue in the appointment of a replacement, the time taken to acquaint themselves with the matter, the time taken to collate the information relating to the estate, and any other factor that would hamper the finalisation of the estate.

108. Does section 54(1)(a)(v) of the Act entitle a surviving spouse married in community of property in the position of the Applicant, who is neither heir nor beneficiary of the deceased's half of the joint estate, to apply for the removal of the Executor? The Act is silent on who can apply for the removal of an Executor. Here again, the answer has to be in the affirmative. The predominant consideration is the interests of the estate and the beneficiaries.³³ There has to be a relationship of trust between the Executor and the spouse surviving a marriage in community of property for the equitable liquidation and distribution of the estate. This Court considers the

³³ Die Meester v Meyer en Andere 1975 (2) SA 1 (T)

relationship between the Executor and the non-inheriting surviving spouse on the same footing as between the Executor and the heirs and beneficiaries.³⁴ In the circumstances, a surviving spouse in the position of the Applicant has standing to apply for the removal of an Executor.

109. What is the ambit of the provision that allows a court to remove an Executor? Removing an Executor is a drastic step that a Court will not grant lightly.³⁵ A court will be even more circumspect in removing an Executor Testamentary from his position. The court shall pay close attention to the wishes of the Testator as expressed or implied in the terms of the will. The Court, however, cannot be bound by those wishes if they are to the detriment of the beneficiaries to whose interest it must equally clearly have regard.³⁶ Our courts have removed Executors for misconduct unrelated to the administration of the estate, e.g., the misappropriation of trust funds³⁷, theft³⁸, and fraudulent insolvency³⁹. Maladministration or absence of administration is also a valid ground for removal.⁴⁰ The failure to lodge accounts after the lapse of a long period⁴¹, serious dereliction of duty⁴², and negligence⁴³ were further grounds for the removal of an Executor.

110. Where it is sought to remove an Executor from office, the acts complained of must be enough to label the Executor as a dishonest, grossly inefficient, or untrustworthy person whose future conduct can be expected to expose the estate to actual loss or administration in a way not contemplated by the will. Even if an executor had not acted strictly in accordance with his duties and the strict requirements of the law, something more was required before removal from office was warranted.⁴⁴

³⁴ Gory v Kolver & Others 2007 (4) SA 97 (CC) at para 57

³⁵ Segal v Segal 1979 (1) SA 503 (C)

³⁶ Port Elizabeth Assurance Agency & Trust Co. Ltd. v Estate Richardson, 1965 (2) SA 936 (K) at page 940

³⁷ Bronkhurst v Erasmus 1907 TS 486

³⁸ Mathlabane v Spogter 11 SC 252, Meyerowitz at page 120

³⁹ Ex Parte Schultz 1909 TH 22, Meyerowitz at page 120

⁴⁰ ex Parte Suleiman 1950 (2) SA 373 (C)

⁴¹ Phoenix Assurance Co v Wepener 1935 OPD 35

⁴² Meyer v Dalldorf 1918 OPD 87, Meyerowitz at page 121

⁴³ ex Parte Suleiman supra

⁴⁴ Volkwyn v Clark & Damant 1946 WLD 456 at 464

111. The test for removal of an Executor is whether the continuance of an Executor in office will prejudicially affect the future welfare of the estate placed in his care.⁴⁵ The discretion vested in the courts to remove an Executor is a discretion in the strict sense and has to be exercised judicially.⁴⁶ A court exercises a strict or narrow discretion if it chooses between permissible alternatives. Different judicial officers, acting reasonably, could legitimately come to different conclusions on identical facts.⁴⁷

112. The Applicant relied upon *Reichman v Reichman*⁴⁸, which deals principally and in detail with conflicting interests as a reason for removing an Executor. The Respondent in *Reichman* had an irreconcilable conflict between his personal interests and his duty as Executor to act impartially in the estate's best interests. The Court stated that one of the duties of the Executor must be to investigate the validity of the debts which the Applicant in *Reichman* alleged the First Respondent owed to the estate. An Executor cannot be a judge in his own cause and cannot rely on the Master to resolve factual disputes arising in the case. Only a Court can do so if the parties cannot resolve the dispute.

113. An Executor is entitled to take appropriate action to protect his personal interests, but he should not use his office as Executor of the estate to pursue such interests.⁴⁹ An Executor may be removed from office if his private interests conflict with those of the estate. An Executor cannot remain impartial if he has to entertain his claim as a creditor against the estate he has to defend. An Executor should not derive any personal benefits from how he conducts the business or manages the estate's assets.⁵⁰ An Executor who is a beneficiary of an estate is still required to execute his fiduciary duties towards the other beneficiaries. He can expect his actions in liquidating and distributing the estate to be narrowly scrutinised.

⁴⁵ *Kennedy and Another v Miller and Others* [2005] JOL 15800 (T), Meyerowitz at page 121

⁴⁶ *Gary v Kolver* supra at para 57

⁴⁷ *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) at paragraph 28, *Ganes v Telecom Namibia* 2004 (3) SA 615 (SCA) par 21

⁴⁸ *Reichman v Reichman* 2012 (4) SA 432 (GSJ) at paragraph 14 et seq

⁴⁹ *Reichman v Reichman* supra

⁵⁰ *Harris v Fisher* 1960 (4) SA 855 (A)

114. It is untenable for an Executor who sacrifices his fiduciary functions, which requires the exercise of utmost good faith, to pursue a line dictated in favour of his own interests.⁵¹ A party occupying a fiduciary position must not engage in a transaction by which he will personally acquire an interest adverse to his duty.⁵² Where a person stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty.⁵³ The latter principle underlies an extensive field of legal relationships, e.g., a guardian to his ward, an attorney to his Client, and an agent to his principal. If a Trustee is a beneficiary and acts in such a way as to benefit himself at the expense of other beneficiaries, his acts will be narrowly scrutinised.⁵⁴ Executors and administrators will not be permitted to derive a personal benefit from how they transact the business or manage the estate's assets.⁵⁵

Adjudicating disputes of fact

115. The Respondent argues correctly that it would have been patently apparent to the Applicant that there would be several disputes of fact before the launching of the application. Again, the Respondent submits correctly that numerous disputes of facts have arisen on the papers, and little appears to be common cause. The Respondent contends that the matter must be dealt with in terms of the Plascon Evans rule⁵⁶, and upon properly interpreting the facts in the matter, the application should be dismissed.

116. It is well established under the Plascon-Evans rule that where in motion proceedings, disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the Applicant's affidavits, which have been admitted by the Respondent, together with the facts alleged by the latter, justify such order. It may be

⁵¹ *Lindenberg v Glass NO and Another* 1957(3) SA 30 (SWA) at 33G-34 A-J in the context of costs sought against an Executor, Reichman at para 14.

⁵² *Harris v Fisher NO* 1960 (4)SA 855 (A) at 861 H- 862 E

⁵³ *Robinson v Randfontein Est GM Co Ltd* 1921 AD 168 at p177, Reichman at para 14

⁵⁴ *Colonial Banking and Trust Co. Ltd v Estate Hughes and Others*, 1932 AD 1 at p. 16

⁵⁵ *Horn's Executor v The Master*, 1919 CPD 48 at p. 51 and cf. *Grobbelaar v Grobbelaar*, 1959 (4) SA 719 (AD) at p. 724G)Reichman at para 17 citing *Story Equity Jurisprudence* for the remarks in sec. 322, p. 212 of the 2nd ed. *Sackville West v Nourse and Another*, 1925 AD 516 at pp. 533 - 4)

⁵⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A)

different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched, or so clearly untenable that the court is justified in rejecting them merely on the papers.⁵⁷

117. The Respondent submitted further that the Applicant had not satisfied the Wightman⁵⁸ expansion of the rule. The Supreme Court of Appeal found that the party raising a dispute of fact in motion proceedings must seriously and unambiguously address that fact. This will indicate whether the dispute is real, genuine or bona fide. Suppose the disputing party necessarily possesses the knowledge and ability to show the facts in question as untrue or inaccurate but fails to do so, instead resting on a bare or ambiguous denial. In that case, there is no bona fide dispute of fact. Factual averments seldom stand apart from a broader matrix of circumstances, all of which must be considered when deciding.

118. A court may take a robust view of the matter in certain circumstances.⁵⁹ Where certain disputes of fact cannot be resolved on the papers and require referral for oral evidence, or where the disputes necessitate a trial and the orders sought are pressing, a court can grant the order if there is sufficient clarity regarding the issues to be resolved. The robust approach is not warranted or sought in adjudicating this application.

EVALUATION

119. The road traversed by the Applicant and Respondent has been long and hard, fuelled by accusations and counteraccusations, all spilling out in gargantuan proportions in this application. There is little that is common cause, and everything else has been placed in dispute. The Court has the arduous task of extensively applying the Plascon-Evans Rule to adjudicate disputes. It had to arduously perform the mechanical task of ticking and crossing the boxes to establish who must prevail in this marathon disgorgement of acrimony.

⁵⁷ National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA)

⁵⁸ Wightman t/a JW Construction v Headfour (Pty) Ltd & Another 2008 (3) SA 371 (SCA) at para 13

⁵⁹ Mahala v Nkombombini 2006 (5) SA 524 (SE)

120. Scurrilous, baseless, unsubstantiated, oft-defamatory allegations litter the track that the Court had to traverse. The finger points largely in the Applicant's direction for the latter transgressions. Nevertheless, the Court has done its work and must now pronounce on its findings, acutely aware that the orders sought to remove an Executor, more so, unseat one who enjoys testamentary protection, should not be lightly done. The evidence has been covered sufficiently to enable the parties to identify the direction the Court has taken in adjudicating this application. The parties can also accept that the Application's allegations, as weighed against the Respondent's answers to them and constitute genuine disputes of fact, were decided in the Respondent's favour.

121. The application has a protracted history of a decade of hostility. M[...] B[...] Snr handed the Respondent a poisoned chalice, a will that required him to do his utmost to resist the Applicant's claims. Is he capable of transcending the deceased's wrath, which found expression in at least two clauses of a document the Applicant alleges he had a hand in crafting? A new Executor will be saddled with the same document and instructions. Would a replacement at least bring an independent mind; a fresh approach to the administration of this estate? Will they be free of past baggage to surmount and ignore the objectionable clauses of the will, the validity of which has been confronted but not contested?

122. Has the Applicant provided any other reason to satisfy the Court that the Respondent should not act further as the Executor of this deceased estate? Has the Applicant provided sufficient evidence to support the notion that the Respondent's tenure in office will prejudicially affect the future welfare of the estate placed in his care? After sifting the wheat from the chaff and weighing up the Applicant's allegations against the Respondent's answers, the Court has identified certain themes that point to the Respondent's suitability to remain as Executor. These factors must still be explored further to determine whether they are prejudicial to the welfare of the estate.

123. The Respondent denies any input into the drafting of the deceased's will. He stated that he translated the document handed to him from German to English. He states elsewhere that the deceased dictated the content of the will to him, including

the precise details contained therein. The Respondent made it clear on acceptance of his nomination as Executor Testamentary, which would have occurred with the finalisation of the will, that he would only pursue lawful and ethically tenable clauses. The Respondent denies knowledge of the deceased's ill health. Yet, he relies upon a letter dated 27 February 2022 to show that the deceased was reasonably proficient in English. The content of the letter refers to the deceased being rather ill, his 'unfortunate bad health situation' on his birthday and clinical examinations revealing complications. The letter referred to further tests and surgery that the deceased had to undergo. The Respondent had to know that the deceased was far more ill than he acknowledged.

124. The will was finalised in April 2022, shortly after the deceased announced his illness in the letter. The will conveniently contains clauses that benefit the Respondent beyond the four percent legacy of a member's interest in the close corporation. The Respondent benefits from a reasonable management fee over a few years for work related to the close corporation for and on behalf of the two sons until they reach the age of 25. The Respondent is directed to take every legal step necessary to enforce the transfer of the three German units to Walter, M[...] Jnr, and Sandra. The reference to a reasonable management fee is repeated in clauses 4 and 7 of the will. The Respondent is directed to resist the Applicant's claims of whatsoever nature for the deceased's assets with all means necessary and to all extents possible. The Respondent would be entitled to his reasonable fees for work related to the opposition of any of the Applicant's claims. The Respondent's attorney firm has already billed for legal work related to the estate.⁶⁰ The Respondent's allegation that he was not involved in formulating the terms of the will is implausible.

125. The Respondent denies that the units in the Munich building were surreptitiously transferred to Hölger in November 2013, just before the Applicant and the deceased were in the throes of divorce. The Respondent was the attorney who initiated an application for declaratory orders to the effect that the transfers of the units occurred during the normal course of business. The evidence suggests that the transfer occurred as a 'gift'. It is unclear whether Hölger or the deceased had to

⁶⁰ See the draft liquidation and distribution account

borrow money from two other persons to reduce the deceased's debt. Hölger provided a fraction of the money the deceased required in 2013. It was only on 7 June 2016 that Hölger obtained a bond to cancel the deceased's debt in another German bank. Yet, the Respondent alleges that the transfer occurred in 2013 to restructure the deceased's debt. The Accountant merely confirmed that the deceased's debt had improved since 2013. The table illustrating the monthly cash surplus available to the deceased was not included in the bundle of documents.⁶¹ Thus, The Court cannot establish whether the improvement occurred when the transfer was effected.

126. The transfer of the units to Hölger occurred coincidentally when the divorce action began and when the deceased was informed that his marriage to the Applicant in South Africa was in community of property. The deceased's debt problems had arisen years earlier. Any attempt to justify the contrary, that is, that the transfer had nothing to do with the marital strife and the marital property regime, has to be rejected out of hand. The Court wonders how a party can defend the indefensible.

127. The Respondent did not address the allegation that the transfer of the units to Hölger occurred within four days. The Respondent denies knowledge of the Applicant's challenge that resulted in an injunction on the transfer of the remaining units held by Hölger. Hölger sold off some of the units transferred to him to finance the restructuring and gifted one to his wife, Ina. The Respondent alleged that he did not know of the Munich litigation involving the deceased. Whilst it is correct that the deceased was not a party to the litigation involving the Applicant and Ina, he featured largely in that litigation and was available to testify if called.

128. The Respondent could cite chapter and verse about the alienation of the units, the deceased's debt problems and the restructuring thereof. Still, he denied knowledge of the injunction the Applicant obtained on the sale of any units transferred to Hölger. He chose not to address the allegation that the units were transferred within four days when the process allegedly takes six weeks to complete.

⁶¹ Page 14 of the Greenbaum report was omitted. The bundle followed the normal sequence of numbering at 235 and 236.

The Respondent alleges that his role was restricted to advising the deceased on the German proceedings as they applied to the ongoing divorce action.

129. The Respondent's persistent efforts to persuade the Applicant to drop the litigation against Hölger, even after the German Courts confirmed the Applicant's rights to litigate there without the Respondent's consent, are noteworthy. The Respondent's intention to intervene and withdraw the action against Hölger, despite being rebuffed by the German Courts, and his subsequent threats to join any litigation initiated against the manager of the rental agency in Germany, as well as to interdict the Applicant from pursuing the collection of rentals on the units, demonstrate his unwavering determination to halt the Applicant's litigation.

130. Other considerations feature in the Respondent's intervention in the Applicant's litigation in Germany. In the Respondent's letter addressed to the Judge presiding over the Applicant's case against Hölger, he says that the matter has to be kept in abeyance and may not continue until he considers all risks relating to the litigation, the financial liability of the estate, and whether he intends to replace the Applicant in the litigation. Apart from the propriety of such demand, The purpose of substitution in this context is for the Executor to take the place of the deceased in litigation to which he was a party to enable the litigation to continue without interruption. The deceased was not a party to the litigation. The litigation in Germany involves the Applicant and Holger. The Executor is not obliged to pursue foreign assets of an estate. Furthermore, the Applicant acts as a creditor who sues for the return of assets transferred by the deceased with the aid of Hölger, who allegedly intended to defraud her. In this instance, the Respondent cannot represent or substitute the Applicant, who seeks the return of assets transferred in fraud.⁶² Only a creditor can bring an action for a transaction in fraud of creditors.

131. The Respondent demanded that the litigation in Germany be held in abeyance until he had the opportunity to assess its prospects of success. Yet the Respondent advised his clients, including the deceased and Hölger, to obtain declaratory orders that transferring properties to Hölger was a normal business

⁶² Du Toit's Executors v Du Toit 1911 CPD 713, Meyerowitz at page 148

transaction. The letter to the Judge was dated 13 July 2023, barely six months after he had instituted the application for declaratory orders. The Respondent's decision as Executor to abandon the litigation in Germany, formally announced in October 2023, has a hollow ring. What was there to decide? The decision to oppose the litigation against the Applicant had been taken years before. The Applicant's allegation that the Respondent has attended to the administration of the estate with premeditated and preconceived ideas has merit. The Court rejects the Respondent's contention that he holds no agenda to 'eliminate' the Applicant's claim against Hölger.

132. The Respondent's intervention in the German litigation has cost the estate R478 816 in legal fees. The Respondent warns that the costs of litigating in Germany are prohibitive. If the Applicant's litigation against Hölger fails, those costs would trickle down to the joint estate. The Applicant failed to reply to these allegations. There has, to date, been no claim against the estate by the Applicant for legal fees incurred in Germany. The Respondent alleged that her litigation is privately funded. If she does submit a claim for legal costs, there is no reason why the Respondent could not resist that claim in terms of section 32 of the Act.

133. The Respondent sought to trade off Hölger's substantial claim against the estate and Hölger's legal fees if the Applicant withdrew her litigation against Hölger. It is unclear as to who conceived the idea of the trade-off. The Respondent attributes it to himself but credits it to Hölger elsewhere. The Respondent accepted Hölger's claim because the deceased signed it off in July 2022 despite having reservations about the items comprising the claim. There is no indication that the Respondent intended to challenge Hölger's claim under section 32 of the Act.

134. The Respondent denies favouring Hölger to the detriment of the estate. The denial does not correlate with his actions as an attorney to the deceased and Hölger and his subsequent actions as Executor. The Respondent represented Hölger in at least one legal procedure instituted in South Africa just before the deceased's passing. Hölger featured in the divorce settlement. When the settlement negotiations failed, the Respondent advised Hölger to continue litigation against the Applicant. If the Applicant prevails in her case against Hölger, the value of the joint estate would

improve considerably. The Respondent's actions in favouring Hölger, both in the latter's retention of the units and his intention to accept Hölger's claim against the estate, do affect the welfare of the estate. The court finds that the Respondent's denial of any leaning towards Hölger's preserving interest is implausible. The Court also finds that the Respondent's support of Hölger is not only to the detriment of the estate but also to the interests of the Applicant. He has a fiduciary duty to protect her half-share of the estate.

135. The Applicant alleged that the Respondent had delayed a decision on how he intended to deal with the loan accounts to the close corporation and the GRG company. Despite acknowledging that the close corporation owed the joint estate R35 million in October 2023, the Respondent reflected the loan account in the draft liquidation and distribution account to be R6 million. There is no reference to the loan account to GRG of about R5.8 million in the liquidation and distribution account. The Respondent has already missed the deadline for filing a liquidation and distribution account for the estate within the six weeks specified by the Act. There is no indication that he has complied with the further requirements of section 35 of the Act.

136. The Respondent repeatedly alleges that the draft liquidation and distribution account was compiled merely for discussion purposes. It, unfortunately displays a worrying trend that may have serious ramifications for the Applicant's entitlement to a half share of the estate once its liabilities have been settled. The Respondent intends to retain the close corporation for Sandra's benefit, who is the major beneficiary of the member's interest in the close corporation.

137. The allocation of four percent of a member's interest in the close corporation undoubtedly poses a conflict of interest for the Respondent. The Applicant has sketched the various computations the Respondent can exercise to maximise the benefit from this legacy. The Respondent denies the charges and alleges his interest in the close corporation is inconsequential and probably worthless given the entity's solvency. He may have to contribute to liquidating its debt. He has no qualms about liquidating the close corporation if that is required. However, his actions and the redistribution plan he conceived, whereby the Applicant has to give up ownership of some of her units, are intended to retain the close corporation. Although he alleges

that it would benefit Sandra, he undoubtedly benefits if the close corporation is retained. His conflict of interest becomes manifest even though he denies it strenuously.

138. The Applicant alleged that the lower the value attached to the close corporation, the higher the value of the member's interest that the Respondent would obtain for this four percent. The draft liquidation and distribution account is sufficient evidence for the Court to find that the Respondent cannot be trusted to ensure the estate is properly valued. If the estate is undervalued, the Applicant is severely prejudiced in her legal entitlement to an equitable half-share to obtain the half share she is legally entitled to.

139. The units in Munich were valued by Kaufmann Stephan and included in the Respondent's answering papers. They were each valued at approximately R2 395 305 on 7 December 2017. The value on the day this matter was heard amounts to R2 991765.⁶³ Yet the Respondent overvalues each by approximately R1 500 000 in the draft liquidation and distribution account. Hölger's claim of approximately R23 million against the estate is reflected there, even though the Respondent purports to have reservations about some line items in the claim. If the units in Germany are overvalued, it prejudices the Applicant in a redistribution plan conceived by the Respondent.

140. The Respondent has effectively declared the estate insolvent. This is inconceivable, given that the estate could afford to offer the Applicant a R40 million settlement a few years back and has a substantial property portfolio. The Applicant is correctly concerned that the Respondent's actions give effect to the repugnant clauses contained in the deceased's will. The Court finds that the Respondent has a conflict of interest, and the plans he has proposed thus far will benefit him whether he intended that outcome or not. The Respondent's actions, therefore, affect the welfare of the estate as well as the legal interest of the Applicant.

⁶³ The Rand Euro exchange rate was 15.9687 on 7 December 2017 and 19.5491 on 18 September 2024.

141. A deep-seated distrust exists between the Applicant and the Respondent, which goes beyond mere disagreement. They seem incapable of cooperating minimally, let alone adequately, to bring finality to the estate. If the two cannot cooperate, the Applicant's distrust of the Respondent will increase. The relationship is inconducive to the equitable finalisation of the estate and can only result in more litigation against each other, with the attendant costs diminishing the estate even further. The Respondent has a low threshold for threatening litigation and litigating on behalf of the estate against the Applicant. He has intervened at the estate's cost in Germany and South Africa. His attorney firm benefits from the litigation. This attitude is inconducive to the interests of the estate, to that of the heirs, as well as to the Applicant.

142. There are other compelling reasons for the removal of the Respondent as Executor. The Respondent, as the attorney to the deceased, has been involved in the acrimonious litigation against the Applicant, which was directed to stifle the Applicant's entitlement to a fair half share of the joint estate. The Respondent acted as an attorney just before the deceased's death in litigation that was intended to deprive her of the German assets of the deceased.

143. The Respondent correctly asked what his actions as an attorney had to do with his role as Executor. Well, the deceased expected the Respondent to become immersed in the administration of the joint estate way beyond that which is ethically and legally permitted of an Executor. The deceased expected the Respondent to pursue the Applicant with the same vigour he did while alive. The deceased expected the Respondent to become his agent in death. The Respondent accepted the nomination in full knowledge of the deceased's wishes and has expressed his intention to carry them out. His protestations about obeying the repugnant clauses in the will are unconvincing.

144. The Respondent's unsuccessful attempts to intervene and his commitment to intervene through litigation against the Applicant's interests both here and in Germany do not bode well for his obligation to be fair and to obtain an equitable outcome for the estate. The Respondent's actions suggest an undue inclination towards promoting the interests of Hölger and Sandra. The Respondent has not

attended to the speedy resolution of the issues relating to the South African properties. He has not attempted to seriously resolve the loan issues with the close corporation or with GRG. His handling of the Ouplaas and Oaktree properties is less than ideal. His preference to pay the maintenance of the first wife and the German body corporate for work to be done to the public spaces in the Munich building, over his obligation to pay maintenance to the Applicant, cannot be deprecated enough. His attitude that the Applicant should get a job and support herself whilst he earns off the estate is ill-considered. The Applicant had to resort to litigation to obtain a commitment to get maintenance payments. Yet, shortly after that, the Respondent agrees to halt the source of that payment in favour of paying over R2 million to maintain the public spaces in the German building.

145. The administration of this estate requires an independent Executor who will bring a fresh and uncluttered mind to its resolution. This estate requires an Executor who is not encumbered by the baggage of the past and will genuinely attend to his legal and fiduciary duties. A new executor must consider, among others, the implications of intervening in the German litigation, the resolution of the loan accounts, and the litigation costs initiated by the Respondent's attorney firm.

146. The Court has considered the delay that may eventuate in appointing a new Executor, as well as the administration of the estate. The Court cannot assess the extent of the work performed by the Respondent. The Respondent contends that his fluency in the German language is advantageous in the administration of this estate. There is no reason why the Master will not be able to choose an Executor with the necessary proficiencies to administer this estate. The consequences of replacing the Respondent far outweigh his continued tenure as Executor. The Court has no hesitation in ordering the removal of the Respondent as Executor of this estate. The Court does not need to consider the Respondent's removal under s54(1)(ii) of the Act.

SHOULD THE RESPONDENT BE DEPRIVED OF HIS REMUNERATION AS EXECUTOR?

147. Applicant seeks an order that the Respondent shall not be entitled to any remuneration for services rendered as Executor. She refers to the Respondent's conflicting interests and the other issues she has identified in her papers relating to his fitness to hold office as the estate's executor.

148. The Respondent's answer to the order sought is that he has earned his fees for his work. He has done nothing which has detrimentally impacted the Applicant. The costs that have been expended have largely arisen from the Applicant's hunger for further litigation and failure to communicate with him on matters relating to the estate and her share. Sandra, the second largest shareholder, has requested that he not resign and carry on with estate administration.

149. In reply, the Applicant alleges that Sandra has played a role in the dissipation of the estate's assets. It is not surprising that Sandra supports the continued tenure of the Respondent, which is to her benefit. The Applicant takes issue with the Respondent's allegation that he sought her cooperation. The Respondent has continuously impeded her from access to information relating to estate administration. He interdicted her from interfering in the estate.

150. Executors, or agents appointed to manage the affairs of a deceased person's estate, are entitled to receive compensation for their services. This compensation typically amounts to 3.5% of the estate's total value and 6% of the estate's growth after death. The above excludes other administration fees like section 25 adverts, valuation fees, bank charges

151. The Master of the High Court plays a supervisory role in the administration of estates, and the executor must submit a detailed account of the estate (i.e. the liquidation and distribution account), including the proposed remuneration. The Master has the ultimate authority to scrutinise and, if necessary, adjust the proposed executor's fees/remuneration to ensure compliance with the statutory framework. If heirs or beneficiaries believe the executor fees to be unreasonable or excessive, they may contest the fees. In such cases, the Master may intervene and assess the reasonableness of the remuneration. Executors should be prepared to provide detailed records justifying the time and effort spent administering the estate. When a

professional executor or a legal practitioner is appointed, the fees may be subject to additional scrutiny. The courts have emphasised the need for transparency and reasonableness in such cases, considering factors like the executor's expertise and the complexity of the estate. In instances where professional fees are levied, this would normally be rendered on a time-cost basis. Executors are always obligated to disclose their remuneration to the heirs or beneficiaries.

152. Section 51 of the Act concerns the remuneration of executors. Section 51(1)(b) permits remuneration according to the prescribed tariff and shall be taxed by the Master. Section 51(3) permits a Master to increase, decrease, or disallow line items on any final invoice submitted by an Executor. Section 51(4) determines that an Executor shall not be allowed any remuneration before the estate has been distributed unless the Master approves payment in writing.

153. The Respondent is not allowed the three percent of the estate's value as reflected in the draft liquidation and distribution account. The orders below shall specify the extent to which the Respondent may claim his fees for administering the estate thus far.

MISCELLANEOUS MATTERS

154. The Applicant sought the removal of the Respondent but cited him in his representative capacity. An application for the removal of an Executor is a claim against the Executor in his personal capacity.⁶⁴ The Applicant brought a formal application for the amendment of the citation. The Respondent did not object to the application which was granted. The Applicant filed confirmatory affidavits that contained matters of a substantive nature. The affidavits were filed late. The Respondents objected to the lateness of the affidavits and their content and asked that the court deny its admission. The court ordered that the affidavits are inadmissible. The Respondent brought an application to strike out material from the Applicant's replying affidavit because they constituted new material and were

⁶⁴ *Mc Namee and Others v Executors Estate Mc Namee* 1913 NPD 428, *Rampersadh v Pillay* 1963 (3) SA 320 (D&CLD) at 321A

vexatious. The court dismissed the application to strike out. No order as to costs was made in any of the three applications.

COSTS

155. The Applicant has belatedly prayed that the Court exclude the professional attorney fees incurred by the Respondent in pursuing the German litigation. There is merit in this prayer as the intervention in the German litigation was unjustified. The appropriate order shall be made.

156. Each party sought punitive costs on an attorney-client scale were they to prevail. Neither party motivated why a punitive costs order should be granted apart from what is becoming common practice, i.e., that the Court has to infer, by the alleged behaviour of each party, that a punitive costs order is justified in any given case. This is unacceptable. If a party desires a punitive costs order, they should motivate it. What has happened to the normal order of costs sought on a party and party scale? It would seem that the punitive costs standard has increasingly become the norm, and the normal party and party costs scale has become the exception. This Court is averse to granting punitive costs orders unless there are exceptional circumstances and the order sought is properly motivated. Any costs order granted against the Respondent must be paid by him.

157. The Court makes the orders that follow.

ORDER

158. The First Respondent is removed from his office as Executor of the estate of deceased M[...] B[...] in terms of the provisions of section 54(1)(a) (v) of the Administration of Estates Act 66 of 1965 ("the Act"),

159. The First Respondent shall, in terms of section 54(5) of the Act, immediately return his letters of executorship to the Master of the High Court ("the Master"),

160. The First Respondent shall be entitled to claim his fees as Executor of the estate of M[...] B[...] from the date of his appointment to the date of this judgment in terms of sections 51(1), 51(3) and 51(4) of the Act,

161. The First Respondent or his attorney firm shall not be entitled to claim any legal costs relating to the intervention in the matters involving the Applicant in Germany from the date of his appointment as Executor to the date of this judgment,

162. The Master shall, as soon as possible, exercise its powers under the Act to appoint and grant letters of executorship to such person or persons who it may deem fit and proper to be the Executor or Executors of the estate of M[...] B[...],

163. The First Respondent shall pay the costs of this application,

164. Counsel's fees will be recovered and taxed on the "C " scale.

Ajay Bhoopchand
Acting Judge of the High Court
Western Cape Division
Cape Town

Judgment was handed down and delivered to the parties by e-mail.

Applicant's Counsel: T Barnard, instructed by Francois Pienaar Attorneys Inc t/a FDP Law, Cape Town

Counsel for the Respondent: M A McChesney, instructed by Brand & Van Der Berg Attorneys, George.