

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2023 / 096257

DATE: 08-09-2025

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

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

(3) REVISED

08 September 2025

In the matter between:

AVRIL SHORKEND N.O.

FIRST APPLICANT

SHORKEND, AVRIL

SECOND APPLICANT

(Identity No. 6[...])

TABAK, IVAN

THIRD APPLICANT

(Identity No. 5[...])

AND

JACQUELINE SETTON N.O.

FIRST RESPONDENT

SETTON, JACQUELINE

SECOND RESPONDENT

(Identity No. 6[...])

TABAK, RUSSEL

THIRD RESPONDENT

(Identity No. 5[...])

REASONS IN TERMS OF RULE 49(1)(c)

BEFORE THE HONOURABLE JUDGE, MATJELE AJ

Introduction

1) This matter came before me in the opposed motion roll on the 13th of May 2025. When the matter was called Adv D Marx appeared for the Applicants and Adv K Howard appeared on behalf of 1st, 2nd and 3rd Respondents. The 4th respondent was not represented, as it agreed to be bound by whatever order the Court granted.

2) After hearing both counsel an ex-tempore judgment in favour of the Applicants as follows:

“HAVING read the documents, heard Counsel and having considered the matter: IT IS ORDERED THAT:

1. that the First Respondent be removed as an executor of the estate of TOMMY LEWIS TABAK (identity number 3[...]) and MIRIAM TABAK (identity number 3[...]) with Estate numbers 0[...] and 0[...] respectively ("the late Estates");
2. that the First Respondent is to return her letters of executorship for the late Estates to the Fourth Respondent;
3. that an independent senior legal practitioner is to be appointed as an executor in the late Estates nominated by the Legal Practice Council, and which nominee shall have not less than 15 years' experience in administration of deceased estates;
4. that the executor's fees and disbursements charged by the executor referred to in prayer 3 above, are to be paid from the respective deceased Estates;

5. that in the event of the First Respondent resigning or being removed by the Above Honourable Court as an executor of the respective deceased Estates then in such event the First Applicant shall forthwith resign;
6. that the First Respondent/Second Respondent is ordered to place the vehicles being a red Hyundai Getz registration W[...] and a silver 3[...] registration V[...] back in the name of the two respective deceased Estates;
7. that the First Respondent, upon granting of this order, is to relinquish all possessions, laptops, hard copies, access to email servers and bank accounts and/or assets belonging to the late Estates and to provide same to the First Applicant immediately;
8. the First Respondent is to immediately vacate the immovable property of the late EL Miriam Tabak and to restore the property into the same condition as it was prior to taking the residency of the property;
9. should the First Respondent fail to comply with prayers 2, 6,7 and 8 above, then the Sheriff of the High Court is authorised to assist the First Applicant, paired with the assistance of the South African Police services, if necessary;
10. the First Respondent/Second Respondent is ordered to pay back the amount of R124 700.00 (One Hundred and Twenty-Four Thousand Seven Hundred Rand) back to the late Estate within 7 days of the granting of the Order;
11. costs to be paid by the Second Respondent in her personal capacity and on a party-party scale."

Request for reasons (Rule 49(1)(c))

3) Subsequent to the order above, the First and Second Respondents filed a notice in terms of Rule 49(1)(c) read with Rule 49(1)(b) of the Uniform rules requesting for reasons. The reasons for the above order are vividly provided below.

Facts

4) In considering the facts of this case I will firstly state common cause facts as reflected and admitted in the answering affidavit of the First Respondent (also Second Respondent) in the matter. I will then identify facts emanating from the

founding affidavit of the First Applicant (also Second Applicant) admitted or not contested by the respondent. Lastly, I will consider what the First Respondent disputes or denies, and if same raises a dispute of facts.

Common cause facts from Respondent's affidavit.

5) It is common cause from the Respondent's answering affidavit that the Wills and Codicils compiled by Miriam Tabak include her election to appoint Steven Friedland as the agent on their behalf to deal with her estate.¹ And the Wills and Codicils declared by the late Tommy Tabak also appoint Steven Friedland as the agent on their behalf to deal with his estate.² The First Applicant and First Respondent were appointed as executrixes of both the late Miriam Tabak's estate,³ and that of the late Tommy Tabak's Estate.⁴

Applicant's facts admitted in the answering affidavit.

6) The following are common cause facts from the First applicant's founding affidavit, not disputed by the First Respondent in her answering affidavit:

- i) First Respondent changed the locks of the late deceased parents flat changed and accessed the late Tommy's current bank account directly (despite him being deceased) to make the payment.⁵
- ii) That the First Respondent made numerous transactions out of the late Tommy's bank account directly and without the co- executrix's knowledge and consent⁶;
- iii) That the First Respondent was directly accessing the late Tommy's bank accounts, acting as Tommy to the bank and using his cell phone for the OTP for these transactions;⁷
- iv) The statements demonstrating transfers out of Tommy's various accounts, including his savings account, by the First Respondent without the co- executrix's knowledge and/or consent.⁸ (this constituting unlawful activity);

¹ Answering Affidavit, paragraph 70 to 71, p. 02-289

² Answering Affidavit, paragraph 77, p. 02-289.

³ Answering Affidavit, paragraph 77, p. 02-289.

⁴ Answering Affidavit, paragraph 80, p. 02-290.

⁵ Answering Affidavit, paragraph 56, p. 02-295.

⁶ Answering Affidavit, paragraph 126, p. 02-296.

⁷ Answering Affidavit, paragraph 129 to 132, p. 02-296.

⁸ Answering Affidavit, paragraph 138 to 139, p. 02-297.

- v) That the First Respondent attempted to apply for the First Applicants renunciation as co-executrix;⁹
- vi) The First Respondent paid a contractor to completely re-tile the kitchen of the parents flat without the co-executrix's knowledge and consent;¹⁰
- vii) That the First Respondent contacted the beneficiaries to pay money into her personal account regarding the estates as well as petrol for her to drive the deceased vehicles;¹¹
- viii) The First Respondent made insurance claims to Momentum alleging loss of hearing aids by the late Miriam, when she was already deceased;¹²
- ix) The First Respondent requested that Standard bank deposit R10 000.00 per month out of the late estate bank account into her personal account;¹³
- x) The Respondent sold her own vehicle and started utilising the deceased vehicles,¹⁴ and she transferred both vehicles of the late estates into her personal name;¹⁵
- xi) The First Respondent verbalised that she intended to live in and purchase the late parents' property;¹⁶
- xii) The First Respondent unilaterally provided a Liquidation & Distribution (L&D) account to the master without the co-executrix' knowledge, signature or consent;¹⁷
- xiii) The First Respondent threatened all other beneficiaries that if funds are not transferred as per her instructions she will withhold her personal payments and not allow expenses to be paid from estate funds (in effect prejudicing the estate by not being able to pay creditors);¹⁸
- xiv) That the First Respondent demanded that co-executrix must personally pay for estate expenses;¹⁹

⁹Answering Affidavit, paragraph 153, p. 02-299.

¹⁰ Answering Affidavit, paragraph 166, p. 02-301.

¹¹ Answering Affidavit, paragraph 171, p. 02-301.

¹² Answering Affidavit, paragraph 195 to 197, p. 02-305.

¹³ Answering Affidavit, paragraph 217, p. 02-307.

¹⁴ Answering Affidavit, paragraph 214 to 215, p. 02- 307.

¹⁵ Answering Affidavit, paragraph 230. p. 02-309.

¹⁶ Answering Affidavit, paragraph 149.5, p. 02-323.

¹⁷ Answering Affidavit, paragraph 256, p. 02-312.

¹⁸ Answering Affidavit, paragraph 149.5, p. 02-323.

¹⁹ Answering Affidavit, paragraph 342, p. 02-324.

7) It is also noteworthy that First Respondent is of the opinion that it is not necessary to engage professional services for the efficient winding up of an estate. Also, that she is entitled to act unilaterally and without the co-executrix consent. And, lastly, she believes that executrixes are liable for the estate expenses personally.²⁰

8) Reference is further made to the Applicants' Heads of Argument dealing with a table of the admitted facts by the First Respondent, justifying her removal,²¹ among others the following are stated:

- a) On para 274 Jacqueline admits to transferring monies into her personal account from the late estates' accounts, which amounts to dereliction of duties and fraudulent breach of fiduciary duties.
- b) In para 296 Jacqueline admits to utilising the assets in the estates. Dereliction of duties, breach of fiduciary duties, and conflict of interest.
- c) In para 327 Jacqueline admits to retaining the vehicles as "security" until she gets reimbursed on her own amounts. She further admits in her own correspondence as annexure "FA62" wherein she confirms that the cars are "hers" until she gets paid back according to her demands. This amounts to extortion, and is unlawful and as breach of fiduciary duties".
- d) In paras 349 - 353 Jacqueline admits that the co-executrix's endorsement is required in the submission of the liquidation and distribution accounts and knowingly failed to comply. Demonstrates an intentional breach of fiduciary duties.
- e) In para 396 Jacqueline admits to having an illegal firearm in her possession. Illegal conduct by the executor.
- f) In para 415 Jacqueline admits to holding cash from the deceased estate. It should be placed in a late estate account. This is dereliction of estate duties.

CONTENTIONS ON THE MAIN ISSUE:

9) The Applicant contends that:

²⁰ Answering Affidavit, paragraph 349, p. 02-325.

²¹ Page 19-47 on caselines.

- a) the executor changed the locks of the estate's immovable property and has taken control of the motor vehicles, by driving the vehicles and the like;²²
- b) the executor has unlawfully, and without any knowledge or consent, transferred large amounts of funds out of the deceased's bank account into her personal bank account, directly after the death of the deceased;²³
- c) the executor has demanded transfers from beneficiaries to be paid to her personally for expenses of the estate, due to her own maladministration;²⁴
- d) the executor has thereafter fraudulently registered both the motor vehicles (estate property) into her personal name;²⁵
- e) the executor has made a claim for expenses allegedly incurred by her, as well as personal interest charges, from the estate, rendering the executor a creditor;²⁶
- f) the executor has obstructed the process of the winding up with regard to the moveable property, in order to prepare inventories and the proper winding up of the estate, taking it as far as even changing the locks of the property;²⁷
- g) the executor, despite the fact that there is a co-executrix, refuses to provide proof of what she has done thus far and/or proof of expenses;²⁸
- h) the executor unilaterally withdrew funds from the estate without providing any proof of allocation and it is presumed that those funds have been allocated for her personal use;²⁹
- i) the executor refused to notify creditors and/or provide advices on whether she has notified creditors, this being an integral part of the winding up of an estate;³⁰
- j) the executor has attempted to "bribe" her co-executor with access to the immovable property, provided that she signs off on the prepared liquidation and distribution accounts;³¹

²² Founding Affidavit, para 173.1.

²³ Founding Affidavit, para 173.2.

²⁴ Founding Affidavit, para 173.3.

²⁵ Founding Affidavit, para 173.4.

²⁶ Founding Affidavit, para 173.5.

²⁷ Founding Affidavit, para 173.6.

²⁸ Founding Affidavit, para 173.7.

²⁹ Founding Affidavit, para 173.8.

³⁰ Founding Affidavit, para 173.9.

³¹ Founding Affidavit, para 173.11. p 49.

- k) the executor has further failed to renew the deceased father's gun licences and is currently in possession of an illegal firearm;
- l) the executor refuses to provide her letters of executorship therefore preventing the opening up and continuing of the estate accounts in order to pay expenses flowing from the estate. Instead, she pays expenses personally and then claims interest to her benefit;³² and
- m) the executor, on the whole, refuses to work with the co-executrix and/or the beneficiaries, and has completely deadlocked the estate and is continuing with a serious dereliction of duties.³³

Denials:

10) The First Respondent vehemently denies that she acted in a negligent manner, that she maladministered the estate and/or that there is a conflict of interest. She further vehemently denies that her actions to progress with the winding-up of the estate constituted a dereliction of her duties as alleged or at all.

Legal principles:

11) The decision of the Supreme Court of Appeal in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,³⁴ ("the Rule") serves as a guide to the courts in determining which party's version should prevail when disputes of fact are found in motion proceedings. The Rule holds that when factual disputes arise in circumstances where the applicant seeks final relief, as in the present case, the relief should be granted in favour of the applicant only if the facts alleged by the respondent in its answering affidavit, read with the facts it has admitted to, justify the order prayed for. Worded differently, the rule allows the courts, in certain circumstances, to decide on disputes of fact in motion proceedings without having to hear oral evidence.

12) The Plascon-Evans rule, therefore, states that a court may grant a final order, if the facts alleged by the applicant and admitted by the respondent, along with the

³² Founding Affidavit, para 173.13, p 49.

³³ Founding Affidavit, para 173.14, p 50.

³⁴ (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)

respondent's own averred facts, justify the order. It provides a method for courts to resolve disputes of fact in motion proceedings without calling oral evidence.

13) This rule has its roots from what Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd,³⁵ stated:

".... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted".

14) The exception is only when the respondent's version raises factual denials that are genuine or bona fide. A denial by the respondent of a factual allegation in the applicant's founding affidavit must be real, genuine and *bona fide* before it can be considered prohibitive to the applicant being granted final relief. This issue was touched upon in the 2011 decision of the Eastern Cape High Court in *Islam v Kabir*.³⁶

"When in application proceedings there is a dispute of fact which has to be resolved on the papers and on the basis of the principle enunciated in the Plascon-Evans Paints matter, the court can only reject the version of the respondent if the absence of bona fides is abundantly clear and manifest and substantially beyond question". [own emphasis added]

15) Thus, a court must be convinced that the allegations of the respondent are so far-fetched or so clearly untenable that it is justified in rejecting them merely on the papers and without requiring oral evidence to be led.³⁷ Otherwise, the court may order that one of the options set out in Rule 6(5)(g) of the Uniform Rules of Court are followed, which includes the referral of the disputed portion of the matter to oral evidence.

³⁵ 1957 (4) SA 234 (C) at p 235 E-G.

³⁶ (CA: 280/2010) [2011] ZAECHGHC 9 (11 April 2011)

³⁷ See the remarks of BOTHA AJA in the Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en Andere, 1982 (3) SA 893 (A), at p 924 A.

16) Based on the above, counsel for the Applicant argued that The First Respondent has to be removed and relief granted in terms of the Notice of Motion.

The reasons relied upon are that:

- a) the interests of the estate will be furthered by the removal; there is a serious dereliction of duty;
- b) the beneficiaries will be prejudiced should the executor not be removed; the executor has acted negligently;
- c) there exists maladministration or an absence of administration;
- d) there exists fraud, unlawfulness and self-enrichment with estate assets; and
- e) the continuance of office of the executor will prejudicially affect the future welfare of the estate.

17) Adv. P Marx for the Respondents argued, in response to maintain the status quo, with the Second Respondent remaining executrix. It was states that:

- a) All money alleged to have been taken by the First Respondent it was used to maintain the deceased estates and to cover all costs related to them.
- b) In respect of unilaterally erecting a tombstone, it was argued that she was carrying out what her late parents had instructed her, as she used to live with them.
- c) It is argued that the reason she sold her vehicle was so she could afford managing the deceased estate. This does not make sense, as the money for managing the estate should be from the estate itself and not from her. After selling her car she began using the deceased parents' vehicle. Her counsel argued she registered the two vehicles in her name so that she is able to renew their discs yearly. I agree with the Applicant's counsel that there is no requirement for ownership of vehicles to be transferred to before discs could be renewed.
- d) In respect of the alleged conflict of interest that she has offered to buy the flat of their late parents for R1,2M, when in the L&D Account she reflected

it as R1,5m. Her counsel argued that nothing precludes her from making an offer. This is the flat she is not allowing the co-executrix from accessing, and also in which she installed new tiles without the consent of other heirs and co-executrix.

e) About a claim against the insurance for the late mother's hearing aids, claiming R80 000, which went into her own bank account, and not the deceased estate account, or the so called "control account" she allegedly opened to singularly handle the deceased estates, it was argued there was nothing wrong with her lodging a claim. The question remains, why two years later?

f) In respect of her accessing the deceased Tommy Tabak's bank account with money withdrawals of over R93 500, keeping his cellphone and attempting to transfer that phone into her name so as keep accessing one-time-pins, it was argued that these happened before the appointment of executrices. This indeed does not paint a good picture about the Second Respondent. What she did there is downright fraudulent. When a person dies his death is reported to the banks, and their bank account frozen. It was clearly not the case herein, where the second respondent actually impersonated her father as though he is still alive.

g) The reason for not accepting the help from Friedland, the professional appointed by both late parents in their individual wills, leaves much to be desired. The first respondent's refusal to work with him for whatever reason, even the cited one that he previously had a relationship with Second Applicant is neither here nor there. What makes it worse is that she is referring to an old childhood relationship. The choice of the deceased is sacrosanct. Coming to the second professional who offered to help, Mr. Behr it is alleged his help was never refused, yet it never happened. Suddenly, First Respondent was now having assistance from an official in the Master's office. However, as admitted in her affidavit, she does not believe in the assistance by professionals.

h) Even the alleged rivalry between the two sisters, if First Respondent was professional she ought to be cooperative with the appointed Co-executrix, as per their late parent's wishes in their wills. The parents knew why they did not appoint her executrix alone, and their decision should be respected and not circumvented by the First Respondent. The L&D account that she alleges to have completed singularly, not even having items from the safe, leaves much to be desired. The further argument that the First Applicant does not live in Johannesburg, does not hold water, as she has availed herself, but First Respondent is not interesting in working with her. As correctly replied by the applicants' counsel, it is easy to communicate via technology.

Duties of Executrix(es):

18) In South Africa, an executor's primary duty is to administer and distribute a deceased person's estate in accordance with their will, or intestate succession law if there is no will. This involves reporting the estate to the Master of the High Court, identifying, safeguarding, and valuing all assets, paying all debts, taxes, and claims, and ultimately distributing the remaining assets to the beneficiaries. The executor must also keep accurate records, provide transparent updates to beneficiaries, and file the final liquidation and distribution account with the Master for approval. If the executor fails to carry out these duties he or she can be removed on several grounds in section 54 of the Administration of Estates Act 66 of 1965.

19) In this case the applicant is asking for the removal of the First Respondent relying on section 54(1)(v) which provides as follows:

“(1) An executor may at any time be removed from his office (a) by the Court ... (v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned;”

20) In *Oberholzer N.O. vs Richter* (2013) 3 All SA 205 GNP it was stated that in terms of S.54(1)(a)(v) *“mere breakdown of relationship or disagreements is insufficient for discharge of executor”*. Same was echoed in *Gory v Kolver NO and Others*,³⁸ where Hartzenberg J said the following:

³⁸ [2006] ZAGPHC 28; 2006 (5) SA 145 (T) in paragraph [27].

“The aforesaid authorities confirm that mere disagreement between an heir and the executor of a deceased estate, or a breakdown in the relationship between one of the heirs and the executor, is insufficient for the discharge of the executor in terms of section 54(1)(a)(v) of the Act. In order to achieve that result, it must be shown that the executor conducted himself in such a manner that it actually imperilled his proper administration of the estate. Bad relations between an executor and an heir cannot lead to the removal of the executor unless it is probable that the administration of the estate would be prevented as a result.”

21) *“... the essential test is whether such disharmony as exists imperils the trust estate and its proper administration”.*³⁹ [my emphasis]

22) *“Both the statute and the case cited ... indicate that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. It must therefore appear, I think, that the particular circumstances of the acts complained of are such as to stamp the executor or administrator as a dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument.”*⁴⁰ [my emphasis]

Application

23) The Respondent’s heads of argument start with the usual justification of the “Entitled sibling”, that First Respondent lived in Johannesburg all her life, except between 2011 and 2014; she lived with and took care of the now late parents, whereas the First Applicant visited Johannesburg only twice, during the father’s funeral and in 2022. This is totally irrelevant, and no justification for discriminating any or other siblings who are equal beneficiaries of the estate. This assistance to parents can never translate to gaining the upper hand, right of first option or granting of a higher advantage to the deceased parents’ estate for the “clever sibling” over other equally entitled siblings, heirs and/or beneficiaries.

³⁹ Volkwyn, N. O. v Clarke & Damant, 1946 W. P. A. 456 on pg. 474.

⁴⁰ Volkwyn, N. O. v Clarke & Damant, 1946 (WLD) 456, at 464.

24) In this case, there is a reason in both the wills and codicils of the parents the First Respondent was not appointed executrix alone, and an attorney, Friedland was added to the two appointed Executrices. The late parents were clearly avoiding a scenario where their intentions and aspirations after death could be circumvented for selfish reasons to the exclusion of other beneficiaries and heirs they intend ensuring they benefit from their individual estates. The facts that their wills are a mirror of each other definitely points to both having discussed and arriving at the same conclusion considering their knowledge of their own children, heirs in their individual estates.

25) Lack of co-operation or animosity between two siblings who have been appointed co-executrices to wind up the estate for the benefit of all six siblings, inclusive of themselves, cannot be compared to the above cases where the dispute is between an executor and an heir. Here it is two people tasked with a sacrosanct responsibility to enforce the will. It is clear that in this case the disharmony that exists imperils the trust estate and its proper administration, and therefore change is necessary. More so that even though there aren't a lot of serious allegations against the First Applicant, but she is also willing to step down once the First respondent either resigns or is removed by Court, to allow an expert to carry out these responsibilities. This is commendable on her part.

26) Indeed, the solution in the effective winding up of this estate lies in the appointment of an independent professional, as originally envisaged by both parents with their appointment of Friedland. The appointment of a senior legal practitioner of 15 years' experience, who won't be interrupted while carrying out his/her duties is befitting.

27) I am satisfied that some of the actions of the First Respondent as per her own answering affidavit and those admitted by her from the First Applicant's affidavit I am satisfied there has been a serious dereliction of duties, negligence, fraud, maladministration and a conflict of interests, which justify the removal of Jacqueline in her capacity as an executor.

28) Lastly, in applying the Plascon-Evans rule, I am convinced that the allegations or denials of the respondent are so far-fetched or so clearly untenable that it is justified to reject them merely on the papers and without requiring oral evidence to be led.

29) Accordingly, all orders granted are befitting.

LMA MATJELE
ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant: K. Howard

Attorneys for the Applicants: Hugh Raichlin Attorneys

Counsel for the Respondents: P. Marx

Attorneys for the Respondents: Gerhard Botha Attorneys

Date of the Hearing: 13 May 2025

Date of Reasons: 8 September 2025