

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

CASE NO: 2023 / 096257

DATE: 20-02-2026

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED: ~~YES~~ / NO

20 February 2026

In the matter between:

**JACQUELINE SETTON N.O.
SETTON, JACQUELINE**

FIRST RESPONDENT / APPLICANT
SECOND RESPONDENT/ APPLICANT

And

**AVRIL SHORKEND N.O.
SHORKEND, AVRIL**

FIRST APPLICANT / RESPONDENT
SECOND APPLICANT / RESPONDENT

In re:

**AVRIL SHORKEND N.O.
SHORKEND, AVRIL
TABAK, IVAN**

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT

AND

**JACQUELINE SETTON N.O.
SETTON, JACQUELINE
TABAK, RUSSEL
MASTER OF THE HIGH COURT ,
JOHANNESBURG**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT**

Judgment – Application for Leave to Appeal

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 029258/2021 and 023029/2020 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 320i BMW 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 Applicants (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. Same were provided by the court on the 8th September 2025.
- 4) The Court in its decision considered firstly state common cause facts as reflected and admitted in the answering affidavit of the Applicant (First and Second Respondent) in the matter, identified admitted or not contested facts emanating from the founding affidavit of the Respondent (First and Second Applicant) by the former. Thereafter, I considered disputed facts, and made findings thereon.
- 5) Among, others, the court dealt with the duties of executrix(es) and grounds for their removal from office in terms of section 54(1)(v) of the Administration of Estates Act 66 of 1965, from para 18 onwards. This section provides that:

“(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;”

- 6) After dealing with relevant case law and applying it to the facts before me pointing to extreme disharmony between two executrixes, the court had to determine if “... such disharmony as exists imperils the trust estate and its proper administration”.¹ And indeed that was the court’s finding.

Leave to Appeal:

- 7) The Applicant (First Respondent and Second Respondent in the main case) has brought an application for leave to appeal to the full bench of the Gauteng High Court or the Supreme Court of appeals.
- 8) It is noteworthy that a week before the hearing of this application, the Applicant’s attorneys filed a notice of withdrawal as attorneys of record. The Applicant, nonetheless, still wanted to proceed with the application representing herself, and her request was granted to her by the Court.

LAW:

- 9) Applications for leave to appeal are governed by sections 16 and 17 of the Superior Courts Act 10 of 2013, as amended (“the Act”) in order to determine the prospects of success of an appeal.

¹ Volkwyn, N. O. v Clarke & Damant, 1946 W. P. A. 456 on pg. 474.

10) Section 17 of the Act provides that an application for leave to appeal may be granted where the presiding judge is of the opinion that either the appeal would have reasonable prospects of success, or there is some other compelling reason why the appeal should be heard, including whether or not there are conflicts in judgments on the matter under consideration.

11) The test has evolved by applying the "would test", which enquires: "would another court come to a different decision?"

12) In *Acting National Director of Public Prosecutions and Others v Democratic Alliance In re Democratic Alliance and Others*,² Ledwaba DJP, writing for the Full Court, considered the test as envisaged in section 17 of the Act. Ledwaba J stated the following:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against." [own emphasis]

13) Hendricks DJP, in the matter of *Dooreward v S*,³ explained the general principle for the granting of leave to appeal, as follows:

² (19577/09) [2016] ZAGPPHC 489 (24 June 2016)

³ [2019] ZANWHC 25.

"The test to be applied is now higher than what it used to be. It is no longer whether another court may (might) come to a different decision than what the trial court arrived at. It is now whether another court, sitting as court of appeal, would come to a different decision."

14) In *S v Zide*⁴ the learned DJP Nhlangulela, though in a criminal case, distinguished among other from the test of 'reasonable prospects of success', that

"The High Court having the application for leave to appeal to the Full Court or Supreme Court of Appeal must make its decision dispassionately based on the facts and the law. What the Court is expected to do is disabuse its mind of the fact that it convicted the applicant and its decision is now being criticised on appeal."

15) Accordingly, this Court must consider whether another Court will come to a different conclusion.

Grounds of appeal:

16) The grounds of the appeal relied on by the Applicant (First and Second Respondents) are that the court a quo erred in the following respects:

1. By finding that the First Respondent, thus in the capacity as executrix, was residing in the property of her deceased mother, granting an eviction order against the First Respondent while no objective facts were presented to the Honourable Court that the First or Second Respondents were occupying the

⁴ (49B/06) [2018] ZAECHMC 17 (22 March 2018).

property. In substantiation, service of the application on the Second Respondent was effected at her own home address, and not at the property of the deceased;

2. By finding that the First and or Second Respondent must repay to the estate (presumably the estate of her father) the amount of R 124 700.00 (One Hundred and Twenty - Four Thousand, Seven Hundred Rand) when no evidence to the calculation of the amount was presented; and the Second Respondent's admission that an amount R 93 500.00 (Ninety - Three Thousand Five Hundred Rand) was withdrawn from the account of her deceased father, which amount was utilised for the upkeep of both estates, and specifically: a Funeral costs; b Tombstone costs; c) Levies; d) Rates and taxes; e) Insurance; f) Car maintenance; and g) Internet subscriptions. was not considered.
3. By finding that the First and Second Respondent obstructed the process of winding up the estates when the First and Second Applicant failed to apply for her appointment of executrix for a period of more than 5 (five) months after the death of her father, Tommy Tabak; and failed to engage with the Fourth Respondent for 9 months from date of submission of her application for appointment of executrix for the estate late Miriam Tabak;
4. By finding that the First Respondent irregularly acted as nominee when the vehicles of her deceased parents were transferred into her name; and that the vehicles must be transferred back into the names of the deceased, rejecting the First Respondent's submission that such transfers are not possible;
5. By finding that a claim for expenses allegedly incurred by the Second Respondent, rendered her a creditor of the estate, without considering the

First and Second Applicant failed to attend to the appointment as executrix of the two (2) estates; operation of estate late bank accounts for both the deceased estates after her appointment; and refusing to contribute to the upkeep of the estate's assets when no access to the estate late accounts was possible.

6. By finding that the First Respondent was in dereliction of her duties by unilaterally agreeing to replace tiles in the property of the deceased Miriam Tabak when such repairs were covered by an insurance policy and while urgent repairs caused by water damage were required, affected prior to the appointment of either the First Applicant or First Respondent as executrix of the relevant estate.
7. By finding the First Respondent submitted a fraudulent insurance claim when the claim was paid by the relevant insurer; and declared by the First Respondent to be a benefit of the estate of the late Miriam Tabak.
8. By finding that the First and Second Respondent's refusal to accept assistance from Friedland as a professional appointed by the deceased as agent, when the transfer by Friedland of R 20 000.00 (Twenty Thousand Rand) to the Second Applicant from a trust account held in the name of the deceased Mrs. Miriam Tabak (which transfer took place after the death of Mr. Tommy Friedland), was not endorsed by the Second Respondent.
9. In addition, the Court a quo did not consider that Friedland failed to open an estate late account for the estate of the late Mrs. Miriam Tabak even 11 (eleven) months after her death; and Friedland charged the First and Second Respondent R 50 096.88 (Fifty Thousand and Ninety - Six Rand and Eighty - Eight Cents) for services rendered prior to the appointment of the First and

Second Applicant and First and Second Respondent as executrix for the estate late Tommy Tabak.

10. Moreover, and in support of the above, the Court a quo erred by rejecting the First and Second Respondent's preparation and submission of a draft Liquidation and Distribution account to the Fourth Respondent; and thereafter to the Applicants, with supporting vouchers, finding the First and Second Respondent in dereliction of her duties without having any regard to the provisions of Section 35(7) of the Administration of Estate Act, Act 66 of 1965.
11. The Court a quo erred in finding the proposed meeting with the Fourth Respondent, after submission of the draft Liquidation and Distribution accounts, was not required under the circumstances; and that such request by the First and Second Respondent was irrelevant premised on the finding that the First and Second Respondent was in dereliction of her duties, guilty of negligence, fraud, maladministration of estate assets; and conflict of interests. The First and Second Respondent attended to the Fourth Respondent in compliance with her duties, yet the Court a quo found she refused assistance from independent professional advice.
12. The Court a quo erred in finding the Second Respondent liable for the costs of the application when she acted within the scope and duties of an executrix, and not in her personal capacity.
13. The Court a quo reliance on the tender of the First Applicant to relinquish her duties as executrix for the estates is misplaced as the First Applicant failed to pro - actively engage in her appointment as executrix; and thereafter the management of the estates, while disputing the First Respondent's authority to do so.

17)The new issues being raised on the leave to appeal application cannot be entertained, as a matter of law.

18)In the present case, though the applicant avers that she, to the exclusion on the co-executrix, has completed the L&D account, the mere fact that its accuracy is disputed by one or more interested parties, including the co-executrix (respondent), it calls for an independent executor, which is what this Court ordered, in the best interest of justice for these two estates.

19)Subsequent to the order of the court a quo, the Legal Practice Council (LPC) has appointed one Mr. Mochi to proceed with the winding up of these estates. It is my humble view that the applicant should be supporting this move by the court to eliminate disharmony in this winding up process, instead of opposing it as she does, unless she has something to hide.

20)In addition, Mr. Mochi's as an executor should collate all information, invoices, and information already before the Master of the High Court, which would include the applicant's submitted L&D account. All disputed figures raised by the applicant herein would also be ascertained by him to determine accuracy. Factoring the Court a'quo's ruling, and he will as a matter of his assignment, he will have to ensure that he distributes assets of the two estates to all heirs, factoring realistic adjustments based on his findings, ensuring that previous relevant enrichment(s) by any heir are deducted from their individual portion of inheritance or bequeathals.

21)One of the issues that aggrieve the applicant, and that caused her to appeal is the cost order against her, in person. The cost order against the applicant (1st and 2nd Respondent) is justifiable where she was requested several times, even by experts to allow a professional to handle or assist with the winding of the estate, and also approached prior to the original application being brought before the court to voluntarily step aside together with the respondent (1st and 2nd Applicant), and allow professionals or at least cooperate with them, but she refused and insisted on continuing to handle an estate in the objectionable manner she did. She is clearly still insisting even at the moment with this intended appeal. Costs were inevitable and justifiable in the circumstances. It would be unfair to other heirs and beneficiaries for the estates to be burdened with such costs, which were avoidable.

22)Taking into consideration the above, the common cause facts and the admitted facts by the Applicant (1st & 2nd Respondents) in the papers, it is clear that another Court will not come to a different conclusion in the matter.

23)Accordingly, the application for leave to appeal is dismissed.

LMA MATJELE

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant: Applicant in person

Attorneys for the Applicants: Gerhard Botha Attorneys Withdrew

Counsel for the Respondents: K. Howard

Attorneys for the Respondents: Hugh Raichlin Attorneys

Date of the Hearing: 4 December 2025

Date of Reasons: 20 February 2026