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

REPORTABLE

Case no: A106/25
Court *a quo* case no: 13157/2024

In the matter between:

ECKERT BRAND	Appellant
and	
D[...] B[...]	First Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	Second Respondent

Coram: Le Grange J, Lekhuleni J et Kantor AJ

Heard: **26 March 2026**
Judgment: **12 May 2026**

Summary: Appeal against removal of an executor in terms of section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965.

ORDER

1. The appellant's application to adduce further evidence on appeal is granted, with costs to be costs in the appeal.

2. The first respondent's application to adduce further evidence on appeal is dismissed, with costs to be costs in the appeal.

3. The appeal is upheld with costs, including the costs of the application for leave to appeal to this court and to the Supreme Court of Appeal, with scale C applying to the costs in this court.

4. The order of the court *a quo* is varied to be as follows: 'The application is dismissed with costs, with scale C applying.'

JUDGMENT

Handed down by email to the parties on 12 May 2026

Judgment handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII.

KANTOR, AJ:

1. After I prepared and distributed this judgment, my colleague, Justice Lekhuleni, prepared a judgment which I have had the pleasure of reading and considering. We both consider that the appeal is against the exercise of a discretion in the strict sense by the court *a quo* which requires (relevant to this matter) misdirection on fact and/or law for appellate intervention. What I consider to be a core and material difference between our approaches in this matter which

contains myriad disputes of fact, is as follows: in my view, in order to make the determination under section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965 ("the Act") which is the core issue in this matter, the court must first determine the material before it on which that determination is to be considered and made. Accordingly, I believe that one must undertake the exercise of considering and resolving, through the prism of *Plascon-Evans* (considered in detail below), the myriad disputes in the matter. This is necessary to determine the material grounds which have in fact been established and which are before the court on which the section 54(1)(a)(v) determination is to be made. Once that is done and the evidence and material on which the court is to make the determination has been identified, the court has the material on which the section 54(1)(a)(v) determination is to be made. As appears from what is contained in this judgment and the reasons articulated therein in some depth, I considered the evidence through the prism of *Plascon Evans* and came to the conclusion that each of the material grounds on which the first respondent relied in her papers were not established and, as a result, there was no basis established for the removal of the appellant as executor.

2. The appellant was nominated as executor in the will of M[...] B[...] ('the deceased') executed on 19 April 2022 ('the Will') and was appointed as such in respect of the estate of the deceased ('the Estate') by the second respondent ('the Master') who issued letters of executorship in this regard on 23 May 2023.

3. The first respondent successfully applied to the court *a quo* for the removal of the appellant from his office as executor, as well as other relief ancillary thereto and in relation to his remuneration in that capacity. The decision of the court *a*

quo is reported as *D.B. v Brand and Another* [2025] 1 All SA 102 (WCC). The appellant appeals that decision to this court, with the leave of the Supreme Court of Appeal, the court *a quo* having refused leave to appeal.

4. The Deceased and the first respondent were married in 2006. In 2014 the first respondent instituted divorce proceedings, which were acrimonious. The deceased was represented by the appellant. The deceased opposed the first respondent's claims vigorously and he claimed forfeiture of matrimonial benefits against the first respondent. In the divorce proceedings the marital regime was in dispute. On 2 December 2014, this was determined by this court, as sought by the first respondent, to be in community of property. The deceased was refused leave to appeal, including by the Supreme Court of Appeal. When the Deceased died on 29 January 2023, he and the first respondent were still married.

5. In consequence of the Deceased's death pre-divorce, with the marriage being in community of property, the legal position is that the whole joint estate falls under the administration of the executor appointed to the estate of the Deceased. The "*… person to liquidate the joint estate is the executor of the first dying, acting in consultation with the survivor, and that the survivor was entitled to one half of the nett residue of the estate after it was liquidated and the debts of the joint estate were paid.*" (*Hare v Estate Hare* 1961 (4) SA 42 (W) at 45H, with reference to *Van Wyk v Joubert* 1947 (1) SA 285 (T) at 290). The duty of the executor of the joint estate is to discharge all its liabilities before distributing it. Half of the nett balance of the joint estate vests in the surviving spouse:

*Costain v Godden* 1960 (4) SA 458 (SR) at 461E, referred to with approval in _*Hitzeroth v Brooks* 1965 (3) SA 444 (A)_ at 452C-E.

6. The Deceased executed the Will on 19 April 2022 in which he acknowledged the first respondent's half share of the joint estate and that she was entitled to the value thereof. In clause 8 thereof, his negative feelings towards the first respondent were made clear to the effect that she was not to inherit anything from him and that the executor should defend any claims which she may assert against his half of the Estate, with his reasons articulated in somewhat unrestrained terms. This clause 8, which the court *a quo* identified as being '*vile*' and described as '*unpalatable*' in paragraph 12 of the Judgment, reads as follows:

> "Should at the time of my death I still be married to my still wife D[...] T[...], I herewith direct that she is not to benefit from my will at all and she is in total disinherited. The reasons for disinheriting her are inter alia:
>
> 8.1 That she, when she announced her divorce from me in writing undertook to, despite the divorce, tend to me in my old age, an undertaking she has shamefully neglected;
>
> 8.2 That she during the divorce-proceedings wrongly and maliciously made false accusation of rape and assault against me, which she was never able to substantiate;
>
> 8.3 That she, through her greed, refused to accept settlement offers made in the divorce-proceedings, that were way beyond what she was in fact entitled to and protracted the proceedings to such an extent that she stole the childhood and youth of our minor sons and 10% of my life and destroyed my wealth and our children's inheritance.
>
> 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 impossible. My executor will be entitled to his reasonable fees for work related to the opposition of any claims as mentioned above."

7. In clause 2 of the Will the appellant was nominated as the deceased's executor.

8. As mentioned, the Deceased died on 29 January 2023 and the appellant was appointed executor to the Estate of the Deceased by the Master on 23 May 2023.

9. Before the court *a quo*, the first respondent sought the removal of the appellant from his position as the executor of the Estate.

10. Removal of an executor by the court is governed by section 54(1) of the Act which provides as follows:

> **54. Removal from office of executor**
>
> (1) An executor may at any time be removed from his office—
>
> (a) by the Court—
>
> (i) ...
>
> (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 any heir, debtor or creditor of the estate, any benefit to which he is not entitled; or
>
> (iii) if he has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as executor or to effect or to assist in effecting such recommendation; or
>
> (iv) if he has accepted or expressed his willingness to accept from any person any benefit whatsoever in consideration of such person being engaged to perform any work on behalf of the estate; or
>
> (v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned; …

11. Relevant for the purposes of this appeal is section 54(1)(a)(v), the question being whether a court is satisfied for any other reason besides those listed above it that it is undesirable that an executor should act as such.

12. The first respondent brought an application in terms of section 54(1)(a)(v) of the Act for the removal of the appellant from the office of executor of the Estate.

Section 54(1)(a)(ii) was later also relied upon, but it did not play a material role in the matter or on this appeal and will not be considered further. That application succeeded before the court *a quo*. The Judgment and the Order of the court *a quo* will be referred to as the 'Judgment' and the 'Order'.

The Notice of Appeal

13. For the sake of completeness, it was averred by the first respondent that the Notice of Appeal was defective because it did not articulate the grounds of appeal. Uniform rule 49(4) provides:

> Every notice of appeal and cross-appeal shall state –
> (a) what part of the judgment or order is appealed against; and
> (b) the particular respect in which the variation of the judgment or order is sought.

14. The Notice of Appeal complies with this sub-rule which is what is required: see the analysis in *Wiese and Another v Absa Bank Limited* [2017] 2 All SA 322 (WCC) at paragraphs 3 to 17. The first respondent did not press this point at all in oral argument. Nothing further need be said on this aspect.

Evidence on appeal

15. Both the appellant and the first respondent applied for further evidence to be admitted on appeal. The appellant's application was initially opposed by the first respondent, but on 17 March 2026 (the hearing was on 26 March 2026) the opposition was withdrawn. On the same day, the first respondent launched her application, which the appellant opposed.

16. These applications were dealt with at the outset of the hearing. The appellant's application was granted, with costs to be costs in the appeal. The first respondent's application was refused, with costs to be costs in the appeal. The court indicated that reasons would be included in this judgment. What follows, are the reasons for that order.

Legal principles

17. Section 19(b) of the Superior Courts Act 10 of 2013 ('the SC Act') provides that:

> "The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law– … (b) receive further evidence;".

18. The courts are reluctant to admit new evidence on appeal, exercise the discretion to do so sparingly and will only do so in special circumstances. This is because of the interest in the finality of litigation. The evidence must be weighty and materially relevant to the matter, its absence before the court *a quo* should not be due to the fault of the applicant for its admission, there must be a reasonably sufficient explanation why it was not led at trial and there must be no prejudice to the other parties: see *Afribusiness NPC v Minister of Finance* 2021 (1) SA 325 (SCA) at paragraph 11 and, in general, Erasmus *Superior Court Practice* Vol 1 at D140-145. In *Prophet v NDPP* 2007 (6) SA 169 CC at 185E it, was held that new evidence may only be admitted on appeal "… *in exceptional circumstances where the evidence sought to be submitted is "weighty, material and to be believed" and there is a reasonable explanation for the late filing of the evidence.*"

The appellant's application

19. The appellant's application is simple. The first respondent had commenced litigation against the deceased's son and his wife in Germany, the material relevance of which will be dealt with in some detail later in this judgment. Subsequent to the Judgment (of the court *a quo*), the German appeal court found against the first respondent. The result of the German appeal is materially relevant, as appears from the consideration of that issue below. The first respondent relied, including in reply, on the ongoing nature of these proceedings in Germany which had by then not yet been dismissed on appeal. The absence of this evidence before the court *a quo* is self-evidently not the fault of the appellant because it was not yet in existence.

20. This is a good example of when new evidence should be admitted on appeal and it was no surprise that the first respondent withdrew her opposition thereto. Further, it emerged from the papers that the first respondent had applied to the German Constitutional Court in respect of the appeal decision, which went against her, and that was dismissed. The first respondent's German litigation was therefore finally adjudicated on and dismissed. The court granted the appellant's application for further evidence to be admitted on appeal.

The first respondent's application

21. While the appellant's application was a quintessential example of when evidence should be admitted on appeal, the first respondent's application was a typical example of when it should not be. . Her application was for the admission on appeal of evidence, in the form of her 21 page founding affidavit in her application and the annexures thereto, which includes portions of

paragraphs of affidavits and annexures from the application under case number 2025–177657 of this court which is pending and is set down for hearing on 18 August 2026 ('the 177657 Application'). Aside from, and as appears from, the reasons below, this evidence would also introduce into the matter numerous further disputes of facts.

22. The court refused the first respondent's application for further evidence to be admitted on appeal, with reasons to be provided in this judgment. The main aspects of the first respondent's 21 page affidavit motivating her application, and which she sought to be admitted as further evidence, are considered below.

23. The first respondent avers that the appellant made '*perjurious allegations*' as to the German litigation having reached the stage of final judgment in his answering affidavit filed on 29 January 2026 in the 177657 Application because 'a constitutional complaint' had been filed on 21 November 2025 with the German Constitutional Court, which was pending until 13 March 2026 when it was dismissed; and that this "*…should therefore disqualify him from continuing to act as executor.*" This accusation is watered down somewhat a paragraph later in the affidavit in which the first respondent stated that the appellant "*… at all times keeps himself informed as to progress made in German litigation and that, therefore, he would been fully aware of the launching of my constitutional appeal.*" What stands out from this is that the first respondent does not say that the appellant was informed by her or anyone else or was served with the papers. Her case is based on inference from which she makes her serious accusations of perjury. On her own version, there is no evidence that the

appellant knew about what had been submitted to the German Constitutional Court. In his opposing affidavit, the appellant explained that by 29 January 2026 he did not know about the approach to the German Constitutional Court and that no constitutional point had been raised before. In my view, this aspect does not satisfy the legal test for the admission of new evidence on appeal.

24. The next point raised by the first respondent was that the effect of the result in the German litigation is that H[...] B[...] ('H[...]', the deceased's son from a previous marriage) is the owner of the applicable properties and that the appellant therefore had nothing to do with those properties which, she argues, supports his removal because those properties do not form part of the estate and the appellant caused funds of the estate to be squandered in the litigation in Germany. The problem with this thesis is that the appellant's actions, considered in some detail below, were all geared towards bringing the litigation which he regarded as having no prospect of success to an end to reduce joint estate funds being spent thereon (anything the first respondent spent on that litigation reduces the extent of the Estate; further she had not undertaken that any such costs would be paid from her half share of the Estate). In my view, this aspect does not satisfy the legal test for the admission of new evidence on appeal.

25. The next point concerned the observations, in the German appeal judgment and by the court *a quo*, of the close temporal link between the marital strife between the Deceased and the first respondent and the transfer of the properties which suggests a lack of good faith. The obvious problem with this is that the observations of those courts relate to the Deceased, not the appellant.

The court *a quo* stated that the appellant was defending the *indefensible* (paragraph 126 of the Judgment). The obvious problem with this is that the appellant was proved right in his view that the first respondent's German litigation would fail and was a wasteful exercise, including in respect of costs (the first respondent was ordered to pay the costs of the German litigation) – the indefensible proved to be defensible in the German litigation as the appellant had contended: see *National Scrap Metal v Murray & Roberts* (809/2011) [2012] ZASCA 47; 2012 (5) SA 300 (SCA) at paragraph 22 quoted below, including that "… the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered." In my view, this aspect does not satisfy the legal test for the admission of new evidence on appeal.

26. The next aspect was the averment that the dismissal of the first respondent's German appeal does not mean that the application of the principles of South African law by the court *a quo*, which are different to German law, should be set aside on appeal. This compares apples with pears. The German law in question related to the onus to be applied in the German litigation. The issue between the appellant and the first respondent in respect thereof was the continuation of the German litigation in which that German law applied. South African law was irrelevant to that issue. It is meaningless to postulate that applying the different onus applicable in South African law may have had a different result because what was in issue was the result of a German case. In my view, this aspect does not satisfy the legal test for the admission of new evidence on appeal.

27. The court had also to consider the averment that the first respondent's and the deceased's joint ownership had not been registered over properties in Germany. The reason for that is obvious: they did not know that they were married in community of property (this is addressed in some detail below). Similarly, it is my view that this aspect as well, does not satisfy the legal test for the admission of new evidence on appeal.

28. Furthermore, the court had to determine the argument that the appellant impermissibly obtained an interdict against the first respondent not to deal with Estate property, including the six German units registered in her name. The obvious problem with this is that the obtaining of the interdict is raised in the papers and can be considered on the papers as they stand. The appellant recorded in his affidavit that he has not yet applied to be recognised as the executor in Germany because of a shortage of funds in the joint estate. I might add that whether or not he does so, does not entitle the first respondent to deal with those properties because they fall into the joint estate (the authority as to the effect of the death of a spouse married in community of property is dealt with below). The first respondent also contended that she and only she had, to the exclusion of the Estate, any interest in the six German units registered in her name. In my view, this is unfounded: first, the reason for the entry in the register (termed a *caveat* by Mr Barnard, who appeared for the first respondent, which seemed apt) was pertinently recorded in the German judgment to be to eliminate a *bona fide* acquisition. There is no suggestion that the absence thereof would convert (between the spouses in community of property) what is a joint estate property to one which is somehow owned separately in another estate by the first respondent. I do not know the German law, but I highly doubt

that that is the case, and, further, anyone relying thereon would need to prove it as a matter of fact. What matters for present purposes is that the first respondent's assertion does not in fact appear from the German judgment relied on by the first respondent. Second, this point was not relied upon in the papers. The issue in this regard was taken up in paragraphs 119 to 125 of the founding affidavit and no mention is made therein of this point, the allegation made therein having been that the appellant had attempted to circumvent another German judgment of 23 November 2023 relating to his attempt to be included in the German litigation brought by the first respondent. Third, there was no suggestion that the appellant was aware of this alleged point of German law (which I do not consider to have been established and regard as dubious, as mentioned) and therefore he cannot be criticised on the basis thereof. In my view, this aspect does not satisfy the legal test for the admission of new evidence on appeal.

29. The next point was that on 30 June 2017, the deceased guaranteed in writing that he would reimburse H[...]'s costs of litigation against the first respondent and that he ceded his claims in writing against the first respondent in respect of the six apartments in Munich to H[...]. The first respondent avers that the '*likely conclusion*' is that the appellant paid H[...]'s costs from the estate or allowed them to be paid out of the rentals in Germany. It is also stated that it is '*most unlikely and improbable*' that the appellant would not have known about these arrangements and would not have implemented them in favour of H[...]. The first respondent also avers that the appointment of H[...] as custodian of funds would have facilitated the set-off and that it is clear why the two critically important documents made their belated appearance in the 177657 Application,

probably by accident. There are numerous problems with these allegations. The first is that they are inferences based on alleged likelihoods and probabilities. Second, these are documents signed by the deceased, not the appellant. Third, the appellant states in his affidavit that the two documents were not included in error in the 177657 Application and were not deliberately withheld in the instant matter. He explains that he provided them in the 177657 Application as the documents which H[...] used to support his claim to be reimbursed his costs by the Estate and to persuade the appellant to agree to do so. The appellant points out that this is not an indication that H[...] has been reimbursed from the Estate. The appellant confirms that H[...] was not so reimbursed. In the answering affidavit in this matter, and in the opposing affidavit in the first respondent's application to introduce further evidence on appeal, the appellant explained why he did not and will not accept H[...]'s claim in totality, had reservations about it and that it will be addressed in the normal course of the administration of the estate. Fourth, he does not know whether anything was paid by the Deceased to H[...] while he was alive. As from his appointment as executor, the appellant records that no payments were made to H[...] from the Estate. Equally, , this aspect, in my view, does not satisfy the legal test for the admission of new evidence on appeal.

Legal principles

The removal of an executor in terms of section 54(1)(a)(v) is the exercise of a discretion; the approach of an appeal court in an appeal against the exercise of a discretion in this context by a court a quo

30. The Constitutional Court has held that a decision to remove an executor in terms of section 54(1)(a)(v) (as the court *a quo* did) amounts to the exercise of

a discretion in the strict sense and will be interfered with on appeal only in limited circumstances, for example if it is shown that the court *a quo* did not act judicially in exercising its discretion, or based the exercise of that discretion on a misdirection on the material facts or on wrong principles of law. In these respects, the Constitutional Court held as follows in *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC) at paragraphs 56 and 57:

> "[56] In terms of section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965, an executor may at any time be removed from his office by the Court if for any reason other than those set out in the rest of section 54(1)(a), "the Court is satisfied that it is undesirable that he should act as executor of the estate concerned". In *Die Meester v Meyer en Andere*, Margo J (with whom Davidson J and Franklin J concurred), dealing with the approach to be followed by a court in exercising its discretion under this section, held as follows:
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> > "Hoe dit ook al sy onder die gemenereg en ingevolge die gewysdes onder die ou Boedelwet, 24 van 1913, is die Hof nou gemagtig kragtens art. 54(1)(a)(v) van die huidige Boedelwet om 'n eksekuteur te verwyder indien dit onwenslik is dat hy as eksekuteur van die betrokke boedel optree. Die Hof het hier 'n diskresie en myns insiens bly die oorheersende oorweging die belange van die boedel en van die begunstigdes." [1]
>
> [57] … The discretion vested in the High Court by section 54(1)(a)(v) is a discretion in the strict sense and an appellate court will ordinarily only interfere with the exercise of that discretion in limited circumstances; for example if it is shown that the High Court did not act judicially in exercising its discretion, or based the exercise of that discretion on a misdirection on the material facts or on wrong principles of law."

31. Being, as held in *Gory*, a discretion in the strict sense, the consideration on appeal of the exercise thereof is governed by the following principles, as held by the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1 (CC) at paragraph 11:

> "A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong

[1] The following translation of this passage in the headnote of the reported judgment in *Meyer* at 2E-F is quoted in footnote 65 of *Gory*: "Whatever the position may be [u]nder the common law and according to the authorities under the old Administration of Estates Act, 24 of 1913, the Court is now empowered in terms of section 54(1)(a)(v) of the present Administration of Estates Act, 66 of 1965, to remove an executor from office if it is undesirable that he should act as executor of the estate concerned. The Court has a discretion and the predominating consideration remains the interests of the estate and of the beneficiaries."

principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."

32. The exercise of a discretion can therefore be set aside on appeal, but not on the basis *per se* that the appeal court disagrees with the decision, and only in certain circumstances, such as in the case of material misdirection on the facts or in law. As held in *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at paragraph 41:

> "Therefore the question for this Court is not whether we would have permitted radio and television broadcasting of the appeal in the circumstances of this case, but whether the Supreme Court of Appeal did not act judicially in exercising its section 173 discretion, or based the exercise of that discretion on wrong principles of law, or a misdirection on the material facts."

33. In regard to this aspect in general, see also *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at paragraphs 85 to 87.

Removal of an executor

34. The removal of an executor in terms of section 54 is a *drastic step* which the court will not grant lightly: *Segal v Segal* 1979 (1) SA 503 (C) at 506G; *Basson v Redelinghuys* 1945 CPD 194 at 196 (which describes it as *very drastic*), Meyerowitz *The Law and Practice of Administration of Estates and their Taxation* 2025 edition at paragraph 11.1 which describes it as "… *a very drastic step which the court will not grant lightly.*" Footnote 66 of Gory (at 121H) reads (albeit in respect of an earlier edition, but the content appears in principle to be largely the same) "On the removal by the court of an executor in terms of s 54(1)(a)(v), see generally Meyerowitz … at 11-1 – 11-5 and the authorities there cited."

35. For an example where there were numerous proved contraventions on the part of the executor but he was not removed, see *Visagie v Bosua N.O and Others* (342/2024) [2024] ZAMPMBHC 85 (29 November 2024) in which it was held at paragraph 29 that:

> "Section 54(1)(a)(i) affords the Court a discretion to remove an executor from office, "…..*the predominating consideration remains the interests of the estate and the beneficiaries."* Much is required for the removal of an executor. A failure to exercise his or her duties or to strictly observe the law is not enough. In Sackville West v Nourse and Another it was said: " … *it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity…".* Reasonable fidelity depends on the circumstances of each case, in particular, whether the executor is dishonest, grossly inefficient or untrustworthy. The court must be able to reasonably foresee that the executor's conduct, as demonstrated by proven past conduct, is expected to expose a deceased estate to risk or actual loss. See: Oberholster N.O. and Others v Richter [2013] All SA 205 GNP. What is required from an executor is to act with the necessary skill and care, independently and in the interest of the deceased estate and its heirs while having due regard to the rights of the deceased estate's creditors."

36. For an example of the removal of an executor where he had secured his appointment through dishonest means, thereby committing an offence, see *Goss v Bennett* (A5021/2022) [2023] ZAGPJHC 556 (31 May 2023) in which the Court stated:

> "[18] It should be recalled that section 54(1)(a)(v) confers a discretion on the Court to remove an executor if it is satisfied that it is just and equitable for the executor to be removed. However, the Court must exercise its discretion judicially. It is not only the interests of the estate and that of the heirs as contended by the appellant that should be considered in this case. But whether the person so appointed as executor and the manner in which he conducted himself in securing his appointment serves the interest of justice considering that the administration of estate is governed by the law. The offending conduct of disregarding the prescripts of the Act has deprived and prevented the Master from a general overview of the facts surrounding the estate of the deceased.
>
> [19] The gravamen of the respondent's complaint is the manner in which the appellant secured his appointment as the executor of the estate of the deceased. The question that faced the Court a quo was whether it is just and equitable to allow the appellant, who has conducted himself in a dishonest and unethical manner when he secured his appointment as executor by breaching the provisions of the act which rendered him guilty of an offence, to continue with the winding up of the estate of the deceased. Put in another way, whether a person who commits an offence to secure his appointment as executor can be expected to act and produce the best results in the interest of the estate and its heirs.

> [20] It is my respectful view that the Court a quo correctly answered the above question in the negative. Allowing the appellant to continue as the executor of the estate of the deceased would be rewarding him for the dishonorable and unethical conduct he has committed to secure his appointment as executor. The Court cannot countenance the flagrant disregard of the law by the appellant when he reported the estate of the deceased. The offending conduct of the appellant amounted to the flagrant disregard of the standard of complete honesty, reliability and integrity expected of an attorney. I hold the view therefore that the Court a quo cannot be [faulted] in the exercise of its discretion when it ordered the removal of the appellant as the executor of the estate of the deceased for his appointment was unlawful."

37. Negligence in administration, in the absence of prejudice, does not warrant removal: *Meyerowitz* at paragraph 11.1, citing a trust case, *Sackville West v Nourse* 1925 AD 516, in respect of which it submitted the principle to be the same for executors. I agree. The principle was applied to executors in *Kennedy v Miller* [2005] JOL 15800 (T).

38. In *Harris v Fisher* 1960 (4) SA 855 (A) at 862C, it was held that an executor must not "*… act in such a way as to benefit himself at the expense of the other beneficiaries* …"

39. It is not *per se* a conflict of interest to be a beneficiary and an executor. Where an executor is a beneficiary, he/she "… *holds a fiduciary position towards the other beneficiaries, and therefore his acts will be narrowly scrutinised; he should not derive any personal benefit from the manner in which he conducts the business or manages the assets of the estate.*" *Meyerowitz* at paragraph 11.1.5, citing *Harris v Fisher* 1960 (4) SA 855 (A) at 862B-E and *Beukman v Pieterse NO and Others* [2024] ZAWCHC 391 (26 November 2024) at paragraph 45 which reads:

> "The facts outlined earlier indicate that the second respondent harbours a clear conflict of interest and is intransigent with regard thereto. No legal basis is revealed in the evidence for the second respondent's claim to retain the guesthouse income. The correspondence indicates that, since the appointment of the executors, the applicant has been sent from pillar

> to post, mostly to get the second respondent to comply with the clear terms of the Will. And regrettably, the first respondent failed to bring to bear an objective mind to the respective beneficiaries' dispute in this regard. The equities were accordingly tilted against the applicant. This is one reason I am of the view that it would be just and equitable for the second respondent to be removed as an executor. <u>Her interests as a beneficiary in this matter are interfering with her duties as an executor</u>." [my emphasis]

40. Where an executor's private interests conflict with those of the estate or the beneficiaries, removal from office may result. This is because he would have a conflict of interest. In this regard:

    40.1. An executor/executrix will be removed from office if he/she has a claim against the estate which is disputed by the heirs. The court need not go into the validity of the claim because the question as to who is right or wrong is irrelevant. The reason for this is that the executor/executrix finds himself/herself in the impossible position of having to argue for his/her claim as creditor and resolve the dispute as to his/her claim as executor and therefore cannot be impartial: <u>*Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A)</u> at 724G; <u>*Barnett v Estate Beattie* 1928 CPD 482</u> at 484-5.

    40.2. The court has removed an executor who pursues a personal agenda in the administration of the estate: <u>*Judin v Jankelowitz* 2010 JOL 26471 (SG)</u> at paragraph 17.

    40.3. <u>*Reichman v Reichman* 2012 (4) SA 432 (GSJ)</u> concerned the removal of an executor due to conflict of interest. In that matter, there were wide-ranging disputes between children of the deceased, one of whom had been appointed as executor. That son caused summons to be issued against his brother "… in which he (acting as executor) is seeking an order that the 'will' is valid and that he (in his personal capacity) should be declared the sole heir of the deceased." The court removed him as executor.

41. Hostility or disagreement or breakdown of the relationship between the executor and the heirs is not sufficient reason to warrant the removal of an executor: Meyerowitz at paragraph 11.1.3, citing *Oberholster NO and Others v Richter* [2013] 3 All SA 205 (GNP) in which it was held as follows at paragraph 17 (see also *Nieman v Olivier and Others* (4921/2024) [2026] ZANWHC 30 (16 February 2026) at paragraph 36):

> "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."

42. This is a common theme: as held in (a trust case) *Volkwyn NO v Clarke & Damant* 1946 WLD 456 at 474: "… the essential test is whether such disharmony as exists imperils the trust estate and its proper administration" and at 464 that for removal "… the particular circumstances of the acts complained of are such as to stamp the executor 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."

43. *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 16C-17F referred to authority to the effect that "… the acts of omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity … main guide must be the welfare of the beneficiaries."

44. Ultimately, in the exercise of the discretion to remove, as stated in *Meyer* at 17E-F, and approved by the Constitutional Court in *Gory* at paragraph 56, "… the predominating consideration remains the interests of the estate and of the beneficiaries."

Disputes of fact

45. The court *a quo* pointed out in paragraph 16 of the Judgment that "*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.*" In paragraph 27 of the judgment in the application for leave to appeal it was stated that there are *hundreds* of disputes of fact.

46. A factor in this matter is that it was brought and persisted with on motion in the face of many disputes of fact. *Nadat v Bibi-Sulaman and Another* (1718/2022) [2024] ZALMPPHC 39 (23 April 2024) is an example where an application for the removal of an executor was refused when it was sought on motion and there were disputes of fact.

47. The rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C therefore applies. As this rule plays an important role in this matter, I consider it worthwhile not to resort to the common '*Plascon-Evans*' reference but rather to quote the *dictum* of Corbett JA (as he then was):

> "Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 E-G, to be:
>
> > ".... 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".

This rule has been referred to several times by this Court (see *Burnkloof Caterers Ltd v Horseshoe Caterers Ltd* 1976 (2) SA 930 (A) at 938 A-B; Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (A) at 430-1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G-924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163-5; *Da Mata v Otto NO* 1972 (3) SA 585 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (*cf Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case, *supra*, at 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board* 1983 (4) SA 278 (W) at 283 E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra*, at 924 A)."

48. This was commented on as follows in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA):

"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* [2005] ZAWCHC 6; 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the

veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

49. In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) it was held as follows at paragraph 26:

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. 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 (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be 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. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."

50. While trite, I consider it to be important to identify the core elements of what has entered the South African legal vernacular as the *Plascon-Evans* rule, owing to its importance as the prism through which the material evidence in this matter is to be viewed and considered:

50.1. Motion proceedings will be adjudicated on the facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent. Put another way, an applicant who seeks final relief on motion, in the event of conflict of fact, does so on factual version set up by his opponent.

50.2. This is subject to two main qualifications:

50.2.1. Where facts, though not formally admitted, cannot be denied, they must be regarded as admitted. This would also include the situation when a bare denial is made in circumstances in which the respondent must necessarily possess knowledge of the facts averred and be able to provide an answer.

50.2.2. Where the respondent's allegations do not raise a real, genuine or *bona fide* dispute of fact or are palpably implausible or so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

51. According to the Microsoft Word thesaurus: Palpably can mean obviously, unmistakeably or unambiguously. Implausible can mean unbelievable, fantastic, far-fetched or incredible. Far-fetched can mean unbelievable, implausible, fantastic or incredible. Fantastic can mean bizarre, fanciful, imaginary, incredible, unbelievable or implausible. The words feed off each other.

52. Finally on this aspect, a common companion of the dispute of fact is the request to refer specified issues to oral evidence (or the matter to trial), which is often opposed on the basis that there is no real dispute of fact. In other words, on the basis of the second qualification referred to above, that the version is palpably implausible or so far-fetched or clearly untenable that the court is justified in rejecting it merely on the papers and it would be futile to refer the matter to oral evidence or trial. In this respect the Supreme Court of Appeal has held as follows:

52.1. In *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA) at paragraph 36:

> "Media24 chose not to pursue this case by way of trial. Nor did it ask for the matter to be referred to oral evidence. In asking for it to be decided on the affidavits alone, it therefore bound itself to the long established approach described in *Plascon Evans*. That meant that the case could not be determined simply on a weighing of the probabilities as they emerged from the affidavits. The facts deposed to by OUP's witnesses had to be accepted, unless they constituted bald or uncreditworthy denials or were palpably implausible, far-fetched or so clearly untenable that they could safely be rejected on the papers. A finding to that effect occurs infrequently because courts are always alive to the potential for evidence and cross-examination to alter its view of the facts and the plausibility of evidence." [underlining added]

52.2. *In National Scrap Metal v Murray & Roberts* (809/2011) [2012] ZASCA 47; 2012 (5) SA 300 (SCA) at paragraph 22:

> "As was recently remarked in this court, the test in that regard is 'a stringent one not easily satisfied'. In considering whether it has been satisfied in this case, it is necessary to bear in mind that, all too often, after evidence has been led and tested by cross examination, things turn out differently from the way they might have appeared at first blush. As Megarry J observed in a well-known dictum in *John v Rees* [1970] Ch 345 at 402:
>
> > 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.' "
>
> [underling added]

General comment

53. It is in the aforesaid legal context that this court must consider, as held in *Gory*, whether the court *a quo* "… did not act judicially in exercising its discretion, or based the exercise of that discretion on a misdirection on the material facts or on wrong principles of law."

54. The papers and argument focused on whether there was misdirection on the material facts. The main aspects will be considered below.

55. In my view, the core issues in this matter are whether any of the following were established, warranting the removal of the executor: (1) conflict of interest; and/or (2) bias and/or dishonesty and/or untrustworthiness; and/or (3) maladministration imperilling the estate. I consider the core factual aspects pertaining to these issues to be (1) the litigation in Germany in regard to properties alienated by the deceased to his son H[...], (2) whether the appellant was biased in favour of H[...], (3) the circumstances in which the Will was drafted, i.e. whether the content thereof was created by the appellant or the Deceased and (4) the bequest in the Will of 4% in a close corporation to the appellant and any conflict of interest in relation thereto. These factual issues, amongst others, are dealt with below.

56. Each of the grounds raised by the first respondent against the applicant in the founding affidavit (with references to the replying affidavit as appropriate), using the headings of sections therein (or paraphrasing thereof) will be considered against the appellant's version in order to determine whether there were any misdirections of fact and/or law by the court *a quo* material to its conclusion that the appellant be removed as executor in terms of section 54(1)(a)(v) of the Act. These aspects will be dealt with in the order in which they are raised in the founding affidavit, save that those which relate to the 'German litigation' and 'H[...]' aspects (which span various headings in the founding affidavit) will be dealt with together first in one section.

The German litigation and alleged bias in favour of H[...]

"Litigation in Germany"

"The position of the [appellant] as agent for the deceased"

"Further evidence of the [appellant's] bias in favour of H[...]"

“The costs of H[...]’s litigation in Germany are being paid from the resources of the joint estate”

57. The core issue in this respect is whether the appellant was biased in favour of H[...], the Deceased’s son, to whom he transferred properties in Germany which the first respondent challenged in German litigation, and whether he was his client.

58. The court *a quo* found as follows:

58.1. The appellant had favoured H[...] above the estate and the first respondent (see paragraphs 124 to 134 of the Judgment in general), holding in paragraph 134 that *“The Respondent denies favouring H[...] to the detriment of the estate. The denial does not correlate with his actions as an attorney to the deceased and H[...] and his subsequent actions as Executor.”*

58.2. In paragraph 134 of the Judgment: *“The Respondent’s actions in favouring H[...], both in the latter’s retention of the units and his intention to accept H[...]’s claim against the estate, do affect the welfare of the estate. The court finds that the Respondent’s denial of any leaning towards H[...]’s preserving interest is implausible. The Court also finds that the Respondent’s support of H[...] 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.”*

58.3. In paragraph 131 of the Judgment: “*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 H[...].*”

58.4. In paragraph 125 of the Judgment: *“The evidence suggests that the transfers occurred as a ‘gift’.”* This concerned the transfers of the properties in Germany to H[...].

58.5. In paragraph 129 of the Judgment, that the facts "*… demonstrate his unwavering determination to halt the Applicant's litigation.*"

58.6. In paragraph 142 of the Judgment: "*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.*"

58.7. In paragraph 144 of the Judgment: "*The Respondent's actions suggest an undue inclination towards promoting the interests of H[...] and S[...] .*"

59. There are other examples in the Judgment, but I consider the above more than sufficient to illustrate the point.

60. The first respondent's main contentions (the papers are voluminous and a more comprehensive exposition of the evidence will unduly burden this judgment):

60.1. According to the first respondent, having taken advice from another attorney (Fanie Roux), that she had a claim to 50% of the joint estate on divorce, the Deceased, in November 2013, without the first respondent's knowledge or consent, which she would not have given, *donated* certain properties in Germany to his son H[...] which were transferred in 4 days instead of the usual 6 weeks, and the deceased obtained a usufruct over the properties. The first respondent averred that these actions by the Deceased and H[...] were aimed at diminishing and denuding her claims against the joint estate.

60.2. The first respondent commenced litigation in Germany against H[...] and his wife I[...] to amend the land registers which reflected them as the owners of the properties in question. The appellant entered the picture as executor and, having investigated the situation, reached the conclusion that the litigation should not be pursued and persisted with as it had no prospect of success and would be prohibitively expensive (even though the first respondent was paying for the litigation, the fact of the joint estate meant that ultimately it was funding those legal costs and she had not indemnified the Deceased's half share thereof from effectively sharing those costs). He wrote to the German court expressing his views against the first respondent's right to participate in the German litigation and applied to become a party to the litigation to provide his input, but this was refused by the German court. The first respondent submitted that the appellant's actions were made by him in the interest of and for the benefit of H[...] and as the agent of the deceased.

60.3. The deceased averred in litigation, "*upon grounds which were not legally sound, … that the German properties which he had transferred to H[...] should not form part of the joint estate.*"

60.4. In December 2022, six weeks before his death, the deceased launched proceedings in George, Western Cape, to declare and ratify the alienation of the German properties as being in the normal course of business for the purposes of the section 15(6) of the Matrimonial Property Act 88 of 1984 ('the MPA'). The first respondent contended that this was solely the appellant's doing because (1) the deceased could not understand such proceedings and form his own opinion and (2) this could only be to benefit H[...] because the deceased was about to die. By then, the appellant had already been nominated as executor and therefore had no intention to be impartial.

60.5. The first respondent alleged that:

60.5.1. "*The initiative behind such application could only have emanated from the [appellant], and could only have been inspired by the [appellant]'s intention to protect H[...].*"

60.5.2. The appellant "… *continued to actively conjure up ways and means with which to thwart and scupper my claims, in the interests of mostly H[...].*"

60.5.3. The appellant "… *had no intention to act impartially in assessing either my own claims against the estate, or the defences of H[...] to my claims against him (H[...]). The fact that he would prefer the interests of H[...] over those of any other parties with an interest in the joint estate, was a preconceived and premeditated decision.*"

60.5.4. Even in the matters where the appellant "… *was not the formally appointed attorney of record of the deceased, he continued to act as agent of not only the deceased, but also as representative of and in the interest of H[...].*"

60.6. The appellant failed to take cognisance of legal precedents overwhelmingly contradicting his own stance concerning the first respondent's capacity to act in the German courts as she was doing.

60.7. The appellant appointed H[...] to accept rental income from German properties and to keep those funds in a separate account and to pay them to the executor once letters of executorship have been received.

The first respondent alleged it to be "*… risible that the one co-perpetrator of the fraud forming the subject matter of my claims in the German courts, could be appointed as alleged custodian of funds arising from fraudulent transactions*." The appellant threatened an interdict in a South African court to stop the first respondent from interfering in the administration of the estate which the first respondent alleged to be *audacious*, *partisan* and *biased*.

60.8. The first respondent alleged there to have been *cloak and dagger* type of administration of the estate in that rental funds in Germany had been withheld there for the maintenance of the German properties as a result of which her personal maintenance instalment could not be paid from the estate, without indicating what exactly the total rental income is and what portion and by whom it had been withheld, which she alleged to be "… *a clear hallmark of an executor who has no desire or intention to discharge his duties in a properly transparent, objective and neutral manner. It furthermore paints the picture of an executor who has a personal agenda to conduct such administration in the favour of a party that he wishes to prefer and/or benefit, to the detriment of other parties having an interest in the funds and assets of the estate.*"

60.9. The Deceased had sent a WhatsApp message to the first respondent complaining that her German litigation against H[...] and the legal costs he had to pay to H[...]'s attorneys in Germany to defend them was *pulverising* the monies in the estate. The first respondent alleged that the appellant must have been aware at all times that the joint estate was paying for H[...]'s legal expenses in Germany and that he was most likely also aware that the rental income generated in Germany was abused, and continues to be abused, by H[...] for payment of such expenses.

60.10. The appellant sent a letter on 17 February 2023 in which he advised the first respondent (through her attorneys) that he had carefully considered all aspects of the German litigation and after careful perusal of the court documentation he had come to the conclusion that it would not be in the interests of the Estate to pursue that litigation which he intends to withdraw on condition that H[...] withdraws his claim against the Estate for €1 141 882 which the Deceased had accepted although the appellant was not personally satisfied that all the amounts would be recoverable by H[...]. The appellant expressed the view that given the high costs and risks of litigation it is not in the interests of the heirs of the Estate to continue with the litigation which would be better served if H[...]'s claim against the Estate and the litigation were both withdrawn. The first respondent alleged that the appellant had the *agenda* and *modus operandi* to "*… eliminate my litigation against H[...] in Germany to exonerate him (H[...]) from any liability to me and/or the joint estate, which liability in extent is far in excess of the amount of H[...]'s claim. By doing so he would vicariously do his (indirect) client H[...] a substantial favour*." The first respondent alleged this to be "… *egregiously unconscionable and unacceptable …*" and to demonstrate "… *an inability of substantial proportions to discharge the duties of an executor in a transparently neutral and unbiased manner.*"

60.11. The first respondent contended that the following extract from an email on 21 May 2020 from the appellant to the first respondent's previous attorneys in George "… *places the question whether or not the respondent acted on behalf or advised H[...], beyond dispute.*": "*In the light of your client's stance* ***we have no other choice to but advise Mr. H[...] B[...]*** *that has (sic) to forge ahead with his preparation for upcoming litigation in Germany …*" [the underlining, bold and italics is as in the replying affidavit].

61. Ultimately, the first respondent was alleging that the appellant had a bias in favour of H[...] which negatively affected the administration of the Estate.

62. The appellant's version:

62.1. He contends that there is nothing wrong with trying to "*… resolve a dispute which has been ongoing since 2014, without any progress being made therein, where the chances of success are negligible. I am not prepared to tie the estate up by waiting for the Applicant's vexatious ongoing litigation in the face of overwhelming evidence against her and thereby act to the detriment of the other heirs to the estate. I reiterate that I have got no special relationship with H[...] and am not acting as his agent in any way or form. What does concern me is the cost of the litigation in Germany and the possibility that the joint estate is substantially diminished thereby.*"

62.2. Having investigated the German litigation as executor, which included considering the papers and the law, he reached the conclusion that the litigation should not be pursued and persisted with as it had no prospect of success and would be prohibitively expensive (as I understood the effect of the facts, even though the first respondent was paying for the litigation, her funds are part of the joint estate, and therefore that expense would ultimately be funded by the joint estate; and she had not indemnified the Deceased's half share thereof from effectively sharing those costs). He wrote to the German court expressing his views against the first respondent's right to participate in the German litigation and applied to become a party to the litigation to provide his input, but this was refused by the German court.

62.3. He considered it appropriate to address the German court in correspondence because of the substantial impact of the German litigation on the joint estate especially when it came to costs, as he has an obligation towards the heirs of the estate to safeguard the estate's assets and where the first respondent litigates personally an adverse costs order against her, even though against her personally, has a significant effect on the joint estate. The correspondence was not written on the request of H[...] but rather out of concern for the Estate's assets and out of his obligation to take control over the Estate in its entirety. He requested the first respondent's input on his view but it was not received.

62.4. On his reading of the papers and a previous judgment of the German court, the appellant had formed the view that the continued litigation against H[...] was without merit and the likelihood of success negligible. He explained this in detailed letters to the first respondent's previous attorneys on 17 February 2023 and 2 October 2023.

62.5. The result on appeal confirmed this view. The fact of this result was allowed as evidence in this appeal, as mentioned above.

62.6. The costs of the litigation could be ruinous and H[...]’s claim is very substantial which makes it worthwhile considering the withdrawal of the matter on condition that he pays his own costs and withdraws his claim against the joint estate. This was the basis on which he was prepared to do this, which was a substantial *quid pro quo*.

62.7. The first respondent does not have the sole interest in the outcome of the litigation and the appellant cannot just act as she pleases because he is duty-bound to look after the interests of the heirs as well.

62.8. For these reasons the appellant’s view was that the German litigation should have been withdrawn and he wished to become a party for this purpose. The application for the latter was made in the interests of the estate and not H[...]. He had been advised by his German attorneys that they were satisfied with his chances of success and he therefore did not bring the application recklessly. The reason why the application was not granted, according to the judgment therein, was that an executor cannot involve himself/herself in matters relating to property which does not fall within the estate.

62.9. The result on appeal confirmed his view as to the merits of the German litigation. H[...] was found not to have acted in bad faith because at the time he did not know that the Deceased and the first respondent were married in community of property.

62.10. The appellant’s view was that only an executor can litigate on behalf of a joint estate. He disagreed with the opinion of the first respondent’s counsel in this regard and furnished his own written reasons in the form of a letter dated 22 August 2023. The appellant invited comment on his opinion from the first respondent, but none was forthcoming.

62.11. The first respondent's litigation in Germany failed, including on appeal (the result of that appeal having been introduced in evidence allowed in this appeal).

62.12. Before he was appointed executor, the appellant could not and did not receive the income from the rental of the German properties. Before the passing of the Deceased, the rental income had always been paid to H[...] who then paid the usufructuary interest to the deceased's account in South Africa. H[...] had always acted in this way and paid the Deceased without demur and it made sense for this practice to continue and to properly account to the appellant. He had a special account to receive the Estate's rental income for this purpose. This was the prudent thing to do in order to protect the incoming funds on behalf of the heirs of the Estate. After his appointment as executor, H[...] paid the funds into the estate account. The appellant told the first respondent that he was satisfied with the funds received. She never asked for an accounting. This is denied by the first respondent in reply but she does not provide any details thereof – what she provides is a reference by the appellant to her seeking an order in Germany against the managing agent there to provide information, but no request to the appellant. He received a full and proper accounting from H[...] and attached an accounting to the answering affidavit which reflected that H[...] had over-paid by €660. Nothing was ever deducted from the rent for any legal or other expenses. This matter is the first time that he has heard a concern from the first respondent in this regard. He had no reason to suspect H[...] of fraud in any respect. He refers to section 11 of the Act dealing with the temporary custody of estate assets pending appointment of an executor.

62.13. The first respondent threatened via her German attorneys to have the income due to the estate paid to her and the appellant applied for an interdict against her in this regard which was granted by this court.

62.14. Some of the rental income, by agreement between the appellant and the managing agent of the properties, was withheld to pay for the mandated maintenance to the public open spaces of the building in which the rental units are situated. This was authorised by the Body Corporate in a meeting in December 2023. The documentation from Germany set this all out and the first respondent was provided with a copy. No funds were withheld by H[...]. There was no cloak and dagger administration. All the relevant information was provided to the first respondent's attorneys.

62.15. The first respondent interfered in the collection of rental in Germany resulting in the agent withdrawing and the appellant having to collect the rental himself. This has created more difficulties because the appellant is unable to open a trust account in Germany and will have to convince tenants to pay rental directly to the estate account in South Africa which creates unnecessary administration and costs.

62.16. The appellant was not aware that the Deceased had been paying H[...]'s legal costs in Germany. That came as news to him in this matter.

62.17. The Deceased and the first respondent lived beyond their means and would sell property in Germany to finance their lifestyle. This caused a liquidity crisis and the banks were not prepared to release more properties from bonds. The only way to resolve the crisis was with debt restructuring. The deceased stumbled from one liquidity crisis to the next which was addressed by selling properties but that created a vicious cycle because, while the sale of a property paid debt, it at the same time resulted in cash-flow problems because of decreased rental income.

62.18. The restructuring involved transferring the remaining properties in Germany to H[...] in return for the payment of debts, including the bond, and a usufruct to be registered in favour of the Deceased until 2028 or his death. The bond liability at the time was €1 801 567 which was paid off/taken over by H[...].

62.19. At the time that the first respondent and the Deceased separated, neither of them was aware that they were married in community of property. They only became aware of this in 2014 after certain properties in Germany had already been transferred to H[...]. This was recorded by the first respondent's attorney in court papers filed by her in the German courts.

62.20. That the parties were previously unaware that they were married in community of property and that they believed that they were married according to the laws of Germany appears from a deed of transfer in respect of a property purchased by them in 2005.

62.21. The Deceased had invested in property all his life and was involved in many property transactions. He never obtained the first respondent's consent while they were married.

62.22. The Deceased transferred three properties to the first respondent in 2012 at substantial cost. There would have been no reason to do so were they to have believed that they were married in community of property.

62.23. The Deceased therefore did not consider that he needed the first respondent's consent to transfer property and the transfers in Germany were for the purpose of debt restructuring.

62.24. An independent accountant, Hilton Greenbaum ('Greenbaum'), was requested to report on the financial consequences of the transaction between H[...] and the Deceased. He prepared a written report which showed that the Estate was slightly better off from an asset perspective and there was no benefit to H[...], while the transaction resulted in the alleviation of cash flow problems because of the usufruct over rentals. In essence, debt had been reduced without reducing net asset value while cash flow was preserved. The asset/liability position in Euro was as follows:

Value of property transferred	5 373 000
Less: Land charge M[...] B[...]	(832 121)
Less: Deceased's liabilities paid by H[...]	(2 187 961)
Less: Value of usufruct	(2 012 054)
Less: Payments to the deceased	(450 970)
Less: Payment of legal costs to M[...] B[...]	(62 550)

Net value to the deceased: 172 655

62.25. Greenbaum also reported that the restructuring resulted in the net monthly income to the Deceased increasing from €7 729 to €12 758 and in his monthly deficit reducing from €12 756 to €3 721.

62.26. Greenbaum summarised the effect of the restructuring as follows:

62.26.1. Bank loan of €1 500 000 no longer a liability of the Estate.

62.26.2. The loans secured over the properties that had been donated to the first respondent were expunged.

62.26.3. The first respondent's portion of the original property loan of approximately €270 000 was expunged.

62.26.4. The restructuring improved the Deceased's financial position which had declined between 2003 and 2013 and would have continued to do so had the restructuring not been effected.

62.26.5. The restructuring benefited the Deceased by increasing his monthly cash flow for the remainder of his life, eliminating his financial exposure to the bank and repaying his personal loans and other liabilities.

62.27. The first respondent has consistently refused to consider the reasoning relating to the transaction with H[...], causing the matters to drag on, despite the German court finding against her and this being confirmed on appeal. The first respondent also lost her similar case in Germany against H[…]'s wife, I[...] B[...].

62.28. He was not involved in the transaction between the deceased and H[...] in Germany and had no knowledge thereof.

63. Evaluation:

63.1. There is a core dispute of fact, as to whether the appellant was biased against the first respondent and in favour of H[...] and was not able to act in an even-handed, fair and objective manner, as contemplated in *Plascon-Evans*.

63.2. There were no bald denials. The first qualification in *Plascon-Evans* therefore does not apply.

63.3. That leaves the second qualification: whether the appellant's version is so palpably implausible or far-fetched or untenable as to be rejected out of hand.

63.4. The disagreement as to *locus standi* between the first respondent's counsel and the appellant need not be resolved. What is relevant is that a considered and reasoned basis for his approach was proffered by the appellant.

63.5. The appellant was not an attorney to H[...]. The court *a quo* misdirected in this regard.

63.6. H[...] has put in a claim which is a further indication that no payment had been received by him for the joint estate.

63.7. In my view, the word 'advise' in the email from the appellant dated 21 May 2020 was used in the sense of 'inform' and not in the sense of formal legal advice or as an attorney. This ties up with the fact that the appellant had been negotiating a settlement on behalf of the deceased with the first respondent at the time and had said that terms thereof affected third parties, being H[...], his wife I[...] and S[...] (the deceased's daughter) who would need to agree thereto. To me, this means that they stood on a different footing to the deceased in that the appellant had a mandate to act for him, but not for them.

63.8. In footnote 4 on page 14 of the Judgment, the court *a quo* recorded: "*After reading the German judgment, the Court does not share the [first respondent's] optimism regarding her case against H[...]*." Having found this, it does appear somewhat surprising that the court *a quo* then saw fit to criticise the appellant for being against the litigation (paragraphs 129 and 130 of the Judgment). I consider this criticism to be a material misdirection on the facts.

63.9. Similarly, I consider the finding in paragraph 126 of the Judgment that the appellant was defending the *indefensible* to be a material misdirection on the facts (and which also contradicts footnote 4 on page 14 of the Judgment).

63.10. The facts establish that the properties were not donated to H[...] by the deceased. The evidence of Greenbaum established a significant benefit to the estate which had stumbled from one liquidity crisis to the next.

63.11. The facts show that the appellant had carefully considered the German litigation and that his opposition thereto was justified; and vindicated by the result of the litigation, after appeal – both cases against H[...] and his wife I[...] having been lost by the first respondent. They do not show bias in favour of H[...]. I consider the findings of bias to be a material misdirection on the facts applying the rules as to the resolution of disputes of facts in motion proceedings.

63.12. The appellant's version as to the rental income from Germany involved a continuation of an existing state of affairs which worked and H[...] was successful in the allegations against him (no fraud was established on the papers).

63.13. The appellant's attempt to join the German litigation: He based it on the South African legal position mentioned above (*Hitzeroth*) that the whole joint estate falls under the administration of the executor appointed to the estate of the deceased and only the executor has *locus standi* to sue or be sued. He had also taken legal advice from his German attorneys in this regard. His actions were motivated by his duty to protect the Estate from exposure to legal costs.

63.14. In oral argument, Mr Barnard, who appeared for the first respondent, relied on the following finding of the German appeal court in paragraph 46 of its judgment to aver that the six German properties registered in the first respondent's name are hers and hers alone to the exclusion of the joint estate and that for this reason the appellant's conduct in regard to those properties should disqualify him as executor (warranting his removal): "*The joint ownership status that arose on the basis of the South African Community of Property would have to be entered in the Land Register in order to eliminate a bona fide acquisition. This is permissible and necessary … but in the present case this was undisputedly not done … The registration of such foreign matrimonial regimes serves precisely to eliminate good faith in the sole right of the disposal of the registered person*."

63.15. I consider this submission to be unfounded: first, the reason for the entry in the register (termed a *caveat* by Mr Barnard, which seemed apt) was pertinently recorded in the German judgment to be to eliminate a *bona fide* acquisition. There is no suggestion that the absence thereof would convert (between the spouses in community of property) what is a joint estate property to one which is somehow owned separately in another estate by the first respondent. I do not know the German law, but I highly doubt that that is the case, and what matters for present purposes is that it does not appear from the German judgment relied on by the first respondent. Second, this point was not relied upon in the papers. The issue in this regard was taken up in paragraphs 119 to 125 of the founding affidavit and no mention is made therein of this point, the allegation made therein having been that the appellant had attempted to circumvent another German judgment of 23 November 2023 relating to his attempt to be included in the German litigation brought by the first respondent. Third, there was no suggestion that the appellant was aware of this alleged point of German law (which I do not consider to have been established and regard as dubious, as mentioned) and therefore he cannot be criticised on the basis thereof.

63.16. Finally, in paragraph 145 of the Judgment it is recorded that "*A new executor must consider, among others, the implications of intervening in the German litigation …*" This is a strange bedfellow of a finding that the appellant's consideration of that same litigation warrants his removal.

63.17. For these, and the other reasons provided by the appellant as summarised above, I do not consider that his version is "palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers".

63.18. In my view, and applying the primary rule in _Plascon-Evans_ and its two qualifications, the court *a quo* materially misdirected itself on the facts in regard to this aspect and its findings listed above were not justified.

63.19. In the premise, I am of the view that first respondent's case on this aspect was not established.

'*Our divorce and ancillary litigation in South Africa*' (the disposal of assets after an interdict was in place)

64. The first respondent's main contentions (the papers are voluminous and a more comprehensive exposition of the evidence will unduly burden this judgment):

64.1. The appellant represented the Deceased in the acrimonious divorce proceedings between him and the first respondent, with the Deceased, as represented by the appellant, initially vigorously opposing all the first respondent's claims. This included two opposed interlocutory applications which were decided in the first respondent's favour.

64.2. An interdict against the disposal of assets of the joint estate was granted by this court on 27 February 2017. The first respondent averred that the appellant acted in "*abject disregard of such order by assisting the deceased to sell a number of assets*" and caused the proceeds to be paid to his firm and to the deceased personally. The assets were farm vehicles and equipment owned by Droogekraal Meulenrivier CC ('Droogekraal'), 100% of the members interest of which was registered in the deceased's name. These included a Mercedes water truck (R38 000), disc plough (R20 000), round baler (R30 000), Orbagh Mover (R75 000), Massey Ferguson 135 tractor (R45 000), Forklift (R18 000), 2 caravans (R25 000) and "*2 centre Pivots for Irrigation of significant value*".

64.3. The deceased averred in litigation, "*… upon grounds which were not legally sound, … that the German properties which he had transferred to H[...] should not form part of the joint estate.*"

65. Although not a model of clarity, it would appear that, ultimately, the first respondent was alleging that the appellant was conducting litigation on legally unsound bases and that he assisted the deceased in acting contrary to a court order, with which the court *a quo* effectively agreed.

66. The appellant's version:

66.1. The question of the German litigation has already been dealt with in detail.

66.2. At the time that the first respondent and the deceased separated, neither of them was aware that they were married in community of property. The deceased told the appellant that at the time they were married they believed that their marriage would be governed by the laws of Germany.

66.3. The appellant was not involved in the disposal of any of the farm assets and vehicles. He also had no knowledge of any of this, other than the Mercedes Unimog, which the deceased told him was not being used and was deteriorating.

66.4. The interdict order of this court granted on 27 February 2017 did not prevent the deceased from trading and farming which was part of his livelihood. From the information and documentation which the appellant has been able to obtain, equipment no longer required in business/farming operations was replaced by newer and better items in the normal course of business and more assets higher in value were purchased than those sold, leaving the Estate in a better financial position. The appellant provided details of the figures involved. The appellant was made aware of the Mercedes Unimog which was not being used and was deteriorating, and which was sold. He has no knowledge of any of the other transactions.

66.5. He therefore denies that he acted or assisted the Deceased in acting contrary to a court order.

67. Evaluation:

67.1. There is a dispute of fact as to whether the appellant was conducting litigation on legally unsound bases and whether he assisted the deceased in acting contrary to a court order. Insofar as the German litigation is concerned, this has been dealt with above.

67.2. There were no bald denials. The first qualification in *Plascon-Evans* therefore does not apply.

67.3. That leaves the second qualification: whether the appellant's version is so palpably implausible or far-fetched or untenable as to be rejected out of hand.

67.4. His version is that he did not participate in the sale of any assets and he provided an explanation which was so palpably implausible or far-fetched or untenable as to be rejected out of hand.

67.5. The litigation aspect has been dealt with above.

67.6. In my view, the appellant's version is not so palpably implausible or far-fetched or untenable as to be rejected out of hand and therefore the court *a quo* misdirected itself.

67.7. In the premise, I am of the view that first respondent's case on this aspect was not established.

<u>Droogekraal and the allegation of a conflict of interest</u>

68. The core issue in this respect is whether, due to the bequest to him of a 4% interest in Droogekraal and his involvement in litigation as an attorney, the appellant has a conflict of interest imperilling the administration and future welfare of the estate and of interested parties which justifies his removal.

69. The court *a quo* found:

69.1. In paragraph 72 of the Judgment, in regard to the 4% bequest, that "*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.*"

69.2. In paragraph 135 of the Judgment, that "*Despite acknowledging that the close corporation owed the joint estate R35 million in October 2023, the [appellant] reflected the loan account in the draft liquidation and distribution account to be R6 million ... The Respondent has already missed the deadline for filing a liquidation and distribution account within the six weeks specified by the Act.*"

69.3. In paragraph 137 of the Judgment, that "*The allocation of four percent of a member's interest in the close corporation undoubtedly poses a conflict of interest for the Respondent ... he undoubtedly benefits if the close corporation is retained. His conflict of interest becomes manifest even though he denies it strenuously.*"

69.4. In paragraph 138 of the Judgment, that "*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.*"

69.5. In paragraph 139 of the Judgment, that "*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. Yet the Respondent overvalues each by approximately R1 500 000 in the draft liquidation and distribution account. H[...]'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.*"

69.6. In paragraph 140 of the Judgment, that "*The Respondent has effectively declared the estate insolvent. This is inconceivable, given the estate could afford to offer the Applicant a R40 million settlement a few years back and has a substantial property portfolio.*"

69.7. In paragraph 140 of the Judgment, that "*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.*"

69.8. In paragraph 144 of the Judgment, that the appellant "*… 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.*"

70. Before considering the versions of the appellant and the first respondent in regard to this issue, I consider it instructive to mention what is probably the only material common cause aspect of the matter as it is pertinent to this issue: The appellant was bequeathed a 4% interest in Droogekraal. The joint estate has a loan account claim of approximately R35 million against Droogekraal. The first

respondent's former attorney thought the amount was R20 million. The appellant corrected this and confirmed that the actual amount was R35 million. This runs directly contrary to the thesis against him of acting against the interests of the Estate because it prejudices the value, if any (see below – all indications are that there is no value), of his 4% interest in Droogekraal. In my view this (rare) common cause aspect undermines a case of conflict or prejudice to the welfare of the estate or its beneficiaries.

71. As to the contentious aspects, the first respondent's main contentions (the papers are voluminous and a more comprehensive exposition of the evidence will unduly burden this judgment):

71.1. The appellant has failed, despite demand, to indicate how he intends to deal with Droogekraal in which he has a 4% interest and against which the estate has a R35 million claim.

71.2. The appellant had recorded in a letter dated 17 February 2023 to the first respondent's then attorneys that he was "… *in my capacity as executor ex officio the only member of Droogekraal CC for purposes of liquidation of the estate. I do not understand how I am supposed to deal with the loan account if I do not know what the final figures thereof are. <u>The mere fact that a 4% interest in the CC has been bequeathed to me, has no bearing on the decision-making process. I therefore once again deny that there is any conflict of interest in this matter</u> and your assertion that I must have assisted in formulating a strategy on how to act to the detriment of your client, is ludicrous.*" [the underlining and italics were in the founding affidavit].

71.3. The first respondent alleged (in a letter sent by her attorneys to the appellant on 13 September 2023) that "*It is untenable that a CC in which you were bequeathed a 4% interest must first provide financials before you decide how to "deal" with the loan account of nearly R20 million. We repeat, you have a conflict of interest. While we accept that our client might not be objective, neither was the deceased, who you represented at all times during acrimonious litigation and whom you surely must have assisted in formulating and executing strategy.*" [the underlining and italics were in the founding affidavit].

71.4. The first respondent alleged in the founding affidavit with reference to the above letter from the appellant that "*… the respondent piously and with feigned surprise reacted to the above allegations concerning his 4% members interest in Droogekraal*".

71.5. The first respondent also alleged that "*It is surprising that the [appellant] could be as bold and audacious to suggest that he is not aware of the fact that, if the liability of Droogekraal towards the estate is disingenuously presented in an amount lower than what it actually is, the member's interest in the corporation, of which the [appellant] holds 4%, would have a commensurately higher value. There is therefore every reason to be concerned, charitably put, about the [appellant's] inaction or apparent reluctance in enforcing the claim of approximately R35 million against Droogekraal. The glaring conflict of interest is self evident.*"

71.6. The appellant recorded in a letter dated 11 March 2024 to the first respondent's then attorneys that "*The loan of Droogekraal CC obviously forms part of the whole picture and we have in previous correspondence* *to you already indicated that according to the CC's books it amounts to approximately R35 million. As we do not know whether it will be necessary to liquidate the CC, we have for now not taken that figure into account.*"

71.7. In this regard the first respondent alleged that "*It is overwhelmingly clear that, in view of the above statement, the respondent he is likely to be called upon to make a decision whether or not to liquidate Droogekraal, which would require him to take a position on behalf of either the estate, or effectively his own behalf arising from his personal interest of being a 4% member in the corporation. His conflict of interests in this context is glaring and indisputable.*"

71.8. The first respondent alleges that the appellant paid rental income from two properties owned by Droogekraal into his own account.

71.9. The first respondent alleges that the appellant *boldly* violated her constitutional property rights and that he "… *initiated such violation, introduced it into the will with the intention to give effect thereto, and now attempted to implement the violation …*", which evidences the "… *improper and vindictive bias that the respondent bears towards me.*"

72. The appellant's version:

72.1. "*I am not aware of any legal hindrance which would disqualify me from being a beneficiary in the estate as well as an executor.*" It is noted that this is correct in law, as dealt with above.

72.2. The 4% of the member's interest in Droogekraal bequeathed to him "*is probably worth nothing.*"

72.3. Droogekraal, given the loan account that needs to be repaid, is in all likelihood insolvent.

72.4. The loan account in favour of the Estate substantially exceeds the value of Droogekraal's assets. It however needs to be considered whether the biggest part of the loan account has not prescribed and is therefore not recoverable from the estate. He is in the process of considering this.

72.5. It is incorrect that he failed to indicate how he intended to deal with Droogekraal. He explained in a letter to the first respondent's previous attorneys dated 2 October 2023 that he "*… will recover the loan to Droogekraal to the extent that it is legally recoverable. I have also made it clear that I do not intend to at this stage put the CC in liquidation, as I wanted to discuss a distribution plan on a reasonable and calculated basis, by which not everything had to be sold but rather allocated in a way that the Applicant got 50% of the value of the estate and the heirs the balance. Obviously, I was not able to deal with the loan account before I was provided with the financial statements, which proved to be the correct approach because the loan account turned out to be substantially more than the R20 million as asserted by the Applicant, to wit R35 million.*"

72.6. "*I made it known that the loan account against Droogekraal was substantially higher than the Applicant believed it to be. I can't be forced to take steps for the recovery thereof until I have a distribution plan, of all the estate assets collectively. Droogekraal only owns fixed assets. I have no reluctance in enforcing the loan account claim and* *have stated as much. I however need the co-operation of the Applicant to formulate the distribution plan, which has despite numerous requests been completely lacking.*"

72.7. "*I have no issue in liquidating Droogekraal if need be. I however cannot be forced to make that decision before* ['before' should be 'while'] *I do not have a distribution plan. It was the testator's wish that Droogekraal not be sold and that his daughter, S[...] should continue farming there. I have therefore tried to establish whether this would be possible by compensating the Applicant for her share via other available assets and/or funds. I am duty-bound to do so. If this should eventually not be possible, I will take the necessary steps to recover the loan account in as far as it is recoverable.*"

72.8. "*I have no legal obligation to transfer a 50% membership interest in the CC to the Applicant. She is entitled to one half of the value of the members' interest in Droogekraal. It is a legal entity that stands on its own and the wish of the testator is that I should not sell the farm but rather pay the Applicant her share which is a request I will try to honour, should it be possible.*"

72.9. He prepared what he termed a '*discussion document*' in the form of a draft liquidation and distribution account, stating that "*It was merely a discussion document and was never intended to be a liquidation and distribution account, but rather a guideline for the discussions I had with Applicant's counsel. This was recorded in "**DB15**".*" Annexure "DB15" is dated 11 March 2024 and records as follows: "*The document referred to as a L & D Account is a mere discussion document in the form of a* *template and was prepared merely for purposes of the meeting with your counsel. It was never intended to be a final document nor were the figures related therein given to be final and accurate. This was made abundantly clear when the document was handed to your counsel.*"

72.10. No rental income has been received by the appellant from Ouplaas or the Oaktree Guest House. The Deceased entered into an agreement with a couple to live rent-free in the Ouplaas residence on condition that the residence is renovated. The appellant is satisfied that renovations are taking place as envisaged. After two years, a market related rental will be negotiated. The Oaktree Guest House was rented out but the lessee did not pay the rent (while the Deceased was still alive), was evicted and left the building in a total state of neglect which the appellant had cleaned up to make it more presentable. This was relayed to the first respondent's attorney in a letter dated 12 April 2024 together with his concern about that property and a request to agree to the sale thereof because the heir thereof, S[...] B[...], has indicated that the property may be sold. To date he has not received the courtesy of a reply. Much of this was disputed in reply.

73. Evaluation:

73.1. There is a core dispute as to whether the appellant is conflicted.

73.2. There were no bald denials. The first qualification in *Plascon-Evans* therefore does not apply.

73.3. That leaves the second qualification: whether the appellant's version is so palpably implausible, far-fetched or untenable as to be rejected out of hand.

73.4. The appellant has placed on record that Droogekraal, given the loan account that needs to be repaid, is in all likelihood insolvent and that the 4% interest bequeathed to him is probably worth nothing.

73.5. As to Ouplaas and the Oaktree Guest House, there are clear disputes of fact which cannot be resolved on the papers.

73.6. As mentioned above, the legal position is that while it is not *per se* a conflict of interest to be a beneficiary and an executor, where an executor is a beneficiary, his acts will be narrowly scrutinised and he should not derive any personal benefit from the manner in which he conducts the business or manages the assets of the estate (see *Harris* and *Beukman* referred to above).

73.7. On the appellant's version, the loan account and asset values are to be determined. No case has been made out as to him, with his acts narrowly scrutinised, having derived any personal benefit from the manner in which he has conducted the business or managed the assets of the estate.

73.8. There is therefore no case made out of the acts of the appellant imperilling the administration and future welfare of the estate and of interested parties which justifies his removal.

73.9. Subject to the next paragraph, which I think is the main aspect on this issue, in my view, on the facts, and applying the primary rule in *Plascon-Evans* and its two qualifications, the court *a quo* materially misdirected itself on the facts in regard to this aspect and its findings listed above were not justified.

73.10. In the premise, I am of the view that first respondent's case on this aspect was not established.

74. There is, however, another aspect pregnant in this issue:

74.1. This is the question of the possible prescription of the 'bigger part' of the loans from the Deceased to Droogekraal which was raised by the appellant.

74.2. I agree with the first respondent that "… *if the liability of Droogekraal towards the estate is disingenuously presented in an amount lower than what it actually is, the member's interest in the corporation, of which the [appellant] holds 4%, would have a commensurately higher value.*" The word 'disingenuously' does not contribute to this evaluation.

74.3. While, in making the above statement, the first respondent was addressing the determination of the actual amount of the loans advanced, and not prescription thereof, in my view, this consideration applies equally to prescription. The more of the loans that have prescribed, the less that Droogekraal owes to the estate and the greater that Droogekraal's value may be. To illustrate by way of hypothetical figures: if the loans after prescription, were R5 million and the net value of Droogekraal after payment of the loans and all other liabilities is R10 million, then the appellant's 4% members interest is worth R400 000 (4% of R10 million) as opposed to the zero value he postulated in the papers.

74.4. It follows, therefore, that it would be in his personal interest for as much as possible of the loans to have prescribed.

74.5. It is the appellant, as the executor, who must make the call on behalf of the Estate as to whatever, if any, extent of the loans the Estate will treat as having prescribed. Whatever he decides could result in a dispute or could not.

74.6. This, although not completely *pari passu*, has echoes of what was held in *Grobbelaar* referred to above: An executor will be removed from office if he has a claim against the estate which is disputed by the heirs. The court need not go into the validity of the claim because the question as to who is right or wrong is irrelevant. The reason for this is that the executor/executrix finds himself/herself in the impossible position of having to argue for the claim as creditor and resolve the dispute as to the claim as executor/executrix and therefore cannot be impartial.

74.7. The reason it is not completely *pari passu* is because the 4% is not in dispute and nor is the question of prescription. However, the extent of the prescription of the loans, while not in dispute, is 'in the air' and could become the subject of a dispute once resolved. On the facts of this matter, should the extent of prescription determined by the appellant in due course be in any significant respect, there is a prospect that it will be contested, probably vigorously.

74.8. Had the appellant dismissed any question of prescription at the outset, or never raised it at all, I do not consider that this would have been an issue.

74.9. The question then is whether the fact that prescription could, at some stage, become in dispute, is now a ground for removal or whether it only becomes a ground for removal should a dispute arise, as was the case in *Grobbelaar* at 724CG.

74.10. As pointed out in *Grobbelaar*, while it matters not whether the executor is right or wrong in such a dispute, the conflict arises because there is a dispute.

74.11. The question then is whether on these facts the appellant is disqualified due to conflict of interest.

74.12. *Grobbelaar* postulates a dispute. The fact is that there is not a dispute, yet. It will only arise if the appellant determines that there has been prescription to an extent which does not meet the approval of the first respondent and which she considers to be incorrect and decides to and does dispute.

74.13. That does appear unlikely because the appellant has already indicated that Droogekraal "… *is in all likelihood insolvent and that the 4% interest bequeathed to him is probably worth nothing.*"

74.14. It would appear to me on the facts before this court that this is most likely to be the case taking prescription into account as well (of course, this is not a decision on that aspect which is not an issue before this court): that by lending funds to Droogekraal of which he was the sole member (he then believed he was not married in community of property) the deceased had effectively lent money to himself and did not regard the debt as due and payable there and then (it would make no commercial sense to do so because the funds could be needed for many years and payment of a loan account is the most tax efficient means of extracting funds from a corporation). The result then would be that there has been no prescription. See *Stockdale v Stockdale* 2004 (1) SA 68 (C) at paragraphs 12 to 18 and *De Bruyn v Du Toit* (1162/2015) [2015] ZAWCHC 20 (27 February 2015) at paragraph 7, referred to with approval and recognised as exceptions to the general rule that debts are due and payable on coming into existence established in *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* 2018 (1) SA 94 (CC) at paragraphs 105, 125 and 126.

74.15. If, in the instance of a claim by the executor against the Estate, the claim is not disputed by anyone, then, on my reading of *Grobbelaar* and *Barnett*, a conflict does not arise. On the facts as they currently stand, where there is not a dispute (and I do not apprehend one to arise because prescription should not arise, for the above reasons), I therefore do not consider there to be a conflict of interest along the lines of the nature identified in *Grobbelaar*.

74.16. In the premise, I am of the view that first respondent's case on this aspect was not established.

The failure of the appellant to attend to the first respondent's maintenance claims and his involvement as author and initiator of the content of the Will

75. The core issue in this respect is whether out of bias, malice and vindictiveness the appellant intentionally failed to attend to the first respondent's maintenance claims and was the author and initiator of the content of the Will.

76. The court *a quo* found:

76.1. In paragraph 123 of the Judgment that "*The Respondent had to know that the deceased was far more ill than he acknowledged.*"

76.2. In paragraph 124 of the Judgment that "*The Respondent's allegation that he was not involved in formulating the terms of the will is implausible.*"

76.3. In paragraph 143 of the Judgment, that "*His protestations about obeying the repugnant clauses in the will are unconvincing.*"

76.4. In paragraph 144 of the Judgment, that "*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 ... 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.*"

77. The first respondent's main contentions (the papers are voluminous and a more comprehensive exposition of the evidence will unduly burden this judgment):

77.1. She has a maintenance claim of R1 415 148.19 against the joint estate which has been long outstanding.

77.2. She alleged that the appellant's "… *refusal/neglect to make the maintenance payments to me is however consonant and perfectly in line with the vindictive and toxic instruction that the [appellant] himself – as party who drafted the last will and testament of the deceased – inserted as the last paragraph of clause 8, that reads as follows:*

> *"I direct my executor to, should the said D[...] T[...] put in a claim of whatsoever nature against either my South African all my German [A]ssets, resist those claims with all means necessary and to all extents impossible. My executor will be entitled to his reasonable fees for work related to the opposition of any claims as mentioned above."* "
>
> [the underlining and italics were in the founding affidavit. The word 'all' in the second line is an error and in the will is 'or', the word 'impossible'

in the fourth line is an error and in the will is ‘possible’ and ‘assets’ was ‘Assets’ in the will].

77.3. The first respondent alleges that the appellant “… *fully intends giving effect to a clause that he himself inserted in the will, that effectively gave him a free hand to, reasonably or unreasonably, oppose any claims that I institute against the estate, without considering or assessing whether it would be prudent or reasonable to do so, and whether or not such obstructive attitude would be in the interests of the heirs and beneficiaries of the estate.*”

77.4. The first respondent claimed that one of the Deceased’s previous wives was preferred over her (his third wife) insofar as maintenance was concerned.

77.5. The first respondent claimed that the appellant inserted clause 8 (quoted above) in the Will and he intends to use it to oppose her maintenance claims.

77.6. The first respondent alleged that at the time that the Will was signed in April 2022, the Deceased no longer had clear and sound mental faculties. She said that he could barely communicate and often drifted away in mid-sentence. She said that their children said that it was not possible to freely communicate with him since he was always sleeping (this was hearsay). She also said that the Deceased could barely read, write or communicate in English.

77.7. For these reasons she alleged that the content of the Will was prepared and recorded by the appellant. In her founding affidavit she stated that “… *it is submitted to be clear that the respondent had a substantially free hand to record in the will what he preferred to see included therein.*”

77.8. Effectively she was saying that the Will did not reflect the will of the Deceased but rather that of the appellant.

78. Ultimately, the first respondent was alleging that the content of the Will was authored by the appellant and that he had inserted clause 8 in the will to give him a free hand to act contrary to her interests and that he used this to deprive her of maintenance.

79. The appellant's version:

79.1. The Estate is not in a position to pay the first respondent's arrear maintenance because there are not enough funds in the Estate and there is also the claim for maintenance from the deceased's second wife, M[...] B[...], which is also substantially in arrears.

79.2. The maintenance claims of the two claimants would be paid proportionately from the rental received.

79.3. He is not in a position to liquidate assets to pay maintenance because the first respondent refuses to co-operate.

79.4. The appellant explained that maintenance was paid as and when cash became available and that there was no preference.

79.5. The fact is that the first respondent's claims were not ignored and maintenance was paid. She was requested in writing to submit claims.

79.6. He was not aware that the Deceased was terminally ill with cancer, nor was he ever so informed by him. He knew that the Deceased suffered from a lung and liver issue for which he had been treated in hospital from time to time, but was otherwise in good health until shortly before his death.

79.7. The Deceased was well and of sound mind when he signed the Will in April 2022. He regularly attended the appellant’s offices personally which involved a 180 kilometre round trip from Oudtshoorn for him which the Deceased drove himself. He communicated clearly and properly with the appellant. He was very clear in his instructions regarding a number of matters and his mind was clear. Had the appellant and the Deceased’s children been of the view that he was of unsound mind, they would not have allowed him to depose to affidavits and would have approached the court for the appointment of a curator.

79.8. In late February 2022, the Deceased appeared personally in a criminal matter instituted by the first respondent against him. He made arrangements for visits of his minor children and arranged their passports at the German consulate. He consulted with the appellant extensively on complex environmental regulatory matters. He never experienced the deceased drifting off mid-sentence.

79.9. The appellant explained that he did not create or author the content of the Will. Rather, it was dictated to him in German by the deceased and he translated it into English. He had no role in the terms of the Will and had nothing to do with their content. On the contrary, he cautioned the Deceased against certain aspects thereof, explaining that “*Despite me advising on the legalities of certain aspects thereof, the deceased insisted on the content as dictated, to be his final will, which was his right.*”

80. Evaluation:

80.1. There is a core dispute of fact as to whether the appellant intentionally failed to attend to the first respondent's maintenance claims and was the author and initiator of the content of the Will, as contemplated in *Plascon-Evans*.

80.2. There were no bald denials. The first qualification in *Plascon-Evans* therefore does not apply.

80.3. That leaves the second qualification: whether the appellant's version is so palpably implausible or far-fetched or untenable as to be rejected out of hand.

80.4. In oral argument, Mr Barnard emphasised that the rental income from the six properties in Germany registered in the first respondent's name was impermissibly used to pay for the German equivalent of 'levies' raised by the German equivalent of a sectional title 'body corporate' in respect of properties owned by H[...] (the properties owned by H[...] and the first respondent were all in the same development and had their own 'levies'). There was no evidence in the papers of payment of expenses for H[...]. Mr Barnard also contended that the rental was the first respondent's alone and did not fall into the joint estate, relying on the German 'caveat' point mentioned in paragraphs 28 and 63.15 above. For the reasons mentioned above in regard to this point, I do not consider this argument to be of any merit.

80.5. One might add to the factors mentioned above in respect of the appellant's version, that the first respondent was content to press on with criminal proceedings in February 2022 and it was not suggested that the Deceased had no capacity to act and did not the mental faculties to understand the criminal proceedings which she was pressing against him.

80.6. The appellant had advised on the legalities of certain aspects of the will, but the Deceased insisted on the content as dictated (considered further in the next section). While one's legal instinct may at first blush question an attorney formalising a will for a client which, in his or her view, contains provisions which are not enforceable and which he or she would not enforce (as in the case of the appellant in respect of the Will), this cannot, in my view, warrant removal as an executor. First, the first respondent did not take this point and it was not canvassed on the papers. Second, the Will is that of the client, not the attorney and it is the client's prerogative as to what is to be included in it. Third, for the removal of an executor, the *predominating consideration remains the interests of the estate and of the beneficiaries* (as considered in the authorities above). Fourth, it is the implementation of objectionable provisions which must be considered by an executor, which is what the appellant did in this matter. For example, despite clause 8 of the Will purporting to prevent any claim by the first respondent, the appellant requested her to file her claims, including in correspondence.

80.7. The first respondent's allegation that the Deceased could not converse in English appears to be contradicted in the first respondent's replying affidavit in which she stated that Morné Kleinhans, who was the farm manager of the deceased for 15 years "*… had an exceptionally close relationship with the deceased for the entire period during which he was holding the position of farm manager, and that the deceased confided in* *him concerning matters affecting almost every aspect of his personal life and business.*"

80.8. The version of the appellant as to the preparation of the Will is, in my view, not so palpably implausible or far-fetched or untenable as to be rejected out of hand (this is dealt with further in the next section). Nor is his version as to maintenance. Similarly, his version as to not preferring the ex-wife over the first respondent and why funds were not available.

80.9. On the facts, applying the primary rule in *Plascon-Evans* and its two qualifications, I am of the view that findings of the court *a quo* referred to above are material misdirections.

80.10. In the premise, I am of the view that first respondent's case on this aspect was not established.

Drafting of the Will and clause 8 by the appellant alleged by the first respondent: this ignores the first respondent's constitutional rights in property being her 50% interest in the joint estate

81. The core issue in this respect is whether the appellant had conceived and created the content of the Will, and in doing so deprived the first respondent of her constitutional rights.

82. There is substantial overlap between this and the previous section, but I have considered it appropriate and convenient to deal with them separately and to deal with the evaluation of the Will aspect in some further detail in this section.

83. The court *a quo* found:

83.1. In paragraph 12 of the Judgment: "*It is difficult to believe that the Respondent, who was the deceased's lawyer, for at least 10 years, did not have a hand in drafting the will ... It is apparent that an attorney, if not the Respondent, drew up, or at least assisted in drawing up the will.*"

83.2. In paragraph 123 of the Judgment that "*The Respondent had to know that the deceased was far more ill than he acknowledged.*"

83.3. In paragraph 124 of the Judgment that "*The Respondent's allegation that he was not involved in formulating the terms of the will is implausible.*"

83.4. In paragraph 143 of the Judgment, that "*His protestations about obeying the repugnant clauses in the will are unconvincing.*"

84. The first respondent's main contentions (the papers are voluminous and a more comprehensive exposition of the evidence will unduly burden this judgment):

84.1. She alleges that the appellant "… *(when he initiated and drafted the will), as well as the deceased when he signed and executed same, totally lost sight of the fact that I am a 50% owner of an undivided share of the assets in the joint estate. This is evidenced by what I set out below.*"

84.2. Clause 3.1 of the Will contained prohibitions as to selling or transferring his 100% members interest in Droogekraal. The first respondent contends that it was her constitutional entitlement to be owner of 50% of the members interest in Droogekraal. Similar considerations apply to clauses 5, 6.2 and 7 of the Will.

84.3. She alleged that "*It appears that the respondent and the deceased were so driven by their malice towards me that they simply lost sight of the limitations upon the legal competence of the deceased to make* *testamentary dispositions in respect of the entirety of a joint estate, including the 50% part thereof of which I am the owner.*"

84.4. She alleged that the appellant "… (*as initiating party who drafted the will clearly made recommendations to the deceased), together with the deceased, then proceeded to gratuitously vent their spleen in a toxic display of animosity towards me, recording that the "reasons for disinheriting me were …"* and she then quoted clauses 8.1 to 8.3 of the Will (quoted above).

85. Ultimately, the first respondent was alleging that the appellant had from his own initiative produced the Will in a toxic display of malice and animosity towards her, losing sight of legalities and the first respondent's property rights.

86. The appellant's version:

86.1. The Will was signed on 19 April 2022. In it, the Deceased accepted that community of property applied to his marriage to the first respondent.

86.2. Clause 8 disinherits the first respondent and instructs the executor to resist all her claims.

86.3. However, none of that can be imputed to the appellant.

86.4. This is because the appellant's version was that he had nothing to do with the terms of the Will – he did not prepare them or have anything to do with their content. They were simply dictated to him by the Deceased. The Deceased did this by giving him oral instructions in German at a consultation which the appellant translated into English. The appellant recorded that had he been the author of the Will, it would have looked different. He contends that it is ludicrous and defamatory to aver that he drafted a will for the Deceased to suit himself.

86.5. The appellant denied that he had anything to do with the substantive content of the Will or that he advised the Deceased on the content thereof and/or dictated the content thereof. He stated that "… *the content of the will was dictated to me by the deceased.*" This was done in German and translated into English by the appellant.

86.6. He recorded in his affidavit that he can only follow lawful directions given by the Deceased and has made it abundantly clear in correspondence to the first respondent and her legal representatives that he will not follow directions which are unlawful and/or ethically untenable.

86.7. The appellant pointed out that the content of clause 6 of the Will which deals with jewellery and furniture bequeathed to the Deceased by his parents could only have come from the Deceased, which supports his version that the Deceased had dictated the terms of the Will to him.

86.8. As to content of the will which might be objectionable or unlawful, he stated: "*Despite me advising on the legalities of certain aspects thereof, the deceased insisted on the content as dictated, to be his final will, which was his right.*"

86.9. The appellant cautioned and advised the Deceased on the legalities of some aspects of the Will but the Deceased insisted that they be included.

87. Evaluation:

87.1. There is a core dispute of fact as to whether the appellant conceived and drafted the terms of the will, as contemplated in <u>*Plascon-Evans*</u>.

87.2. There were no bald denials. The first qualification in *Plascon-Evans* therefore does not apply.

87.3. That leaves the second qualification: whether the appellant's version is palpably implausible, so far-fetched or untenable as to be rejected out of hand.

87.4. The first respondent had no direct knowledge as to whether the appellant had conceived and drafted the terms of the Will.

87.5. The appellant explained what actually happened in his interaction with the Deceased in regard to the Will. This is dealt with in some detail in the above section. I do not think that this is so far-fetched or implausible or untenable as to be rejected on the papers. In my view, to have done so was a misdirection by the court *a quo*.

87.6. I think that the finding in paragraph 12 of the Judgment quoted above has pregnant in it a misdirection: the fact that an attorney must have assisted in drawing up the Will document (i.e. reducing it to writing) – with which I agree, simply because of its format and legalistic wording – does not mean that the attorney authored or initiated or created the actual substantive content of the Will. Of course, the document which embodies the Will was put together, was formatted and made use of 'legalese' in its presentation with the input of an attorney. The misdirection which I perceive is that this does not mean that the attorney played a part in the creation and authoring of its content. I consider that the first respondent conflated the physical creation of the document embodying the Will in formal legal parlance and format with the creation and authoring of the substantive content thereof and that the court *a quo* made the same misdirection.

87.7. Indeed, on the contrary, the appellant's version is that he actually cautioned the Deceased on the legalities of certain aspects of the Will, but the Deceased declined to follow that advice.

87.8. The direction in clause 4 of the Will to pay out half the value of the members interest in Droogekraal to the first respondent is effectively the function of an executor in this situation, in that "*… the person to liquidate the estate is the executor of the first dying, acting in consultation with the survivor, and that the survivor was entitled to one half of the nett residue of the estate after it was liquidated and the debts of the joint estate were paid.*": *Hare v Estate Hare* 1961 (4) SA 42 (W) at 45H; see also *Costain v Godden* 1960 (4) SA 458 (SR) at 461E, *Hitzeroth v Brooks* 1965 (3) SA 444 (A) at 452C-E.

87.9. As mentioned, the appellant has also stated that he did not author the terms and content of the will, had advised against the legalities of aspects thereof and will not act in terms of anything therein which is illegal or unethical. On his version he has not done anything illegal or unethical.

87.10. The first respondent contended that the disposition of 4% of the members interest in Droogekraal made him a direct and complicit party in despoiling the first respondent of her property rights. I disagree, for the above reasons (including the appellant's version that he did not author the Will) and because the Deceased could in law only dispose of his undivided half share in the members interest (to that extent, any contrary provision in the Will would not be legally effective: *Costain v Godden* 1960 (4) SA 458 (SR) at 460H, approved in *Hitzeroth* at 452C). In other words, were 4% of the members interests to be transferred to the appellant (which I consider unlikely because of the function of the executor in dealing with the Estate and the facts of the matter, both mentioned above), it could only come from the deceased's half share and the first respondent retains her half share (whether in the form of the members interest itself or the monetary value thereof).

87.11. In my view, the appellant's version is not palpably implausible or so far-fetched or untenable as to be rejected out of hand, which has the consequence that any of the objectionable or unlawful terms in the Will are not to be attributed to him and his version that he will not act in terms of anything therein which is illegal or unethical and had also advised the Deceased against the legality of aspects of certain of the proposed content of his Will, must be accepted.

87.12. On the facts, applying the primary rule in *Plascon-Evans* and its two qualifications, I am of the view that the court *a quo* erred in accepting the version that the appellant had conceived and drafted the Will and in rejecting his version.

87.13. In the premise, I am of the view that this is a material misdirection and the first respondent's case on this aspect was not established.

The launching of the interdict application against the first respondent on 22 May 2024

88. The core issue in this respect is whether the launching of the interdict application on 22 May 2024 showed that the appellant was biased against the

first respondent. The relief sought was to interdict the first respondent from interfering with the administration of the estate of the deceased and dealing with the assets falling within the joint estate.

89. The first respondent's main contentions (the papers are voluminous and a more comprehensive exposition of the evidence will unduly burden this judgment):

89.1. This application was an attempt to circumvent the decision of the German court on 30 November 2023 which confirmed that she could proceed with her litigation in Germany.

89.2. She alleges that this "… *is fully consonant with the vindictive and toxic attitude that the respondent has exhibited in his dealings against me, from the inception of the divorce action in 2014, to date hereof.*" and demonstrates "… *the intransigent inability of the [appellant] to act in an even-handed, fair and objective manner, in matters involving the interests of parties such as myself, in the joint estate*."

89.3. She states that the order was granted on the appellant's founding papers and she did not put in a version. She stated that she considered an appeal but was advised that the order was interim and would not be appealable.

90. Ultimately, the first respondent was alleging that the appellant was biased against her and was not able to act in an even-handed, fair and objective manner.

91. The appellant's version:

91.1. The interdict application was granted by this court on an interim basis on 6 June 2024. It was launched on 22 May 2024.

91.2. After hearing counsel, the first respondent was interdicted and restrained from interfering with the administration of the estate or dealing with any of its assets, but this excluded the pending litigation in Germany. A copy of this court's order was attached to the answering affidavit.

91.3. The application was brought at the instance of the deceased at a time when he was still in a position to clearly understand the content thereof. He gave the appellant full and proper instructions. The reason he gave for the application was that he wished to have the divorce finally adjudicated.

91.4. The appellant was not the initiative behind the application.

92. Evaluation:

92.1. There is a core dispute of fact as to whether the appellant was biased against the first respondent and was not able to act in an even-handed, fair and objective manner, as contemplated in *Plascon-Evans*.

92.2. There were no bald denials. The first qualification in *Plascon-Evans* therefore does not apply.

92.3. That leaves the second qualification: whether the appellant's version is so palpably implausible or far-fetched or untenable as to be rejected out of hand.

92.4. In paragraph 99 of the Judgment the court *a quo* held that "… *the surviving spouse is an automatic heir to half of the joint estate*". This is legally incorrect. She is not an heir but the owner of an undivided half share of the joint estate. It also contradicts what was, in my view correctly, said earlier in the Judgment, namely that the first respondent "*is neither heir nor beneficiary of the deceased's will*".

92.5. I have already indicated that, in my view, on the papers, the court *a quo* erred in accepting the version that the appellant had conceived and drafted the Will.

92.6. In my view, as to constitutional rights to property, the first respondent retains her entitlement to an undivided half share of the members interest in Droogekraal, i.e. an effective 50%. The deceased bequest of 4% to the appellant would come from his effective 50%. She is not deprived of any rights to property.

92.7. On the facts, applying the primary rule in *Plascon-Evans* and its two qualifications, I am of the view that this it was a material misdirection for the court *a quo* to decide otherwise.

92.8. In the premise, I am of the view that first respondent's case on this aspect was not established.

93. In line with what is mentioned in the first paragraph of this judgment, I have considered the evidence through the prism of *Plascon Evans* and, for the reasons articulated in detail above, have come to the conclusion that none of the material grounds on which the first respondent relied in her papers were established. As a result, in my view, there was no material averred and relied upon which was established on the evidence for the section 54(1)(a)(v) determination to be made in the first respondent's favour.

The tone of affidavits

94. The tone of the first respondent's affidavits requires some attention and comment. Criticism of the appellant in emotive and aggressive terms was made by the first respondent in the papers. The following were some of what was

employed in respect of appellant: '*perjurious allegations*', '*venom*', '*risible and startlingly disingenuous*', '*vindictive and toxic*', '*driven by malice*', '*toxic display of animosity*', '*venting his spleen*' and '*cloak and dagger*'.

95. *Knoop NO and Another v Gupta and Another* 2021 (3) SA 88 (SCA) at paragraph 145 reminds legal practitioners about the care that is required when affidavits are drafted. It cautioned against allegations cast in emotive terms that are not borne out by any evidence. And it reminded legal practitioners that serious allegations of misconduct against opponents should only be made "… *after due consideration of their relevance and whether there is a tenable factual basis for them.*":

> "[145] Before concluding it is appropriate to remark that the application papers in this matter reflect little credit on the legal practitioners responsible for their preparation. They were replete with allegations in emotive terms not borne out by any of the evidence. Ms Ragavan's allegations against the BRPs did not stand up to scrutiny and the charges of incompetence, conflict of interest, lack of independence, a failure to live up to the high professional standards expected of BRPs and the like, were unwarranted. It should not be necessary to remind legal professionals who draft affidavits for their clients that they bear a responsibility for the contents of those documents and may not use them for the purpose of abusing their client's opponents. Such allegations should only be made after due consideration of their relevance and whether there is a tenable factual basis for them. This aggressive tone was likewise reflected in the affidavits of Mr Knoop where he described Ms Ragavan and others as 'Gupta acolytes', an expression more appropriate to a newspaper report than an affidavit. On many points, he would have been better advised to set out greater detail and less rhetoric. As to some of the correspondence between the attorneys, the less said the better. It was marked by aggression, hostility and accusations but little of great relevance to the case and little that reflected well on the authors."

Conclusion

96. In my view, for the above reasons, the appeal should succeed and the order of the court *a quo* varied to the application before it being dismissed

Costs

97. There is no reason why the appellant, having been successful in the appeal, should not be awarded his costs in respect thereof and of the application before the court *a quo*. He was, by means of an amendment, cited in his personal capacity. The appellant and the first respondent both advocated scale C and I do not see any reason for it not to apply.

Order

98. In the premise, I propose that the following order be granted:

1. The appellant's application to adduce further evidence on appeal is granted, with costs to be costs in the appeal.
2. The first respondent's application to adduce further evidence on appeal is dismissed, with costs to be costs in the appeal.
3. The appeal is upheld with costs, including the costs of the application for leave to appeal to this court and to the Supreme Court of Appeal, with scale C applying to the costs in this court.
4. The order of the court *a quo* is varied to be as follows: 'The application is dismissed with costs, with scale C applying.'

A Kantor

Acting Judge of the High Court

I agree, and it is so ordered:

____

A Le Grange

Judge of the High Court

<u>Lekhuleni J:</u>

[1] I have had the benefit of reading the judgment of my colleague, Kantor AJ (the first judgment). Regrettably, I disagree with the conclusion it reaches particularly in the setting aside of the judgment of the court *a quo*. In my view, the appeal should fail. However, I agree with the views expressed in the first judgment in respect of the preliminary issues relating to the application to adduce further evidence on appeal.

[2] The central issue in this appeal is whether the court *a quo* erred in granting an order removing the executor, the appellant herein, as the appointed executor in the estate of the late M[...] B[...] ("the deceased"), who died on 29 January 2023.

[3] As will be demonstrated hereunder, I hold the view that in the circumstances of this case, the appointed testamentary executor (the appellant) is conflicted and thus, it is undesirable that he should continue his work as the executor of the deceased's estate. I further believe that the hostility that existed between the deceased's wife ("first respondent") and the testamentary executor who represented the deceased as his attorney of record in various matters against the first respondent as well as the predisposition of the appellant towards the deceased's son, makes it undesirable for him to continue as an executor in the estate of the deceased. I further believe that it will be problematic for the appellant, as the executor, to make impartial judgments while fulfilling his duties, especially concerning the first respondent, who is the surviving spouse of the deceased.

Background

[4] The factual background has been succinctly set out in the first judgment; however, to give context to the conclusion that I reach and to the order I propose hereunder, I deem it prudent to give a summary of the background facts that underpin my reasoning on the central issue in this appeal. The first respondent and the deceased were married in community of property on 6 February 2006 at Oudtshoorn, South Africa. During the marriage, both the deceased and the first respondent believed they had been married in accordance with German law, that is, out of community of property with accrual, as the deceased was a German citizen, and the first respondent was a Filipino citizen. In 2012, the parties' marriage relationship began to break down. Thereafter, in November 2013, the first respondent informed the deceased of her intention to institute divorce proceedings.

[5] Subsequent thereto, the deceased immediately approached their family lawyer, one Fanie Roux ("Roux"), for advice on what steps to take to address the first respondent's intended action. Roux gave the deceased, and the first respondent advice contained in a letter setting out that the deceased and the first respondent were married in community of property and that each would have a claim equal to 50 per cent against the joint estate. Roux also suggested a settlement between the parties and made settlement proposals to the first respondent. Pursuant thereto, the first respondent consulted her attorney and subsequently rejected the proposal.

[6] After that, the deceased donated some of his German properties to his son, born from his first marriage, H[...] B[...] ("H[...]"). In respect of those properties, the deceased obtained the rights of a usufructuary, with the full power to utilise the properties and to receive income therefrom. The first respondent believed that her husband, the deceased herein, dissipated most of the German properties by transferring them to his son H[...] upon being advised that the marriage between them was in community of property. The first respondent asserted that H[...] and the deceased unlawfully collaborated to facilitate this disposition. She never consented to such transactions, which, according to her, violate the provisions of section 1, 15(2)(a) and 15 (3) of the Matrimonial Property Act 88 of 1984 ("the Matrimonial Property Act"). The first respondent therefore instituted action in the courts of Munich in accordance with German law to impugn the validity of the dispositions. H[...] opposed the proceedings.

[7] In the interim, the marriage relationship between the parties deteriorated, giving rise to the first respondent instituting divorce proceedings against the deceased in January 2014 in the Eastern Circuit Local Division of the High Court, in George. The divorce proceedings between the first respondent and the deceased continued until 29 January 2023, when the deceased passed away, and the death of the deceased dissolved their marriage. The appellant was nominated as the executor of the deceased's last will dated 19 April 2022. The appellant accepted such nomination and was subsequently appointed as executor on 23 May 2023.

[8] As noted in the first judgment, the first respondent successfully applied to the court *a quo* for the removal of the appellant from his office as executor, as well as other relief ancillary thereto and in relation to his remuneration in that capacity. The appellant appeals the decision of the court *a quo* to this court, having obtained leave from the Supreme Court of Appeal, as the court *a quo* declined to grant leave to appeal. In this appeal, the appellant seeks a reversal of the order made by the court *a quo*.

Applicable legal principles

[9] It is trite that the removal of an executor is a very drastic step which the court will not lightly grant. *Segal v Segal* 1979 (1) SA 503 (C). The removal of the executor from his position involves the exercise of a discretion. The discretion vested in the High Court to remove an executor in terms of section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965 ("the Administration of Estates Act") is a discretion in a true sense. *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T). It is a well-settled principle that the power to interfere on appeal in matters of discretion is strictly circumscribed. In *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335 Greenberg JA, indicated that the question in such a case is whether 'the Court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons'. (See also *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I–782B. That, in my view, is the approach which is to be adopted in the instant case.

[10] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) para 83, ("*Trencon"*) the Constitutional Court observed that in order to decipher the standard of interference that an appellate court is justified in applying, a distinction between two types of discretion emerged in our case law. That distinction is now deeply rooted in the law governing the relationship between appeal courts and courts of first instance.

[11] The Court noted that the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was a discretion <u>in the true sense</u> or whether it was a discretion in the <u>loose sense</u>. The distinction between the two is made for the purposes of determining the extent of an appellate court's power to substitute its own determination for that of the court *a quo* where the decision in point is accepted to have involved the exercise of 'a discretion'. See also *S v Tafeni* 2016 (2) SACR 720 (WCC) para 6.

[12] A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. The lower court has an election of which option it will apply, and any option can never be said to be wrong, as each is entirely permissible. In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permissible options. A discretion in the loose sense means no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision. See *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361I.

[13] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para 11, the Constitutional Court emphasised that when a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

[14] Section 54 of the Administration of Estates, deals with the removal of executor from office. Section 54(1)(a)(v) which is pertinent to the instant case provides:

> 'An executor may at any time be removed from his office <u>if for any other reason the court is satisfied that it is undesirable that he should act as executor</u> of the estate concerned.' (emphasis added)

[15] Section 54(1)(a)(v) of the Administration of Estates Act endows a court with a discretion to remove an executor from his position if it is undesirable for the executor to continue to act as the executor of the estate of the deceased. A court may make this finding without any finding that there has been wrongdoing on the part of the executor as contemplated in section 54(1)(a)(ii), (iii) or (iv) of the Administration of Estates Act. See *Reichman v Reichman* at [2011] JOL 28151 (GSJ) para 24.

[16] The common law principle affirmed in *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 724F-G, is that the Court is vested with a discretion to remove an executor from office if his personal interests are in entire conflict with the interests of the estate. In the exercise of its power to appoint or remove an executor, the Court will pay close attention to the wishes of the testator as expressed in or implied from the terms of the will. The Court cannot, however, necessarily be bound by these wishes even to the detriment of the beneficiaries to whose interest it must equally clearly have regard. See *Port Elizabeth Assurance Agency & Trust Co Ltd v Estate Richardson* 1965 (2) SA 936 (K) at 940.

[17] Meyerowitz *The Law and Practice of Administration of Estates and Estate Duty* (2007) at 11 – 2, notes that where an executor's private interests conflict with those of the estate, he may be removed from office. If an application is made for the removal of an executor on the ground that he has made a claim against the estate which is disputed by the heirs, it is not necessary for the Court to go into the validity of the claim, as the question as to who is right or wrong is irrelevant. The executor finds himself in the impossible position on the one hand having to fight for his claim as a creditor and on the other hand having as executor to defend the estate against the same claim; he cannot remain impartial.

[18] In determining an application in terms of section 54(1)(a)(v), Scholtz AJ in *Reichman v Reichman (supra),* concluded from a review of relevant authorities that the court may exercise its power under this section where there is a conflict of interest between the executor in his capacity as executor and his personal capacity, such as where there is a dispute between the executor and other beneficiaries concerning their entitlement to benefit from the estate. Importantly, as foreshadowed above, the court was satisfied that even where there was no finding of wrongdoing on the part of the executor, the facts established it was undesirable for him to continue to act as executor.

[19] In *Van Niekerk v Van Niekerk and another* [2011] 2 All SA 635 (KZP) paras 10 and 11, Wallis J, observed that the executor of an estate has broader responsibilities. The executor is given the custody and control of all the property in the estate (section 26(1) of the Act). The executor is not a mere agent for the heirs. As soon as possible after letters of executorship have been granted, the executor must cause a notice to be published calling upon all persons having claims against the estate to lodge such claims (section 29(1). The executor must consider these claims and having done so, may dispute them (section 32) and reject them (section 33). Thereafter, the admitted claims and any rejected claims that are proved against the estate in legal proceedings must be included in the liquidation and distribution account and paid, in order of preference, before the claims of legatees and heirs.

[20] The court emphasised that an executor is obliged to exercise these powers *bona fide* and with a measure of objectivity. In dealing with a claim, he or she should assess its merits on a fair consideration of the facts and its legal merits. The court noted that it is not proper for an executor to reject claims against the estate without some good reason to do so.

[21] From the principles discussed above, it is apparent that the Court must be satisfied that there are some acts or conduct on the part of the executor which demonstrate or prove that it is undesirable for him to continue as executor. It is not any dispute which causes the executor of an estate to become susceptible to removal at the instance of the court. 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. *Oberholster NO and others v Richter* [2013] 3 All SA 205 (GNP) para 17.

[22] Expressed differently, there has to be a proven conflict of interest or facts which demonstrate that he is incapable of impartial administration of the estate to the detriment or prejudice of the estate, and consequently its heirs or beneficiaries. See *SNS and another v Master of the KwaZulu-Natal High Court, Pietermaritzburg and others paras* [2015] JOL 33962 (KZP) para 30.

Discussion

[23] The court *a quo* considered the provisions of s 54(1)(a)(ii) and s 54(1)(a)(v) of the Administration of Estates Act and found that there was a manifest conflict of interest in the appellant acting as an executor in the deceased's estate. The court *a quo* found that the appellant's actions suggest an undue inclination to promote H[...]'s interests over those of the first respondent. The court opined that the respondent's preference to pay maintenance to 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 first respondent, cannot be sufficiently deprecated.

[24] In the view of the court *a quo*, the first respondent had to resort to litigation to obtain a commitment to get maintenance payments. Yet shortly after that, the appellant agreed to halt the source of that payment and pay over 2 million to maintain the public spaces in the German building. In my opinion, the findings of the court *a quo* indicating a conflict of interest in the appellant serving as the executor of the estate are beyond criticism and should not be disturbed.

[25] It is common cause that the appellant, the testamentary executor herein, as an attorney of the deceased, represented the deceased in acrimonious litigation against the first respondent, which was directed to restrain the first respondent's entitlement to a fair half share of the joint estate. This commenced on 24 January 2014, when

the first respondent instituted divorce proceedings against the deceased and sought a decree of divorce with further ancillary relief. From the inception of the divorce proceedings and throughout thereafter, the deceased was represented by the appellant as his attorney of record. The deceased initially denied that the marriage between them was in community of property. That denial culminated in an application, launched in this court under case 10019/2014, for an order declaring that the marriage between the parties was in the community of property.

[26] The deceased opposed the application. The appellant was the deceased's attorney of record when the application was heard. As detailed below, whilst it is accepted that the appellant was acting on behalf of the deceased, his client, it must be emphasised that the appellant demonstrated a mindset that is unfriendly towards the first respondent and favoured his client and H[...] even after the deceased's death. The application for the determination of the parties' marriage regime was heard on 28 October 2014 before Cloete J. On 2 December 2024, Cloete J granted the relief sought and found that the marriage between the deceased and the first respondent was in community of property. The deceased, represented by the appellant, sought leave to appeal, but both Cloete J and the Supreme Court of Appeal denied it.

[27] It is common cause that the deceased, assisted by the appellant, filed a counterclaim against the first respondent, seeking an order for forfeiture of benefits. Essentially, it was contended that the first respondent should not receive any share of the joint estate despite the determination of Cloete J finding that the parties were married in community of property and that the first respondent is entitled to 50 per cent of the joint estate. Ostensibly, the prayer for forfeiture in terms of section 9(1) of the Divorce Act 79 of 1970, was predicated on shaky grounds as it was subsequently withdrawn.

[28] It is also common cause that the first respondent brought an application to amend her particulars of claim in the divorce action by introducing averments that the deceased had fraudulently dissipated the German properties with the intention of placing them beyond the first respondent's reach and beyond the reach of the joint estate in contravention of the provisions of the Matrimonial Property Act. The first

respondent sought to introduce a prayer declaring that the disposition of the properties to H[...] was null and void and that the properties formed part of the joint estate. The deceased objected to the proposed amendment and refused to provide any further particulars in respect of the German properties. Still, the appellant represented the deceased in that application as well as in the first respondent's application for further and better particulars.

[29] I am mindful that the appellant was representing his client and advancing his interests when he acted on behalf of the deceased. However, it is notable that the appellant, acting as the deceased's attorney, represented the deceased in a contentious legal battle against the first respondent. Essentially, the litigation sought to deny the first respondent's right to a fair share of the joint estate, despite the parties being married in community of property. Crucially, the appellant also served as the deceased's attorney shortly before the deceased's death in litigation aimed at depriving the first respondent of the deceased's German assets.

[30] Concernedly, as will be discussed below, the appellant's correspondence to the German court for the withdrawal of the first respondent's case against H[...] for properties which do not form part of the joint estate raises serious concerns. The failure to pay maintenance from the estate that the first respondent requested for herself and her children is indeed troubling. This situation not only raises serious concerns about the fairness and objectivity of the appellant but also highlights potential bias that could affect the heirs, particularly the first respondent.

[31] As the court observed in *Van Niekerk v Van Niekerk and another* [2011] 2 All SA 635 (KZP) paras 156H-I, whilst the executor of an estate may be vigorous in resisting a claim that he or she regards as doubtful and this may result in acrimony between the executor and the claimant, the proper execution of the duties of an executor demands, a measure of impartiality and fair treatment in dealing with claims against the estate. From a conspectus of all the evidence, I am of the view that the appellant did not treat the first respondent fairly and objectively as he did with H[...]. This is, in my view, is a compelling reason for the removal of the appellant as an executor. I will address the appellant's relationship with H[...] at a later point in this judgment.

[32] The dispute raised by the first respondent as to who prepared the will between the appellant and the deceased is, in my view, neither here nor there. If the first respondent disputes the contents of the will, the first respondent should have challenged the validity of that will. That was not done, and I need not say more than that. For the purposes of this judgment, I accept that the appellant prepared the will of the deceased at the instructions of the deceased. Consequently, I will not deal with the issue relating to the disputes of fact that the first judgment traverses. To this end, I agree with the first judgment on the legal principles espoused governing the resolution of factual disputes.

[33] Notwithstanding, I am of the firm view that the appellant had an ethical and legal duty to advise the deceased of the contents of his will and to ensure that it complied with the law and the Constitution. As the court *a quo* pointed out, the appellant had a duty to be fully involved in giving the deceased appropriate and thorough advice on what was achievable and appropriate under South African law when he dispensed advice on the contents of the will. In clause 3.1 of the will, the following is stated:

> 'I direct that my membership in the Droogekraal Meulenrivier Farm CC, as well as my share of the property situated in the van der Riet Street, Oudtshoorn, may not be sold or transferred other than directed herein…'

[34] In clause 4 of the will, the deceased bequeathed 100 per cent of the members' interest in the Droogekraal CC to various heirs, including 4 per cent to the appellant. It is incontestable that the first respondent remained constitutionally entitled to be the owner of 50 per cent in the members' interest in the corporation. The deceased did not at all specify that clause 4 of his will concerns only his 50 per cent share. It is clear from the will that the first respondent was unconstitutionally denied her entitlement to 50 per cent of the members' interest in the close corporation. The appellant contended that he is not the initiator nor the drafter of the will and cannot dictate to a testator what he should state in his will. In the context of this matter, I do not agree with this proposition. The deceased was a German citizen who relied on the appellant for legal advice on what was lawfully achievable and appropriate under South African law, when the appellant dispensed advice to the deceased on the contents of the latter's will.

[35] I appreciate the argument of Ms McChesney, the appellant's counsel, that freedom of testation provides for the right of the testator to determine the contents of his will even where contrary to advice received or legally enforceable. It must be stressed that freedom of testation itself is constitutionally protected as it implicates the rights to property, dignity and privacy. see *Wilkinson and Another v Crawford NO and Others* 2021 (4) SA 323 (CC), para 70. Freedom of testation entails a testator's right to dispose of his estate as he pleases in a will, provided that the <u>disposition is lawful</u> and is not contrary to public policy. *Harvey NO and others v Crawford NO and* 2019 (2) SA 153 (SCA) para 56. Simply put, there are various restrictions on freedom of testation. These include: (a) effect will not be given to testamentary dispositions which are illegal, contrary to public policy or vague; See *Minister of Education v Syfrets Trust Ltd NO* 2006 (4) SA 205 (C); (b) restrictions imposed by legislation.

[36] I find the expression of Jafta J, in *King N.O and others v De Jager and others* [2021] JOL 49722 (CC), apposite. The learned justice stated:

> '[124] Therefore, <u>*it cannot be gainsaid that freedom of testation, as a right, is protected in our law.*</u> It is protected not only because it forms part of our common law, but also because it advances the values of freedom and dignity which are the foundation of the Constitution, our supreme law. The importance of freedom of testation to our law of succession was affirmed by this Court in *Moosa NO*.
>
> [125] But freedom of testation, <u>*important as it is, is not a licence for testators to act unlawfully.*</u> <u>*This means that a testator may not dispose of her property in a will or trust deed by unlawful methods. Nor can she impose unlawful conditions. If she does any of these things, she renders the will unenforceable to the extent of the unlawfulness.*</u> This is because a testator cannot, after departing from this world, do what she could not achieve in her lifetime. The right of ownership, of which freedom of testation forms part, entitles <u>*the owner to do as she pleases with her property, as long as what she chooses to do is permissible under the law.'*</u> (footnotes omitted and emphasis added)

[37] Whilst it is accepted that the deceased enjoyed the freedom of testation, it must be stressed that the appellant, as the deceased's attorney of record, had a legal and ethical duty to advice the deceased and ensure that the deceased's will was <u>lawful</u> and complied with the law. Consistent with the Code of Conduct for all legal practitioners, the appellant had a duty to treat the interests of his client as paramount, provided that his conduct was subject always to his duty to the court; the

interests of justice; <u>the observance of the law</u>; and the maintenance of the ethical standards prescribed by the Code. The appellant knew that the deceased and the first respondent were married in community of property as determined by the court.

[38] That court order constitutionally entitled the first respondent to 50 per cent of the members' interest in the close corporation. If the first respondent were to be not interested in owning such percentage or portion of the total membership interest, she would be entitled in terms of the provisions of the Close Cooperation Act 69 of 1984, to sell same at the market related price in terms of and in according with the requirements of the relevant sections in the Close Cooperation Act.

[39] In my view, the appellant had a duty to advise the deceased accordingly and not allow a clause that essentially conflicted with the court order of Cloete J to form part of the will. Crucially, clause 4 of the will that disinherits the first respondent benefits the appellant by granting him 4 per cent of the members' interest. At the same time, it clearly disadvantages the first respondent by disinheriting her.

[40] The appellant's entitlement to a bequest of 4 per cent from the 100 per cent members' interest compounds the difficulty. Notably, the will does not specify that the 4 per cent shall be from the deceased's 50 per cent share. Instead, it is bequeathed from the totality (100 per cent) of the members' interests. As discussed above, I accept that the appellant is not the initiator of the will; however, I find it strange that when the appellant translated the deceased's will from German to English, he must have noted that the deceased is unlawfully disinheriting the first respondent of her 50 per cent and instead bequeathing the 4 per cent to him. This, in my view, raises concern about the appellant's objectivity and impartiality towards the first respondent.

[41] I acknowledge the freedom of testamentary disposition. However, as the attorney representing the deceased, I believe the appellant should have taken care to ensure that the allocation of 4 per cent of the member's interest to himself, along with the disinheritance of the first respondent, does not unlawfully conflict with the court order that declared the marriage of the parties to be in community of property. The conflict further arises from the lack of specificity regarding whether the payment was to come from the deceased's 50 per cent share or that of the first respondent.

Mr Barnard, counsel for the respondent, submitted that the disposition of 4 per cent of the members' interest in the close corporation to the appellant personally made the appellant a direct party in the despoiling of the first respondent's property rights.

[42] As adumbrated above, in terms of the deceased's will, the appellant was bequeathed 4 per cent of the members' interest in the close corporation; Droogekraal Meulenrivier Farm. The close corporation is indebted to the estate (loan account) in the sum of approximately R35 million. Simply put, the appellant is a beneficiary of members' interests in the close corporation that is indebted to the estate, which the appellant, as the executor, is entrusted to administer. The first respondent's attorney has requested the appellant to indicate how he intended to deal with the close corporation and its indebtedness to the estate. In response, the appellant indicated that, as he did not know whether it would be necessary to liquidate the close corporation, he had not yet considered the R35 million debt.

[43] The appellant is likely to be required to make a decision regarding the potential liquidation of the close corporation. This will necessitate him to adopt a position that favours either the estate or, conversely, acts against his own interests with respect to his 4 percent membership interest in the close corporation. The appellant also raised the question of the prescription of this claim. He must determine whether the claim has prescribed or not. In one of his correspondences to the first respondent's attorneys, he stated that it needs to be determined whether the biggest part of the loan account has not prescribed and is therefore not recoverable from the estate. The appellant also indicated that he is in the process of considering same.

[44] Invariably, if he determines that the claim has prescribed, his 4 per cent share would have a commensurately higher value. A dispute may arise, particularly where the first respondent or one of the heirs does not agree with his finding. Clearly, this raises a conflict of interest. If the matter goes into Court, the appellant will have to instruct attorneys in his personal capacity, and tell them what evidence to obtain concerning the prescription, or determination of his share in the close corporation and, in his capacity as executor, he will have to instruct attorneys how best to meet the case set up by himself in his personal capacity. See *Barnett v Estate Beattie* 1928 CPD 482 at 485.

[45] It seems to me that the position of the appellant is an impossible one. The appellant cannot act as his own watchdog in respect of the 4 per cent interest and the loan to the estate. This brings to mind the observation of Van Blerk JA, in *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 724 F-G, where the learned judge stated:

> 'Dit is duidelik dat hier 'wesenlike botsing bestaan tussen die persoonlike belange van die respondent en die van die boedel waardeur'n toestand geskep is wat respondent se posisie as eksekuteur vir hom onhoudbaar maak. <u>*Hy bevind hom in die onmoontlike posisie dat hy enersyds as skuldeiser van die boedel sal moet veg vir sy eis en andersyds in sy hoedanigheid as eksekuteur die boedel sal moet verdedig teen dieselfde eis.*</u> In hierdie rol say hy genoodsaak wees om kant te kies. Hy kan nie onsydig of onpartydig bly nie.' (emphasis added)

[46] Moreover, the appellant, as an executor, most likely stands to benefit financially in his personal capacity, depending on the decision he takes as executor regarding his 4 per cent and the loan to the estate. Evidently, the appellant's interests in the corporation and those of the estate are in sharpest conflict. The court *a quo*'s finding that the allocation of 4 per cent of a member's interest in the close corporation undoubtedly creates a conflict of interest for the appellant cannot be faulted. The appellant cannot be a player and a referee of his own game. The conflict of interest in this context is glaring and indisputable.

[47] The conflict of interest is further exacerbated by the potential for disputes regarding the appellant's involvement in the close corporation's debt to the estate, as well as his 4 percent interest. These issues are likely to become sources of contention among the heirs, particularly with respect to the first respondent. Clearly, the appellant cannot represent his own interests in the close corporation and still represent the estate's interests. Mores so, as articulated above, the appellant represented the deceased as his client in acrimonious litigation against the first respondent. The deceased, in his lifetime, acknowledged indebtedness to his son H[...] for more than 1 million euros. Similarly, H[...] filed a claim against the estate for this amount. The first respondent disputes this claim. Although the appellant

expresses some doubts about the validity of this claim, the appellant appears willing to accept it.

[48] This situation presents a conflict of interest. It seems to me, the current circumstances also present significant challenges for the appellant to take action that contradicts the wishes of his former client in the administration of the estate. Addressing this claim, in his correspondence to the first respondent's attorneys, amongst others, the appellant stated:

> '*Although **I am personally not satisfied** that all the amounts referred to in these claims would have been recoverable from the joint estate, had the late M[...] B[...] not accepted such claim....*I am of the view that it will rather be in the interest of the heirs if the claim of *H[...] B[...] against the joint estate can be set off against the withdrawal of the matter,* and the estate can be concluded without further encumbrances and delay.'

[49] The appellant is prepared to set off a claim that he doubts its validity at the expense of the first respondent withdrawing her claim against H[...]. Evidently, the prejudice to the fist respondent is manifest. As I see it, the learned Judge in the court *a quo* was correct in removing the appellant from his position as executor.

[50] I accept that there is nothing in our law that precludes an executor from inheriting or receiving a bequest from the estate he is administering. However, this case stands on a different footing. The mere fact that the appellant is a beneficiary in the estate under these circumstances, in my view, disqualifies him from being the executor in the estate. The close corporation is currently indebted to the estate. The appellant holds a beneficial interest in the close corporation. As such, the appellant must make a decision regarding the appropriate course of action between the estate and the close corporation, while carefully considering his interests in the corporation. Here, there is a glaring conflict of interest. Where an executor's private interests conflict with those of the estate, he should be removed from office. The appellant must assess any prescription issues and determine whether the close corporation should settle its debt with the joint estate or be liquidated, which could have negative financial implications for him.

[51] In *Oberholzer NO and others v Richter* [2013] 3 All SA 205 (GNP) para 15, the Gauteng full court found that both in *Grobbelaar* and *Webster* matters, the executor stood to benefit financially in his personal capacity, depending on what actions he took as executor. In such instances, his personal interests are in conflict with the interests of the estate and his inability to be impartial may be a *prima facie* ground for his removal as executor. To this end, s 54(1)(a)(v) gives the court a discretion and the main consideration remains a consideration of the interests of the estate and the heirs.

[52] The first respondent has complained that the appellant is hostile to her and has clubbed together with H[...] against him. The appellant has disputed this assertion. However, a thorough examination of the appellant's conduct and various correspondences corroborates the first respondent's version. I do not intend to address all the correspondence, but I consider the following pertinent. It is common cause that the first respondent instituted proceedings against H[...], challenging the transfer of properties that her deceased husband had made to H[...] during his lifetime. On 23 July 2023, the appellant addressed a letter directly to the judges of the court in Munich, stating that he had been informed that the first respondent was pursuing a claim against H[...] in her personal capacity for the transfer of certain properties that previously belonged to the joint estate.

[53] The appellant further stated that he held the view that the first respondent did not have *locus standi* to pursue the matter in a German court in the first place, as the divorce proceedings were instituted in South Africa and all issues relating thereto had to be addressed here in the first instance. Importantly, the appellant noted that since the deceased's passing, the first respondent has no *locus standi* in either the German or South African courts to pursue any claim relating to assets belonging to the joint estate, and that only the executor may pursue such claims.

[54] What I find concerning is that the properties in question had already been transferred to H[...]. The properties did not form part of the joint estate. They fell outside the scope of the executor as the administrator of the deceased's assets. The appellant had no power, in my view, to deal with or administer such assets, as they

had been transferred into the names of H[...]. The appellant was not requested by the first respondent or the court in Munich to render such assistance to the court, or to provide the court with opinions or a memorandum of such nature.

[55] As I see it, the appellant's interference in the German proceedings was unsolicited and, on the objective facts, was taken to protect H[...]'s interests. As correctly pointed out by Mr Barnard, counsel for the first respondent, the correspondence was intended to ultimately block the litigation against H[...] by substituting the first respondent as a plaintiff with the appellant solely for the purpose of withdrawing the proceedings instituted by the first respondent against H[...].

[56] I am mindful of the cost implications of the litigation in Germany that the appellant postulates; however, it must be stressed that the first respondent had a constitutional right to vindicate her rights. She was married to the deceased in community of property. Irrespective of the purpose of such transfer, the deceased transferred properties belonging to the joint estate to H[...] without her consent in contravention of section 15 of the Matrimonial Property Act. At the time of the transfer of the properties, the deceased was aware that the parties were married in community of property, pursuant to the advice they received from attorney Fanie Roux.

[57] I am mindful of the version proffered by the appellant and the argument raised by Ms McChesney, that the deceased's instructions to the appellant were that at the time of the transfer of the units to H[...], the purpose of the transfer was to restructure and alleviate his debts. I also accept that the proceedings were in Germany; however, it cannot be gainsaid that the first respondent had the right of access to courts guaranteed in section 34 of the Constitution to vindicate her claim in South Africa and in the German courts. The property that belonged to the joint estate was transferred to H[...] without her consent. The proposed withdrawal of her case was a typical violation of her constitutional right to access the courts.

[58] Furthermore, it must be highlighted that the first respondent has borne her own legal expenses, not those of the estate. To date, there is no evidence whatsoever that the appellant has paid the legal costs incurred by the first respondent from the

estate account in respect of the proceedings conducted in Germany. In *Laws v Laws* 1972 (1) SA 321 (W) the court noted:

> ‘Professor Hahlo, in the SA Law of husband and Wife, 3rd ed, at p.157 take the same view. At p. 156 Professor Hahlo Says that if a husband married in community of property makes donations out of the joint estate to third parties in deliberate fraud of his wife, then the wife or her estate has a right of recourse against him or his estate on dissolution of the marriage, and that, where necessary, she or her estate may proceed with the *Actio Pauliana* directly against the third party for the gift or its value.’

[59] The right to sue in Germany, in order to assert her rights, is a constitutional entitlement of the first respondent that cannot be easily revoked as suggested by the appellant, as such an action would undermine the foundational legal protection provided by section 34 of the Constitution. From the objective facts, despite his fervent denial, in my opinion, the appellant went an extra mile to protect H[...] the party whom the first respondent accused of fraudulently collaborating with the deceased to defraud her of assets of the joint estate.

[60] In doing so, the appellant interfered in the German litigation between the first respondent and H[...] and attempted to thwart the proceedings in that court in H[...]'s favour. The appellant's attitude toward the first respondent's claim against the estate, as well as against H[...], raises concerns about a potential lack of impartiality toward the first respondent. It bears emphasis that an executor is obliged to exercise his powers bona fide and with a measure of objectivity. See *Van Niekerk v Van Niekerk and another* [2011] 2 All SA 635 (KZP) para 11.

[61] The appellant, in my view, cannot be expected to administer the estate impartially in instances where he prefers one beneficiary over the other. The appellant has consistently denied having represented H[...]; however, the objective evidence contradicts this assertion. In the replying affidavit, the first respondent raised a very glaring point that, in my view, disqualifies the appellant as an executor in this matter. Of great concern, the appellant never responded to it, nor did he seek the indulgence of the court to address this point. For completeness, I deem it proper

to reproduce the first respondent's assertion in paragraph 14.1 to 14.6 of the replying affidavit.

> 14.1 'H[...] for all intents and purposes, has at all times been and continues to be, currently albeit indirectly, a client of the respondent (appellant).
>
> 14.2 In the above context I point out that during 2019, I conducted settlement negotiations with the deceased and H[...] and his wife, I[...]. *During the course of such negotiations, H[...] and I[...] were represented by the respondent (appellant)*.
>
> 14.3 I draw the attention of this honourable court to the fact that, in paragraph 13.1 of the respondent's answering affidavit, he disclosed confidential and privileged information concerning the settlement proposals exchange between the deceased, H[...] and I[...], and me, with scant regard to the ethical and common law obligation prohibiting such disclosure.
>
> 14.4 His disregard of such obligation however demonstrates, yet again, to what length he will go to cast aspersions on my integrity. His intention in doing so appears to be an attempt to convey the impression that my litigation for the recovery of the properties transferred to H[...], need not receive the attention and consideration from him that I respectfully submit it deserves. He attempts to convey the notion that in demanding my lawful share of the joint estate, I do so unreasonably, for which reason he is entitled to treat my claims dismissively.
>
> 14.5 However, and now that the respondent waived the privilege that attached to such settlement negotiations, I similarly waive such privilege and attach hereto as annexure DB18, a copy of a draft settlement agreement, of which the relevant parts were *proposals insisted upon by respondent (appellant) in his capacity as representative of H[...] and I[...], as well as S[...] M[...] , during the course of 2019.*
>
> 14.6 The copy of the proposed settlement agreement is redacted not to include any of the customary issues that would normally have been dealt with as part of a divorce settlement. *However, I below refer to the following features of the proposed agreement that dealt with the claims and demands of H[...], I[...] and S[...] .*

[62] As can be seen from the above, the first respondent drew the court's attention to the settlement negotiations that took place between the deceased, the deceased's son H[...] and the first respondent. Both parties waived the privilege that attached to such settlement negotiations, and the first respondent attached a copy of the settlement agreement. In clause 7 of the settlement agreement, the following was noted:

> 'The parties record their awareness of the fact that any settlement in division of their joint estate also involves the rights and obligations of third parties, namely H[...] B[...] ("H[...]"), I[...] B[...] ("I[…]") and S[...] M[...] B[...] M[...] ("S[...] "), and the rights of M[...] B[...] (jnr) ("M[...] jnr"). For this agreement to have any effect and or validity, it must therefore be agreed to and also signed by H[...], I[...] and S[...] .'

[63] Clause 7.15.3 provided as follows:

> 'Without derogating from the generality of the above, the plaintiff specifically agrees to withdraw the anti-dissipation interdict registered against the title deeds of the properties of H[...] and I[...], in Germany, and agrees to sign all the necessary documents to reflect such withdrawal. H[...] and I[...] agree to pay all costs, charges and expenses that will or may be incurred for purposes of the withdrawal of the anti-dissipation interdict.'

[64] The first respondent asserted that the document contained proposals insisted upon by the appellant in his capacity as representative of H[...] and I[...], as well as on behalf of S[...] M[...] - B[...]. Most importantly, the first respondent pointed out that when she rejected the proposal made by the appellant upon the basis of the provisions relating to her and the children, the appellant reacted indignantly and with anger in an email dated 21 May 2020 addressed to the first respondent's attorney in George, in which the appellant, inter alia, stated the following in an outburst of intemperate and disrespectful language:

> 'I have taken with absolute disbelief notice of the content of your letter and are flabbergasted and quite frankly disgusted that we have to be subjected to such utter nonsense and that you are quite willingly align yourself with an instruction which in our view is not only unethical but also immoral…

In the light of your client's stance, we have no other choice *to but to advise Mr H[...] B[...] that has to forge ahead with his preparation for further upcoming litigation in Germany* and will those extra costs be recovered from whatever the parties may eventually agree on, if anything at all.' (emphasis added)

[65] The settlement agreement and this correspondence, in my view, put paid to the fact that the appellant represented H[...]. As I see it, it seems to me that the appellant communicated with H[...] and his wife as his client on the proposed settlement agreement. From the contents of the above correspondence, it can be reasonably inferred that the parties were represented by their attorneys when the settlement was negotiated. Ms Isabelle Buhr represented the first respondent. The first respondent's attorney could not communicate directly with H[...] and his wife I[...], or with S[...], during negotiations of the settlement. From the correspondence, it can be reasonably inferred that it was the appellant who communicated with H[...] and I[...], his clients.

[66] Based on the objective facts, the first respondent's attorney negotiated with the appellant; hence, the appellant was concerned when the first respondent rejected the settlement proposal. Pursuant thereto, he was adamant that he would advise H[...] to proceed with the civil suit in Germany. From the correspondence above, it is my firm view that the appellant represented H[...] B[...]. As stated, this conclusion is demonstrated by the terms of the draft settlement agreement and the appellant's letter.

[67] The first judgment proposes that the appellant's use of the phrase 'he will advise Mr B[...]' in the letter quoted above indicates an intention to merely inform him rather than to offer legal advice or as an attorney. I respectfully disagree with this interpretation. It is important to emphasise that this email should not be viewed in isolation; rather, it must be considered in the broader context of the unsuccessful settlement negotiations. On these facts, I firmly believe that the appellant assisted H[...] during the settlement negotiations. When the first respondent made what seemed to be unreasonable demands, the appellant responded by stating that he would advise H[...] to proceed with litigation in Germany. In my opinion, this shows that the appellant represented H[...], who is involved in a civil suit with the first respondent concerning the estate that the appellant is managing. Given these

circumstances, I believe it would be inappropriate for the appellant to continue serving as the executor of the estate.

[68] Most importantly, the appellant sought an order that the transfer of the deceased's properties, listed in annexure MB1 to the founding affidavit, to H[...] B[...], be ratified by the court due to the respondent's refusal to consent to transfer as envisaged in section 15 of the Matrimonial Property Act. In my view, H[...] must have known about this application. I am mindful of the appellant's contention of the deceased's usufructuary claim in respect of these properties. However, I am of the view that, in the bigger scheme of things, the application was intended to thwart the first respondent's claims in H[...]'s interest. This raises a clear conflict of interest.

[69] I do not propose to deal with all the incidents raised by the first respondent regarding the appellant preference of H[...] over her; however, the facts in my view, speaks for themselves. The appellant's conduct, as outlined above, raises significant concerns about his ability to render an unbiased judgment in assessing the first respondent's claims against the estate. In my view, due to the conflict of interest raised above, and the apprehension of bias against the first respondent, it is undesirable that the appellant should act as executor of the estate concerned.

[70] Section 54(1)(a)(v) of the Administration of Act provides that an executor may at any time be removed from office by the court if, for any reason, the court is satisfied that it is undesirable that she should act as executor of the estate concerned. In my opinion, the court *a quo* was correct in granting an order removing the appellant as the executor of the deceased estate.

[71] In the result, I would have dismissed the appeal with costs, including the costs of counsel on scale B.

J Lekhuleni

Judge of the High Court

<u>Legal representatives</u>

<u>For the appellant:</u>
Adv M McChesney
Instructed by Brand & van den Bergh Attorneys

<u>For the respondent</u>
Adv T Barnard
Instructed by John Smith & Associates