IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 048796/25

In the matter between

MARTHINUS WESSEL NAGEL NO	1st APPLICANT
RYSZARD ORLIK	2nd APPLICANT
ARN ORLIK	3rd APPLICANT
MERYN ORLIK	4th APPLICANT

AND

STRUAN ORLIK	1st RESPONDENT
THE MASTER OF THE HIGH COURT, RESPONDENT	2nd

CAPE TOWN

In Re the Counter Application of

STRUAN ORLIK APPLICANT

AND

MARTHINUS WESEL NAGEL NO 1st
RESPONDENT

RYSZARD ORLIK 2nd
RESPONDENT

ARN ORLIK 3rd
RESPONDENT

MERYN ORLIK 4th
RESPONDENT

THE MASTER OF THE HIGH COURT, 5th
RESPONDENT

CAPE TOWN

JANE COURTNEY ORLIK 6th
RESPONDENT

LANE ORLIK 7th
RESPONDENT

PAIGE ELIZABETH ORLIK 8th
RESPONDENT

BRITTANY ANN ORLIK 9th

RESPONDENT

CARRIE BUICK 10th

RESPONDENT

Heard on: **24 February 2026**

Delivered on: 08 June 2026

ORDER

(a) The application for a declaration that subsequent to effect being given to the bequeaths contained in the last will and testament of the deceased as referenced in clause 3.1 to 3.7, the residue of the estate shall be distributed according to clause 3.8 which provides that the residue of the estate including all movable and immovable assets be distributed in equal shares between the 2nd, 3rd and 4th applicants only, is dismissed.

(b) The costs of the main application shall be borne by the estate.

(c) The counterapplications for the discharge of Marthinus Wessel Nagel (Nagel) as executor of the estate; for the order for Nagel to repay executors fees and forfeiture of any executor fees of the estate; for the authority for the Master to appoint another person as executor and for the order to deliver the objections and answering affidavits to another person and to instruct such person to furnish comments in respect of the objections, is dismissed.

(d) The costs of the counterapplication shall be borne by the estate.

JUDGMENT

THULARE, J

[1] In the opposed main application the applicants sought a declaratory order concerning the proper interpretation of the last will and testament of the late JER Orlik (JER). The applicants sought an order that after the effect being given to the bequests in clause 3.1 to 3.7 of the will, the residue of the estate shall be distributed in equal shares between 2nd , 3rd and 4th applicants only excluding the first respondent. Only the first respondent (Struan) opposed the application. Struan also brought a counter application wherein he sought a stay of the administration of the estate pending the outcome of his objection lodged with the Master, the rectification of the will by substitution of paragraph 3.8 thereof so as to include him therein, alternatively that the issue of rectification be referred for oral evidence and the removal of the first applicant (Nagel) as the executor of the estate. The counterapplication is opposed by the applicants in the main application. The sixth to tenth respondents in the counter application have not opposed the applications and no relief was sought against them. They were the JERs niece (tenth respondent) and grandchildren (sixth to ninth respondents). They were heirs who benefited from the will by way of specific bequests and are not involved in the dispute concerning the residue of the estate. Although the applicants in the main application in reply and answer to the counter application raised a point *in limine,* they have since abandoned it but contended that Struan's conduct was relevant for costs. The Master did not oppose any of the applications.

[2] The second to fourth applicants in the main application and Struan are siblings born of JER and are also nominated heirs. JER was a widow. She passed away on 27 March 2022 and left an estate of considerable value, comprising assets with an approximate value of just under 22 million rands. She executed a last will and testament dated 29 October 2021. In the will she made several specific bequeaths recorded in paragraphs 3.1 to 3.7 thereof in which her four children, her grandchildren and her niece benefitted as heirs. In addition to the specific bequeaths, the residue of the estate was bequeathed to the second to fourth applicants. It is the interpretation of this clause, 3.8, that is in dispute. Struan contends that the deceased did not intend to exclude him from the residual bequest. Paragraph 3.11 provided a resolution mechanism for any dispute arising from the bequeaths. Struan relied on the provisions paragraph 3.11.

[3] A dispute arose between 2nd, 3rd and 4th on one side and Struan on the other in respect of the interpretation of clause 3.11 of the last will and testament of JER. Nagel also differs from Struan on the interpretation of clause 3.11. Nagels interpretation of the disputed will is that only the 2nd, 3rd and 4th applicants were the residuary heirs, which excluded Struan from the benefit. Struan's view was that Nagels interpretation was influenced by extreme bias in favour of his siblings to his extreme prejudice. Struan's view was that Nagel accepted his siblings contention that clause 3.8 expressed the wish of JER that the residual was governed by clause 3.8, without in any way investigating it.

The main application

[4] Clauses 3.1 to 3.8 of the will reads as follows:

3. APPOINTMENT OF HEIRS

Bequeth my estate as follows:

3.1 All my jewellery I bequeath to my daughter, MERYN ORLIK, identity number …

3.2 To my daughter MERYN ORLIK identity number … the sum of R200 000 (two hundred thousand rand).

3.3 To my niece CARRIE BUICK of …, Scotland the sum of R100 000-00 (one hundred thousand rand).

3.4 To my son RYSZARD WILLIAM GERARD ORLIK identity number … the sum of R750 000-00 (seven hundred and fifty thousand rand).

3.5 To my son STRUAN ORLIK identity number … I bequeath my loan account in RSA & M TRUST (I[...]) and all assets related to the trust and name my son, STRUAN ORLIK as my follow-up trustee of the RSA & M TRUST (I[...]).

3.6 To my son ARN ORLIK identity number … the sum of R950 000 (nine hundred and fifty thousand rand).

3.7 My grandchildren are to receive each an amount of R200 000 (two hundred thousand rand:

3.7.1 COURTNEY JANE ORLIK, identity number …

3.7.2 SHANNYN LANE ORLIK identity number …

3.7.3 PAIGE ELIZABETH ORLIK identity number …

3.7.4 BRITTANY ANN ORLIK identity number …

3.8 The entire balance of my estate including all movable and immovable assets in equal shares to my children RYSZARD ORLIK, ARN ORLIK and MERYN ORLIK in equal shares.

Clauses 3.9 and 3.10 are not applicable for purposes of the dispute and the judgment. Clause 3.11 reads as follows:

3.11 In the event of there being any dispute and/ or argument and or difference of opinion between my aforesaid children in respect of the bequests as set out in herein, I direct that

MARTHINUS WESSEL NAGEL shall act as arbitrator with the power to make a final determination in resolving the dispute/difference of opinion/argument between my children. In this regard MARTHINUS WESSEL NAGEL shall have the full power as to how to resolve the dispute, which power shall include the selling of the assets and then distributing the proceeds thereof in equal shares to my children at all times taking into account the principle that they should share in the entire bequests in terms of these sub-paragraphs equally fit and upon the death of such beneficiary the said inheritance shall devolve upon the intestate heirs of such beneficiary.

[5] A dispute arose in respect of the bequest set out in clause 3.8. The dispute in respect of that bequest triggered clause 3.11. The children named in the will, before clause 3.11 are the 4th applicant in clause 3.1 and 3.2, the 2nd applicant in clause 3.4, Struan in clause 3.5 and the 3rd applicant in clause 3.6. It is the children to which clause 3.11 refers when it mentions my aforesaid children. There is no basis to conclude that clause 3.11 excluded Struan from the dispute resolution mechanism which his mother set up in that clause. The dispute resolution mechanism in clause 3.11 applied to all four children of JER.

[6] The approach to the interpretation of a will was set out in *Spangenberg and Others v Engelbrecht NO and Another* (717/21) [2023] ZASCA 100 (14 June 2023) at para 12 where it was said that:

Principles of Interpretation

[12] The 'golden rule' for the interpretation of Wills and the inherent limitation (that it should not contravene the law), was, as far back as 1914, described in *Robertson v Robertson* thus:

'The golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, *unless we are prevented by some rule or law from doing so*.' [Emphasis added.]

[7] The *Concise Oxford English Dictionary*, 10th edition, edited by J. Pearsall, Oxford University Press, 2002, (the dictionary) defined the word any as whichever of a specified class might be chosen. The dispute as to the exclusion or inclusion of Struan in clause 3.8 falls within the category of any dispute as envisaged in clause 3.11. Nowhere does the will say that clause 3.8 was excluded from the operation of clause 3.11. Clause 3.11 clothed Nagel with the power to make a final determination in resolving the dispute between Struan and his siblings. Clause 3.8 was a dominant clause which bequeathed the residue of the assets, but it was JER who required that its effect should be strained by clause 3.11. It is the testator who determines the destiny of their estate. Clause 3.11 renders clause 3.8 to no longer be a term so self-evident as to go without saying. In the event of a dispute like the present, clause 3.11 sets out a process through which beneficiaries should be identified, and the court should not hesitate to give effect to the testator's intention under those circumstances. Clause 3.11 is part of the whole of the terms of the will from which the testator's intention is to be determined.

[8] In *Raubenheimer v Raubenheimer and Others* 2012 (5) SA 290 (SCA) at para 23 it was said:

[23] In interpreting a will, a court must if at all possible give effect to the wishes of the testator. The cardinal rule is that no matter how clumsily worded a will might be, a will should be so construed as to ascertain from the language used therein the true intention of the testator in order that his wishes can be carried out [per Steyn J in *Masters v Estate Cooper* 1954 (1) SA 140 (C) at 143H-144A].

[9] Nagel did not have a blank cheque. There is an underpinning principle to which his determination had to comply with. The dictionary defines a principle as a fundamental truth or proposition serving as the foundation for belief or action. The principle is a rule or belief that should have governed Nagels behaviour and attitude [the dictionary's further definition of principle]. The fundamental source of and basis for resolving the dispute between JERs children, which should have been the quality and attribute of Nagels determination, was that all the children of JER, to which clause 3.11 applied, should share in the entire bequest in terms of sub-paragraph 3.8, which was the only disputed clause, equally fit. This is the principle which Nagel had to apply in exercising his power to resolve the dispute. It is in exercising that power, underpinned by considering the principle, that he would then distribute the entire balance of JERs estate in equal shares, to all her children, which included Struan.

[10] I do not understand the position of Nagel as arbitrator, as mentioned in the will, to mean that the dispute was to be referred to arbitration as we understand it in law, before him. He is a professional chartered accountant and not a lawyer. There may be jurisdictional issues relating to an arbitrator adjudicating on a disputed will, as well as whether the siblings having a dispute voluntarily agreed to arbitration of their dispute. A professional chartered accountant may not necessarily have the professional training, competency, skill and experience to attend to those kinds of disputes. I understand that provision in the will to simply indicate an honest attempt by a mother to ensure that Nagel would be able to break a deadlock between any of her children by making a binding decision subject to all the children benefiting equally.

The counterapplication

[10] In the light of my findings, rulings and orders in the main application, the need for rectification and referral for oral evidence falls away. The removal from office of executor by the court is governed by section 54 (1) of the Administration of Estates Act, 1965 (Act No. 66 of 1965) (the AEA). It provides that:

"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] A court has a discretion in an application seeking the removal of an executor and in the exercise of that discretion the predominant considerations

are the interests of the estate and those of the beneficiaries [*Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 17F, a passage approved by the Constitutional Court in *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) at [56]. The acts or omissions complained of against an executor must be such as to 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 [*Sackville West v Nourse and Another* 1925 AD 516 at 527; *Die Meester* at 16H]. It must be undesirable for the executor to continue acting in such capacity [*Oberholster NO and Others v Richter* [2013] All SA 205 (GNP) at para 22]

[11] There are disputes of fact in relation to the reasons that Struan advanced further for the removal of Nagel as the executor. For instance, the inclusion of the loan account in Orlik Property Holdings CC. Struan alleged it was donation by JER to her children. Nagel alleged that in the financial statements accepted by Struan the funds were advanced as a loan due to tax implications involved in a donation. Interest was raised in the loan account from time to time and the close corporation claimed this interest as a tax deduction. Nagel disputed that the loan account should be excluded from the liquidation and distribution account. There was also a dispute of fact in respect of the offshore assets. Nagel said the Aviva account funds were liquidated by the deceased, brought back to South Africa and utilized by the deceased to *inter alia* purchase ABSA policies. The ABSA policies had listed beneficiaries, being the 2nd to 4th applicants who received payments directly from ABSA. These policies did not comprise part of the estate. The remainder of the funds were used to purchase Citadel investments which were included in the liquidation and distribution account. Aviva did not have any records of any remaining policies. Nagel was unaware of any offshore assets which ought to be included in the estate.

[12] In respect of the alleged loan from JER to 4th applicant being excluded, the 4th applicant sold her property in Johannesburg and bought a property in Melkbosrand with the proceeds. JER assisted the 4th applicant in purchasing the property in Melbosrand. The bequest of an amount left for the 4th applicant, in clause 3.2 was included in the will. A consideration of the amounts left for the 2nd, 3rd applicant as well as Struan indicated that JER considered the financial assistance provided to 4th applicant when she executed the will. The deceased had given the 2nd applicant power of attorney to administer her financial affairs as JER had been scammed due to being unable to keep up with technological changes and the ingenuity of the scammers. I deem it not necessary to deal with the totality of the disputes, suffice it to state the court cannot determine them on the papers. Struan had prayed for referral of the dispute as regards interpretation of the clauses of the will for oral evidence, but not on the question of the removal of Nagel as executor. I am not persuaded that there is a need for the discharge of Nagel as executor. I am unable to find that all the facts known to Nagel in the disputed facts were equally known to Struan before he launched the counterapplication.

I am not persuaded to refer these disputes for oral evidence in this application. Equally I am not persuaded that Struan's contest was spurious. For these reasons the orders are made.

DM THULARE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv MJ Kapp

Instructed by Calitz Inc

Counsel for Respondent: Adv. H F Geyer

Instructed by Bieldermans Inc