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

JUDGMENT

Not Reportable

Case no: 018360/2025

In the matter between:

L[...] D[...] K[...] N.O.	Applicant
and	
M[...] J[...] S[...]	First Respondent
M[...] J[...] S[...] N.O.	Second Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	Third Respondent
LEGAL PRACTICE COUNCIL	Fourth Respondent

Coram: LOUW AJ

Heard: 23 April 2026

Delivered: 6 August 2026

Summary: The father, acting on behalf of his minor twin children, sought the removal of the executrix in terms of section 54(1)*(a)*(v) of the Administration of Estates Act 66 of 1965 and an order, in terms of section 20 of the Trust Property Control Act 57 of 1988, precluding her from being appointed trustee of the testamentary trust – The application succeeded – Executrix removed and precluded from serving as trustee, and ordered to pay punitive costs.

ORDER

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1 The First Respondent is hereby removed as the executrix of the estate of the late Dr N[...] V[...] D[...] K[...] administered under the Third Respondent's reference 018700/2018 ('the deceased estate').

2 The First Respondent is directed forthwith to return to the Third Respondent the letters of executorship issued to her under the Third Respondent's reference 018700/2018.

3 The Third Respondent is directed within 15 days of service of this order at the Third Respondent's office to appoint a substitute executor, of at least 15 years' experience, to the deceased estate.

4 The First Respondent in her capacity as the executor, is directed to account for all monies and assets, and/or books that she took into her possession for the duration when she acted as the executor of the deceased estate, and transfer all accounts to the new executor,

appointed by the Third Respondent, within five days of the new executor being appointed.

5 It is declared that it is in the interests of the testamentary trust envisaged in the last will and testament of the late Dr N[...] V[...] D[...] K[...] dated 7 January 2015 and of the beneficiaries of that trust that the First Respondent shall not hold office as a trustee of that trust.

6 The First Respondent is to pay the costs of this application on the attorney-client scale, including the costs of two counsel on scale C, and that none of those costs shall be borne by or recouped from the estate of the late Dr N[...] V[...] D[...] K[...].

JUDGMENT

LOUW AJ:

Introduction

[1] The Applicant, Mr D[...] K[...] (the 'father'), acting nominally on behalf of his two minor children (the twins), applies in terms of section 54(1)*(a)*(v) of the Administration of Estates Act 56 of 1965 ('Administration of Estates Act') for an order removing Ms S[...] (née D[...] P[...])

(hereinafter 'Ms S[...]'), the First Respondent, a practising attorney, from the office of executrix of the estate of his late wife, Dr N[...] V[...] D[...] K[...], the mother of the twins (the deceased estate). Ms S[...] is the deceased's identical twin sister and is accordingly the twins' maternal aunt (as well as their godmother) and Mr D[...] K[...]'s former sister-in-law. Ms S[...] herself is also a legatee of R500 000 in terms of the deceased estate.

[2] The father also seeks an order, in terms of section 20 of the Trust Property Control Act 57 of 1988 ('Trust Property Control Act'), precluding Ms S[...] from being appointed as trustee of the testamentary trust to be established for the benefit of the twins in accordance with the deceased's will.

[3] Prior to her death, the deceased transferred R5.6 million, representing the proceeds of a claim against the Road Accident Fund, into Ms S[...]'s trust account. Following the deceased's death, Ms S[...] was appointed as executrix of the deceased estate. The father, acting nominally on behalf of the twins, subsequently instituted a representative application under the so-called *Beningfield* exception against Ms S[...] in her personal capacity, seeking an order directing her to account to the estate for the R5.6 million. Ms S[...] was cited separately, in her representative capacity as executrix of the deceased estate, and as the second respondent for notice purposes ('the accounting application').

[4] On 25 February 2021, this Division dismissed the accounting application, finding that although Ms S[...] owed fiduciary duties to the

deceased, there was no evidence that she had breached those duties.[1] The litigation nevertheless continued. On 11 October 2022, a Full Court in this Division overturned the decision of the court a quo and held that Ms S[...], in her personal capacity, was obliged to render a full and proper account and was also liable for the father's costs in both courts.[2]

[5] However, on 2 October 2024, the Supreme Court of Appeal ('SCA') upheld Ms S[...]'s appeal in *S[...] and Another v D[...] K[...] NO and Others*[3] and dismissed the father's accounting application. The SCA held that Ms S[...] was not obliged to account to the deceased estate for the R5.6 million that had been paid into her trust account prior to the deceased's death from the proceeds of the deceased's Road Accident Fund claim arising from the motor vehicle accident. The father subsequently sought leave to appeal to the Constitutional Court, but the application was dismissed, bringing the accounting application to a conclusion.

[6] Ms S[...] thus successfully opposed the accounting application. During the course of the litigation, however, it emerged that she had used funds belonging to the deceased estate to pay the legal costs she had personally incurred in opposing that application, including payments made to Spamer Triebel Attorneys. In the present application, the father contends that, by using estate funds to satisfy her personal legal expenses, Ms S[...] acted in breach of her fiduciary duties as executrix. He accordingly submits that it is undesirable for her to continue holding the office of executrix in terms of section 54 of the Administration of Estates Act. He further contends that the

[1] *D[...] K[...] N.O. v S[...] and Others*, Under case number 6375/2020 (25 February 2021).
[2] *D[...] K[...] N.O. v S[...] and Others* Under case number A207/2021 (11 October 2022).
[3] (312/2023) [2024] ZASCA 132 (2 October 2024).

same conduct equally renders her unsuitable to be appointed as trustee of the testamentary trust to be established for the benefit of the twins.

[7] Ms S[...] opposes the present application. She contends that, in opposing the accounting application, she acted not only in her personal capacity as the first respondent, but also in her representative capacity as executrix of the deceased estate, in which she was cited as the second respondent. On that basis, she submits that she was entitled to use estate funds to pay the legal costs incurred in opposing the application and that, in doing so, she did not breach any fiduciary duty owed to the estate. Whether that contention is correct lies at the heart of the present application.

[8] The father contends that Ms S[...] paid more than R3 million from estate funds to Spamer Triebel Attorneys, representing approximately 80 per cent of the funds under her control as executrix. He submits that these payments amounted to an improper appropriation, alternatively an unauthorised loan, of estate funds to finance her personal litigation, in breach of the fiduciary duties she owed to the deceased estate.

[9] The present application was instituted on 6 February 2025. On 2 September 2025, a supporting affidavit was deposed to by Ms S[...]'s former husband, Mr F[...] J[...] S[...]. In essence, the affidavit dealt with the various countries in which he and Ms S[...] had resided during their marriage and recounted certain private conversations between them concerning the accounting application.

[10] Before the hearing of the present application, the father applied for leave to file a further replying affidavit and, in terms of Rule 6(15) of the

Uniform Rules of Court, sought an order striking out certain portions of Ms S[...]'s answering affidavit. When the matter was heard, counsel for the father informed this Court that the application for leave to file a Supplementary replying affidavit was no longer being pursued. The application to strike out accordingly remained for determination.

[11] Ms S[...] opposed the application and delivered her answering affidavit from Austin, Texas, on 2 April 2025. She also opposed the father's application for leave to file a supplementary replying affidavit. In anticipation of the possibility that such leave might nevertheless be granted at the hearing, she deposed a supplementary answering affidavit on 26 March 2026, in which she described herself as a practising attorney and conveyancer in South Africa and a businesswoman conducting business from Austin, Texas.

[12] In addition, Ms S[...] indicated on 27 March 2026 that, at the hearing of the matter, she would seek condonation for the late filing of an application in terms of Rule 6(15) to strike out the supporting affidavit deposed to by her former husband. She contended that the affidavit was irrelevant, alternatively scandalous and vexatious, and that its inclusion would cause her irreparable prejudice. It is common cause that Ms S[...] and Mr S[...] were previously married and have since divorced.

Factual background

[13] Certain background facts are necessary to determine the issues in dispute and the relief sought. There has been extensive litigation between the

father and Ms S[...] concerning the administration of the deceased estate. It is therefore necessary to set out the background facts relevant to the present application to place the issues in their proper context.

[14] Ms S[...] and the deceased were in a motor vehicle accident that occurred on 14 August 1995, in which the deceased sustained serious injuries. Following the accident, a claim for compensation was pursued against the Road Accident Fund, the proceeds of which would later become central to various disputes between the parties.

[15] On 9 September 2006, the applicant, Mr D[...] K[...] (father of the twins), married the deceased. Shortly thereafter, on 26 October 2006, the deceased executed her first will. The couple's twin children were born during July 2012.

[16] On 1 April 2005, Ms S[...] commenced practice for her own account under the name D[...] P[...], Bellville Attorneys and Conveyancers, having previously practised at her father's firm, D[...] P[...] Boland Inc. On 28 November 2014, an amount of R5.6 million, representing the proceeds of the deceased's Road Accident Fund claim arising from the motor vehicle accident, was paid into Ms S[...]'s trust account. On 2 December 2014, those funds were transferred into an investment account at ABSA held in her name. It is common cause that, prior to the deceased's death, the father had no knowledge of the deceased's Road Accident Fund claim, the subsequent settlement thereof, nor that the proceeds of R5.6 million had been paid into Ms S[...]'s trust account.

[17] Shortly after receiving the payment from the Road Accident Fund, the deceased executed a second will on 7 January 2015.[4] In terms thereof, she made specific bequests to her parents, including her two motor vehicles and a stand in Mossel Bay, and bequeathed a cash legacy to Ms S[...]. The deceased's husband, the father of the twins, was in substance disinherited. Apart from most of the household furniture, excluding certain specifically identified items bequeathed to the twins, and the remission of a loan of R200 000 owed to the deceased, he received no further benefit under the will. The residue of the estate was bequeathed to the twins, making them the principal beneficiaries of the estate. The will further directed that a testamentary trust be established for their benefit, with Ms S[...] nominated as trustee, and that the twins would become entitled to their respective inheritances upon attaining the age of 21 years.

[18] During July 2016, Ms S[...] married F[...] S[...]. It is not common cause where the married couple's matrimonial home was exactly during their marriage. From September 2016 until June 2022, they seemingly resided intermittently in Switzerland and in Texas in the United States of America and in Ms S[...]'s own version she visited South Africa regularly, while it was common cause that during the Covid-19 pandemic, the international travel restrictions in force limited Ms S[...]'s ability to travel to South Africa.

[19] On 25 September 2018, the deceased underwent surgery to address the long-term consequences of the injuries she had sustained in the motor vehicle accident many years earlier. At the time, Ms S[...] was in

[4] Annexure A to the founding affidavit (Court Index at 002-1 to 002-3).

Switzerland. Although the deceased initially survived the operation, she subsequently developed post-operative complications and passed away the following day, on 26 September 2018.

[20] In April 2019, the deceased's second will was discovered and, on 19 April 2019, it was accepted and registered by the Master. It may be observed that the circumstances surrounding the discovery of the second will are somewhat unusual. However, as no party has challenged the validity of the will in these proceedings, and no relief is sought in that regard, it is neither necessary nor appropriate for this Court to consider that issue further. On 29 April 2019, Ms S[...] accepted her appointment as executrix while in Lucerne, Switzerland. She elected a *domicilium citandi et executandi* in Wellington, South Africa, and appointed MHI Attorneys as her local agents to assist with the administration of the deceased estate. On 18 July 2019, the Master issued letters of executorship to Ms S[...], following which MHI Attorneys formally commenced administering the estate on her behalf.

[21] On 1 August 2019, MHI Attorneys opened an estate late bank account at Nedbank. Between August 2019 and July 2021, they recovered and paid a total of approximately R4.25 million into that account for the benefit of the estate. During the administration of the estate, substantial payments were also made to the estate's attorneys, Spamer Triebel Attorneys, beginning on 28 February 2020 and continuing over the following years.

[22] During the period August 2019 to March 2020, the father unsuccessfully sought information from MHI Attorneys, Ms S[...] and the Master concerning the whereabouts of the R5.6 million that had been paid

into Ms S[...]'s trust account in 2014. Dissatisfied with the lack of information, he lodged a complaint against Ms S[...] with the Legal Practice Council on 11 March 2020. On 5 June 2020, he instituted proceedings in this Division seeking an account of the administration of the estate (that is, 'the accounting application'). The Legal Practice Council complaint was thereafter effectively held in abeyance pending the outcome of the litigation.

[23] On 31 July 2020, MHI Attorneys prepared the first and only liquidation and distribution account. The provisional liquidation and distribution account, dated 31 July 2020, reflected assets of approximately R8.48 million, liabilities of approximately R1.19 million, and a net balance of approximately R6.57 million available for distribution to the beneficiaries in accordance with the will, including the specific bequests to the deceased's parents and the cash legacy to Ms S[...].[5] It is common cause that no further material progress was made in the preparation of a revised liquidation and distribution account thereafter.

[24] On 25 February 2021, Baartman J dismissed the accounting application in this Division, finding that although Ms S[...] owed fiduciary duties to the deceased, there was no evidence that she had breached those duties.[6] The litigation nevertheless continued and on 11 October 2022, a Full Court in this Division overturned the decision of Baartman J. It held that Ms S[...], in her personal capacity, was obliged to render a full and proper account and was also liable for the father's costs in both courts.

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[5] Annexure D to the founding affidavit (Court Index at 002-60 to 002-63).
[6] *D[...] K[...] N.O. v S[...] and Others* above fn 1 at para 27.

[25] On 12 January 2021, the deceased estate instituted an action against the father, alleging that he was indebted to the estate in respect of various loans allegedly advanced to him by the deceased during her lifetime. The father acknowledges that the deceased had advanced loans to him during her lifetime, but disputes the amounts allegedly outstanding. On 16 March 2021, the father delivered his plea together with a counterclaim. It is common cause that the action has not yet been finalised.

[26] During 2022, significant changes occurred in the administration of the estate. MHI Attorneys' mandate was terminated on 27 June 2022, and D[...] P[...] Bellville Attorneys and Conveyancers became Ms S[...]'s new agents. The following day, R1.5 million held by MHI Attorneys was transferred into Ms S[...]'s trust account. During the ensuing months, Ms S[...] distributed the R1.5 million by paying R500,000 to Spamer Triebel Attorneys and transferring the remaining R1 million to D[...] P[...] Wellington Inc. Thereafter, acting on Ms S[...]'s instructions, D[...] P[...] Boland (Ms S[...]'s father's firm) opened an 'estate late' account at ABSA, into which the R1 million was subsequently deposited.

[27] During the end of 2022 to 2023, further payments were made from the estate funds to Spamer Triebel Attorneys. The ABSA estate account was closed on 16 August 2023, after R800,000 had been transferred to another ABSA account, leaving a nominal balance. The Nedbank estate account was closed on 18 October 2023. On 29 November 2023, Ms S[...] instructed that the remaining balance of R497,118.58 held by MHI Attorneys be paid to Spamer Triebel Attorneys, and that payment was effected on 1 December 2023. By then, apparently millions had been paid to Spamer Triebel

Attorneys. Although the parties dispute the precise amount paid to Spamer Triebel Attorneys from estate funds, it appears from the papers that the payments amounted to well in excess of R3 million.

[28] During 2024, following the termination of MHI Attorneys' mandate, attorney Nita Brand became involved on behalf of Ms S[...]. On 6 August 2024, an amount of R863,585.68, representing the previously transferred R800,000 together with accrued interest, was paid into Ms Brand's trust account. Ms S[...] signed a power of attorney appointing Ms Brand as her agent on 23 August 2024. Ms Brand later advised that she was unable to open a new estate late account because she had not yet received the original power of attorney.

[29] During 2023, after learning that MHI Attorneys' mandate had been terminated, the father, through his attorney, made various enquiries regarding the status of the administration of the deceased estate and the funds held on its behalf. A series of communications followed between the father's attorney and Ms Brand, who acted as Ms S[...]'s agent. In those communications, Ms Brand repeatedly indicated that she was awaiting the original power of attorney from Ms S[...] before she could open an estate late account, alternatively that she was awaiting further instructions from Ms S[...]. She also declined to confirm the country in which Ms S[...] was residing.

[30] The father maintains that these enquiries were made in his capacity as the parent and guardian of the twins, who are the principal beneficiaries of the deceased estate. Despite these enquiries, it appears that no meaningful

information regarding the financial position of the estate or the available estate funds was provided to the father's attorney.

[31] It appears from the papers that the father has, since the deceased's death, been solely responsible for the financial support of the twins, who remain minors. No maintenance or support claim has been brought against the deceased estate on their behalf.

[32] On 2 October 2024, the SCA upheld Ms S[...]'s appeal, overruled the judgment by the full court and dismissed the father's accounting application. The SCA held that Ms S[...] was not required to account to the deceased estate for the R5.6 million paid into her trust account from the deceased's RAF claim before her death.

Main issues for determination

[33] The principal issues for determination are whether Ms S[...] acted in breach of her fiduciary duties as executrix by using estate funds to pay the legal costs incurred in opposing the accounting application and, if so, whether such conduct renders it undesirable for her to continue holding the office of executrix in terms of section 54(1)*(a)*(v) of the Administration of Estates Act.

[34] A related issue is whether the same conduct renders Ms S[...] unsuitable to hold office as trustee of the testamentary trust to be established in terms of the deceased's will for the benefit of the twins, and whether an order prohibiting her from acting as trustee should accordingly be granted.

Arguments in the matter

[35] The father's counsel, Mr Melunsky, stressed that the present application is not concerned with whether Ms S[...] was obliged to account for the R5.6 million. Rather, it concerns the manner she funded her defence of the accounting application by allegedly using estate funds for her own benefit.

Arguments for removal of Ms S[...] as executrix

[36] Counsel for the father consistently emphasises throughout the heads of argument that the father does not litigate in his personal capacity or for his own benefit, but acts nominally on behalf of the twins, who are still minors and the main beneficiaries of the deceased estate. Counsel submitted that the accounting application was competently instituted by the father under the so-called Beningfield exception, as recognised in *Gross v Pentz and Others*.[7] The exception permits a beneficiary to institute representative proceedings on behalf of a deceased estate where the executor's own conduct is impugned and the executor cannot reasonably be expected to institute proceedings against himself or herself. Counsel relied on this authority to justify the father's *locus standi* to bring the accounting application on behalf of the deceased estate.

[37] The father's counsel submits that the accounting application was brought solely against Ms S[...] in her personal capacity to account personally to the estate for the amount of R5,6 million that she had received

[7] 1996 (4) SA 617 (A).

from the deceased. Although she was cited both personally and in her representative capacity as executrix, she was cited as executrix merely for notice purposes. No relief was sought against the estate in the accounting application.

[38] To support this argument, the father's counsel provided various statements and they are summarised as follows: that the founding affidavit in the accounting application expressly stated this;[8] Ms S[...] herself repeatedly admitted under oath that the relief in the accounting application was sought only against her in her personal capacity[9] and that she consistently defended the application on that basis; Ms S[...] expressly denied that relief was sought against her as executrix; and lastly the SCA in *S[...] v D[...] K[...]*[10] similarly affirmed the accounting application as one directed against her personally. In particular, the SCA's statement in paragraph 3 of its judgment where it said '[a]lthough she was cited both in her personal capacity and as an executrix, *relief was sought against her only in her personal capacity and as an attorney*.' (Own emphasis.)

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[8] See Court Index at 001-16 at para 24 where the wording of two paragraphs (para 7 and 16) of the founding affidavit of the accounting application dated 6 May 2020 marked as annexure C-2 (at 002-10 to 002-28) are cited as follows:
'[7] The second respondent is M[...] J[...] S[...], NOMINE OFFICII. This is the same person as the first respondent. However, she is cited also in her capacity as the executrix of the deceased's estate. … Given the nature of this application the second applicant is cited, *strictly speaking, merely for notice*. …
[16] The purpose of this application is therefore to compel Ms S[...] *in her personal capacity, as a debtor of the deceased estate*, to deliver a full account of what she did with the aforesaid amount of R5,6 million, to debate the account, and to pay to the estate whatever is found to be due to it by her.' (Own emphasis.)
Counsel similarly also relied on paragraphs 22, 23 and 24 of the founding affidavit in the accounting application, where it is expressly stated that the application was directed solely against Ms S[...] in her personal capacity.
[9] Counsel relied on various paragraphs in the founding affidavit, the answering (opposing) affidavit from Ms S[...] and the replying affidavit in the accounting application (Court Index at 001-16 to 001-17, 002-30, 002-32, 002-37 and 005-3 to 005-4; answering affidavit attached as Annexure C-3 at 002-29 to 002-59).
[10] *S[...] v D[...] K[...]* above fn 3, specifically in paras 1 and 3.

[39] Accordingly, counsel for the father submits that it remained common cause until the present proceedings that Ms S[...] defended the accounting application solely in her personal capacity. Counsel submits that only after the present proceedings commenced did Ms S[...] contend that she had opposed the accounting application not only personally but also as executrix. Her explanation is that the accounting application formed part of a *mala fide* strategy to impede the administration of the estate because it allegedly prevented her from recovering debts from the father on behalf of the estate. Counsel also stresses that Ms S[...] was represented in the accounting application, and in all appeals that flowed from it, by Spamer Triebel Attorneys.

[40] Counsel argues that this explanation should be rejected because it contradicts Ms S[...]'s previous sworn evidence; she never previously suggested that she defended the accounting application for the estate; she has failed to identify any genuine estate interest that required protection; and the factual premise underlying her explanation is demonstrably incorrect.

[41] According to the father's counsel, the accounting application never prevented her from performing her duties as executrix. Indeed, while that litigation was pending, she instituted action against the father on behalf of the estate to recover alleged debts. Counsel argues that this demonstrates that she was never prevented from administering the estate.

[42] Counsel submitted that this Court should reject Ms S[...]'s attempt to depart from her earlier sworn evidence that the accounting application was directed solely against her in her personal capacity. It was argued that her

belated contention that she also opposed the application as executrix is unsupported by the evidence, and that she defended the accounting application solely in her personal capacity.

[43] A substantial portion of the father's counsel concerns the movement of estate funds between the different estate accounts and the agents/attorneys appointed by Ms S[...]. Counsel submits that Ms S[...] apparently recovered R4,251,625.69 for the estate; she paid at least R3,436,415.49 of those funds to Spamer Triebel Attorneys; this represented approximately 80 per cent of the estate funds under her control. Although some payments related to legitimate estate work, counsel submits that most of the payments related to Ms S[...]'s personal defence of the accounting application. Counsel relies upon Ms S[...]'s own admission that 'most' of the legal costs related to the accounting application.

[44] Counsel also highlights various discrepancies between the amounts alleged to have been paid to Spamer Triebel Attorneys and the amounts reflected in the supporting documentation. Whilst the papers do not establish with precision the total amount paid, they indicate that a substantial sum, well in excess of R3 million, was paid to Spamer Triebel Attorneys.

[45] Counsel submitted that, in the absence of any meaningful challenge by Ms S[...] to the factual allegations or calculations relating to the deployment of estate funds, this Court should accept those conclusions. Counsel further submitted that, should the amounts remain in dispute, they can be verified with reference to the admitted correspondence exchanged with Ms Brand, who acted as Ms S[...]'s current agent in South Africa.

[46] Counsel submitted that the father, acting on behalf of the twins as the beneficiaries of the deceased estate, seeks proper accountability regarding the administration of the estate. In particular, he seeks clarity on the current balance of the estate and the extent to which estate funds were used to pay the legal costs incurred by Ms S[...] in her personal capacity in opposing the accounting application.

[47] The father's counsel submits that an executrix owes fiduciary duties of utmost good faith to the estate and its beneficiaries, while relying on an array of court cases.[11] An executrix: must preserve estate assets; must avoid conflicts between personal interests and estate interests;[12] may not derive any personal benefit from estate property;[13] and may not use estate assets for private purposes or personal financial advantage, such as borrowing estate money. Counsel relied on *Sackville West v Nourse and Another*[14] for the principle that a person occupying a fiduciary position, such as a trustee, must exercise due care and diligence in dealing with the property of beneficiaries and must not expose those assets to unnecessary risk. Counsel argues that, because Ms S[...] was defending her own personal interests, the use of estate funds to pay her legal costs amounted to a clear breach of those fiduciary duties.

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[11] See, e.g., relying on *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at para 34, as to the typical characteristics of a fiduciary relationship; and *Jones v Pretorius NO* 2022(1) SA 132 (SCA) at para 15.

[12] Relying on *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178 and later cases following this principle, such as *Phillips* above fn 11 at paras 30-33; and *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd and Others* 2019 (5) SA 354 (CC) at paras 58-61. Counsel acknowledged that the *Robinson* judgments concerned the fiduciary duties of company directors, but submitted that the same principles apply equally to an executrix administering a deceased estate, particularly the duty to avoid conflicts between personal interests and fiduciary obligations. Also relying on *Grancy Property Ltd and Another v Gihwala and Others* 2025(2) SA 76 (SCA) at paras 191and 201.

[13] *Kuttel v Master of the High Court and Others* 2023 (3) SA 498 (SCA) at paras 30 and 31.

[14] *Sackville West v Nourse and Another* 1925 AD 516 at 535.

[48] The father's counsel relies on section 46, together with section 26 of the Administration of Estates Act, as statutory support for the proposition that an executrix is entrusted with the custody and administration of estate assets and may not deal with those assets for her own benefit. Counsel submits that an executrix may not appropriate or borrow estate funds for personal purposes and that any use of estate property must be for the benefit of the estate. Section 46 is cited alongside authority on fiduciary duties to reinforce this submission.

[49] Counsel further argues that Ms S[...] has placed herself in an irreconcilable conflict of interest. If she used estate funds improperly, she would be obliged as executrix to recover those monies from herself on behalf of the estate. Counsel submits that this creates an obvious conflict between her personal financial interests and her duties to the beneficiaries. Counsel therefore contends that she has demonstrated herself to be dishonest, untrustworthy or grossly inefficient within the meaning of section 54(1)*(a)*(v) of the Administration of Estates Act and should be removed as executrix.

[50] The father's counsel also drew this Court's attention to sections 52 and 53 of the Administration of Estates Act. Section 52 makes it clear that the office of executor is personal to the person appointed by the Master and that an executor may not substitute another person to perform the functions of that office. Section 53 provides that an executor may not be absent from the Republic for a period exceeding 60 days without the permission of the Master, who may grant such permission subject to appropriate conditions.

[51] Counsel for Ms S[...], Mr Tredoux, submits that the father's application should be dismissed in its entirety. The central theme of the opposition is that the father has attempted to portray the matter as a simple complaint about legal costs, whereas the accounting application directly affected the administration of the deceased estate and required Ms S[...], in her capacity as executrix, to protect the interests of the estate and its beneficiaries. Counsel further argues that the application is not brought in the interests of the beneficiaries, but is another step in the longstanding litigation between the parties.

[52] Ms S[...]'s counsel further relied on the broader factual background, submitting that the father had been effectively disinherited under the deceased's 2015 will, was indebted to the estate, unsuccessfully pursued the accounting application through to the Constitutional Court, and had repeatedly interfered with the administration of the estate. Against that background, counsel submitted that the present application is motivated by the father's own interests rather than those of the beneficiaries.

[53] Counsel submitted that, although the accounting application appeared on its face to seek relief against Ms S[...] personally, it inevitably involved the administration of the deceased estate. The father sought payment of the R5.6 million into the estate account, relied on the Beningfield exception on the basis that Ms S[...] was allegedly a delinquent executrix, and effectively challenged the manner in which the estate was being administered. In those circumstances, counsel argued, Ms S[...] was obliged, in her representative capacity as executrix, to protect the interests of the estate.

[54] Her counsel accordingly submitted that she was entitled to oppose the accounting application not only in her personal capacity but also as executrix. It was argued that the decision to involve the estate in the litigation was a legitimate exercise of her discretion as executrix, taken on legal advice, and that the use of estate funds to defend proceedings affecting the administration of the estate was justified. Counsel further submitted that the estate's participation was necessary to protect its interests and that the estate could not realistically have been excluded from the litigation.

[55] Ms S[...]'s counsel submitted that Spamer Triebel Attorneys acted for the estate generally and not solely in relation to the accounting application. Ms S[...] maintained that the attorneys were appointed to advise both her personally and in her capacity as executrix, and that they advised her that the accounting application affected the administration of the estate, thereby justifying opposition on behalf of the estate. Counsel further submitted that the decision to oppose the proceedings and to utilise estate funds for that purpose was made on the advice of her attorneys and formed part of her duties as executrix. It was submitted, however, that the father failed to establish the precise amount paid from estate funds in respect of that litigation. Counsel pointed out that various figures appear throughout the papers demonstrating that no reliable or consistent calculation had been established. As to the legal costs, Ms S[...] accepted that estate funds were used to pay Spamer Triebel Attorneys and that most of the legal fees related to the accounting application. She contended, however, that the exact amount attributable to that litigation had not been established, that some of the fees were paid from her own personal funds, and that some of the costs

had already been, or were expected to be, recovered from the father pursuant to the costs orders granted in the accounting litigation.

[56] Counsel denied that Ms S[...] had appropriated estate funds for her own benefit. It was submitted that the estate funds utilised were applied solely for the benefit of the estate, that Ms S[...] acted in good faith and did not obtain any secret profit or personal advantage, and that the decision to use estate funds formed part of her duties as executrix in protecting the administration of the estate. Counsel further submitted that any dissatisfaction with the administration of the estate should properly be addressed through the statutory mechanisms available under the Administration of Estates Act, including complaints to the Master, objections to the liquidation and distribution account, or an action for damages where actual loss could be established.

[57] Counsel submitted that the father had failed to establish the requirements for removal under section 54(1)*(a)*(v). It was argued that the removal of an executor is a drastic remedy that is granted only in exceptional circumstances and that mere negligence, even if proved, is insufficient. Counsel submitted that there was no evidence that Ms S[...] had acted dishonestly, was grossly inefficient or untrustworthy, nor any evidence that the continued administration of the estate by her would prejudice either the estate or its beneficiaries. On the contrary, counsel argued that she continued to pursue claims on behalf of the estate against the father.[15]

[15] In support of these submissions, counsel relied on *Segal and Others v Segal and Others* 1979 (1) SA 503 (C); *Kennedy and Another v Miller and Others* 2005 JOL 15800 (T); *Volkwyn v Clarke and Daman*t 1946 WLD 456, *Jicama 194 (Pty) Ltd v Lotter and Another* 2013 JOL 29775 (KZD); and *Gory v Kolver NO and Others* 2007 (4) SA 97 (CC).

Arguments to prevent Ms S[...] becoming trustee

[58] Counsel for the father submits that the same conduct relied upon for the removal of Ms S[...] as executrix equally renders her unsuitable to serve as trustee of the testamentary trust under section 20 of the Trust Property Control Act. The argument is comparatively brief. Counsel contends that trustees owe fiduciary duties comparable to those of executors; that Ms S[...]'s alleged misuse of estate funds demonstrates that she cannot be entrusted with assets belonging to beneficiaries; and that the interests of both the trust and the minor beneficiaries militate against her appointment as trustee.

[59] Ms S[...]'s counsel in contrast argued that the relief sought to prevent Ms S[...] from acting as trustee of the testamentary trust was premature, as no trust had yet been created. It was argued that the father had failed to establish that her future appointment would prejudice the proper administration of the trust or the interests of the beneficiaries. Counsel also relied on the fact that the deceased herself had nominated Ms S[...] to fulfil that role and submitted that the same stringent principles applicable to the removal of trustees should apply to any attempt to prevent a trustee's appointment in advance.[16]

Interlocutory Applications

Leave requested to deliver a further replying affidavit

[16] In support of these submissions, counsel relied on *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T).

[60] The father applied for leave to file a further replying affidavit. Ms S[...] opposed the application and, in anticipation of the possibility that leave might nevertheless be granted, deposed to a supplementary answering affidavit. At the hearing, counsel for the father informed this Court that the application for leave to file the further replying affidavit was no longer being pursued. In those circumstances, it is unnecessary to consider the abandoned application further. Accordingly, neither the proposed further replying affidavit nor the supplementary answering affidavit was considered in determining the issues before this Court.

Father's application to strike out

[61] Counsel for the father seeks an order under Rule 6(15) striking out substantial portions of the answering affidavit. These include paragraphs 10 to 38; paragraphs 39 to 44; paragraphs 45 to 49; and paragraph 51 of the answering affidavit. Counsel relies on the replying affidavit for the detailed grounds supporting each prayer and submits that the impugned material should not be considered when determining the present application. Counsel submits that substantial portions of the answering affidavit and many annexures seek to revisit issues already determined in the accounting application. Those issues, it is argued, have no bearing on the issues to be decided in the present proceedings and merely distract this Court from the real dispute. The impugned material is said to be irrelevant and prejudicial.

Ms S[...] request to strike out

[62] Ms S[...]'s counsel at the hearing of the matter sought condonation for the late filing of an application in terms of Rule 6(15) to strike out the

supporting affidavit deposed to by her ex-husband. Her counsel contended that the affidavit was irrelevant, alternatively scandalous and vexatious, and that its inclusion would cause her irreparable prejudice. It is common cause that Ms S[...] and Mr S[...] were formerly married and are now divorced. The papers reveal that the divorce was acrimonious and that a substantial degree of animosity exists between them.

[63] Counsel for the father opposed the application to strike out the supporting affidavit of Mr F[...] S[...]. It was submitted, as a preliminary point, that the grounds for the application were not contained in the application itself, but only in paragraph 8 of Ms S[...]'s supplementary answering affidavit, the admission of which the father had already opposed. Counsel further submitted that, even if this Court was to consider those grounds, the father's opposition to the striking-out application was well founded and the application should be dismissed. Counsel nevertheless argued that, should the affidavit ultimately be struck out, the remaining evidence before this Court was sufficient to determine the principal factual and legal issues in the father's favour.

Applicable legal principles and discussion

[64] The issues before this Court are distinct from those determined by the SCA in the accounting application. The SCA was concerned only with whether Ms S[...] was obliged to account to the deceased estate for the R5.6 million paid into her trust account by the deceased prior to her death. It did not consider the issue presently before this Court, namely whether Ms S[...] acted in breach of her fiduciary duties as executrix by using estate funds to

pay the legal costs incurred in opposing the accounting application, and the consequences, if any, flowing from that conduct.

Interlocutory applications

Leave to file further affidavits

[65] Before considering the merits of the application, it is necessary to deal with the various interlocutory applications that arose during the proceedings. I will deal with the leave to file further affidavits first. The father sought leave to file a further replying affidavit. Ms S[...] opposed that application and, anticipating that leave might nevertheless be granted, filed a supplementary answering affidavit. At the commencement of the hearing, however, counsel for the father informed this Court that the application for leave to file the further replying affidavit was no longer being pursued.

[66] Once that application was abandoned, there was no longer any basis for considering either the proposed further replying affidavit or the supplementary answering affidavit filed in response thereto. It is therefore unnecessary to determine that interlocutory application, and neither affidavit has been considered in deciding the issues before this Court.

The respective applications to strike out

[67] Both parties also brought applications seeking to strike out portions of each other's papers. The father sought to strike out substantial portions of Ms S[...]'s answering affidavit on the basis that they were irrelevant, alternatively scandalous and vexatious, and served only to revisit issues already determined in the accounting application. Ms S[...], in turn, sought to strike out the supporting affidavit deposed to by her ex-husband, Mr F[...] S[...], contending that it was irrelevant, alternatively scandalous and vexatious, and would cause her prejudice.

[68] Having considered the papers and the submissions of counsel, I was not persuaded that either application should be granted upon hearing the matter for the reasons set out next. I did, however, agree with counsel for the father that many of the paragraphs identified in the answering affidavit are of little or no relevance to the issues requiring determination in these proceedings. Several of those allegations seek to revisit matters that were fully ventilated in the accounting application or concern personal attacks on the father which have no bearing on the issues before this Court. They are, at best, peripheral and, at worst, appear calculated to divert attention from the real issues requiring determination.

[69] In my view, embarking upon a paragraph-by-paragraph adjudication of the numerous passages sought to be struck out would have resulted in a wholly disproportionate expenditure of judicial time and would itself have become the very distraction of which complaint was made. Rather than engaging in that exercise, I considered it more appropriate to read the papers in their entirety, attribute weight only to material that is relevant and

admissible, and disregard allegations that do not advance the determination of the issues before this Court. Courts are well accustomed to separating relevant evidence from immaterial allegations without the necessity of formally striking out every objectionable paragraph.

[70] The same approach applies to the application directed at the supporting affidavit of Mr F[...] S[...]. It is apparent from the papers that the divorce between Ms S[...] and her former husband was acrimonious and characterised by considerable animosity. That background is relevant when assessing the weight, reliability and probative value of the evidence contained in Mr S[...]'s affidavit. The existence of that animosity does not, however, render the affidavit inadmissible. It merely requires the Court to approach its contents with the necessary caution. I have treated its contents with the circumspection they warrant. Significantly, counsel for the father conceded that, even without Mr S[...]'s supporting affidavit, the remaining evidence was sufficient to determine the principal factual and legal issues in the father's favour. That concession underscores the limited significance of that affidavit to the issues before this Court.

[71] The impugned paragraphs in the answering affidavit and the supporting affidavit of Mr S[...] have been considered only to the extent that they are relevant to the issues properly before this Court. To the extent that they are irrelevant, scandalous, vexatious or otherwise unhelpful, they have simply been disregarded. Neither the impugned portions of the answering affidavit nor Mr S[...]'s supporting affidavit materially assist in determining the merits of this application.

Application to remove Ms S[...] as executrix

[72] The principal issues for determination are whether Ms S[...] breached her fiduciary duties as executrix by using estate funds to pay the legal costs incurred in opposing the accounting application and, if so, whether such conduct renders it undesirable for her to continue holding office as executrix in terms of section 54(1)*(a)*(v) of the Administration of Estates Act. A related issue is whether the same conduct renders Ms S[...] unsuitable to be appointed as trustee of the testamentary trust to be established in terms of the deceased's will for the benefit of the twins.

[73] In determining these issues, I have approached the matter from the perspective of the twins, who are still minors and do not have a voice of their own in these proceedings as the main beneficiaries of the estate. As the Court is the upper guardian of all minor children, their best interests are of paramount importance and have remained a central consideration throughout this judgment.

[74] An executor acts upon his or her own responsibility but is not free to deal with the assets of the estate in any manner he or she pleases. An executor's position is a fiduciary one and he or she must therefore act not only in good faith, but also in accordance with the law.[17] It is trite that the removal of an executor is a drastic remedy which will not lightly be granted by a court.[18] Where an executor has been nominated by the testator, a court should be particularly slow to interfere with that appointment and should

[17] D Meyerowitz & PH Cilliers *The Law and Practice of Administration of Estates and Their Taxation* (2025 edition) at para 12.14.
[18] *Segal* above fn 15.

give due weight to the testator's wishes.[19] However, those wishes are not decisive, and the court must remove the executor where the continued appointment would be detrimental to the interests of the beneficiaries.[20] The primary consideration is whether the continued appointment of the executor is prejudicial to the proper administration of the estate and the interests of the beneficiaries.[21] The court in *Oberholster NO and Others v Richter*[22] reaffirmed that mere dissatisfaction, hostility, or disagreement between an executor and an heir does not constitute sufficient grounds for the removal of an executor.[23]

[75] In considering whether an executor ought to be removed, the court is required to have regard to the interests of the estate and not merely the subjective dissatisfaction of a beneficiary.[24] The test was formulated in *Volkwyn NO v Clarke & Damant*[25] as whether the executor has shown himself or herself to be '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'.[26] An executor duly appointed by a testator should not be removed in the absence of clear evidence demonstrating misconduct, incapacity, conflict of interest, dishonesty, gross inefficiency or conduct that endangers the estate or renders its proper administration impossible.[27]

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[19] *D.B v Brand and Another* [2025] 1 All SA 102 (WCC) at para 109.
[20] Ibid.
[21] See *Die Meester* above fn 16; *Letterstedt v Broers* (1884) 9 App Cas 371; *Sackville-West v Nourse and Another* 1925 AD 516.
[22] *Oberholster NO and Others v Richter* [2013] ZAGPPHC 99; 2013 (3) All SA 205 (GNP).
[23] *Oberholster* above fn 22 at para 17. Meyerowitz & Cilliers above fn 17 at para 12.14.
[24] *Volkwyn* above fn 15 at 464; *Die Meester* above fn 16 at 16H-17E.
[25] *Volkwyn* above fn 15.
[26] *Volkwyn* above fn 15 at 464 and also quoted with approval in *Oberholster* above fn 22 at para 13.
[27] See *Volkwyn* above fn 15 at 464; *Die Meester* above fn 16; and *Oberholster* above fn 22 at paras 13 and 17.

[76] A court may remove an executor where there is proved maladministration, failure to administer the estate, or a serious dereliction of duty. However, mere negligence or hostility between the executor and interested parties is generally insufficient for removal unless it is shown that the executor's continued appointment would prejudice the estate or its beneficiaries. The decisive consideration is whether the executor's continued administration is likely to harm the future welfare of the estate.[28]

[77] In *Brimble-Hannath v Hannath and Others*[29] this Division held that an executor occupies a fiduciary position and must administer a deceased estate impartially and in the interests of the estate and its beneficiaries. Referring to *Grobbelaar v Grobbelaar*,[30] the court explained that where an executor's personal interests conflict, or may conflict, with those fiduciary duties, the conflict itself may render it undesirable for the executor to remain in office. The court emphasised that the enquiry is not whether the executor has acted dishonestly or whether one party is right or wrong on the underlying dispute. Rather, the concern is that an executor should not be placed in a position where he or she is required to act both in a personal interest and in a representative capacity, thereby becoming the judge in his or her own cause.[31]

[78] The court further held that, once it is demonstrated that an executor is in a conflicted position, that will ordinarily be sufficient to render it undesirable for the executor to remain in office. Proof of misconduct is not a

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[28] See Meyerowitz & Cilliers above fn 17 at para 11.1.3 and the authorities relied upon, including *Letterstedt* above fn 21; *Sackville-West* above fn 21 at 527; and *Kennedy* above fn 15.
[29] (3239/2021) [2021] ZAWCHC 102 (25 May 2021).
[30] 1959 (4) SA 719 (A).
[31] *Brimble* above fn 29 at paras 10-13.

prerequisite. The decisive consideration is whether the conflict renders it inappropriate for the executor to continue acting, since an executor must remain impartial and cannot properly adjudicate matters in which he or she has a personal interest. The mere existence of a demonstrated conflict of interest therefore constitutes prima facie sufficient grounds for removal under section 54(1)*(a)*(v) of the Administration of Estates Act.[32]

[79] In *Beukman v Pieterse NO and Others*[33] the principal issue was whether the executors should be removed in terms of section 54(1)*(a)*(v) of the Administration of Estates Act. The court had to determine whether a conflict of interest, delays in the administration of the estate and the conduct of the executors rendered it undesirable for them to continue in office.[34]

[80] My sister, Mangcu-Lockwood, J held that the second executrix had a clear conflict of interest because, while administering the estate, she continued to retain and benefit from income which the court found belonged to the estate.[35] She held that her personal interests had interfered with her fiduciary duties as executrix, with the result that the proper administration of the estate had been compromised.[36] Mangcu-Lockwood, J further found that the prolonged delays in administering the estate, the failure to account to the beneficiary, the lack of transparency, and the executors' failure to act impartially justified their removal.[37] She emphasised that executors occupy a fiduciary position, must administer the estate in accordance with the will and

[32] *Brimble* above fn 29 at paras 16-19.
[33] (2526/2024) [2024] ZAWCHC 391 (26 November 2024).
[34] *Beukman* above fn 33 at para 24.
[35] Ibid at paras 25–26.
[36] Ibid at paras 25, 27–28.
[37] Ibid at paras 29–41.

the law, and must act impartially in the interests of all beneficiaries.[38] Accordingly, she concluded that it was just and equitable to remove both executors and appoint a new executor to ensure the proper administration of the estate.[39]

[81] In *D.B v Brand and Another*,[40] the court held that an application for the removal of an executor under section 54(1)*(a)*(v) requires the court to exercise a judicial discretion. The applicant must place before the court substantial and compelling reasons demonstrating that it is undesirable for the executor to remain in office.[41] In exercising that discretion, the court must consider the practical consequences of removal, including its effect on the administration of the estate, the additional costs, and any delay that the appointment of a replacement executor may cause.[42] The court further held that, although the Administration of Estates Act is silent on who may seek the removal of an executor, the decisive consideration is the interests of the estate and its beneficiaries, and a person with a sufficient interest may therefore bring such an application.[43]

[82] A considerable portion of the argument advanced on behalf of both parties in the matter before me concerned the precise amount of estate funds utilised to pay the legal fees of Spamer Triebel Attorneys. In my view, that is not the central enquiry before this Court. Whether the amount ultimately proves to be R3.1 million, R3.4 million or some other figure is of secondary importance. The real question is whether Ms S[...] was entitled to utilise

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38 Ibid at paras 41–42.
39 Ibid at paras 24, 43–46.
40 [2025] 1 All SA 102 (WCC).
41 *Brand* above fn 19 at para 106.
42 Ibid at para 107.
43 Ibid at para 108.

estate funds to finance the legal costs incurred in defending the accounting application. Once that question is answered, the precise quantum may become relevant for purposes of accounting or any consequential relief, but it is not determinative of the issue presently before this Court.

[83] What is particularly concerning is the lack of transparency that emerges from the papers. Ms S[...] has not been forthcoming with this Court regarding the extent to which estate funds were used to finance the accounting litigation, the amount presently remaining in the estate for the benefit of the beneficiaries, or even her current country of residence and the countries in which she has previously resided. Rather than providing direct answers to the questions raised by the father, many of the responses are evasive and leave significant gaps in the evidence. The overall impression created by the papers is that the administration of this estate has been cloaked in secrecy rather than characterised by the openness and accountability expected of a fiduciary.

[84] I also find it difficult to reconcile Ms S[...]'s explanation regarding the legal costs with her professional standing as an attorney. An attorney is expected to appreciate the fundamental importance of keeping trust monies separate from personal funds and to maintain accurate records of monies received and disbursed. Yet, on her own version, Ms S[...] is unable to state with any certainty what portion of the legal costs was paid from her own funds and what portion was paid from estate funds. That state of affairs is, in my view, both surprising and unsatisfactory.

[85] Having considered the papers as a whole, I am not persuaded that Ms S[...] has administered the financial affairs of the estate with the degree of transparency expected of an executrix. The repeated movement of estate funds between different accounts, the appointment of numerous attorneys/agents to administer various aspects of the estate, the uncertainty surrounding the legal costs, and the apparent lack of progress in bringing the administration of the estate to finality all contribute to that conclusion. It appears that only one liquidation and distribution account has been prepared since Ms S[...]'s appointment as executrix, yet several years have elapsed and the estate remains unresolved.

[86] It is correct that beneficiaries ordinarily have a remedy against an executor who has maladministered an estate or failed to exercise the degree of care required by law, and such claims can generally be pursued once the liquidation and distribution account has lain for inspection and the beneficiaries are able to determine the extent of any loss suffered.[44] A prudent executor would, however, 'not unnecessarily be secretive or withhold information relating to the estate's affairs from their heirs or creditors without just cause, especially where they have a legitimate interest in the matter'.[45] Furthermore, where a beneficiary makes enquiries regarding the affairs of the estate, the executor should account for the administration of the estate and its assets or provide a proper reason for withholding the requested information.[46] It is only where the enquiry is made by a person with no legitimate interest in the estate that the executor is entitled to limit

[44] Meyerowitz & Cilliers above fn 17 at paras 12.4 and 12.9.2.
[45] Meyerowitz & Cilliers above fn 17 at para 12.9.2 relying on *Via v Cachalia* 1934 AD 102 and *Doyle v Board of Executors* 1999 (2) SA 805 (C), but also acknowledging although these cases dealt with trust affairs the principles equally applies to executors.
[46] Meyerowitz & Cilliers above fn 17 at para 12.9.2.

disclosure to the information available for public inspection at the Master's office.[47]

[87] The present matter concerns beneficiaries/heirs who are still minors and are therefore incapable of protecting their own interests or making independent enquiries. They are entirely reliant on their father to safeguard those interests. In addition, a further concern arises in the present case. On the papers before me there is a strong prima facie indication that a substantial portion of the estate has already been expended and that the funds remaining for the benefit of the minor beneficiaries may have been materially depleted. In these circumstances, requiring the beneficiaries simply to await the final liquidation and distribution account carries the real risk that any effective remedy may come too late. If the estate continues to diminish during the administration process, there may ultimately be insufficient assets remaining to afford the beneficiaries meaningful relief. That concern underscores the importance of this Court considering whether the continued administration of the estate by Ms S[...] remains desirable.

[88] These concerns are heightened by the fact that Ms S[...] is the maternal aunt of the twins, who are the principal beneficiaries of the estate. One would have expected her to act with particular diligence to finalise the administration of the estate as expeditiously as possible and to minimise unnecessary legal costs that diminish the beneficiaries' inheritance. Instead, the estate remains unresolved several years after the deceased's death, with the consequence that there is now a real risk that no funds will remain available to be paid into the trust yet to be established for the benefit of the

[47] Ibid.

twins. Equally, it is entirely understandable that the father, as the guardian of the twins, seeks to protect their inheritance. In these circumstances, his attempts to obtain clarity regarding the administration of the estate and to safeguard the interests of the minor beneficiaries are both natural and appropriate.

[89] Having considered all the evidence before me, the judgment of the SCA in the accounting application and the arguments advanced by counsel, I am satisfied that the accounting application was, at all material times, directed against Ms S[...] in her personal capacity. The deceased estate was cited only in Ms S[...]'s nominal capacity as executrix for notice purposes. The accounting application sought an order requiring Ms S[...], in her personal capacity, to account for the sum of R5.6 million which the deceased had paid into her trust account prior to her death. In my view, there is no ambiguity in that regard.

[90] I am unable to accept Ms S[...]'s contention that she was advised by her former attorneys that she was entitled to utilise estate funds to defend the accounting application. Whatever advice may have been given, the decision to authorise payment from estate funds remained hers as executrix. Moreover, Ms S[...] is herself a practising attorney. One would reasonably expect an attorney, particularly one administering a deceased estate, to appreciate the distinction between defending litigation in a personal capacity and incurring expenses on behalf of the estate. I therefore agree with the submissions advanced by the father's counsel that the legal costs incurred in defending the accounting application were costs incurred by Ms S[...] in her personal capacity.

[91] In my view, the facts disclose a clear conflict between Ms S[...]'s personal interests and her fiduciary duties as executrix. That conflict lies at the heart of the present application. It is further compounded by several troubling features apparent from the papers, including the lack of transparency regarding the administration of the estate, the repeated movement of estate funds, the uncertainty surrounding the legal costs paid from estate funds, the appointment of numerous agents to administer the estate, the limited progress made in finalising the estate over a number of years, and the continued absence of any financial benefit to the minor beneficiaries. Considered cumulatively, these matters raise significant red flags regarding the continued administration of the estate by Ms S[...] and reinforce the conclusion that her personal interests have become inextricably intertwined with her fiduciary obligations.

[92] The Administration of Estates Act sets out the duties and responsibilities of an executor, including the obligation to open and maintain a prescribed estate banking account into which all estate funds must be deposited and administered for the benefit of the estate. Section 28(1) requires an executor to deposit estate funds into a bank account opened in the name of the deceased estate, although surplus funds may be invested in a savings account or interest-bearing deposit if they are not immediately needed to pay estate debts. Section 28(2) requires the executor, when requested by the Master, to provide details of the estate account and proof of its status or balance, while section 28(3) prohibits the transfer of that account to another bank branch without prior written notice to the Master.

[93] Section 28 contemplates that estate funds must be held in an account opened in the name of the estate, unless the Master directs otherwise, and does not generally authorise the use of an attorney's trust account as a substitute for an estate account. The Master has, however, directed that the requirement to open a separate estate bank account may be dispensed with where a practising attorney administers the estate funds through a trust account, provided that funds not immediately required are invested in an interest-bearing account and that the executor remains responsible for their proper administration. Meyerowitz and Cilliers nevertheless contend that the Master's consent should first be obtained before this approach is followed.[48] From the papers, it is unclear whether the necessary permissions were obtained in this case when various attorneys' trust accounts were used.

[94] Furthermore, section 46 of the Administration of Estates Act provides that an executor who fails to pay estate funds to the Master or another person when required, fails to deposit such funds into the prescribed estate banking account, or improperly uses estate property, may be liable to pay into the estate double the amount not paid over or deposited, or double the value of the property misused. The Master may, however, exempt the executor wholly or partly from this liability if good cause is shown. In *Sfigakis and Another v Vardakos NO*,[49] the court recognised that beneficiaries are entitled to information reasonably necessary to verify an executor's administration of the estate, including details of estate bank accounts and bank statements.[50]

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[48] See also Meyerowitz & Cilliers above fn 17 at para 12.7 and the Chief Master's Directive 4 of 2007.
[49] (2019) JOL 40833 (GJ).
[50] See also Meyerowitz & Cilliers above fn 17 at para 12.7.

[95] In *Stander and Others v Schwulst and Others*[51] the court held that an application for the removal of a trustee is a claim against the trustee in his or her personal capacity, as it concerns an alleged breach of fiduciary duty rather than the administration of the trust itself.[52] The court further held that costs in removal proceedings should ordinarily follow the result. A trustee who is removed for improper or unreasonable conduct should bear both the successful applicant's costs and his or her own costs personally, while a trustee is entitled to an indemnity from the trust only for expenses properly incurred in the proper discharge of fiduciary duties.[53]

[96] Although *Stander* concerned the removal of trustees, the same principle is instructive in the present matter. The question here is whether an executor who faces removal for an alleged breach of fiduciary duty should likewise bear personally the costs of opposing the application, rather than requiring the estate to fund that litigation.

[97] In the present matter, it is common cause that Ms S[...] resided outside South Africa for extended periods, initially in Switzerland and later in the United States of America. Whilst these facts prompted counsel to refer to sections 52 and 53, prolonged residence abroad does not, without more, disqualify an executor from holding office. Ms S[...]'s response to the allegation that she does not reside in South Africa is, in essence, a bare denial. On the papers before this Court, it is noteworthy that none of the affidavits or other documents deposed to or signed by Ms S[...] were executed in South Africa. Nor has she disclosed a South African residential

[51] 2008 (1) SA 81 (C).
[52] *Stander* above fn 51 at paras 32 and 34.
[53] Ibid at paras 36–39.

address. This is so notwithstanding that the Covid-19 travel restrictions, which may previously have affected international travel, were lifted some time ago. It is further apparent that Ms S[...] has, over a considerable period, appointed a succession of agents to act on her behalf in South Africa in relation to the administration of the deceased estate.

[98] These circumstances give rise to a legitimate question whether Ms S[...] ordinarily resides outside South Africa and, if so, whether the requirements of section 53 were complied with. However, that issue has not been fully ventilated on the papers, and it is neither necessary nor appropriate for this Court to make any finding thereon. It is also unclear from the papers whether the Master was informed of, or approved, Ms S[...]'s prolonged absences from South Africa. Ms S[...] merely states that the Master was aware that she had appointed various agents to assist her in the administration of the estate, which she explains was necessitated by her absences from time to time.[54] Her version therefore implies that the Master had knowledge of those absences. The enquiry in the present matter nevertheless remains whether the requirements of the Administration of Estates Act were complied with and whether Ms S[...]'s absence, if established, materially affected the proper administration of the deceased estate.

[99] For the reasons set out above, I am satisfied that it is undesirable for Ms S[...] to continue acting as executrix of the deceased estate in terms of section 54(1)*(a)*(v) of the Administration of Estates Act. Her continued appointment is not in the best interests of the estate or its minor

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[54] First and Second Respondent's Answering Affidavit at para 93 (Court Index at 003-33 to 003-34).

beneficiaries. Ms S[...] is accordingly removed as executrix, and the Master is directed to appoint an independent executor to finalise the administration of the estate.

[100] A further consideration for this decision is that the papers suggest that both Ms S[...] and the father may have claims involving monies allegedly due to, or claimed by, the deceased estate. It is unnecessary, and indeed inappropriate, for me to make any finding on the merits of those competing claims. However, their existence reinforces the need for the appointment of an independent executor, free from any actual or perceived conflict of interest, to investigate the estate's affairs impartially and, where appropriate, to recover any amounts that may properly be due to the estate.

Preclusion from appointment as trustee

[101] Section 9(1) of the Trust Property Control Act requires a trustee to perform their duties and exercise their powers with the care, diligence, and skill that can reasonably be expected of a person managing the affairs of another. In essence, trustees must act prudently, responsibly, and in the best interests of the trust and its beneficiaries.

[102] I am likewise satisfied that Ms S[...] should be precluded from being appointed as trustee of the testamentary trust to be established for the benefit of the twins. A trustee, like an executor, occupies a fiduciary office and is required to act with complete impartiality and solely in the interests of the

beneficiaries.[55] For the reasons already set out above, I have concluded that Ms S[...]'s personal interests have become entangled with her fiduciary obligations, giving rise to a clear conflict of interest. In these circumstances, it would not be in the best interests of the twins (beneficiaries) for her to assume the office of trustee.

[103] In my view, the same considerations that necessitate Ms S[...]'s removal as executrix equally justify precluding her appointment as trustee. Just as the Master must appoint an independent executor to complete the administration of the deceased estate, so too must an independent trustee, free from any actual or perceived conflict of interest, be appointed to administer the testamentary trust in the best interests of the twins. Their inheritance should be managed by a person whose impartiality and fidelity to their interests are beyond question.

[104] A High Court may remove a trustee under section 20(1) of the Trust Property Control Act and, in exercising its supervisory jurisdiction over trusts, make orders relating to the appointment of a replacement trustee where necessary to protect the trust and its beneficiaries. However, the Master ordinarily has the statutory power under section 7 to appoint a replacement trustee when a vacancy arises. In short, removal is governed by section 20(1), while appointment is generally the Master's function under section 7, subject to the court's supervisory powers.[56] In the present matter, however, no trust has yet been created. Accordingly, it is not necessary to

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[55] R Du Toit, B Smith and A van der Linde *Fundamentals of South African Trust Law* 2 ed (2023) at 101 and 121-121.

[56] Du Toit, Smith and Van der Linde above fn 55 at 109 read with 143-145.

remove Ms S[...] as trustee; rather, it is appropriate to direct the Master not to appoint her and instead to appoint an independent trustee.

Final observations

[105] I consider it appropriate to make certain observations arising from the papers. I am left with considerable unease regarding the manner in which the deceased estate has been administered thus far. In particular, the papers reveal that estate funds were transferred on numerous occasions between different bank and trust accounts before ultimately reaching what appears to now be the estate account. The repeated movement of substantial sums of money inevitably raises questions as to whether the estate may have been deprived of interest that would otherwise have accrued for the benefit of its beneficiaries.

[106] I am equally concerned by the number of attorneys and agents appointed by Ms S[...] over the course of the administration of the estate. Whilst there may, in appropriate circumstances, be justification for appointing agents, Ms S[...] is herself a practising attorney. One would ordinarily have expected her to perform at least a substantial portion of the duties of executrix personally. From the papers before this Court, it is not readily apparent what work was performed by Ms S[...] herself, as opposed to the various agents appointed by her, particularly when regard is had to the significant legal costs incurred by the estate.

[107] It is further common cause that Ms S[...] has recovered the full 3,5 per cent executrix's remuneration of R296 924.58 to which she was entitled.[57] That remuneration was calculated on the total gross value of the estate of approximately R8.48 million as reflected in the provisional liquidation and distribution account prepared during her tenure as executrix. She has likewise received her own cash inheritance under the will and has distributed the specific bequests to the deceased's parents. Viewed cumulatively, these circumstances create the unfortunate impression that priority has been afforded to the interests of Ms S[...] and her parents, rather than to those of the beneficiaries (twins) whose interests she was obliged to protect.

[108] I emphasise, however, that these issues were not squarely before this Court for determination, and it would therefore be inappropriate to make definitive findings in that regard. They are nevertheless matters of legitimate concern arising from the papers and, in my view, warrant careful consideration by the Master in the continued supervision of the administration of the estate. Insofar as the conduct of Ms S[...] in her professional capacity as an attorney may be implicated, these matters may also warrant careful consideration by the Legal Practice Council. It will further be for the newly appointed executor to investigate the administration of the estate, account fully to the beneficiaries and, where appropriate, take such steps as may be necessary to protect the interests of the estate and its beneficiaries. This should include determining whether, in light of Ms S[...]'s removal before the administration of the estate was completed, any portion of the executrix's remuneration received by her ought to be repaid to the estate.

[57] Annexure D to the founding affidavit (Court Index at 002-60 to 002-63).

[109] The deep-seated hostility displayed by Ms S[...] towards the father, and her apparent focus on personal grievances rather than the proper administration of the estate, is relevant to the question of her continued suitability as executrix. While hostility between an executor and an interested party is not, in itself, a sufficient ground for removal, it becomes material where it impairs the effective, impartial and practical administration of the estate. The test is whether the executor's continued appointment is likely to prejudice the future welfare of the estate. In circumstances where the principal beneficiaries are minor children and the relationship between the executrix and the children's father has deteriorated significantly, such hostility may undermine the proper administration of the estate and support the conclusion that her continued appointment is no longer in the best interests of the estate and its beneficiaries.

Costs

[110] Counsel for the father requested a punitive costs order, including the costs of two counsel on Scale C. Counsel submitted that Ms S[...] has acted reprehensibly, not only in the manner in which she deployed funds of the estate under her control, but also in the manner in which she has conducted her opposition in the present application. It is submitted that this Court should direct, as a mark of its displeasure, that costs shall be taxed on the attorney and client scale.

[111] It is trite that the award of costs is a matter within the discretion of the court. A punitive costs order is appropriate where a litigant's conduct warrants the court's marked disapproval. Having regard to the findings made

in this judgment, I am satisfied that this is such a case. Ms S[...] utilised estate funds to defend litigation brought against her in her personal capacity, failed to act with the transparency expected of an executrix, and conducted the administration of the estate in a manner that has given rise to serious concern.

[112] In the exercise of my discretion, I accordingly order Ms S[...] to pay the costs of this application on the attorney and client scale (Scale C), including the costs of two counsel where so employed. Those costs are payable by Ms S[...] personally, in her personal capacity, and shall not be paid from, recovered from, claimed against, or in any way debited to the assets of the deceased estate or treated as costs of the administration of the estate.

[113] This conclusion is also consistent with the principle articulated in *Stander*, namely that proceedings for the removal of a fiduciary office-bearer are directed against that person in his or her personal capacity for an alleged breach of fiduciary duty, and not against the trust or estate itself. It follows that the costs of unsuccessfully opposing such proceedings should be borne personally and not by the estate.

Order

[114] The following order is made:

1 The First Respondent is hereby removed as the executrix of the estate of the late Dr N[...] V[...] D[...] K[...] administered under the

Third Respondent's reference 018700/2018 ('the deceased estate').

2 The First Respondent is directed forthwith to return to the Third Respondent the letters of executorship issued to her under the Third Respondent's reference 018700/2018.

3 The Third Respondent is directed within 15 days of service of this order at the Third Respondent's office to appoint a substitute executor, of at least 15 years' experience, to the deceased estate.

4 The First Respondent in her capacity as the executor, is directed to account for all monies and assets, and/or books that she took into her possession for the duration when she acted as the executor of the deceased estate, and transfer all accounts to the new executor, appointed by the Third Respondent, within five days of the new executor being appointed.

5 It is declared that it is in the interests of the testamentary trust envisaged in the last will and testament of the late Dr N[...] V[...] D[...] K[...] dated 7 January 2015 and of the beneficiaries of that trust that the First Respondent shall not hold office as a trustee of that trust.

6 The First Respondent is to pay the costs of this application on the attorney-client scale, including the costs of two counsel on scale C, and that none of those costs shall be borne by or recouped from the estate of the late Dr N[...] V[...] D[...] K[...].

M LOUW

ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant: D Melunsky SC with TR Tyler

Instructed by: Snijmann & Associates Inc, Cape Town

For respondent: JC Tredoux

Instructed by: Jordaan and Ferreira Inc, Cape Town.