IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 3426/14

In the matter between

[S….] [N…..] [S…..] **First Applicant**

[K…..] [P…..] **Second Applicant**

And

THE MASTER OF KWAZULU-NATAL
HIGH COURT, PIETERMARITZBURG **First Respondent**

[M…..] [Z…] [K…..] **Second Respondent**

STANDARD EXECUTORS AND TRUSTEES LIMITED **Third Respondent**

JUDGMENT

Delivered: 8 September 2015

MOODLEY J

[1] This application originally placed the validity of a will in dispute and the relief sought included the removal of the executor appointed by the Master of the High Court in terms of the disputed will.

[2] Only the issue of whether the signature on the disputed will was the authentic signature of the deceased, S….. P…, and whether she intended the aforesaid document to be her 'last Will and Testament' was referred to oral evidence.

[3] The applicants are the children of S…. P…., the testatrix of the disputed will ('the testatrix'): the first applicant is her minor child who is represented by his father and natural guardian, and the second applicant is her elder child, who is a major.

[4] The first respondent is the Master of the High Court, KwaZulu-Natal ('the Master'), to whom the estate of the testatrix has been reported. The second respondent is M…. Z… K….. ('K….'), to whom the testatrix was married at her date of death under Islamic law. The third respondent is the Standard Bank Trust (Standard Bank) which was appointed executor under a will executed by the testatrix in 2007.

The first and third respondents are cited by virtue of their interest in the matter and no relief is sought against them. Neither of these respondents filed a report or notice to abide. K…. opposed the application.

Factual Background

[5] The testatrix, S…. P…. also known as R…. S……, died of natural causes on 11 May 2013. Her marital status, as reflected on her death certificate, is 'divorced'. At the time of her death, the deceased had two minor children, S….. N…. S…. (the first applicant) and K…. P…… (the second applicant), who has since attained the age of majority.

K….. was born of the marriage of the testatrix and one T….. P…., who were divorced in 1997. S…. N….. S…. is a child born of the relationship of the testatrix with Naseem Shaik.

The testatrix subsequently commenced a relationship with Khan, whom she married on 13 April 2004 in accordance with Islamic law. No children were born of this marriage.

[6] It is common cause that the testatrix executed a will dated 2 March 2007 (the 2007 will) which was prepared by and executed with the assistance of Standard

Bank, Amanzimtoti. In that will, the testatrix bequeathed her estate to her two children in equal shares and Standard Executors and Trustees Limited or Standard Bank of South Africa Limited was appointed executor.

[7] After the death of the testatrix, the 2007 will was located by K….'s paternal grandmother, P…. P….. (Ms P…..), in the possession of Standard Bank. Ms P….. informed K…. about the will. With the assistance of Ms P….., the Standard Bank Trust Department reported the deceased estate to the Master and letters of executorship were issued to Standard Bank in accordance with that will.

[8] Subsequent to the appointment of the executor, the second respondent produced a will dated 23 February 2013 (the 2013 will), purporting to be the later, and therefore valid, will of the testatrix, in which she revoked and cancelled the 2007 will, appointed the second respondent the executor of her estate and bequeathed a fifty per cent (50%) share in her estate to him and a twenty five per cent (25%) share to each of her sons. In the 2013 will the deceased also directed that should any of her children be a minor or minors at the time of her death, the second respondent was to be appointed the sole guardian and administrator of the affairs and assets of that child or children, until he or they attained majority. She directed further that no money or asset due to the children was to be placed in trust with the Guardian Fund; it was to be held and administered at the sole discretion of the second respondent.

[9] Without informing the beneficiaries or their guardians or Ms P…. about the 2013 will, K…. instructed a firm of attorneys, Bilal Malani & Associates, to report the estate of the testatrix, which was duly done in September 2013. The Master accepted the 2013 will as the valid will, revoked the letter of executorship issued to Standard Bank and appointed the second respondent as the executor of the deceased estate in terms of the letters of executorship dated 26 September 2013.

[10] Emanating from the suspicions of Ms P….. about the signatures on the will being that of the testatrix, the applicants obtained the opinion of a handwriting expert, who reported to them that the signatures on the 2013 were not that of the testatrix. The applicants through their attorneys then disputed the validity of the later

will with Khan's erstwhile attorneys, and having failed to elicit a positive response to their request that the deceased estate be administered under the 2007 will, launched this application to have the 2013 will declared invalid on the basis that the signatures on the Will were a forgery and not that of the deceased, and for the removal of Khan as the executor.

[11] The founding affidavit was deposed to by N….. S……, the father of the first applicant, supported by confirmatory affidavits by K…. and Ms P…... K….. filed an answering affidavit. No replying affidavit was filed.

[12] Prior to the commencement of the hearing of oral evidence, I requested that the two handwriting experts who were to testify on behalf of each party prepare a joint minute. At the insistence of the applicant's counsel the hearing proceeded in the interim.

[13] Ms P….., a bookkeeper with a firm of attorneys, and the former mother-in-law of the testatrix testified[1] that she had maintained a good relationship with the testatrix until her death, especially because K….. continued to live with Ms P…. after his parents were divorced and even after Truvin remarried. The testatrix and K…. had also visited her home regularly, and they had a cordial relationship. Ms P…. knew that the testatrix had executed a will with Standard bank because the testatrix had asked her about executing a will and had phoned her from the bank. She had therefore informed K…. that he should enquire with Standard Bank whether they were in possession of the testatrix's will.
However when K…. advised her that there was no will with Standard Bank, she communicated with the bank herself and the will was located around the end of September 2013. Ms P…. informed K…. that there was a will, and he was grateful for her assistance. He had also informed her that he had searched the house in which he had lived with the deceased but did not find another will. However he took no further steps to report the estate; so she assisted Standard Bank with the necessary documentation.

[1] I have only summarised the pertinent evidence of this witness.

K…. did not tell P….. about the 2013 will, about which she only found out on receipt of the letter from K…..'s erstwhile attorney informing them of the later will.

[14] Ms P…. testified that the testatrix had consulted her about the will and the property she had purchased because Ms P….. worked for a firm of attorneys. She therefore believed that the testatrix discussed her financial affairs with her. However she admitted that the testatrix had an insurance policy of which she was not aware until K…. had informed her about it in July 2013. The two applicants and K…. were the beneficiaries, and the proceeds due to the children were to be invested until they attained 25 years of age.

[15] After a consideration of the joint minutes prepared by the hand writing experts, which was admitted as 'Exhibit E' by consent, the applicants lead no further oral evidence and closed their case. K….. closed his case without leading any evidence.

[16] Mr N…., who appeared for the applicants, thereafter placed on record that the applicants no longer persisted with the relief sought in in paragraphs 1 and 2 of the Notice of Motion in respect of the validity of the 2013 will. However they persisted with the relief in paragraph 3 thereof: the cancellation of the letters of executorship appointing K…. as executor and administrator of the testatrix's estate, and an order for costs against K…….

[17] This relief originally followed on the relief sought in the preceding paragraphs of the notice of motion viz a declaratory order that the 2013 will is invalid. It was not premised on any other ground. However in his argument, Mr N…. premised the application for the removal of Khan as executor on Section 54(1)(a)(v) of the Administration of Estates Act 65 of 1965.
The applicants thereby assumed the onus to persuade me to exercise my judicial discretion in their favour by directing the Master to revoke the appointment of K…. as executor by demonstrating on the application papers and the testimony of Ms P…,

that it was undesirable that K….. act as executor of the deceased estate. The predominant consideration must be the interests of the estate and the beneficiaries.[2]

[18] In argument Mr N…., relying on the general principles set out in **Van Niekerk v Van Niekerk and Another**[3] and **Reichman v Reichman**,[4] submitted that K….'s covert conduct in failing to inform the beneficiaries about the 2013 will was suspicious and questionable, and had engendered a feeling of distrust in the applicants as beneficiaries under the will. There had also been an altercation between K….. and K….. which prejudiced the the objectivity with which the estate should be administered. Further, the preliminary inventory filed by K…. on 9 September 2013 with the master did not record the assets of the testatrix properly, nor did it reflect her bequest or inheritance from the estate of her aunt. K…. had also not conducted himself properly in these proceedings. Mr N…. contended in conclusion that where there is a dispute between the beneficiaries, the executor should not have an interest in the estate. Therefore the relief sought by the applicants was well-founded and should be granted.

[19] Mr M…. who appeared for K…..., pointed out that although Ms P…. had testified, neither K…. nor N…. S…. who deposed to the .founding affidavit had. Although K….. had not testified, no replying affidavit had been filed and the disputed allegations of the applicants must be decided on the respondent's version in accordance with the principle stated in **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints Proprietary (Pty) Ltd.**[5] He contended that on the evidence before the court, that the applicants had failed to place any pertinent proof before the court which justified the relief they sought. There was no maladministration of the estate by K…. or any other conduct, which could be properly be relied on to justify his removal. The parties had agreed that the administration of the estate be suspended. The inventory was a preliminary one and Bilal Malani had written to the previous executor requesting details of the estate in which the testatrix had been appointed heir. Consequently the application lay to be dismissed.

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[2] Van Niekerk v Van Niekerk and Another 2011 (2) SA 145 (KZP) at 147B
[3] Supra
[4] 2012 (4) SA 432 (SG)
[5] 1984 (3) SA 623 (A)

Relevant Legal principles :

Dispute of fact:

[20] The general rule stated in **Stellenbosch Farmers' Winery Ltd v Stellenbosch Winery (Pty) Ltd 1957 (4) SA 234 (C)** at 235 E-G is :

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

[21] Clarification and qualification of the general rule was provided in **Plascon-Evans Paints v Van Riebeeck Paints** (supra) **at 634 H – 635 C:**

> 'It is correct that , where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact…..If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to final relief which he seeks…..Moreover there may be exceptions to this general rule, as, for example where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.'

Removal of an executor in terms of Section 54(1)(a)(v) of the Administration of Estates Act No 65 of 1965, as amended

[22] Section 54(1)(a)(v) provides that an executor may at any time be removed from his office by the Court :

> '(v) if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned'.

[23] The common law principle affirmed in **Grobbelaar v Grobbelaar**[6] is that the court is vested with a discretion to remove an executor from office if his personal interests are in entire conflict with the interests of the estate.

[24] In **Volkwyn NO v Clarke & Damant,** Murray J appositely held :

> 'Both the statute and the case cited (Letterstedt v Broers) indicate that the sufficiency of the cause for removal is to be tested by a consideration of the interests of the estate. It must therefore appear, I think, that the particular circumstances of the acts complained of are such as to stamp the executor or administrator as a dishonest, grossly inefficient or untrustworthy person, whose future conduct can be expected to be such as to expose the estate to risk of actual loss or of administration in a way not contemplated by the trust instrument.' [7]

[25] See also **Meyerowitz The Law and Practice of Administration of Estates and Estate Duty**:

> 'Where it is sought to remove an executor from office it must appear that the acts complained of are such as to stamp the executor as a dishonest, grossly inefficient or untrustworthy person whose future conduct can be expected to expose the estate to actual loss, or of administration in a way not contemplated by the will. Mere hostility between the executor and other interested parties which does not affect the administration, or even negligence which may expose the executor to a claim to make good the loss, is not sufficient grounds for removal; the test is whether the continuance of the executor in office will prejudicially affect the future welfare of the estate placed in his care.'[8]

[26] In **Van Niekerk v Van Niekerk, Wallis J** recognised that the executor is not a mere agent for the heirs nor does he represent the creditors of the estate[9]. He is given custody and control of all the property in the estate and, when considering claims against the estate, he is obliged to exercise the powers conferred on him, in particular under Sections 32 (disputed claims) and 33 (rejected claims), *bona fide* and with a measure of objectivity. He held further:

> 'However, where it is apparent from the executor's conduct that it is their purpose and intent to use the office to resist all claims, or all claims from a particular source, irrespective of their merits and without any fair-minded consideration thereof, that may, in my view, constitute good cause for their removal in terms of s 54(1)(a)(v). That view would be strengthened where the

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[6] 1959 (4) SA 719(A) at 724F-G
[7] 1946 W. P. A. 456 at 464
[8] 2007 Edition page 11-2
[9] At 149 G-H

motive was to secure personal financial benefit in their capacity as heirs. The office of executor should not be used in order to pursue a private agenda.'[10]

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

[28] It is apparent that in applying in any of the principles enunciated above, the court must be satisfied that there was some act or conduct on the part of the impugned executor which demonstrates or proves that it is undesirable for him to continue as executor.

Reasons

[29] In **Reichman v Reichman** the facts are the inverse of that prevailing in this matter. The executor instituted an action in which he (acting as executor) sought an order that a document purporting to be a will was valid and that he (in his personal capacity) should be declared the sole heir of the deceased, to the exclusion of the other beneficiaries. It is for that reason that he court found that it was undesirable for him to continue to act as executor.

[30] Therefore it is not any dispute which causes the executor of an estate to become susceptible to removal at the instance of the court. There has to a proved conflict of interest or facts which demonstrate that he is incapable of impartial administration of the estate to the detriment or prejudice of the estate, and consequently its heirs or beneficiaries.

[31] The dispute about the validity of the 2013 will, initiated by the applicants, has been resolved in favour of K…. Mr N…. sought to persuade me that the alleged

[10] At 150 F-G

altercation between K….. and K…. would have adverse consequences for K…. if the estate were to be administered by K….. There is no evidence to this effect, except Ms P….'s testimony that there was an altercation which 'she thought' occurred because K….. was not happy that K….. visited his brother'.

[32] Mr Naidu also referred me to the following excerpt from the judgment of **Wallis J** in **Van Niekerk** :

> 'Take the case of an executor, who is also the sole heir to the estate, who rejects all claims of R10 000 or less on the basis that the cost of establishing those claims will be such that a number of the claimants will abandon them. That would be an abuse aimed at personal enrichment. Some claimants (widows, dependent children, domestic workers, etc) may be in a vulnerable position and ill-equipped to enforce a claim against a recalcitrant executor. If the executor is well provisioned, because the estate is a substantial one, they may be able to mount a campaign of attrition against claimants, resisting their claims on grounds no stronger than personal dislike. That is not what the Act contemplates by way of the proper performance of an executor's duties. Where the exercise of its powers in this way is directed at personal financial advantage that is even less the case.'[11]

[33] The reliance on both **Reichman v Reichman** and **Van Niekerk v Van Niekerk** to sustain the relief sought is, in my view, ill-conceived. The applicants are not claimants against the estate but heirs, and therefore the executor, although also an heir, cannot reject or dispute their entitlement.

[34] Further it is apparent from the judgment of **Wallis J** that it was because of the attitude that the executrix adopted towards the widow and her claims against the estate, and her determination to resist the claims by the widow, that he held that:

> '[28] Whilst the executor of an estate may be vigorous in resisting a claim that he or she regards as doubtful and this may result in acrimony between the executor and the claimant, the proper execution of the duties of an executor demands, in my view, a measure of impartiality and fair treatment in dealing with claims against the estate. The respondent has demonstrated that, at least insofar as the claims by the applicant are concerned, she is incapable of exercising that level of impartiality and treating the claims fairly.'[12]

[35] While Khan has failed to explain why he failed to advise the beneficiaries or their guardians when he found the later will has not been explained, he correctly points out that he had no legal obligation to inform Ms Pillay. However I am unable to

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[12] Van Niekerk page 156 H-I

find in any of the submissions made by Mr Naidu, including the suspicions that the aforesaid failure aroused, that Khan has committed any act which demonstrates that he is incapable of executing his duties as executor with a measure of impartiality or fair treatment in his dealing with the estate or the other heirs or that he is pursuing his private agenda.

[36] To date, all that has occurred in respect of the administration of the testatrix's estate is that the preliminary inventory and Acceptance of Trust by K… were lodged with the 2013 will with the Master and the letters of Executorship issued in favour of K…..

The preliminary inventory reflects a paucity of details; it does not reflect the bank account of the testatrix, of which K….. was clearly aware, from his allegation in the answering affidavit that the money was held on his behalf. Further, as correctly pointed out by Mr N….., according to the answering affidavit, the immovable property described in the inventory, was not owned by the testatrix but leased by her. It is therefore questionable as to why it is reflected as an asset. Similar questions pertain to the BMW motor vehicle and the remaining jewellery that was allegedly not pawned by the testatrix.

[37] However in my view the following considerations are pertinent :

(i) this is a preliminary inventory; a final inventory will have to be filed before the estate can be finalised and distributed;

(ii) albeit on the instructions of K… and signed by him, the estate documents were completed by K….'s erstwhile attorney, who is no longer on record. (I am unable to read anything sinister into this as suggested by Mr N…);

(iii) the parties had agreed to pend the administration of the estate until the finalisation of this application; therefore any inaction cannot be attributed to K….'s failure to fulfil his obligations as executor;

(iv) there are no claims reflected against the estate at this stage, although claims may be lodged after the notice calling for the debtors and creditors of the estate in terms of Section 29 of the Administration of Estates Act is advertised;

(v) the testatrix's inheritance from her aunt has not been ascertained.

[38] Therefore no act of maladministration, or repudiation or conflict of interest or any other act on the part of K…. as executor to the detriment of the estate or its heirs, has been furnished or proved by the applicant.

[39] I am also mindful that in giving effect to the terms of a will, the expressed intention and directions of the testatrix must be implemented as far as is reasonably possible, although this does not preclude the removal of the nominated executor.[13] According to clause 5 of the 2013 will, despite the unfounded reservations expressed by Ms P…., the administration of the benefits due to the minor children was entrusted to K….. as executor. Further from the evidence of Ms P……, it would appear that the beneficiaries of the insurance policy of the testatrix were the same beneficiaries in terms of her will, although the proportion of benefit is unknown. I note in passing that K….. was in a position to deal with insurance in July 2013, two months after the death of the deceased, although he claims that he was so emotionally distraught that he could not look for the will until September 2013.

[40] I remain mindful that in his answering affidavit K….. alleges that certain assets were held by the testatrix on his behalf and he has a claim against her estate, albeit he has also alleged in correspondence that their marriage which was conducted under Islamic rites was one in which the community of property marital regime prevailed. It remains to be seen if he pursues this claim and whether his performance of his obligations as executor is thereby compromised by the conflict of interest which will arise from his concurrent status as a creditor of the deceased estate, to the prejudice of the beneficiaries.[14]

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[13] Port Elizabeth Assurance Agency & Trust Co. Ltd. v Estate Richardson, 1965 (2) SA 936 (K) at 940: "I have no doubt that in the exercise of its power to appoint or remove an administrator the Court will pay close attention to the wishes of the testator as expressed in or implied from the terms of the will. The Court cannot, however, necessarily be bound by these wishes even to the detriment of the beneficiaries to whose interest it must equally clearly have regard."

[14] Meyerowitz page 11-3 : **Conflicting interests 11.6** 'Where an executor's private interests conflict with those of the estate, he may be removed from office. If application is made for removal of an executor on the ground that he has made a claim against the estate which is disputed by the heirs it is not necessary for the court to go into the validity of the claim, as the question as to who is right or wrong is irrelevant. The executor finds himself in the impossible position on the one hand having to fight for his claim as a creditor and on the other hand having as executor to defend the estate against the same claim; he cannot remain impartial.'

However as the administration of the deceased estate was suspended pending the finalization of the application, the administration can only be resumed hereafter. The applicants are at liberty to take whatever measure they deem necessary to protect their interests in the future. But I am unable, on the application before me, to find in favour of the applicants, even to the extent of the amended relief sought.

Costs:

[41] Mr N…. argued that the applicants had relied on the opinion of their expert in bringing this application, and as they acted *bona fide*, the costs should be borne by the second respondent. This is clearly not a tenable argument, as there is no cogent reason why K…. should be mulcted in the costs of the applicants, whether or not they acted *bona fides*.

Mr Mohammed left the issue of costs in my hands.

[42] I am of the view that the applicants themselves (even K…. who is clearly guided by his grandmother), had little or no control over the institution or the course of these proceedings, and cannot be said to have acted *mala fide*. But their estates will be depleted substantially by the legal costs and disbursements incurred and any adverse costs order.

[43] However it was at the insistence of those instructing their counsel that the hearing of oral evidence commenced, while the joint minute was prepared. Thereafter, even though the validity of the 2013 will was no longer in dispute, on 4 September 2015 the applicants persisted in pursuing an order for the removal of the executor based on new grounds, without any notice to K…..'s legal representatives and, in my view, without proper consideration of whether they had made out a case for the relief as premised on Section 54(1)(a)(v).

Therefore, despite any consideration I may have for the applicants, they have been exposed to an adverse costs order for their unreasonable persistence on 4 September 2015.

Order:

1. The application for the cancellation of the letters of executorship issued to the second respondent by the first respondent in Estate Late S…. P…. Reference No 8572/2013/PMB is dismissed.
2. The costs of the application are to be costs in the administration of the aforesaid estate, except for the costs of the opposed hearing on 4 September 2015.
3. The costs of the hearing on 4 September 2015 are to be borne by the applicants, such costs to be taxed or agreed.

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MOODLEY J

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