**REPUBLIC OF SOUTH AFRICA**

**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

**CASE NO: 2011/15348**

**DATE:23/11/2011**

**REPORTABLE**

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

..... .....
DATE SIGNATURE

In the matter between:

**JEFFREY REICHMAN** **Applicant**

and

**BARRY SOLOMON REICHMAN** **First Respondent**

**BARRY SOLOMON REICHMAN N.O.** **Second Respondent**

**MASTER OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG** **Third Respondent**

**ARNOLD SHAPIRO** **Fourth Respondent**

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**JUDGMENT**

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**Scholtz A J**

[1] On 15 April 2011 the applicant issued a notice of motion against the respondents in which he claimed the following relief:

"1. First Respondent be and is hereby removed as executor in the deceased estate of the late Lea Reichman appointed in terms of letter of executorship no: 26229/09 issued by the Master of the High Court, Johannesburg, on 14 October 2009;

2. The First Respondent is directed forthwith to return to the Third Respondent the aforesaid letters of executorship;

3. Declaring the First Respondent unfit to act as executor of the aforementioned deceased estate;

4. Declaring the Fourth Respondent unfit to act as executor and/or his agent in respect of the aforementioned deceased estate;

5. That the First Respondent forfeit any entitlement to executors fees;

6. That First Respondent be ordered to be personally liable for all fees and/or disbursements incurred by the Fourth Respondent in administrating the aforesaid deceased estate on his behalf;

7. That the First Respondent, in his personally capacity, pay the costs of the Application *de bonis propriis*, alternatively on the scale as between attorney and client;

8. Fourth Respondent be ordered to pay the costs of the Application *de bonis propriis,* alternatively on the scale between attorney and client, jointly and severally with the First Respondent only in the event of him, directly or indirectly opposing the Application;

9. Granting the Applicant such further and/or alternative relief of the above Honourable Court deems fit."

[2] The application is opposed by the first and second respondents, who filed an answering affidavit. The applicant and the first respondent are brothers. The first respondent acts in his personal capacity and as the second respondent is the executor of the estate of his mother, the late Lea Reichman ("**the deceased**"), who passed away on 11 September 2009. The fourth respondent is an attorney and is acting as the agent of the second respondent in administering the estate of the deceased. The fourth respondent abides the decision of the court. The references in this judgment to the fourth respondent will be to him in his capacity as the agent of the second respondent.

[3] The applicant has filed a replying affidavit and the first and second respondents have filed a further affidavit in response to alleged "new matter" raised in the replying affidavit. In the applicant's practice note, which was filed before the hearing of the application, the applicant averred that prior leave had not been obtained for the filing of the further affidavit and that such affidavit should be regarded as *pro non scripto*. However, in the applicant's heads of argument, the applicant has referred to the contents of the further affidavit. I will therefore have regard to this affidavit insofar as it may be necessary to decide the issues in this case.

[4] In the affidavits before the court there are accusations and counter-accusations between the applicant and the first and second respondents. These give rise to factual disputes, many of which cannot be resolved in motion proceedings. There are disputes between the applicant and the first respondent as to what assets each of them and their sister, Marion Sacke ('**Mrs Sacke**"), received from the deceased during her lifetime, whether such assets were gifts or loans and whether a document, which the deceased signed the day before she died, constitutes a valid "will" in terms of which the deceased left her entire estate to the first respondent. It nevertheless remains for the court to decide whether the applicant is entitled to the relief sought in his notice of motion.

[5] The following events do not appear to be in dispute between the parties although many of the contentions advanced on their behalf in the letters written by their respective attorneys are clearly disputed:

(a) on 14 October 2009 the second respondent was appointed by the third respondent ("**the Master**") as the executor of the estate of the deceased in terms of Letters of Executorship No: 26229/09 ("**the Letters of Executorship**"). The applicant was not a party to the appointment;

(b) on or about 22 December 2009 the second respondent (through the offices of the fourth respondent) submitted to the Master a first and final liquidation and

distribution account in the estate of the deceased ("**the L & D Account**"). The distribution account reflected that the balance for distribution was R64 628,58 and this amount was to be distributed in terms of s 1(1)(b) of the Interstate Succession Act 81 of 1987, as amended. Pursuant hereto, the amount of R64 628,58 was to be distributed in equal shares to the applicant, the first respondent and Mrs Sacke;

(c) on 19 January 2010 the applicant's former attorneys addressed a letter to the fourth respondent in which they advised that they were acting for the applicant and requested copies of the draft L & D Account and the will of the deceased;

(d) on 25 January 2010 the fourth respondent addressed a letter to the applicant's former attorneys, to which he attached copies of the will, the letters of executorship and the L & D Account. He advised that the L & D Account had been advertised to lie for inspection as from 29 January 2010;

(e) on 4 February 2010 the applicant's former attorneys addressed a letter to the fourth respondent in which they alleged *inter alia* that certain assets were missing from the L & D Account, more particularly that the deceased had made loans to the first respondent and Mrs Sacke of about R470 000, that jewellery to the value of about R5 million was missing from the L & D Account and the deceased had given the first respondent a fancy yellow diamond valued conservatively at R1,1 million to sell on her behalf;

(f) on 17 February 2010 the fourth respondent addressed a reply to the applicant's former attorneys, which was marked "without prejudice". The applicant annexed the letter to his founding affidavit and averred that the letter did not constitute any form of settlement negotiations and should accordingly be received in evidence. in paragraph 7.8 of the first and second respondents' answering affidavit he stated that the letter "contains a correct

rendition of the position in respect of the deceased estate." Accordingly the admissibility of the letter is not is dispute. In the letter the fourth respondent stated:

"I refer to your letter dated 4 February 2010.

At the outset, I must note that my clients are shattered and devastated by the content of your letter.

I am advised that your client had no relationship with his mother for a number of years prior to her death, and your client's alleged knowledge as to the existence or non-existence of assets, is incorrect and the assertions made by your client are harmful and hurtful.

In reply to the specific allegations, our clients emphatically deny that their late mother held the assets claimed by your client at the date of her death:

1. Loan:

Our clients have no knowledge as to how your client has computed the alleged loan to Barry and Marion in the sum of R470,000.00. Neither Barry nor Marion has any knowledge of this alleged loan. If your client has proof of the allegation, with particular reference to the terms and conditions of the alleged loan, together with proof of payment of same, please let us have same.

In regard to the above, it must be noted that the late Mrs Reichman did make various payments to her children which were done out of love, kindness and benevolence and were a donation to Barry and Marion.

It must be noted that Barry had Power of Attorney and signing power on his mother's account. Barry did not draw a single cheque on the account. Whatever amounts were paid were made by Mrs Reichman personally.

2. Jewellery:

The jewellery Is not missing and the family deny the allegation and imputation. The late Mrs Reichman did not own any jewellery at the time of her death. Whatever jewellery Mrs Reichman owned prior to her date of death, had been dealt with in her lifetime.

3. 3 Carat fancy yellow diamond:

It must be noted that this diamond was valued and found not to be an intense fancy yellow, but to be a natural yellow. The value accordingly changed from approximately R400,000.00 to R100,000.00.

It must be further noted that your client removed the setting containing the diamond which also contained a wave of baguettes. Your client Is still in possession of that setting with the wave of baguettes, which Is valued at approximately R150,000,00.

In order to obtain return of her diamond, the late Mrs Reichman and Barry were compelled to consult the Police for assistance in recovering the ring, but were only able to recover the diamond from the EGL Laboratory.

The stone was sold by Mrs Reichman for R110,000.00. The ring and baguettes are and remain In the possession of your client.

The proceeds of the sale of the ring were used by the late Mrs Reichman for the payment to Jaffa of R50,000.00 and most of the balance was used to pay liabilities, including to settle legal action which had been instituted against Mrs Reichman by "the Little Company of Mary.";

(g) on 25 February 2010 the applicant's former attorneys addressed a letter to the Master in which they lodged on his behalf an objection to the L & D Account. The letter stated:

"We act on behalf of Mr Jeffrey Reichman, one of the heirs in the abovementioned estate.

Our client has examined the Liquidation and Distribution Account and is of the opinion that it does not correctly reflect the assets and claims of the deceased.

Our client has instructed us, in the circumstances, to lodge an objection to the Account on his behalf.

The basis of our client's objection is as follows:-

1. An amount of approximately R487 000 was loaned by the deceased to her son Barry Reichman and her daughter Marion Reichman. The amounts loaned to Barry and Marion were as follows:-

   R387 530 to Barry; and
   R100 000 to Marion.

2. In addition jewellery to the value of approximately R5 million is missing and should have been included in the Liquidation and Distribution Account. According to our client the jewellery was taken by Marion from the deceased without the deceased's permission and consent.

3. The deceased also gave her son Barry a 3 carat fancy yellow diamond to sell on her behalf. The stone was valued at not less than R1,1 million. According to our client the stone was sold and the monies were retained by Barry without the deceased's permission or consent.

Attempts were made to resolve this matter but without success.

You are requested, in the circumstances, to advise the Executor of our client's objection to the Liquidation and Distribution Account.

Kindly acknowledge receipt.

We await your reply."

(h) On 19 April 2010 the fourth respondent addressed a letter to the Master which read as follows:

"We refer to the Master's letter dated 5 March 2010.

We apologise for the delay in replying to the objection.

At the outset, the following matters must be noted by the Master:

- The late Mrs. Reichrnan died testate.
- The late Mrs. Reichman left her entire estate to her son, Barry Solomon Reichman.
- We are advised that the late Mrs. Reichrnan had been estranged from her son Mr. Jeffrey Reichman, who is the objector to the Account.
- Mr. Jeffrey Reichman is in possession of assets of the estate including a ring and baguettes which he has to date failed to deliver to the Executor.
- The original Will was delivered to the Master. We enclose a copy for ease of the objector's attention. It will be noted that the Will was not properly executed and for that reason, we proceeded with the administration as intestate. The objector must be mindful of the fact that the family do retain the right to declare the Will to be the intended Will of the deceased, should same be necessary in terms of Section 2(3) of the Wills Act of 1953. If the Application is successful, Mr. Jeffrey Reichman and his sister will receive nothing.
- Notwithstanding the above, an objection to the L & D Account was noted to our offices by the objector's attorney Kasimov & Associates undercover of their letter 4 February 2010, a copy of which we enclose for the Master's ease of reference.
- We replied to Attorney Kasimov & Associates letter undercover of our letter dated 17 February 2010.
- We attach a copy of our letter of 17 February 2010 which deals with each and every allegation objected to and disputes, denies or rejects the validity of same.
- The Executor stands by his contentions and should the objector wish to proceed to Court, which would be regretful, the matter will be defended with a request to stay the proceedings pending the Executor's Application to declare the draft Will to be the intended Will of the late Mrs. Reichman.";

(i) on 21 April 2010 the applicant's former attorneys addressed a letter to the Master in which they stated that the applicant had examined the deceased's diary and had located a number of extracts therein which supported his

contention that the first respondent and Mrs Sacke had loaned monies from the deceased and had also taken her jewellery and personal effects;

(j) on 10 June 2010 the applicant's former attorneys addressed a further letter to the Master, in which they stated:

"1. We are in receipt of your letter 8 June 2010, together with enclosures, the contents of which are noted.

2.1 Insofar as proof of the amount owing by the deceased's two children is concerned, we respectfully refer you to our letter 21 April 2010, together with the annexures thereto, which was delivered to your offices on 22 April 2010.

2.2 A copy of our letter together with the annexures is annexed for your ease of reference.

2.3 In addition, we annex hereto a copy of the late Lea Reichman's bank statement reflecting a reference, in the late Lea Reichman's own handwriting, of amounts owing by her children, Barry and Marion.

2.4 The amounts reflected in the aforesaid statement accords with the amounts referred to in our letter to you of 25 February 2010.

3.1 Insofar as the Executor's threats to launch an Application to declare the draft Will of the late Mrs Lea Reichman to be her intended Will, our instructions are that our client is of the opinion that the draft Will was not signed by his late mother alternatively it was signed under duress and accordingly any such Application to Court will be opposed.

3.2 It is to be noted that although the deceased's son, Barry Reichman and/ or the Executor were in possession of the deceased's "Will" they did not seek to wind up her estate in terms thereof. Clearly they did not accept the Will as being that of the late Lea Reichman and are only now seeking to do so, due to our client's objection.

3.3 These facts, together with such other facts as are relevant, will be brought to the Courts attention at the appropriate time.

4. Please furnish us with your reply as soon as possible.";

(k) on 28 September 2010 the fourth respondent addressed a letter to the Master, which was copied to the applicant's former attorneys, in which he stated:

"We refer to the Master's letter dated 8 September 2010 and enclosures being a copy of a letter from Kasimov and Associates dated 10 June 2010.

Our client had no knowledge of Attorney Kasimov and Associates letter of 21 April 2010 addressed to the Master.

In reply to the bank statements and extracts from the diary, we advise as follows:

- The handwritten markings, notes and summary recorded on the bank statements are not that of the late Mrs. Reichman.
- Barry Reichman did receive an amount of R250,000.00 from his mother on 10 June 2005.
- Barry Reichman has no knowledge and denies receipt of the sum of R100,000,00 on 22/07/2005 and R26,530.00 on 22 June 2005.
- Marion Sacke denies that an amount of R100,000.00 was paid to her on 10/05/2006.
- The extracts from the diary are not in the deceased's handwriting.
- We will arrange with Mr Kasimov for a copy of the original diary and if necessary, will set up a meeting to peruse same at his offices. If necessary, we will address this matter further.
- Mrs Reichman was known to blow hot and cold. It is contended that she had a vicious streak. She would make the most horrendous allegations about her children's conduct and the next day, be more than generous to them. She believed that many people had stolen from her. The home has confirmed that Mrs Reichman on more than one occasion contended that her son Jeffrey Relchman being the objector to this Account had stolen all her diamonds. She at some stage even contended that the home had stolen her money. Her irrational behaviour was known to all of those who were associated with her. Mr Jeffrey Reichman had limited contact and no relationship with his mother. As far as the home is aware, Mr Jeffrey Reichman never visited his mother. The daily care and visiting and attention given to the late Mrs Reichman in the main was attended to by her son Barry Reichman.
- It must be noted that the complainant is in possession of a ring of the deceased with diamond baguettes. His attorney has admitted that his client is in possession of this ring and the baguettes but notwithstanding demand, he has to date failed to return same to the Executor. Is the Master able to assist in prevailing upon the objector to deliver the ring to the Executor and failing this, the Executor regretfully will have no alternative but to institute legal proceedings for recovery of this item.
- The Will was signed by the late Mrs Reichman in the presence of a witness, R Wilson who is employed at Jaffa. The Will was not properly executed in that it was witnessed by a single witness. The handwritten portion of the Will was also completed by Mr Barry Reichman. It was decided to proceed with the administration as intestate, The rights to proceed in terms of the Wills Act to declare the document to be the intended Will of the late Mrs Reichman and Barry Reichman's right to inherit have been reserved.";

(l) on 5 November 2010 the applicant's present attorney addressed a letter to the fourth respondent in which he stated:

"As you are aware, we have been appointed to act on behalf of Mr Jeffrey Reichman, one of the heirs in the above Estate.

The writer is not sure whether Mr Shapiro is the Executor of the above Estate or whether he merely acts as agent. On the assumption that he is the agent, and that Mr Barry Solomon Reichman is the Executor, our instructions are as follows:

1. The Estate must retain the net capital for distribution of R64 000.00 pending a High Court application removing the Executor and the appointment of an independent third party.

2. An enquiry alternatively an investigation shall thereafter immediately proceed and the theft and location of approximately R8 000.000.00's worth or jewellery belonging to the late Leah Reichman shall be appropriated as an asset/s of the Estate.

3. The cost of the aforegoing shall be payable by the Estate, alternatively the party/ies in whose possession the said assets are located.

4. The alleged donations made to your clients, Mrs Marion Sacke and Barry Solomon Reichman are to be set aside and these parties will similarly be obliged to make payment back to the Estate as these payments were loans and not donations.

The aforegoing is not to be construed as exhaustive relief to be sought in the application set out above. If there is a dispute of fact, then Summons will be issued and the administration of the Estate will be held up until a trial takes place. It is therefore incumbent upon the parties in whose possession these assets are at present to provide an Inventory of same, together with an undertaking not to dissipate or sell same. If this is refused, then clearly criminal charges will also have to be laid against the concerned parties.

The parties to the application or Summons will be our client, Mr Jeffrey Reichman and the Estate as they both have locus standi. We assume that the Master of the High Court will also have to be cited as an interested party.

We would appreciate your Mr Shapiro's comments on the aforegoing. However, as previously advised by the writer to Mr Shapiro, should the parties refuse to settle their differences we are instructed to brief Counsel and will proceed with whatever action is required and advised. All our client's rights and those of the Estate are reserved.";

(m) on 11 November, 26 November and 15 December 2010 and 11 January 2011 the fourth respondent addressed further letters to the Master in which the Master was requested to provide his ruling on the applicant's objections to the L & D Account. No such ruling has been forthcoming from the Master;

(n) on 17 March 2011 the second respondent (i.e. the first respondent in his capacity as the executor of the deceased estate) issued summons against

the applicant in which the second respondent made two claims against the applicant ("**the Summons**"). In the first claim the second respondent made the following averments:

"3.1 The deceased died testate in that she executed the Will annexed hereto marked "BR1" on the 9th September 2009.

3.2 The deceased's last Will and Testament annexed hereto does not comply with the provisions of Sections 2(1)(a)(ii) and (iii) of the Wills Act 7 of 1953 (as amended) in that the deceased's last Will and Testament:

3.2.1. was signed at the end thereof by the deceased in the presence of only one competent witness being one Mrs Wilson ("Mrs Wilson"), alternatively was signed by the deceased whereafter she acknowledged her signature to Mrs Wilson.

3.2.2 was signed and attested to by Mrs Wilson at the end thereof in the presence of the deceased and whilst the deceased was in a mental state fit to execute a valid Will and whilst she appreciated the nature and contents of the Will and her conduct.

3.3 The deceased passed away on the 10th September 2009, being one day after the deceased and the aforesaid witness signed the Will but, before the deceased could request a second witness to attest to, and sign the Will in her presence and that of Mrs Wilson.

3.4 The deceased requested the plaintiff on the 9th September 2009 to complete the blank spaces contained in her last Will and Testament as she was unable to write, which task he duly performed in her presence.

3.5 The plaintiff complied with the deceased's request and with each and every instruction given to him by the deceased, which instructions were clear, to the point and without hesitation.

3.6 The plaintiff would, in terms of the law relating to intestate succession have been entitled to inherit from the deceased if the deceased died intestate.

3.7. The deceased at all times intended the document annexed hereto to be her last Will and Testament.

4. In the premises:-

4.1 the plaintiff prays for an order whereby the Master is authorised to accept the deceased's last Will and Testament annexed hereto marked "BR1" as a Will for purposes of administering the deceased estate;

4.2 the plaintiff prays for an order declaring him to be competent to receive the benefits emanating from the deceased's last Will and Testament as envisaged by the provisions of Section 4A(2)(a) and (b) of the Wills Act 7 of 1953.

5 The plaintiff called upon the first defendant to consent to the aforesaid, whereafter:

5.1 the defendant lodged a complaint against the liquidation and distribution account which had been prepared by the plaintiff without having regard to the deceased's last Will and Testament;

5.2 the first defendant advised the plaintiff that he contests and intends to contest the deceased's last Will and Testament."

(o) in the second claim in the Summons the second respondent:

(i) claimed that the applicant was in possession of certain of the deceased's jewellery, the reasonable market value of which was R150 000. Despite the applicant having been called on to return the jewellery to the deceased estate, the applicant refuses to do so;

(ii) in the alternative alleged that the applicant disposed of the jewellery to the detriment and without the knowledge and/or consent of the deceased estate;

(iii) accordingly claimed from the applicant the return of the jewellery, alternatively payment of the amount of R150 000 plus mora interest and costs.

[6] In the applicant's founding affidavit he stated *inter alia* the following:

"8.12 What is abundantly clear at this juncture is that the First Respondent has a clear conflict of interest and yet refused to step down as executor. Shapiro is also callously refusing to deal with any of the documentation which has now been put at his disposal namely the diary of the deceased, her bank account statements and cheques.

8.13 This is now even further exemplified by the first respondent fortuitously issuing summons only against myself to declare the will valid and demanding return of the ring which contained the vivid yellow fancy diamond."
(my emphasis)

"9.7.1 The First Respondent, in his capacity as executor, finds himself in the untenable position that personally as a debtor of the estate he must defend for his claim, and on the other hand in his capacity as executor of the estate he must fight for the same claim. It is for this reason alone that the Honourable Court should remove the First Respondent as executor, as it is undesirable in the circumstances for the First Respondent to continue to retain such office."

[7] In the first and second respondents' answering affidavit he stated *inter alia* the following:

"2. IN LIMINE

2.1. Prior to replying to the applicant's founding affidavit in some detail, I refer the above Honourable Court with respect to the summons and particulars of claim annexed as "JR12" to the founding affidavit, being a summons issued by me, inter alia, against the applicant and wherein I pray for the following relief:

2.1.1. that the Master of the above Honourable Court be authorised to accept the deceased's last Will and Testament annexed to the particulars of claim marked "BR1" as a Will for purposes of administering the deceased estate; and

2.1.2 for an order declaring myself to be competent to receive the benefits emanating from the deceased's last Will and Testament; and

2.1.3. that the applicant be ordered to forthwith return to me, in my representative capacity, the jewellery, being the deceased's wedding band, consisting of a setting and a wave of baguettes belonging to the deceased estate;

2.1.4. and, in the alternative, payment of an amount of R150,000.00 together with interest thereon, and

2.1.5. that the costs of the action be costs in the administration of the deceased estate, alternatively, be paid by the applicant in the event of the action being opposed.

2.2. The summons was issued on the 17th March 2011 and, thereafter served upon the applicant.

2.3. Subsequent to the service of summons upon the applicant, the applicant launched this application for an order that I be removed as the Executor in the deceased estate and that I be declared to be unfit to act as Executor in the aforesaid deceased estate. The applicant similarly prays that Attorney Arnold Shapiro, be removed as my agent in the administering of the deceased estate.

2.4. The action that is pending pertains to the question as to whether the estate should be administered as an intestate or a testate one. Should the above Honourable Court find that the deceased's last Will and Testament is a valid document, the application launched by the applicant becomes irrelevant, particularly in light of the contents of the deceased's last Will and Testament, which document is annexed as "JR1" to the founding affidavit. In that Will, the deceased stated as follows:

*"I, the undersigned,*

*Lea Reichman*

*ID Number 2405260042089*

*Of Jaffa Muckelneuk*

*Pretoria*

*hereby declare this to be my Will.*

*1. I hereby revoke all previous Wills.*

*2. I nominate*

*to be the Executor of my Estate with the power of assumption.*

*3. I direct the Master of the High Court to dispense with the furnishing of security by my nominated Executor for the proper administration of my Estate.*

*4. I bequeath my whole Estate to:*

*BARRY SOLOMON REICHMAN*

*ID 6006065042088"*

2.5. The deceased's last Will and Testament was signed at the end thereof by the deceased in the presence of only one competent witness, being one Mrs Wilson. Mrs Wilson signed the last Will and Testament at the end thereof in the presence of the deceased and whilst the deceased was in a mental state fit to execute a valid Will. She appreciated the nature and contents of the Will.

2.6. The difficulty is that the second witness did not sign the Will in the presence of the other witness. A further difficulty is that the deceased requested me to complete the blank spaces in her last Will and Testament as she was unable to write, which task I duly performed in her presence.

2.7. I complied with the deceased's request and with each and every instruction given to me by the deceased, which instructions were clear, to the point and without hesitation.

2.8. Should the above Honourable Court find that the Will is a valid document, then and in that event the deceased bequeathed her entire estate to me and the first respondent's objections, which are, with respect, unfounded, would be irrelevant.

2.9. For the reasons aforesaid, I pray that the applicant's application be dismissed with costs, alternatively, that the applicant's application be stayed pending the outcome of the action instituted as aforesaid.

3.

3.1. In addition, it was always open to the applicant to launch an application against the Master of the above Honourable Court and against myself for an order that the administration of the deceased estate be stayed pending the outcome of the action but, the applicant elected to follow the route of attacking me in my personal capacity, and in my capacity as the Executor in the deceased estate.

3.2. It was also open to the applicant to launch an application against the Master of the above Honourable Court praying for an order that the Master be ordered to immediately give attention to the applicant's objections. The applicant also, could have requested that the Master convene an enquiry in terms of the Provisions of the Administration of Estates Act 66 of 1965, in order for him to raise his objections at such an enquiry.

3.3. The applicant however, elected to launch an application which makes little sense under circumstances where a summons had been issued, and an action pending in the above Honourable Court.

3.4. I am, with respect, of the opinion that the applicant is embittered by the fact that summons had been issued for the relief as more fully set out in the particulars of claim."

[8] The first and second respondents' answers to the allegations, which I have quoted in [6] above, were as follows:

"7.8. I deny that it is either abundantly clear or at all, that there exists a conflict of interest as my duty and my interest is not in conflict. The letter addressed to the applicant's attorney by Mr Shapiro, annexed "JR9" contains a correct rendition of the position in respect of the deceased estate but, it appears as if the applicant simply ignores the contents thereof, and nitpicks certain sentences thereof, in order to come to his conclusion which is more fanciful than real.

7.9. I deny that I "fortuitously" issued summons against the applicant and, respectfully state that Section 2(3) of the Wills Act allows for an interested party to approach a Court to declare a Will to be a valid Will. To say that I am "unfit" because I issued summons in the above Honorable Court, is, with respect, denying me the right to which I am entitled in terms of the Wills Act." (my emphasis)

"9.1. I have read the unsubstantiated and speculative allegations made against myself and my sister and deny each and every allegation where the applicant intends the above Honorable Court to make a negative finding against either myself or my sister.

9.2. In the light of the fact that summons had been issued and that the above Honorable Court may grant an order to the effect that the deceased died testate and that her last Will and Testament is a valid document, I do not intend to reply to the allegations herein contained, either in detail or at all. I have been advised that there exists no reason to deal with any of the false allegations made against me or my sister as the application launched by the applicant:

9.2.1 is premature, in that these allegations will only become relevant should the above Honorable court find that the deceased's Will and Testament is an invalid document;

9.2.2 has, as its basis, a motive which emanates from the fact that the applicant is embittered by reason of the summons served upon him.

9.3 The allegations herein contained are, in any event, false and based upon speculation. The applicant would prefer me to be dismissed as the Executor in the deceased estate as, he believes that should I be dismissed, the action against him will be withdrawn.

9.4 Save as aforesaid the allegations herein contained are denied and, I reserve the right to reply hereto, either where the applicant convinces the Master to convene an enquiry in terms of the Administration of Estates Act or, should the applicant intend to proceed with the application subsequent to the conclusion of the action against him."
(my emphasis)

[9] It is apparent that there are serious disputes between the applicant on the one hand and the first respondent (in his personal capacity) and the second respondent (in his capacity as the executor of the deceased estate) on the other hand.

[10] Although the Summons was issued by the second respondent, in reality the first respondent is seeking to have the deceased's "will" declared to be valid so that he can receive all the benefits of such "will" to the exclusion of the applicant and, for that matter his sister, Mrs Sacke. The second claim in the Summons is one which, if valid, should be pursued by the executor.

[11] The first respondent has a personal interest in (a) precisely what assets should be recovered by the executor for the benefit of the heirs of the deceased. Indeed, one of the duties of an executor is to recover any debts owing to the estate; (b) warding off the applicant's contentions that he owes money to the estate; (c) whether the last "will" of the deceased should be accepted as valid; (d) the litigation which he has instituted against the applicant in his capacity as executor of the deceased estate; and (e) the manner in which the assets of the estate are distributed. All of these interests conflict with those of the applicant. The first respondent is entitled to take such action as he considers to be appropriate in order to protect his personal interests. However, it is undesirable that he should use his office as the executor of the estate in order to pursue such interests.

[12] During the hearing of this matter the first and second respondents' counsel argued that, until such time as the trial court has pronounced on the first claim being made in the Summons, namely the claim that the deceased's "will" should be accepted as a valid will for the purposes of winding up the estate, the second respondent does not have a conflict of interest with the other potential heirs of the estate. If the trial court finds in favour of the first respondent, he will inherit the entire estate and will have no conflict with the disappointed "heirs". The first respondent will have a conflict with the disappointed heirs only if the trial court finds that the "will" should not be

accepted as the last will of the deceased. In my view, this argument is unsound. The first respondent already has an irreconcilable conflict between his personal interests and his duty as executor to act impartially in the best interests of the estate. One of the duties of the executor must be to investigate the validity or otherwise of the debts which the applicant alleges the first respondent owes to the estate. The first respondent cannot be a judge in his own cause and cannot rely on the Master to resolve this factual dispute. If the parties are unable to resolve the dispute among themselves only a court of law would be able to do so.

[13] Even if I am incorrect in this view it is undesirable to defer a decision on the applicant's application until the litigation, which the second respondent has instituted against the applicant by the Summons, has been finalised. The final outcome of this litigation could take several years, bearing in mind that there is the possibility of an appeal. There is no certainty as to the outcome of that litigation. If the final decision does not go in favour of the fist respondent, he acknowledges that at that stage he will have a conflict of interest with the applicant. In that situation he would not be able to continue to act as the executor of the estate. On the other hand, if the second respondent ceases to act as the executor of the estate at this stage, he will not suffer any prejudice.

[14] In a number of cases our courts have had to consider the position of an executor who had a conflict between his personal interests and his duties as the executor of an estate or trustee of a trust. I set out hereunder the principles which were enunciated in these cases.

[15] In Lindenberg v Giess, No and Another 1957 (3) SA 30 (SWA) Claassen JP stated the following at 33 G - 34 A:

"The question of costs must be considered. The executor was faced with an objection to the account. He acted on a valuation not in terms of the will. When confronted with another valuation of van Helsdingen he was placed in a position where his fiduciary functions, which required the exercise of the utmost good faith, conflicted with his own interests. He followed the line dictated by his own interests. Such conduct cannot be allowed to stand. As was said by INNES, C.J., in Robinson v Randfontein Est. G.M. Co. Ltd., 1921 AD 168 at p. 177:

'Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationships. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in The Aberdeen Railway v Blackie Bros. (1 Macqueen 474) the doctrine is to be found in the Civil Law (Digest 18.1.34.7), and must of necessity form part of every civilised system of jurisprudence.'

The first respondent being personally interested and having acted in his own interests in a position where his own interests conflicted with his duty, he must pay the costs de bonis propriis."
(my emphasis)

[16] In Grobbelaar v Grobbelaar 1959 (4) SA 719 (A) van Blerk JA stated the following at 724 G - 725 A:

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

'n Dergelike posisie het ontstaan in die saak van Barnett v Estate Beattie, 1928 CPD 482, 'n appèl teen 'n beslissing van die Hooggeregshof van Suid Rhodesië, waar 'n eksekuteur vir die rede uit sy amp ontset is. Daar het die Hof heeltemal tereg daarop gewys dat op hierdie stadium dit nie nodig is nie om in te gaan op die geldigheid van respondent se eis, want die vraag oor wie reg of verkeerd is, is nie hier ter sprake nie.

Die toestand wat in die onderhawige geval ontstaan kan slegs verhelp word deur die respondent uit sy amp as eksekuteur te ontset. Alleen daardeur kan myns insiens die belange van die boedel gedien word soos art. 99 van die Boedelwet dit uitdruk.Deur die ontsetting van respondent uit sy amp verval sy bevoegdheid om met die bates van die boedel te handel. Dit sal dus die taak wees van die eksekuteur datief wat respondent opvolg om die eise teen, en die regte van, die boedel te ondersoek."

(my emphasis)

[17] In Harris v Fisher, No 1960 (4) SA 855 (A) Ogilvie Thompson JA stated the following at 861 H - 862 E:

"It was argued by counsel for respondent, relying upon English authority (viz. Re Charteris, 1917 (2) Ch. 379; Hampden v Earl of Buckinghamshire, 1893 (2) Ch. 531; Halsbury (2nd ed.) vol. 33 paras. 401 - 6, 431, 539), that the transaction as contended for by appellant would constitute a breach of trust and that, solely upon that ground, appellant's claim must fail. It is not clear to me that our law relating to breach of trust is the same as that of England as reflected in the above-mentioned authorities; and, in the absence of much fuller argument on the point, this appeal should not, in my opinion, be decided upon the ground thus advanced by counsel for respondent. Nevertheless, it was appellant's duty, in her capacity as executrix and administratrix, to discharge the estate's debts, so far as practicable, in a manner

which would be least burdensome for the ultimate heirs. Although herself a beneficiary, appellant, in her aforementioned capacities, stood in a fiduciary position towards the heirs of the corpus. As WESSELS, A.C.J., remarked in Colonial Banking and Trust Co. Ltd v Estate Hughes and Others, 1932 AD 1 at p. 16

'If the trustee is also a beneficiary and he acts in such a way as to benefit himself at the expense of the other beneficiaries, his acts will be narrowly scrutinised.'

It is, I think, a well established rule of our law that a party occupying a fiduciary position must not as such engage in a transaction by which he will personally acquire an interest adverse to his duty'

(per DE VILLIERS, A.J., later J.A., in Horn's Executor v The Master, 1919 CPD 48 at p. 51 and cf. Grobbelaar v Grobbelaar, 1959 (4) SA 719 (AD) at p. 724G). Story Equity Jurisprudence, in the course of a long discussion upon the subject of fiduciary relationships, and after stating that trustees are, for this purpose, to be treated on the same footing as guardians (which is also the position under our law: see Sackville West v Nourse and Another, 1925 AD 516 at pp. 533 - 4) remarks in sec. 322, p. 212 of the 2nd ed., that

'Executors or administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate."

(my emphasis)

[18] In Webster v Webster en 'n Ander 1968 (3) SA 386 (T) Hiemstra R J stated the following at 388 B - D:

"Wanneer een van die twee mede-eksekuteurs weier om te ageer, kan die ander verlof van die Hof kry om onafhanklik eisende of verwerende op te tree (Van der Merwe v Heydenrich, 19 C.T.R. 460, obiter deur die Appèlhof goedgekeur in Conradie en Andere v Smit, 1966 (3) SA 368 (AA) op bl. 374D; Baard v Estate Baard, 1928 CPD 505). Dit skyn selfs 'n geval te wees waar 'n aansoek om verwydering van die eerste respondent as eksekutrise sterk beredeneerbaar sou wees, volgens die beslissings in Basson v Redelinghuys, 1945 CPD 194, en Grobbelaar v Grobbelaar, 1959 (4) SA 719 (AA) op bl. 725. Die blote feit dat sy nie onpartydig kan wees by die beoordeling van eise teen die boedel nie, is voldoende grond daarvoor. Dit kan wees dat die ander eksekuteur ook behoort terug te tree, maar aangesien daar nie sodanige aansoeke voor my is nie, gaan ek nie verder daarop in nie."

(my emphasis)

[19] In Die Meester v Meyer en Andere 1975 (2) SA 1 (T) a Full Court was faced with an application to remove an executor in accordance with s 54(1)(a)(v) of the Administration of Estates Act. One of the allegations against the executor was that he had a conflict of interests. Margo J (with whom Davidson J and Franklin J concurred) stated the following at 16 C - 17 F:

"Die vraag wat nou ondersoek moet word is of bogenoemde gronde die verwydering van die eerste respondent uit sy amp sou regverdig. Kragtens art. 54 (1) (a) kan 'n eksekuteur te eniger tyd van sy amp onthef word deur die Hof op enigeen van die

spesifieke gronde in paras. (i) tot (iv) van die artikel vermeld; en kragtens art. 54 (1) (a) (v) kan 'n eksekuteur te eniger tyd van sy amp onthef word indien die Hof om "enige ander rede" oortuig is dat dit onwenslik is dat hy as eksekuteur van die betrokke boedel optree. Vgl. art. 99 van die ou Boedelwet. Die huidige bepaling in art. 54 (1) (a) (v) is iets nuuts. Die ou art. 99 het die Hof gemagtig om 'n eksekuteur te skors of uit sy amp te "ontzet" indien die Hof van oordeel was dat uit hoofde van afwesigheid,

"ander bezigheden, zwakke gezondheid of andere voldoende redenen, de belange van de boedel onder zijn beheer gediend zijn door zijn schorsing of ontzetting".

Die Hof sal nie ligtelik 'n eksekuteur van sy amp onthef nie, veral waar hy 'n eksekuteur-testamentêr is. Tog is hierdie oorweging nie deurslaggewend nie. In Port Elizabeth Assurance Agency & Trust Co. Ltd. v Estate Richardson, 1965 (2) SA 936 (K), het VAN WINSEN, R., op bl. 940, gesê:

"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."

In Sackville-West v Nourse and Another, 1925 A. A. 516, het SOLOMON, WN. H. R., op bl. 527 na die uitspraak van Lord BLACKBURN in Letterstedt v Broers, 9 A. C. 371, (op appèl van die ou Kaapse Hooggeregshof) verwys, en het voortgegaan:

"He then quotes a passage from Story, Equitable Jurisprudence... as follows:

'But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.'

He then proceeds to lay down the broad principle that...

'In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated that their main guide must be the welfare of the beneficiaries.'"

Hierdie beginsels, wat deur SOLOMON, WN. H. R., goedgekeur is, is ook van toepassing op 'n eksekuteur. Sommige van die latere beslissings van ons Howe wat hierdie beginsels illustreer is in Ex parte Hills, 1959 (4) S. A. 644 (O. K.) op bl. 647, versamel.

Op bl. 528 van die Sackville-West saak het SOLOMON, WN. H. R., bygevoeg dat blote wrywing of 'n vyandige verhouding tussen die administrateur en die begunstigde nie per se ' n genoegsame rede is vir die verwydering van die administrateur uit sy amp nie tensy dit waarskynlik is dat dit die bereddering van die trust sou verhoed. Soos MURRAY, R., gesê het in Volkwyn, N. O. v Clarke & Damant, 1946 W. P. A. 456 op bl. 474:

"... the essential test is whether such disharmony as exists imperils the trust estate and its proper administration".

Mnr. Van Dijkhorst het hom beroep op die volgende passaat in MURRAY, R., se uitspraak in Volkwyn se saak op bl. 464:

"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."

Hierdie beginsel is deur MURRAY, R., omskryf slegs in verband met "acts complained of", d. w. s. die doen en late van 'n eksekuteur wat hom onbevoeg maak om sy pligte uit te voer. Die beginsel is nie veelomvattend nie. Dus, bv. kan omstandighede ontstaan waar 'n eksekuteur hom in 'n onhoudbare posisie teenoor die boedel vind. Grobbelaar v Grobbelaar, 1959 (4) SA 719 (AA) op bl. 724G. In die geval van botsende belange, is die blote feit dat 'n eksekuteur nie onpartydig kan wees by die beoordeling van eise teen die boedel nie, prima facie grond vir sy verwydering. Webster v Webster en 'n Ander, 1968 (3) SA 386 (T) op bl. 388C - D.

Hoe dit ook al sy onder die gemenereg en ingevolge die gewysdes onder die ou Boedelwet, 24 van 1913, is die Hof nou gemagtig kragtens art. 54 (1) (a) (v) van die huidige Boedelwet om 'n eksekuteur te verwyder indien dit onwenslik is dat hy as eksekuteur van die betrokke boedel optree. Die Hof het hier 'n diskresie en myns insiens bly die oorheersende oorweging die belange van die boedel en van die begunstigdes."

(my emphasis)

[20] Although the facts in the cases, which I have quoted in [15] to [19] above, are not on all fours with the facts in the present case, I am of the view that the principles enunciated in those cases are relevant to this case. In a dispute of the nature set out in the Summons, and the other disputes which have been raised in the correspondence between the parties' attorneys, it is desirable that the executor of the estate should be independent of the two factions in the family of the deceased, so that he or she will be in a position to decide:

(a) whether it is in the best interests of the estate to continue with the litigation, which the second respondent has instituted against the applicant; and

(b) whether the executor has claims against the first respondent and Mrs Sacke, as alleged by the applicant, and whether it is in the best interests of the estate that these claims should be pursued. If the applicant's allegations are found to be correct and if claims are successfully pursued against the first respondent and Mrs Sacke, the executor will need to prepare a revised L & D Account.

[21] If the Administration of Estates Act permitted the court to request or direct the Master to appoint an independent co-executor of the estate to act jointly with the second

respondent, this might have been a satisfactory solution to the dispute. During the hearing the applicant's counsel indicated that this would be acceptable to his client. The second respondent could then have recused himself on all matters in which he had a personal interest. However, it appears that the Administration of Estates Act does not confer such a power on the court.

[22] When the dispute between the applicant and the first respondent arose, the first respondent could have resigned as the executor of the estate and proposed to the applicant that the children of the deceased jointly approach the Master to appoint an independent executor to deal with the disputes and to wind up the estate. However, the first respondent did not follow this course. He chose rather to issue the Summons against the applicant in which he (acting as executor) is seeking an order that the "will" is valid and that he (in his personal capacity) should be declared the sole heir of the deceased.

[23] Section 54(1) of the Administration of Estates Act 65 of 1965, as amended ("**the Administration of Estates Act**") provides as follows:

"**Removal from office of executor**

(1) An executor may at any time be removed from his office-

(a) by the Court-

(i) .....

[Subpara (i) deleted by sec 18(a) of Act 6 of 1986.]

(ii) if he has at any time been a party to an agreement or arrangement whereby he has undertaken that he will, in his capacity as executor, grant or endeavour to grant to, or obtain or endeavour to obtain for any heir, debtor or creditor of the estate, any benefit to which he is not entitled; or

(iii) if he has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as executor or to effect or to assist in effecting such recommendation; or

(iv) if he has accepted or expressed his willingness to accept from any person any benefit whatsoever in consideration of such person being engaged to perform any work on behalf of the estate; or

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

(b) by the Master-

(i) if he has been nominated by will and that will has been declared to be void by the Court or has been revoked, either wholly or in so far as it relates to his nomination; or

(ii) if he fails to comply with a notice under subsection (3) of section 23 within the period specified in the notice or within such further period as the Master may allow; or

[Subpara (ii) substituted by sec 18(b) of Act 6 of 1986.]

(iii) if he is convicted, in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged instrument or perjury, and is sentenced therefor to serve a term of imprisonment without the option of a fine, or to a fine exceeding twenty rand; or

(iv) if at the time of his appointment he was incapacitated, or if he becomes inapacitated to act as executor of the estate of the deceased; or

(v) if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master; or

(vi) if he applies in writing to the Master to be released from his office."

[24] I am satisfied that it is undesirable for the first respondent to continue to act as the executor of the estate of the deceased. I make this finding without any finding that there has been wrongdoing on the first respondent's part (or on the part of the fourth respondent) as contemplated in s 54(1)(a)(ii), (iii) or (iv) of the Administration of Estates Act. However, s 54(1)(a)(v) provides that an executor may at any time be removed from his office by the court "if for any other reason the Court is satisfied that it is undesirable that he should act as executor of the estate concerned". In s 1 of the Act "**Court**" is defined as "the provincial division of the Supreme Court (now the High Court) having jurisdiction, or any judge thereof, and includes, whenever a matter in relation to which this expression is used is within the jurisdiction of a local division of the Supreme Court, that local division or any judge thereof".

I accordingly make the following orders:

(a) the first respondent, Barry Solomon Reichman, is removed from his office as executor of the estate of the late Lea Reichman, who died on 11 September 2009;

(b) in terms of s 54(5) of the Administration of Estates Act, the first respondent must forthwith return his Letters of Executorship to the Master;

(c) the issue of whether or not the second respondent is entitled to receive any fees for his services during the period that he acted as the executor of the estate should be left over for determination after the disputes concerning the estate have been resolved;

(d) the Master should as soon as possible exercise his powers under the Administration of Estates Act to appoint and grant letters of executorship to such person or persons whom he may deem fit and proper to be the executor or executors of the estate of the deceased;

(e) the first respondent is ordered to pay the costs of the application.

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**D.R. SCHOLTZ**
**ACTING JUDGE OF THE SOUTH GAUTENG**
**HIGH COURT, JOHANNESBURG**

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| **Date of hearing:** | **3 November 2011** |
| **Date of judgment:** | **23 November 2011** |
| **For the applicant:** | **Adv. R J Bouwer** |
| **Instructed by:** | **Attorney George Wolfe** |
| **For the first and second respondents:** | **Adv. G H Meyer** |
| **Instructed by:** | **Eversheds** |