IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Delete whichever is not applicable

(1) Reportable ~~Yes~~ / No
(2) Of interest to other Judges ~~Yes~~ / No
(3) Revised.

Date: 6th May 2016

6/5/2016

CASE NO: 61016/2013

In the matter between:

GERHARD JACOBUS OLIVIER	Applicant
and	
THE MASTER OF THE HIGH COURT	First Respondent
MICHEIEL DANIEL ENGELBRECHT	Second Respondent
HENDRIK JACOB ENGELBRECHT	Third Respondent

J U D G M E N T

Ismail J:

Background

[1] This matter embraces an application launched by the applicant and a counter application, by the second and third respondents.

[2] The applicant in the main application seek to have the first respondent and second respondent removal as executors in the estate of the late Adriana Johanna Engelbrecht [the deceased] be declared ultra vires. The applicant alleges that the first respondent failed to comply with the provisions of section 54 (2) of the Administration of Deceased Estates Act, 66 of 1969 [the Act]. In the alternative he seeks to have the actions of the first respondent reviewed, thereby setting aside the appointment of the second and third respondents as joint executors in the deceased estate.

[3] The counter application relates to the subsequent appointment of the second and third respondents as joint executors in the deceased estate. The second and third respondents seek that their appointment, pursuant to the removal of the applicant, be ratified by the court in terms of section 18

of the Act.

[4] The deceased appointed the applicant and the second respondent as executors in terms of her last will and testament. They were appointed as joint executors by the first applicant, on the on the 6 July 2012.

[5] The only heirs appointed by the testatrix were her three children, namely the second and third respondent and their sister.

[6] On the 30 April 2013, the first respondent removed both the applicant and second respondent as executors in the estate of the deceased. The apparent reason for doing so was that the first and final liquidation account was not drafted. He gave the applicant 14 days to remedy the situation.

[7] Before dealing with the disputes in this matter I would deviate from the issues and refer to the manner in which the answering affidavit was commissioned in this matter.

Defective answering affidavit

[8] The second and third respondents opposed the application. The answering affidavit at page 107 of the paginated papers is signed by a Commissioner of Oaths, however, the name of the Commissioner of Oaths is not printed nor is his/her designation given.

[9] The Commissioner of Oaths and Justice of the Peace Act No16 of 1963 and specifically regulation 4 thereof state the following:-

(1) Below the deponent' s signature or mark the Commissioner of Oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.

(2) The Commissioner of Oaths shall-

(a) Sign the declaration and print his full name and business address below his signature; and (b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio.

[10] It is imperative that the person who does the commissioning and who administers the oath does the following:

(1) prints his name in full;

(2) states his designation

(3) provides his/her address.

This is mandated in terms of the regulations. One often finds a scroll or a signature and the identity of the Commissioner of Oaths is not apparent at all, thereby making it impossible to know who did the commissioning thereof.

[11] This issue was dealt with by Corbett JA, as he then was, in the matter of *S v Stevens* 1983 (3) SA 649 (A) at 658 D-G. The court held that a Commissioner of Oaths when attesting a written declaration under oath, is required (i) below the deponents signature to certify that he (the deponent) has acknowledged that he knows and understands the contents of the declaration and to state the manner, place and date of taking of the declaration (reg 4 (1); (ii) to sign the declaration and print his full name and business address below his signature (reg 4 (2) (a)); and (iii) to state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment *ex officio* (reg 4 (2) (b)).

[12] In this matter the Commissioner of Oaths failed to print his name in full and also failed to state his/her designation. There was therefore a failure of the provisions of regulation 4 (2) (a) and (b) of the Act.

[13] The respondents were given an opportunity the remedy the defect and the affidavits were accordingly rectified to comply with the provisions of

the Act.

Delay in this matter

[14] This matter was argued before me on the 23 April 2015 and I prepared a written judgment. I informed the parties that I would deliver the judgment on 5 May 2015. On the 5 May 2015 as undertaken and as I was about to deliver the judgment, counsel for the applicant insisted that the judgment should not be handed down as the applicant intended to file a supplementary affidavit in the matter.

[15] This necessitated that the matter had to be postponed, in order to afford the applicant an opportunity to file further affidavits and for the respondents to reply thereto. Consequently the judgment was not handed down. Thereafter the partiers sought a date for the matter to be argued on this aspect and they sent correspondence to my registrar, however, I was on long leave and only returned during the 4th term of 2015.
The roll for that term was already finalized. I requested that they write to the Judge President to allocate a date for the matter to be further ventilated.

[16] From my side I attempted to set the matter down, on days when I was not presiding in court , however the dates were not suitable to the litigants. Ultimately I gave the parties notice that the matter would be

argued during the last week of the first term in 2016, as no matters were set down.

[17] It should be understood that the judgment was completed within two weeks of the hearing, however due to the circumstances referred to above the matter was delayed.

Dispute regarding removal of applicant as executor- main application.

[18] The applicant launched the application for his re-instatement as executor on the grounds that his removal was void and/or sought a review thereof.

[19] The first respondent did not oppose the application.

[20] The Master addressed a letter to Greyling Orchard Attorneys, dated 3 April 2013, which letter stated:

Dear Sir / Madam

ESTATE LATE AJG ENGELBRECHT

Letter of executorship issued on 2012-07-06 has reference.

Unless the liquidation and distribution account or a properly motivated application for extension to lodge the Liquidation and Distribution account in compliance with regulation 6 of the administration of Estates act, is lodged **within 14 days,** I intend to report the matter to the * **LAWSOCIETY / INSTITUTE OF CHARTERED ACCOUNTANTS / ASSOCIATION OF TRUST COMPANIES / REFER THE MATTER TO THE STATE ATTORNEY FOR PROSECUTION OR institute proceedings to remove you as executor.** I refer you to the provisions of section 54 of the Administration of estates act 66/69 and PAJA act3/2000.

Yours faithfully

_____

MASTER OF THE NORTHERN GAUTENG

HIGH COURT

[21] The applicant was removed as an executor of the estate by the first respondent on the 30 April 2013.

[22] The application is premised on the provisions of sections 54(1) (b) and sec 54 (2) of the Act. Section 54(2) stipulates:

" Before removing an executor from his office under subparagraph (i), (ii) (iii) , (iv) (v) of paragraph (b) of subsection (1), the master shall forward to him by registered post a notice setting forth the reasons for such removal, and informing him that he may apply to the court within thirty days from that date of such notice for an order restraining the Master from removing him from his office"

[23] The letter addressed to Greyling Orchards Attorneys, who were the correspondent attorneys of the applicant's firm, in Pretoria, is not a letter which was sent by registered post. Secondly it was not sent to the executor as envisaged by the provisions of section 54(2), giving him notice that he would be removed as executor and that he would have thirty days to bring an application to court restraining his removal as executor.

[24] This letter was apparently given to the applicant by the 3rd respondent at a meeting which was held on the 10 April 2014. Clearly it was not addressed to the applicant by registered post. This begs the question how did the third respondent get the letter which he handed to the applicant.

[25] The Master's removal of the applicant and second respondent as executors of the estate, was not done in terms of the latter of the law as prescribed by section 54 (2). Miss Meyer acting for the applicant submitted that the 30 day period as prescribed in the section had not lapsed and despite that, the Master removed the applicant. The first respondent's actions were thereby *ultra vires* the Act. In addition thereto she submitted that the first respondent's actions were, amongst other things:

(i) not authorized by the empowering provisions;

(ii) the procedure was procedurally unfair;

(iii) the action was taken arbitrarily or capriciously;

(iv) the action was unconstitutional and unlawful

(v) the action contravened the law and is not authorized by the empowering provisions

The second and third respondents submitted in their opposing papers that there was substantial compliance with the provisions of section 54 (2) of the Act.

[26] Counsel for the applicant relied upon the matter of *DJM Ferris and Another v First Rand Bank Limited and Another* 52/13 ZACC 46 at para 21 where it was held:

" While our law recognizes that substantial compliance with statutory requirements may be sufficient in certain circumstances; Mr and Mrs Ferris have not given compelling reasons why substantial –compliance standard would be useful or appropriate in determining compliance with a debt restructuring order. On the contrary, there is no indication in the wording of the Act or debt restructuring order that anything less than actual compliance is required."

See also: *Theart and Another v Minnaar NO; Senekal v Windsor* 2010 (3) SA 327 SCA at par 14

[27] I do not agree with respondents' submission that there was substantial compliance and that the provision enjoined by s 54 (2) had been complied with.

[28] The second and third respondents were thereafter appointed as executors in their late mother's estate during June 2013. The second respondent was once again appointed, having previously been removed as an executor together with the applicant.

[29] It is clear from the papers that the relationship between the applicant and the second respondent deteriorated as the papers mention in the following respects:

1. That the second respondent withdrew an amount of R235 000. 00 which was approved of by the heirs; the second respondent deposed in his affidavit that the applicant remarked to him *" You are now stealing your own money"*

2. The second respondent approached Bester who was appointed as a valuator ; and that he disputed the valuation of the properties as reflected in Bester's report.

3. The view of the second respondent that the applicant was merely interested in his own interest at the cost of the estate, by having to pay higher estate duties and executors fees in having the properties valued higher than the accepted rate;

4. The dissatisfaction on the part of the second respondent that the applicant failed to give him a copy of the appointment certificate and the subsequent request by the applicant that he signs a power of attorney in favour of the applicant to continue with the finalization of the estate;

5. The applicant collected rental income amounting to R418 700. 00 on behalf of the estate. This amount was deposited into the applicant's firms trust account and he refused and failed to transfer it into a separate estate account.

On the second respondent's own version it appears that the relationship was amicable, at least up to the stage that the applicant questioned the withdrawal of the money referred to above. It would appear that the straw

which broke the camel's back was the issue of the valuation which was done by Mr Bester. The second respondent labored under the belief that the valuation of the property was excessive and he together with the third respondent confronted Mr Bester, in the absence of the applicant.

This incident together with the alleged accusation of the withdrawal of the monies, which was shared amongst the heirs, soured the relationship between second respondent and the other heirs against the applicant.

[30] Mr Heyn's, acting for the second and third respondents, submitted that there were three possible alternatives from which the court could make a finding. They are:-

(i) That even if the court found the Master's decision to remove the applicant was *ultra vires,* however the court should ratify the appointment of the second and third respondents as the matter is moot due to the second and third respondents having complied with the first and final liquidation and distribution account and that the properties are transferred;

(ii) Even if the Masters action were ultra vires, notwithstanding the ultra vires nature of the Master's action, the court would appoint

the second and third respondents as executors as the relationship between the heirs and the applicant had deteriorated to the extent whereby no trust and confidence exist between them;

(iii) That the Master did not act in contravention of the Act and that the removal of the applicant and second respondent was lawful and for that reason the application should fail.

[31] Dealing with the proposal in (i) above, the papers do not indicate what Mr Heyn's submitted from the bar, namely that the properties were transferred. Miss Meyer submitted that, if the Master's action were *ultra vires* the Act, then any subsequent actions taken by whomsoever, cannot be regarded as being in compliance of the law, because their authority and/or mandate would be questionable. That action can be ratified, for example, if the Court were to restore the status *ante quo* by re-appointing the applicant and the second respondent, as was the case prior to their removal.

[32] Mr Heyn' submitted what practical effect would the order to set aside the Master's ruling have, since it would be of academic importance only. The estate had been completed and all that remains is the distribution of

the monies held by the applicant in trust. The farms had been already been transferred. In this regard he relied upon the judgment of *Mahomed v Mahomed and Others* 1976 (3) SA (T) at 156 A-B where Marais J stated:

"...the matter before us is clearly of academic interest only and therefore not capable of a proper declaratory order in terms of the section.

These considerations appear to us to be of sufficient weight to refuse to come to her aid."

[33] Mr Heyn's submitted that the applicant should have demanded an undertaking from the respondents not to proceed with the administration of the estate pending the finalization of this application, alternatively the application should have been launched on two stages namely Part A and Part B. In Part A an order restraining them, the second and third Respondents, from doing anything pending the finalization of the administration of the estate and pending the determination of Part B , which would have been the order to declare the master's removal of the applicant to be *ultra vires* and seeking the Court's imperamatur on the way forward.

[34] Concerning the second proposition raised by respondents counsel in terms of the proposal referred to in (ii) above, namely that the Court should appoint the second and third respondents as executors, despite the non-

compliance with section 54 (2), because of the breakdown in relationship between the heirs and the applicant.

The submission is premised on the reasoning that due to the breakdown in the relationship between the parties, the court should ratify the actions of the second and third respondents as the estate had been completed.

The purpose of administrative actions is to ensure that the law is adhered to. Where a functionary acts beyond its powers, to remedy such impugned actions.

[35] It was submitted that the Master did not act in contravention of the provisions of section 54 (2), as the letter referred to in para [17] supra, served as a section 54 (2) notice and for that reason the application should fail. The argument advanced on behalf of the second and third respondent was that there was substantial compliance with the section. This aspect was dealt with in paragraph [22]-[23] *supra*.

[36] The counter application seeks the dismissal of the application and request that the Court orders that the appointment of the second and third respondents as joint executors in the estate of late AJG Engelbrecht in terms of section 18 (1) (d) and /or (e) and /or (f) of the Act.

[37] Section 18 of the Act is headed *Proceedings on failure of nomination of executors or on death, incapacity or refusal to act etc.*

" 18 (1) The Master shall, subject to the provisions of sub-section (3), (4) (5) and (6) -

(a) .....

(d) if the executors in any estate are at any time less than the number required by the will of the testator to form a quorum; or

(e) if any person who is the sole executor or all the persons who are executors of any estate, cease for any reason to be executors thereof; or

(f) if, in the case of two or more persons are the executors of an estate, one or some of them cease to be executors thereof, and in the interest of the estate, one or more executors should be joined with the remaining executor or executors,

by notice published in the Gazette and in such other manner as in his opinion is best calculated to bring it to the attention of the persons concerned, call upon the surviving spouse (if any), the heirs of the deceased and all persons having claims against his estate, to attend before him or, if more expedient, before any other Master or any magistrate at a time and place specified in the notice, for the purpose of recommending to the Master for appointment of executor or executors, a person or a specified number of persons.

[38] The difficulty one is confronted with in this application is that the Master had not opposed the application, and therefore one is not aware of

his reasons for removing the applicant as an executor, apart from the alleged failure to comply with the first and final liquidation account. The only suggestion one has for the removal of the applicant is that of the second respondent, those are his views, and not those of the Master. The second respondent seems to suggest that the applicant failed to satisfactorily perform his duties. That might or might not be the case. It is the Master who removed the applicant and therefore one would expect that notice is given in terms of s 54 (2) stating the reasons and giving the executor the requisite period to bring an application, if he/she does not agree, to Court.

[39] The second and third respondents therefore seek that the court should remove the applicant as co-executor in terms of section 54(1)(a)(v) of the Act where circumstances warrant such removal. The submit that the applic*a*nt and the heirs do not see eye to eye, due to the breakup of a meaningful trust relationship between them. The second respondent avers that there was an easy and genial relationship between himself and the applicant until January 2013, where after things deteriorated.

[40] The second and third respondent's aver that if the court were to find that the Master 's action were *ultra vires,* then in such an event the court should exercise its discretion in terms of section 54 (1) (a) (v) of the Act and order the first respondent to appoint second and third respondents joint executors of the deceased estate in terms of section 18 (1) (d)

and/or (e) and or (f) of the Act

[41] It is trite, that there is freedom of attestation in our law. In terms of the last will and testament of the deceased, she appointed the applicant and the second respondent as the executors of her will. This wish or desire should as far as is reasonably possible be considered.

In *Port Elizabeth Assurance Agency & Trust Co. Ltd v Estate Richardson* 1965 (2) SA 936 (C) Van Winsen J at 940 .. stated:

" I have no doubt that in the exercise of its powers 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."

[42] From my perusal and understanding of the papers it does not appear that the applicant was obstructive or not managing the estate, if anything he questioned certain behavior such as the withdrawal of the R235 000.00 by the heirs. He appointed a valuator whose valuation did not meet the approval of the second respondent. This difference in the valuation was not dealt with by the executors, instead the second and third respondents on the applicant's version confronted the valuator.

[43] The insinuation that the applicant sought a higher valuation as his Executors fees would be higher cannot willy nilly be accepted. When one scrutinizes the allegation, Mr Bester is a sworn valuator and there is no suggestion that there was any complicity between him and the applicant to inflate the valuation, in order for the applicant to receive higher fees.

[44] The first respondent has to adhere to the provisions of the Act particularly where the Act is prescriptive. The provisions of the Act in terms s 54 (2) was not adhered to. The applicant who felt aggrieved thereby, sought refuge to approach the court in order to safeguard his rights and to ensure that the law was complied with. Notwithstanding the proceedings which were pending the respondents continued to winding up the deceased estate.

[45] The writer *D. Meyerrowitz in The Law and Practice of Administration of Estates , Fifth edition* at page 100 under the heading maladministration stated:

" The court will remove an executor on the ground of maladministration in or absence of administration if proved to its satisfaction. Thus executors have been removed for failure to lodge accounts after a long period had elapsed, for failing to sign an account without just cause to pass transfer, for serious dereliction of duty. Mere negligence in administration will ordinarily not be a ground for removal in the absence of proof that the

estate or beneficiaries would be prejudiced if the executor remained in office.- see: *Sackville West v Nourse* 1925 AD 516

In the matter of *Administrators, Estate Richards v Nicol and Another* 1999 (1) SA 551 at 557 C- Scott JA referring to *Sackville v Nourse and Another*, supra, stated :

" this Court had occasion to consider the standard of care required of a trustee in relation to trust property. It was held that the standard was higher than that which an ordinary person might generally observe in the management of his or her own affairs. Such a person, it was pointed out, was free to do what he liked with his property .... A person in a fiduciary position such as a trustee, on the other hand, was obliged to adopt the standard of the prudent and careful person , that is to say te standard of the standard of the *bonus et diligens paterfamilias* of Roman law, ..."

[46] It appears that there was a complaint to the Master, whereby the first respondent removed the applicant and the second respondent as executors. Having removed the second respondent together with the applicant, the Master thereafter re-appointed the second respondent together with the third respondent as an executor. Having removed the second respondent as an executor one ponders why he was re-appointed as an executor. The removal of the applicant as an executor was done in violation of the provisions of section 54 (2) of the Act, more particularly in breach of the time period stipulated in terms of the section and the manner of giving notice thereto.

[47] It was submitted on behalf of the second and third respondents that the notice in terms of section 54 (2) was dated 3 April 2013. That the applicant was finally removed as an executor on the 7 May 2013. For that reason there was compliance with the provisions of the Act. However there is some controversy regarding the date when the applicant received the notice. The respondents submitted that the applicant received it on the 10 April and therefore there was substantial compliance of the section.

On behalf of the applicant it was submitted that there should be strict and not substantial compliance of the section where the first respondent intended to remove a person as a testamentary executor.
In this regard the applicant relied upon the decisions of *DJM Ferris and Another v First Rand Bank Limited and Another CCT* 52/13 ZACC 46 at para 21 and *Theart and Another v Minnaar NO; Senekal v Windsor* 2010 (4) SA 327 SCA at par 14. In the latter matter which concerned the PIE Act, where the court stated:

".. The real and proper enquiry should be whether there has been effective notice of the proceedings on the occupiers in the sense that a court is satisfied that the occupier has been fully informed of the impending eviction, the grounds therefore, the date and [place \of hearing and the right to appear in court and be represented."

[48] *In casu* the first respondent did not send the notice to the nominated address of the applicant; nor was the notice to remove the applicant sent by registered post and more importantly the date of receipt and how it got to the applicant is shrouded by uncertainty.
There seems to be a suggestion that it was brought to the applicant by the second respondent on the 10 April 2013. The implication being that it was hand delivered by the third respondent.

[49] In my view the first respondent did not comply with the latter of the section, in that it was not sent by registered post and the date which the applicant had to perform in terms of the notice was within 14 days of 3 April, namely by the 17 April, however on the second respondents version the applicant only received the letter on the 10th April.

Supplementary affidavits

[50] The matter had been delayed, as previously stated, to afford the applicant an opportunity to file further affidavits.

[51] It is trite that such affidavits may only be filed with the leave of the court.- See: *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA599 (W); *Cohen N.O. v Nel and Another* 1975(3) SA 963 (W) and

Erasmus, Superior Court Practice at B1-47.

[52] In *James Brown & Hammer (Pty) Ltd. v Simmons N.O.* (AD) 1963 (4) SA 656 Ogilvie Thompson at 660 D-G stated:

" It is in the interest of justice that the well- known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted.."

[53] Whether a not a further set of affidavits is permitted is a question of fairness (*Milne NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) at 65A.)

[54] The applicant deposed to an affidavit that he ought to be given leave to file the supplementary affidavit, as he was not aware of the facts when the matter was initially argued. Furthermore the affidavit would reveal that the second and third respondents were not candid with the court, in that they committed 'perjury', when they stated that they were unaware regarding the whereabouts of the title deeds of the two farms.

[55] The applicant stated that he only became aware that the two farms were transferred when he was told, that the respondents informed the court

thereof, when the matter was argued. He was not present in court when this was said. The respondents did not give him notice as the co-executor that the properties were to be transferred. More importantly they deposed to affidavits stating that the original title deeds were missing and could not be found, when they were fully aware that the title deeds were with his firm. The affidavit which the second and third respondent deposed to at the deeds office was patently false and they knew it to be so and therefore they committed perjury.

[56] The applicant attached correspondence from the respondents attorney who requested the applicant's firm to return the title deeds. The applicant replied thereto and he refused to do so in lieu of this application which was pending.

[57] The applicant sought by means of the supplementary affidavit to relay the 'dishonest' nature of the respondents by deposing to affidavits that the title deeds were missing, when they knew that the title deeds were with his firm. On this aspect the second respondent denied the allegation that he gave the applicant the title deeds for safe keeping. I am bound by the rule laid down in *Plascon Evan (Pty) Ltd v Van Riebeech Paints* 1984 (4) SA 632 (AD) at 643E-G. I have to accept the second respondent's version on this aspect. During argument, Ms Meyer posed the rhetorical question who else apart from the second respondent could have given the

title deeds to his firm. A possibility is that Mrs Engelbrecht could have done so whilst she was alive. She could have given it to the applicant for safe keeping as he was her attorney and she trusted him enough to appoint him as an executor terms of her will.

[58] The supplementary affidavit does not assist me in the determination of the issues. All it seeks to do is to create the impression that the respondents are not trustworthy people and for that reason they should not be appointed. They have not been factually shown to be perjurers, and despite that this court is to make a determination of their character as 'perjurers'. Had they been prosecuted for perjury and found to be guilty that might have been a different cattle of fish. The issue of the title deeds rather than assist the Court in the determination of the issues tends to obfuscate the issues.

[59] The first respondent's action in removing the second respondent as an executor was *ultra vires.* The logical question to be determined is what is to follow. The court can authorize the appointment of the second and third respondents as executors in terms of section 18 in terms of the counter application or alternatively to restore the status *ante quo*.

[60] Had the applicant premised the application as suggested earlier herein, by seeking an undertaking from the Engelbrecht brothers not

proceed with the administration of the estate pending the finalization of this application. The court could have restored the status ante quo, despite the tension between the applicant and the heirs. The court could have made an order that the liquidation and distribution account be completed and the properties to be transferred and the remaining monies to be paid out.

[61] However, the estate for all intents and purposes has almost been completed apart from the distribution of the amount which is being held in trust at the applicant's firm. Should the court restore the *status ante qou* in order that the applicant does what has already been done, thereby unscrambling the omelette.

Even if the court were to re-appoint the applicant, the account was advertised and approved and the properties are already transferred. This process cannot be set aside because the applicant did not seek an order to prevent the second and third respondent from acting as executors as they were appointed to do. Their appointment by the first respondent it was submitted was proper and they carried out their mandate in terms of their appointment. See *Oudekraal estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at paras [28]- [29] at 242G-243F

[62] In my view to set aside their appointment would be an exercise in futility and would only delay the finalization of the estate in circumstances where the parties are already not seeing eye to eye at additional costs to

the estate.

[63] Notwithstanding the actions of the first respondent not being in compliance of section 54 (2) of the Act, I am of the view to restore the situation to what it was prior to July 2013 would be academic and moot.

Costs

[64] The applicant has been successful in the main application, whilst the second and third respondents have been successful in the counter application.

[65] I could award the costs to follow the result, however I am of the view that each party should pay their own costs in view of the partial success of each party.

[66] The only costs which I feel should be awarded are those costs associated with the issue of the supplementary affidavits. In view of the fact that the court found that the supplementary affidavits were not to be allowed, I believe that the applicant should be responsible for the costs relating to the filing of supplementary affidavit and the costs for the hearing of 29 March 2016.

[67] Accordingly I am of the view that the following would be an appropriate order:

(a) That the decision of the first respondent , dated 30 April 2013 , to remove the applicant as an Executor in the estate of the late AJG Engelbrecht, is hereby declared to be ultra vires and is set aside;

(b) The counter application succeeds and the second and third respondents are appointed as executors in terms of section 18 of the Act.

(c) The applicant is ordered to pay the cost of the application to lead further affidavit , the supplementary affidavits are disallowed.

(d) To the extent that the court is of the view that the first respondent's action was *ultra vires in the main a*pplication, and the counter application succeeding, the court orders that each party pays its own costs.

Ismail J

APPEARANCES:

For the Applicant : Adv D Meyer instructed by De Kock and Duffy c/o Bernard van der Hoven Attorneys, Hatfield Pretoria

For the Second and Third respondent: Adv G F Heyns instructed by Van der Merwe Du Toit Inc, Brooklyn Pretoria

Date of Hearing: 23 April 2015 & 29 March 2016..

Judgment Delivered : 6 May 2016