

18716/2009

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

CASE NUMBER: 18716/2009

5 **DATE:** 10 MAY 2011

In the matter between:

BARBARA VOLKWYN Applicant

and

10 **THE MASTER OF THE HIGH COURT** 1st Respondent

MARTIN BEY 2nd Respondent

MRS DIANA WILLIAMS Intervening Party

J U D G M E N T

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N C ERASMUS, J:

This matter unfortunately has a long and sad history. Not only
 20 was this court seized with a number of matters, whether it be
 by form of application or by action, in relation to the estate of
 the father of two of the children that stand to inherit from his
 estate, this was pointed out in one of the judgments, it is
 unfortunate that the deceased in the matter, who was a well
 25 respected member of the legal fraternity in this division. I

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have indicated to the parties that he was known to me. I cannot think, for what it is worth, to both Ms Volkwyn and Ms Williams, of a more proper gentleman that have walked the corridors of these courts, than the late Isaac Theodore
5 Volkwyn.

Be that as it may, this application was brought in person by the applicant without the assistance of a legal representative. The proceedings were brought in a haphazard manner, in which
10 matter I will condone all the forms of non-compliance with the rules and deal with the matter on its merits. After various amendments and allegations and counter-allegations that were made, it remained that the relief sought by the applicant was the following:

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1. The removal of the appointed executor as the executor of the estate.
2. An order in terms of the Administration of Estates Act,
20 that the executor in his personal capacity must repay a certain amount of monies to the estate for his failure to comply with his obligations.
3. That the Master withhold any form of remuneration to the
25 executor.

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4. That the executor reimburse the estate with an amount allegedly paid out to one Paul Philander. And lastly, that the liquidation and distribution account lodged by the executor, be rejected by the Master.

On the first ground of relief sought, there is no need for me to deal with that, as before this matter was heard, the executor had resigned and I can understand the reasons therefore.

10 This matter has been around for a number of years. The executor is an attorney of this court and serious allegations were made and I think it was the proper route to take but to stand back. In as far as his remuneration is concerned, he has indicated from the outset and nowhere is there any indication

15 that he had ever charged any fees to the estate. In as far as the final liquidation and distribution account is concerned, it is clear to me from the papers filed that it was not a final account. It was still subject to the approval by the Master and that approval was never given, because it was indicated by the

20 executor that there were a number of disputes.

In relation to the claim for the repayment in to the estate, for payments made to one Pearl Philander, it is also clear that that monies was not paid out of the estate to Ms Philander. It

25 is not only borne out by the evidence under oath in affidavits

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by the executor, as well as by the intervening party, but also by the preparation of the account, as well as the bank statements that were not in dispute. The only matter that could have any substance in this application, is the question of the loss of interest to the estate account. Now again, after the application was amended, the executor filed an affidavit, explained the process that was followed and I simply cannot find that there is any basis for the allegation that is made in that regard. Having said that, it must then follow that there is no basis for the claim.

However, I will fail in my duty if I do not comment on the matter in general. It is clear from all the documentation, and it is almost 700 pages of documentation that was presented to me, that the amount of money in the estate is a very small amount and the estate can, therefore, be wound up in terms of the Administration of Estates Act without going the long route that we have taken here. It is in nobody's interest, neither the administration of justice, nor the interest of the heirs, that this matter that this matter are being prolonged any further. I will, therefore, make an order at the end of this case.

In as far as the costs are concerned, the executor was joined in his personal capacity. He had to defend himself and, therefore, he had to incur costs in this matter. Whereas a

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court is normally hesitant to make an adverse cost order against the litigant who approach the court in person and where there are good reasons for the litigant to pursue his or her claims, this is a different case. In this matter, 5 unfortunately it seems as if the applicant simply fail to want to accept what is put forward. Maybe it is because of the interpersonal relationships the siblings have with each other, which from the papers it seems to be extremely acrimonious.

10 We have reached the point, through the last few years more particularly, where at difference stages and at different times of development of this matter, the different heirs have all indicated they have no further interest in litigating in this matter, including the applicant. What happens overnight is 15 that the matter just come to the fore again and the dirty washing is being done in the courtrooms. This must stop. It is also clear that not only the applicant, but it also seems that one of the brothers, are severely affected by it, in that I have been told and it is borne out by the papers, that the one 20 brother seems to go through a very difficult time because of this fight that has been going on for many years.

The applicant herself had an outburst in court this morning. I decided to let her speak and it is clear that she is emotionally 25 affected by it badly and I will fail in my duty if I do not find a

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way to make an end to this. So even though I find that there is no merit in the application and, therefore, have to dismiss the application with costs, as I hereby do, I will instruct the Master of the High Court to do whatever is possible, within the framework of the law, to finalise the estate. Even if that includes appointing an executor in the sole discretion of the Master in consultation with the Law Society for the Cape of Good Hope, and even if that means that the heirs have no say into the person of the executor.

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I will also order that no further litigation on any of the grounds that was litigated on before in relation to this estate, be entertained by the courts unless a judge of the High Court gives permission for that litigation to commence. So what it means to both you, Ms Volkwyn and Ms Williams, I stop just short of making a declaration of litigation being vexatious. But the registrar will not be able to open a new file for litigation in relation to the estate on all the different matters that we have already had in this court, unless a court orders that. So you will have to make an application to a judge for leave to institute action in any form, and you will also realise that I have used my discretion to extend the powers of the Master to an extent in terms of the framework of the Administration of Estates Act, because these powers are still subject to the discretion of the courts and he can approach the court at any

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stage for assistance.

I hope that this is the end of these fights and that you can find closure in the matter, and it is not only in respect of the financial issues in your father's estate, but rather that you an
5 try and live and let live between the siblings.

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A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line, positioned above the printed name ERASMUS, J.

ERASMUS, J