IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(*Coram*: **GOLIATH, DJP et HENNEY, J et SHER, J**)

CASE NOs: A01/2019, A276/2019

In the appeals between:

ANDREA MARY BAGNALL N.O.	**First Appellant**
YVETTE SUSAN ENDEAN N.O.	**Second Appellant**
DEBORAH ELAINE LOUW N.O.	**Third Appellant**
ASHLEIGH ELIZABETHA BAGNALL N.O.	**Fourth Appellant**
ANDREA MARY BAGNALL	**Fifth Appellant**
YVETTE SUSAN ENDEAN	**Sixth Appellant**
DEBORAH ELAINE LOUW	**Seventh Appellant**
ASHLEIGH ELIZABETHA BAGNALL	**Eighth Appellant**
ROBERT ANDREW BRINK N.O.	**Ninth Appellant**
MARTIN EDMONDS LUYT N.O.	**Tenth Appellant**

and

SHELLEY JANE VAN ACKER N.O.	**First Respondent**
SHELLEY JANE VAN ACKER	**Second Respondent**
THE MASTER OF THE HIGH COURT	**Third Respondent**

NICHOLAS YEOWART N.O. **Fourth Respondent**

Date of Hearing: 30 July 2020
Date of Judgment: 19 November 2020 (to be delivered via email to the parties' legal representatives at 12h30)

JUDGMENT

HENNEY, J (GOLIATH DJP et SHER J concurring):

Introduction

[1] The central parties in these proceedings are the five daughters of the late Mr DA Bagnall ('the deceased'), whose only asset of value during the latter part of his lifetime and at the time of his death, was a property situated at […] V Road, Camps Bay ('the Camps Bay property'). The sale of this property is at the heart of the dispute between his one daughter Shelley Van Acker ('Van Acker'), and his other four daughters, Andrea Bagnall, Yvette Endean, Deborah Louw and Ashleigh Bagnall ('the four sisters'), as will become evident from this judgment.

[2] The deceased passed away on 3 June 2016, having lived in the Camps Bay property since 2010. During 2010 Van Acker, her son, and his girlfriend, moved in with the deceased. According to Van Acker this was in order to that she could take care of him, as he was elderly and in ill-health. Van Acker and her family have to date lived in the Camps Bay property without paying any rental (save for the period between October 2014 and November 2015, when she paid a nonmarket-related rental and during most of which time she also sublet to a tenant). During the last few months of his life, the deceased became increasingly frail and began to suffer from various medical problems. Moreover, as time passed, he also began suffering from dementia, which resulted in an inability to take care of his affairs, including his house and finances, and a lack of awareness of the value of money. He also suffered from a severe mobility impairment.

This resulted in an application, initially for the appointment of a *curator ad litem,* and eventually, after a report from the *curator ad litem*, for the appointment of Mr N Yeowart, a practising attorney in Cape Town, as *curator bonis,* which Order was granted by Savage J. Both these applications were opposed by Van Acker. Both these applications were granted. In appointing the *curator bonis* the Court made an Order that Mr Yeowart should have the standard powers and duties set out in the Master's report dated 27 May 2014, as per Annexure "A" to the Order, save that paragraph (a) thereof was replaced with the following power:

'(a) to sell any property belonging to the patient, provided that before taking any decision to sell the patient's immovable property the *curator bonis* will consider the opinions of the applicant, the patient's daughters including Ms Shelley Van Acker, Dr John Joska and/or Dr Margareta Van Heerden, Dr Francis Hemp and Miss Lindy Smith: and any consequences that such a sale may have upon the patient that are identified.'

[3] By August 2014, due to the deceased's deteriorating health and unacceptable living conditions, it became necessary for him to be moved to a suitable frail-care facility. Moreover, as none of the family members had the financial means to fund the care he needed, it had become urgent and necessary, according to the four sisters and the *curator bonis*, to sell the Camps Bay property in order to raise funds to pay for Mr Bagnall's ongoing care.

[4] Before selling the Camps Bay property, the *curator bonis* consulted with the various healthcare practitioners as specified in the Court Order mentioned above, and the five sisters. He also obtained valuations of the property from three estate agents and from a sworn appraiser, Mr PM Hablutzel, who furnished a detailed report in which he indicated that in his opinion the value of the property was in the order of R5 600,000.

[5] On May 3 October 2015, the *curator bonis* concluded a written offer for the sale of the Camps Bay property to the Danem Trust. The purchase price payable in terms of the agreement was R5 785 000, with no estate agent's commission being due thereon. Sometime after the *curator bonis* had concluded the sale with the Danem Trust, an offer for the property was received from one Dr Kassianides ('Kassianides'), for a price

approximately R150 000 more than that provided in the Danem Trust sale agreement. The *curator bonis* could not accept the offer from Kassianides, because of the prior sale which had been concluded with the Danem Trust.

[6] Clauses 4.1 and 7 of the Danem Trust sale agreement provided that occupation and transfer would only be given on 31 October 2017 ie in 24 months' time, and in terms of clause 2.2 the deposit of R867 700 which was to be paid by the purchaser could be utilised by the *curator* for the care and upkeep of the deceased during that period, pending the finalization of the transaction. Effectively therefore the agreement provided a means whereby the deceased could continue to remain in his home for the following two years, with his care paid for by the purchaser. The *curator bonis* considered this to be an aspect which made the offer from the Danem Trust a particularly attractive one, and it played a large role in his acceptance thereof. The agreement provided that in the event that the transaction was cancelled through no fault of the purchaser, the deposit would have to be refunded. Clause 16(c) of the agreement provided that the purchaser could submit a plan for the development of the property, but no alterations could be made to it before transfer.

[7] There were two further special conditions in the Danem Trust sale agreement which must be mentioned: one in terms of clause 15(d) which provided that:

'This contract is subject to the consent of the Master of the High Court . . . into (sic) far as is required by the order of the Western Cape High Court in case number 1531/2014, dated 13 August 2014, read with paragraph (a) of Annexure "A" to the letters of Curatorship number CR 24/2014 in favour of the seller, dated 12 September 2014.'

And a further one in terms of clause 15(e) which provided that*:*

'The parties agree and confirm that all rights and corresponding obligations in regard to this contract will, on the passing of Mr Bagnall, remain binding on his estate and… the contract will be fully implemented by the Executors of his estate as soon as such appointment is made by the Master of the High Court, Cape Town.'

[8] On 25 October 2015, whilst Mr Bagnall was still alive and the curatorship still in existence, the *curator bonis* requested the Master's consent to the sale, as he was bound to do in terms of clause 15(d) of the sale agreement. Van Acker strenuously objected thereto. She addressed no less than six letters to the Master in which she objected to him consenting to the sale, on a number of grounds. Her principal objection was that, according to her, the property had not been sold for its market value. This resulted in the Master not rendering a decision before the unfortunate death of the deceased on 3 June 2016.

[9] The deceased's passing resulted in the termination of the appointment of the *curator bonis*. As indicated earlier, as per the deceased's will his five daughters were duly appointed as co-executrices of his estate. As co-executrices the four sisters were in favour of proceeding with the Danem Trust sale, and they gave instructions to this effect to the attorneys who were responsible for administering the estate. However, in terms of s 42(2) of the Administration of Estates Act, 66 of 1965, the Master's consent was still required for the transfer of the property, as it fell within a deceased estate.

[10] Van Acker did not want to proceed with the Danem Trust sale and she took steps to prevent the transaction from proceeding. She also sought to prevent the Master from granting the necessary statutory consent, as was required in terms of s 42(2).

[11] The four sisters contend that in doing so she acted in defiance of clause 3.9 of the deceased's will, in which he had enjoined his daughters 'to consult and cooperate with each other to the fullest extent in connection with their duties' in terms of the will and had expressed the fervent desire that they would at all times endeavour to reach a unanimous decision on any issue arising from or in connection with the administration of his estate, and had provided that in the event they were unable to do so the decision of the majority was to prevail.

[12] During April 2017 the four sisters advised Van Acker, in their capacity as co-executrices, that she should start paying a market-related rental, alternatively that she should vacate the property so that it could be rented out at a market-related rental. In

addition, she was also requested to allow letting agents to inspect the property to establish what a market-related rental would be.

[13] In response to these requests, she advised, via an attorney, that she would continue to reside in the premises 'in the exercise of her rights' and that she did not consent to rental agents attending on or having access to the premises.

[14] The four sisters were of the view that, given her obstructive conduct it was clear that for as long as Van Acker continued in office as a co-executrix, the finalisation of the winding-up of the estate would be held up indefinitely. In this regard they pointed out that there continued to be a delay in relation to transfer of the property and, pending transfer, the obtaining of rental income for the property, and receipt of the proceeds which were due from the sale of the property was held back for a period of 2 years.

[15] According to the four sisters Van Acker's conduct in resisting the appointment of the *curator bonis* and the sale by him of the Camps Bay property, as well as the due and proper administration and winding-up of the deceased's estate, indicated that she was intent on using every conceivable tactic and stratagem to prevent them from taking any actions of which she disapproved.

The main application

[16] This resulted in the four sisters launching an application in this Court, under case number 15069/17 ("the main application") in which they sought an Order in the following terms:

a) removing Van Acker as executrix;
b) granting them interim relief, to wit an Order directing that pending determination of the issue of whether Van Acker should be removed as executrix, she should sign certain forms or documents which in terms of the practices of the Master's office had to be signed by all the executrices and submitted to the Master, before the Master could commence the process of considering whether to consent to the transfer of the property in terms of s 42(2).

c) The interim order also sought directions that Van Acker should join the four sisters in signing certain documents that had to be submitted to the local authority. Such documents were needed in respect of the proposed re-development of the property, which the Danem Trust envisaged.

The counter-application

[17] Van Acker launched a counter-application whereby she in turn sought an Order declaring the Danem Trust sale agreement to be null and void; firstly, for want of fulfilment of what she described as the 'suspensive' condition of the Master's consent, which was required by annexure "A", in terms of which the powers of the *curator bonis* were set out. Secondly, because of an alleged failure to comply with the formalities required in terms of the Alienation of Land Act 68 of 1971. In the counter-application Van Acker also sought to review and set aside the decision of the *curator bonis* to conclude the deed of sale, in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), or alternatively at common law. Furthermore, she sought a determination as to whether her co-executrices' decision to abide by the deed of sale which was concluded by the *curator bonis,* was lawful.

[18] Le Grange J granted the interim Order and subsequently granted leave to appeal against the Order. The main application for the removal of Van Acker, together with the counter-application for a declarator came before Tonjeni AJ, who delivered a judgment on 30 November 2018, in terms of which she dismissed the main application and upheld the counter-application, and consequently declared the Danem Trust sale agreement to be null and void. Having decided that the deed of sale was null and void, she concluded that the review of the decision of the *curator bonis* had been rendered moot and there was no need for her to make a decision regarding this aspect.

[19] Leave to appeal her Order was refused, but was subsequently granted by the SCA. In the circumstances, besides the appeal against the Order of Le Grange J ('the interim order appeal'), these proceedings also deal with the Order granted by Tonjeni AJ ('the main appeal').

It will be convenient for me to deal with the issues that require determination in the appeals, in the following order:

[20] Firstly, the application for condonation by the appellants for their alleged failure to comply with the provisions of subrules 49(6) and (7), within the periods specified therein, and for reinstatement of the main appeal;

[21] Secondly, I deal with the issue of the enforceability of the Danem Trust sale agreement, which served in the counter-application before Tonjeni AJ;

[22] Thirdly, the purported review of the decision of the *curator bonis* to conclude the deed of sale for the Camps Bay property, in terms of PAJA or the common law, which also served in the counter-application before Tonjeni AJ, and in respect of which no Order was made by her.

[23] Fourthly, I consider the application for the removal of Van Acker as executrix, which also served before Tonjeni AJ as the principal object of the main application.

[24] Lastly, I deal with the purported appeal against the interim order of Le Grange J.

The late filing of the main appeal

[25] As indicated previously, after Tonjeni AJ delivered judgment on 30 November 2018 she refused leave to appeal. The appellants therefore had to petition the Supreme Court of Appeal. In the interim application which served before Le Grange J, in which Van Acker was the appellant, leave to appeal was granted to the full Court. By the time

this appeal was enrolled for hearing on 29 July 2019 before a full bench (comprising Saldanha J, Samela J and Rogers J), an outcome regarding leave to appeal in respect of the matter that served before Tonjeni AJ ie the main application, was still being awaited from the Supreme Court of Appeal. In a letter which they addressed to the senior presiding judge, dated 24 May 2019, the parties indicated that they had agreed that one and the same Court should hear both appeals. This was *inter alia* because the bulk of the record in the appeal against the 'interim' Order of Le Grange J would of necessity also have formed part of the appeal against the 'final' Order of Tonjeni AJ. Moreover, it would have led to a considerable escalation of costs and unnecessary utilisation of court time and resources, if two separately constituted benches were to hear two appeals. The parties were therefore agreed that if the SCA granted leave to appeal it would be eminently desirable that the same Court should deal with both appeals. On 15 July 2019 the senior presiding judge directed that the full bench appeal should be postponed *sine die* and the parties were advised to approach the Judge-President in due course for the allocation of a date for hearing of the appeal(s), after the decision by the SCA.

[26] Leave to appeal the main application was granted to the appellants on 12 August 2019 by the SCA.

[27] Thereafter, on 22 August 2019 the appellants' counsel addressed a letter to the senior presiding judge for the purpose of enquiring whether arrangements could be made to have the appeals heard by the same bench which had already been constituted, and if so, if it would be acceptable for the parties to approach the Registrar and endeavour to have the appeals enrolled in the beginning of the first term of 2020. This letter was also forwarded to Van Acker's attorneys. Although the appellants' notice of appeal was duly served on them the following day, it could not be filed with the Registrar because the appeals clerk would not accept it without copies of the appeal record and a power of attorney being filed simultaneously therewith, in order that an appeal case number could be allocated.

[28] On 19 September 2019 the appellants' attorneys addressed a letter to the respondents' attorneys, in which they again confirmed the parties' prior agreement that

the appeals should be consolidated and heard by the same full bench. They further proposed that the record which had been prepared in respect of the main appeal should serve as the record for both appeals, given that it contained nearly all the relevant documents. In her eventual response Van Acker's attorney indicated that she was amenable to the record which had been filed in respect of the Le Grange appeal serving as the record for both appeals, subject to clearer copies of certain documents being provided for the Court. No objection was raised to the request that the matters should be consolidated and heard together.

[29] After having been informed by the senior presiding judge on 14 October 2019 that they were required to re-enrol both appeals on the full bench roll, via the Registrar's office, the appellants' attorneys proceeded on 22 October 2019 to file a notice of appeal that was duly accepted by the Registrar. On 24 October 2019 appellants' attorneys prepared a draft order for the consolidation of the appeals and forwarded a copy thereof to their counsel, who in turn forwarded it to Van Acker's counsel on 28 October 2019. According to the appellants' attorneys it was then left to the parties' counsel to liaise with one other with a view to the preparation of the necessary Order of Court for the consolidation of the appeals, and an approach to the office of the Judge-President for this purpose. To this end repeated attempts were made by the appellants' counsel to contact Van Acker's counsel telephonically, and he left no less than three separate voicemail messages with a view to discussing the proposed further conduct of the matters. But Van Acker's counsel did not revert. By the end of January 2020, after having heard nothing from Van Acker's legal representatives concerning the further conduct of the appeals, appellants' attorneys therefore made contact with the appeals clerk, who advised them to address a letter to the Judge-President requesting that the two appeals be consolidated. Such a letter was indeed addressed to the Judge-President, with a copy of a proposed draft order attached to it, which simply incorporated the parties' prior agreement.

[30] The Judge-President subsequently granted the Order consolidating the appeals, and a copy thereof was emailed to Van Acker's attorneys on the same day. On 19 February 2020 the appellants' attorneys received a letter from Van Acker's attorneys in which they expressed their surprise at having received an Order which had ostensibly

been granted by agreement between the parties, but a copy of which in its draft form they had not had prior sight of.

[31] Van Acker's attorneys furthermore contended that a number of issues remained to be discussed and agreed to, prior to an order of consolidation being made, and averred that the appellants had failed to comply with the requirements of rule 49(6). In particular, they complained that the appellants had not timeously applied for a date for the hearing of the appeal, had failed to enter into good and sufficient security for Van Acker's costs and had failed to file a practice note.

[32] It was subsequently also contended that even though the appellants filed a notice of appeal on 23 August 2019, they failed to deliver a copy of the record within the prescribed time of 60 days, which expired on 19 November 2019.

[33] In my view, the position which was adopted by Van Acker was untenable and it appears that she reneged on her agreement that the two appeals would not be dealt with separately, but were to be consolidated and heard together. It is clear that from the outset the parties came to such an agreement when the appellants' attorneys first addressed a letter to Saldanha J dated 24 May 2019. In their letter dated 7 June 2019 Van Acker's attorneys confirmed that the appeals should be consolidated and dealt with by the same, single full bench. They further confirmed that they were a party to the formulation of the letter that was addressed to Saldanha J. This was followed up and confirmed by another letter which they addressed to the appellants' attorneys, dated 19 September 2019, in which they proposed that the record in respect of Van Acker's appeal should serve as the record for both matters. This was again confirmed in a subsequent email which was addressed to the appellants' attorneys on 11 October 2019. In the circumstances, for Van Acker now to argue that a proper record of the appeal was not filed timeously in terms of rule 49(7)(a) ie within 60 days of the filing of the notice of appeal is, as was contended by appellant's counsel Mr Oosthuizen SC, both disingenuous and opportunistic. In the circumstances, in my view, given the agreement which was reached between the parties whereby the respondent consented to the appeal in respect of the interim application being heard together with that in respect of the main application, which she was aware was contingent upon the outcome

of the petition for leave to appeal, she must have realized that it would not be possible for the main appeal to be prosecuted in strict compliance with the provisions of sub-rules 49(6) and (7), and implicitly waived her right to insist on strict compliance therewith. In the circumstances, in my view the respondent waived her right to take the point that the main appeal had lapsed for non-compliance with these sub-rules.

[34] In any event, even if one were to hold that the main appeal (ie the appeal in respect of the main application) had lapsed for wont of compliance with these provisions, it would in my view clearly be in the interests of justice to grant condonation therefor, and an Order re-instating the appeal.

Ad the validity and enforceability of the Danem Trust sale agreement

[35] In this appeal the four sisters, Mr Yeowart as *curator bonis*, and the Danem Trust, have direct interests and I will collectively refer to them as the appellants.

[36] The main point of attack in the appeal against the Order of Tonjeni AJ, which declared the Danem Trust sale null and void, is that the Court erred in its interpretation of clause 15(d) of the sale agreement. The appellants aver that the clause only applied in certain clearly defined circumstances, as it provided that the sale was subject to the *consent* of the Master of the High Court only 'insofar as was required' by the Order of the Western Cape High Court in case number 1531/2014 dated 13 August 2014, and it did not provide that the sale was subject to the Master's *approval*. In this regard it may be pointed out, by way of an introduction to the discourse which follows, that the parties accepted that the Master's powers of supervision over the *curator bonis* would ordinarily not include a power to decide on the terms of a sale of immovable property ie a power whereby the Master could determine who the curator should sell to, and for what price or on what other terms, nor was it a discretionary power whereby he could veto a sale which had been entered into, and it did not constitute a power whereby any sale which the curator entered into would be subject to the Master's prior, general approval, in order for it to become enforceable or valid.

[37] The appellants submit that Tonjeni AJ failed to have regard to and understand under what circumstances the Order of Savage J required the *curator bonis* to obtain the Master's 'consent' in regard to the sale of the Camps Bay property, and did not have due and proper regard for the terms of her judgment which provide context and clarity as to what was meant by the phrase 'in so far as is required'.

[38] The appellants also contend that there are several other reasons why the sale agreement in any event remains enforceable and must be given effect to. They submit that the executrices stepped into the shoes of the deceased and the *curator bonis* in all matters pertaining to the estate, including the sale and transfer of the property, and the decision of the majority of the executrices bound all of them, by reason of clause 3.9 of the deceased's will. They point out that the majority of the executrices accepted that the sale agreement remained valid and binding after the death of the deceased, as did the purchaser, the Danem Trust, and thus they contend the sale remained valid and there was no basis on which the stance of Van Acker as to the enforceability of the agreement could negate this.

[39] They contend further that it is well-established that a suspensive condition which has been inserted into a contract exclusively for the benefit of one party may be waived by that party, and the non-fulfilment thereof cannot be relied upon by the other.

[40] In this regard the appellants contend that on any interpretation clause 15(d) was inserted for the deceased's benefit, and the majority of the executrices (who stepped into the shoes of the deceased and whose decision in this regard was binding on Van Acker) clearly elected to proceed with the sale and transfer. In the circumstances they submit that the requirement that the Master should provide his consent was no longer applicable, after the death of the deceased.

[41] They point out that the Court did not refer to what facts, if any, it took into consideration in coming to its conclusion.

[42] I am of the view that the Court a *quo* misdirected itself in concluding that the Danem Trust sale agreement was null and void and it failed to have regard for the basic

principles which were applicable in relation to the interpretation of an agreement, such as the one which was concluded between the *curator bonis* and the Danem Trust, as articulated by Wallis JA in the oft-cited decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18, where he said the following :

'. . . The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnotes omitted.)

[43] In the first instance the Court a *quo* did not have regard to the context in terms of which clause 15(d) came into existence.

[44] It is clear from a reading of the terms of the agreement as a whole that the intention of the parties was that the consent of the Master would only be necessary insofar as it was required by the Order of the Western Cape High Court in the curatorship application. From the judgment which gave rise to that Order it is evident that it was phrased in the manner in which it was, as a result of the concerns which the Court had at the time regarding the welfare of Mr Bagnall, against the backdrop of the ongoing conflict between the respondent and her sisters. In this regard the respondent contended that her sisters did not have the welfare and interests of their father at heart and had not given due consideration thereto, whereas they in turn contended that she

was motivated by her own, selfish interests in remaining in the property, without paying any rent, for as long as was possible.

[45] With a view to balancing these competing claims and ensuring that the curator could only sell the property if he had properly taken into account the interests and state of health of Mr Bagnall, and the concerns of all of his daughters, Savage J accordingly stipulated that in making a decision to sell the property the curator was required to consult Mr Bagnall's daughters and his healthcare practitioners, as referred to in the Order, and the Master's consent was required. It is not disputed that there was a real need to sell the Camps Bay property at the time, because of the deceased's deteriorating health and unacceptable living conditions. The *curator bonis* said that he had to sell the property in order to raise funds to pay for Mr Bagnall's ongoing care. I am satisfied that the *curator bonis* duly complied with the terms of the Order of Savage J before he concluded the agreement of sale with the Danem Trust. I agree with the appellants that it was in order to satisfy these requirements that the Court imposed a limitation on the powers of the *curator bonis* to sell the Camps Bay property, which limitation was in turn incorporated into clause 15(d) of the sale agreement. On the passing of the deceased it was no longer necessary to consider the effect the sale of the property would have on him or his lifestyle, or whether the proceeds of the sale would be sufficient to provide for his care and accommodation. Thus, I agree with the contention that after the passing of the deceased it was no longer *contractually* necessary to obtain the consent of the Master, in order to fulfil the requirements of clause 15(d). Obviously, once the deceased had passed away the *curator bonis* would cease to have any cause or authority to act on his behalf, and the executrices would have the power and authority to do so once appointed, and in this regard they elected to abide by the sale agreement and to give effect thereto. Although the executrices were subject to the supervisory control of the Master, as in the case of their predecessor (the *curator bonis*), the Master had no power or authority to make contracts on their behalf, or to decide, in his general discretion, what the terms of any such contracts should be. (Of course this does not detract from the Master's statutory duty in terms of s 42(2) of the Administration of Estates Act, to provide a certificate of no objection to the Registrar

of Deeds in order to effect the transfer of an immovable property that falls within a deceased estate, at the request of the executor(s)).

[46] Thus, in my view the Court failed to have regard to clause 15(d) in the light of the agreement as a whole, and in the light of the circumstances attendant upon its coming into existence.

[47] What further reinforces the point that clause 15(d) was only applicable insofar as was required by the Order of Savage J (ie insofar as was necessary in terms of such Order), is that clause 15(e) was inserted into the agreement. Thus, where it was no longer possible to give effect to clause 15(d) and the requirements thereof (which included consultations with Mr Bagnall's medical practitioners) the circumstances which made clause 15(d) operative fell away, and clause 15(e) of the agreement came into play. It provided that the agreement would remain binding on the estate and that it fell upon the executrices to give effect to it, and to implement it. The agreement could therefore not have been rendered null and void for wont of fulfilment of the suspensive condition contained in clause 15(d). It is clear that the Court a *quo* thus erred in failing to have regard for clause 15(d), in the context of the agreement as a whole, which would include the provisions of clause 15(e). The Court a *quo* completely ignored the context and the circumstances which gave rise to clause 15(d), which only catered for a specific purpose and circumstances that at a later stage fell away, after the death of Mr Bagnall. It totally disregarded the provisions of clause 15(e), which was triggered after Mr Bagnall passed away, and which clearly provided that the intention of the parties was to keep the agreement extant and enforceable even after the death of Mr. Bagnall. This was clearly the desire of the contracting parties, being the *curator bonis* on the one hand, acting on behalf of the patient Mr Bagnall (the seller), and the Danem Trust (the purchaser) on the other hand, those being the only parties to the agreement. In *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA), para 25, it was held that:

'Where the parties dispute the meaning of a term then a court must necessarily look to the wording of the provision itself to determine its correct construction. But where they agree on its meaning, even though the provision appears objectively to reflect a different understanding, it would be absurd to insist on

binding them to a term upon which neither agrees only because of a third party's insistence on reliance on the apparent meaning of the provision.'

[48] The agreement was therefore not null and void, because effect could have been given to clause 15(e), which the parties clearly had foreseen.

[49] It is evident from her judgment that Tonjeni AJ did not consider that the agreement remained enforceable after the death of the deceased, and failed to take into account that the executrices stepped into the shoes of the deceased and the *curator bonis*. This was so not only as a matter of law, but also in terms of the deceased's will.

[50] In clause 3.8 thereof the deceased expressly declared that his executrices:

'…shall have the power to continue with and carry on any business and/or investment in which I may be interested at the time of my death, and they shall have the powers to buy, sell by private treaty or public auction or otherwise . . . movable and/or immovable property . . . and to enter into any transaction, contract . . . or other obligation from time to time on behalf of my estate . . . in terms hereof as they may in their discretion consider advisable in the interests of the beneficiaries of my estate, notwithstanding the provisions of section 47 of the Administration of Estates Act No 66 of 1965.'

[51] Thus, according to the deceased's will the executrices were expressly given the power to continue with the sale of the Camps Bay property, notwithstanding the provisions of s 47 of the Administration of Estates Act 66 of 1965.

[52] The section provides as follows:

'47 *Sales by executor*

Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that-

(a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or

(b) if the said heirs are unable to agree on the manner and conditions of the sale,

the executor shall sell the property in such manner and subject to such conditions as the Master may approve.'

[53] In terms of the will the executrices were thus given the power to sell the Camps Bay property by majority decision, and were not bound by the provisions of s 47, as set out above, even though they were unable to agree unanimously on the manner and conditions of the sale. The proviso in s 47(b) was not applicable in this matter, because the executrices were expressly exempted from the application thereof, in terms of clause 3.8 of the deceased's will. This means that in the event, as happened in this case, the heirs, who are also the executrices, were unable to agree on the manner and conditions of the sale, they did not need the approval of the Master for the sale to proceed and to be given effect to.

[54] It is clear from the evidence that the four sisters, as the majority of the executrices, considered the agreement of sale to be valid and binding. Their decision to proceed with the sale was therefore binding on the respondent in terms of clause 3.9 of the deceased's will. (As previously pointed out, the clause provided that in the administration and winding-up of the estate the executrices were to endeavour to reach a unanimous decision on any issue arising therefrom, *but in the event they were unable to do so the decision of the majority would prevail.* It seems that the deceased, in his wisdom, thus forsaw the possibility that his daughters might disagree on matters or issues arising from or in connection with the administration of his estate and made provision for a mechanism whereby such disputes would be resolved.)

[55] The appellants' authority and decision to proceed with the Danem Trust sale agreement, was given to them by virtue of the provisions of clause 3.8, read with clause 3.9 of the deceased's will, which also gave them the power to continue with the Danem trust sale agreement upon the death of the deceased, as per clause 15(e) of the agreement. For these reasons there is no merit in the respondent's contention that the agreement was null and void or unenforceable, and in my view it must be given effect to.

The conduct of the *curator bonis* and the review application in terms of PAJA and the common law

[56] It is not clear on what basis an appeal regarding a purported review of the decision of the *curator bonis* to conclude the deed of sale with the Danem Trust is

before this Court. Especially in light of the fact that the Court a *quo* did not grant any Order in respect of this relief, which had been sought by Van Acker in her counter-application. In this regard the Court a *quo* in its judgment, at page 1093 para 13, said the following: 'Having decided on the aspect of the validity and enforceability of the deed of sale, my view is that the issue of the review of the curator's decision becomes superfluous and falls off.' In addition, at para 15, the Court made the following order: '(1) The application is dismissed. (2) The counter-application is granted in the following terms: - The Brink Offer to Purchase (Deed of Sale) it is declared null and void and of no legal and binding effect.'

[57] It is apparent from the various parts of the notice of motion and the Orders sought in terms thereof, that the review relief which was sought by Van Acker was not sought in the alternative, but as substantive and separate relief, and it appears that for the reasons cited above such relief was not granted to Van Acker. Despite this, no appeal was lodged in respect of the failure of the Court to grant her such relief.

[58] It is well-established that an appeal lies against the substantive Order of a Court and not the reasons for the judgment. In this regard see *Atholl Developments (Pty) Ltd v Valuation Appeal Board of the City of Johannesburg* [2015] JOL 33081 (SCA), where at para [8], the SCA referred to the judgment in *Administrator, Cape and another v Ntshwaqela and others* 1990 (1) SA 705 (A), at 714I-715D, where the following was said in this regard:

'In legal usage the word *judgment* has at least two meanings: a general meaning and a technical meaning. In the general sense it is the English equivalent of the American *opinion*, which is "(t)he statement by a Judge or Court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based". (*Black's Law Dictionary* 5th ed *sv* opinion.) In its technical sense, it is the equivalent of *order*. . .When a judgment has been delivered in Court, whether in writing or orally, the Registrar draws up a formal order of Court which is embodied in a separate document signed by him. It is a copy of this which is served by the Sheriff. There can be an appeal only against the substantive order made by the Court, not against the reasons for judgment.'

[59] Similarly, in *Tecmed Africa (Pty) Ltd v Minister of Health and another* [2012] 4 All SA 149 (SCA) Ponnan JA, at paras 16 and 17, said the following in this regard:

> '[16] Before us, Counsel was constrained to concede that securing a licence for the use of the machine by Cancare at the Durban Oncology Centre had indeed become academic. That notwithstanding, so he urged upon us, the appeal should nonetheless be entertained. His argument, consistent with the approach adopted in the affidavit filed on behalf of Tecmed on this aspect of the case, amounted to this: the approach and reasoning of the Full Court to the disputed factual issues on the papers would stand and were it not to be set aside by this Court, would serve as an insurmountable obstacle in due course to the successful prosecution of its envisaged civil claim against the Minister. In my view, for the reasons that follow Counsel's submissions lacks merit.
>
> [17] First, appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a Court of Appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same . . .'

[60] The Court a *quo* did not deal with any of the arguments which were raised by the parties in relation to the review application. It seems to me that, given the decision and conclusion it came to in respect of the validity of the agreement, that it did not deem it necessary to give an Order as to whether it would dismiss or grant the application for review. It is therefore not clear on what basis and on what grounds an appeal in relation to this aspect is before this Court. In my view, based on the authorities cited above, there is no appeal proper on this point, before this Court.

[61] But, even if I am wrong in this regard, in my view the review application based on PAJA or the common law is in any event ill-conceived, and is not grounded on the law or facts. As far as PAJA is concerned it does not require much elaboration and discussion, in order to conclude that a decision of a *curator bonis* can hardly be described as administrative action as defined in terms of s 1(1) of PAJA. The principles around what can be regarded as administrative action are well- established, and have been dealt with decisively by our Courts. In my view it cannot be said, by any stretch of the imagination, that a decision of a *curator bonis* such as that which is in issue in this matter, is a decision of an administrative nature by an organ of state exercising either a public power or performing a public function, or which constitutes the carrying out of the daily

functions of the state, and it is not a decision or the exercise of a power which was performed in terms of any legislation or any empowering statutory provision, which adversely affected the rights of any person, and which had a direct, external legal effect. It is trite that the functions of a *curator bonis* are limited to managing the affairs or estate of a particular person who is unable to do so, in accordance with a Court Order, subject to the supervision and control of the Master. In my view, the performance by a curator of such functions and duties do not amount to the exercise of public power or the performance of a public function. In addition, the exercise of such power or function only affects the person and property for whom the curator has been appointed, and it does not have a direct and external legal effect on members of society. Put differently, it is not a power which, when exercised, generally affects the public at large. A *curator bonis* is also not appointed in terms of the ordinary bureaucratic, legislative or administrative prescripts in terms of which public officials are appointed, but by way of a Court order on application to it by a person who has an interest in the patient, and a *curator bonis* (or *ad litem* for that matter) is a private person, and not an organ of state which is involved in carrying out the functions of the state. A curator (*bonis* or *ad litem*) is also remunerated from the estate of the person for whom he has been appointed, and not out of public funds. See also *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC), para [33].

[62] In his seminal judgment in *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) Nugent JA, at 324A-B, held that:

'Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.' (Footnote omitted.)

[63] Similarly, in my view the conduct of the *curator bonis* is also not reviewable at common law.

[64] In coming back to the facts of this case, it is evident that in executing and concluding the deed of sale with the Danem Trust, Mr Yeowart, an attorney of this

Court, exercised his powers as *curator bonis* in strict compliance with the Order of Court in terms of which he was appointed. His conduct was eminently reasonable and rational, and in no way arbitrary.

[65] He had legitimate reasons not to accept the offer of Dr Kassianides even though it was for a price approximately R150 000 more than that which was offered by the Danem Trust, until it was a valid offer which was reduced to writing, which only occurred after the sale agreement had already been concluded with the Danem trust. Obviously, one would have expected the *curator bonis* to have accepted the best offer, insofar as the price for the property was concerned, and it would have been improper for him to have accepted the Danem Trust offer if he had received the Dr. Kassianides offer prior to acceptance thereof. But, having done so, he was obliged to give effect to the contract which he had thereby concluded in good faith and had he reneged thereon, he would have made himself guilty of breach of contract, and would have exposed Mr Bagnall and his estate to legal action and a possible claim for damages. Furthermore, as was previously pointed out, the Danem Trust sale agreement, although it was concluded in October 2015, provided that occupation and transfer would only be given on 31 October 2017, in order that Mr Bagnall could continue to live in his house and see out the last of his days there. To this end the agreement provided that the deposit of R867 700 which was paid by the Trust could be utilised for the immediate care and upkeep of the deceased, pending the finalisation of the sale transaction. This made the offer one which was extremely beneficial as far as Mr Bagnall was concerned.

[66] Yeowart's decision therefore to persist with the Danem Trust offer cannot be regarded as improper, or as being against the best interests of Mr Bagnall. In fact, it was clearly in his best interests. The *curator bonis* requested the Master to consent to the Danem Trust sale on 29 October 2015. Van Acker strongly opposed this, so much so that at the time when Mr Bagnall passed away some 7 months later on 3 June 2016, the consent of the Master had still not been obtained.

The application for the removal of Van Acker as executrix

[67] In this appeal only the four sisters have a direct interest as appellants and it will be convenient to refer to them as such.

[68] Regarding the Court a *quo*'s decision in respect of the application to remove Van Acker as executrix, the four sisters submit that having incorrectly found that the Danem Trust sale had lapsed, for wont of compliance with the suspensive condition in clause 15(d) thereof, Tonjeni AJ failed to give proper consideration to the issue of whether the discharge of Van Acker as executrix was warranted. They submit that the application to remove her was based not only on her ongoing efforts to frustrate the sale, but on various other forms of obstructive or improper conduct on her part, in her capacity as executrix. These allegations were clearly set out in the papers, and most of them were not disputed by Van Acker. The Court a *quo* in its brief four-page judgment did not decisively deal with this issue, except by referring, in passing, to s 54 of the Administration of Estates Act 66 of 1965. The Court a *quo* declined to remove Van Acker without properly dealing with the allegations which had been made against her by her co-executrices. It simply said the following: 'I am mindful of the complex and acrimonious relationship between the Bagnall sisters/co-executrices including the history of this case, but I found no real facts that would lead this court to a finding or conclusion it is undesirable to have the first respondent as executrix of the late father's estate.'

[69] Tonjeni AJ did not state on what basis she found that there were no 'real' facts which would allow her to determine if it was desirable to have the respondent removed as an executrix. In order to deal with this aspect, it is necessary to deal with the allegations which were made by the co-executrices against Van Acker and the facts which were tendered in support thereof.

[70] The four sisters contend that whilst Van Acker acknowledged that the Camps Bay property had to be sold as soon as possible, she complained that the property had not been adequately marketed and she claimed that the *curator bonis* had acted too hastily in accepting the offer from the Danem Trust, and according to her the property had consequently been sold for a price which was well below its true market value. But this allegation was based on a cash offer which was elicited for the property in October

2017, some 2 years after the agreement which had been concluded with the Danem Trust. This offer was for R7 500 000, and unlike the Danem Trust offer it was subject to payment of a brokerage fee of 5% ie R375 000, which after being deducted from the sale price, would result in nett proceeds of R7 125,000. But it is clear that if the executrices had purported to accept this offer, the estate would have been obliged to refund the deposit of R867 750 which had paid to it by the Danem Trust, in terms of clause 2.2 of the Danem Trust sale agreement. Where the estate would have found the money to repay this is not apparent. If this amount was allowed to be set-off against, and deducted from, the nett proceeds of the sale the estate would have received R6 257 250 ie R472 250 more than the offer which was received from the Danem Trust. Van Acker's one-fifth share of this amount would have come to R94 450. But as the appellants rightly point out, over the years she engaged in costly litigation which would have resulted in thousands of rands worth of costs, far in excess of this amount.

[71] It is clear that Van Acker failed to comply with the duties which were imposed on her in terms of clause 3.9 of the deceased's will. She did not provide her co-operation in administering the estate in order to enable the sale to proceed and transfer of the property to be given to the Danem Trust, against the wishes of the majority. Instead she conducted a campaign of obstruction and delay of the sale and transfer by every means possible, in order to shipwreck the sale, and by her conduct she prevented the estate from being wound up expeditiously.

[72] The appellants contend that based on the papers the reason for acting in this manner was clearly to benefit Van Acker by allowing her to continue staying in her late father's property, rent-free, for as long as was possible. This started after the deceased's wife died in January 2010, at which time he was still staying in a downstairs flat, whilst the upstairs rooms were being let to tenants, which had provided a source of rental income for the deceased.

[73] It is not disputed that for many years, except for a brief period referred to above, Van Acker occupied the premises rent-free and at times pocketed whatever rental she received from subtenants. After the death of her father she did not account to the estate for any rental monies she received from her subtenants, as she was obliged to do as co-

executrix. According to the four sisters this was the underlying reason for her delaying and sabotaging the implementation of the Danem Trust sale – viz that she could retain for herself the benefit of the rent-free accommodation she was enjoying, for as long as possible. This appears to be a strategy that she has pursued thus far, with considerable success, and it seemed that she had every intention of prolonging this state of affairs for as long as possible.

[74] The extent of her obstructive and unco-operative attitude and how she frustrated the administration of the deceased estate and held up transfer of the property to the Danem Trust, is evident from the following abbreviated history of relevant events.

[75] In August 2016 the four sisters informed Bernardt Vukic Potash & Getz ("BVPG"), the attorneys who were attending to the winding-up of the deceased's estate, that as co-executrices they had accepted the terms of, and had ratified, the Danem Trust sale agreement, and in their view the sale should accordingly proceed. They expressed the view that the sale had been concluded on fair terms and for fair value, in accordance with the powers of the curator, and the substantial deposit that had been paid had allowed the curator to raise sorely needed funds in order to meet the expensive costs of care for Mr Bagnall, until his death. They reported that they had obtained independent legal advice which indicated that the estate was required to abide by the agreement of sale. In response to this Van Acker wrote to BVPG, on 24 August 2016, stating that it was premature to instruct conveyancing attorneys, and asserting that there was no binding agreement of sale in place because of the failure of the suspensive condition that the sale was subject to the Master's consent. She also complained that the sale price was far too low.

[76] On 26 and 30 August 2016 the four sisters affirmed their election to proceed with the sale and transfer. Despite this, and notwithstanding that the will clearly provided for decisions to be made by majority, on 14 September 2016 Van Acker addressed a letter to her co-executrices, in which she contended that they had not consulted and co-operated fully with her as required by clause 3.9 of the will, that the curator had not discharged his obligations before concluding the sale, and that the sale had fallen

through due to the failure to obtain the Master's consent. Moreover, she demanded that the co-executrices explain to her why they supported the sale to the Danem Trust.

[77] On 18 September 2016 one of her sisters, Deborah Louw, suggested to her that a meeting be arranged via a Skype call to discuss matters. Van Acker was not amenable to this. Instead, on 28 September 2016 she again responded via email that in her view there was no obligation to pass transfer to the Danem Trust.

[78] On 29 September 2016 Ashleigh and Andrea Bagnall asked her to furnish details of the persons who were living in the property and what rental was being obtained from their occupation. Contrary to what was expected of her as a co-executrix, she failed to furnish the information that was sought, and simply responded that the executrices were fully aware of the fact that she was staying at the property, and that she was doing so in order to prevent the developer from moving in and 'damaging' it. She offered no proper justification for her failure to pay rental or to provide any details about who was living on the property.

[79] On 7 October she was notified of a meeting of co-executrices which was to be held via Skype two days later. She refused once again to participate therein. On 10 October Deborah Louw expressed her regret that she had not participated in the meeting, as very important issues concerning their father's estate had been discussed.

[80] On 2 November 2016 Andrea Bagnall again requested details as to the rental income which had been obtained from the property, and informed Van Acker that the co-executrices were agreed that the property should generate a market-related rental income and its net expenses should be shared equally between the five of them.

[81] On 17 November 2016 Van Acker replied, indicating that it was premature to address the issue of possible income generation from the property, as it was to be sold. By adopting this stance she failed, yet again, to act in the best interests of the deceased estate and the beneficiaries thereof, as she was required to do as executrix.

[82] On 25 November 2016 Van Acker sent a letter to BVPG wherein she advised that she would not consent to an endorsement of the sale of the immovable property to the Danem Trust, and that her objections were on record with the Master of the High Court. Furthermore, she indicated that she intended to oppose any application which her co-executrices might bring in order to compel her to consent to the sale and transfer proceeding, or an application for her to be removed as executrix.

[83] In February 2017, BVPG obtained independent counsel's opinion as to whether the executors were required to give transfer of the property to the Danem Trust. The opinion confirmed that the executors were entitled, and indeed obliged, to give transfer of the property to the Danem Trust. The opinion was forwarded to Van Acker's attorneys on 28 February 2017. On 15 March 2017 they advised that she did not accept it, and that she had instructed her attorneys to obtain a further opinion from senior counsel.

[84] The four sisters allege that Van Acker engineered a delay in excess of 2 months under the pretext that she was briefing, or had briefed, counsel to provide her with a separate opinion.

[85] In a letter to BVPG, dated 11 May 2017, she claimed that Mr Bagnall had given her and her son permission to occupy the property in exchange for managing the household and his 'affairs', and maintaining the property and caring for him. She claimed that after her father had passed away, she had been making a monthly 'contribution' to the estate in respect of her continued occupation of the property, and indicated that she would continue to reside on the premises, in the exercise of her 'rights', and was not prepared to consent to rental agents attending or having access to the premises.

[86] The four sisters point out that the 'monthly contribution' to which Van Acker referred did not encompass the payment of any rental, but was merely a nominal contribution in respect of utility (ie telephone, refuse, water and electricity) expenses which were being incurred by the estate as a result of her occupation of the property. At the time when the matter was argued her counsel conceded that she enjoyed no right to

reside at the property rent-free and confirmed that her attitude was that she would only be prepared to vacate the property if, and when, it was re-sold.

[87] On 26 May 2017, attorneys acting for the four sisters addressed a further letter to Van Acker's attorneys in which they enquired whether senior counsel had been briefed, and proposed that a roundtable meeting be held with a view to resolving the dispute, without recourse to litigation.

[88] The letter followed an earlier one, dated 24 May 2017, in which Andrea Bagnall (on behalf of the other executrices), requested a family conference call be held as soon as possible, so that they could engage Van Acker in person, in order that they could ascertain what she wanted and what she was objecting to. Once again, she declined to resolve any issues she had, on an amicable basis, without exposing the estate to unnecessary legal costs and without unnecessarily hampering the expeditious and proper winding-up thereof. A further request which was made, on 2 June 2017, that she allow rental agents to inspect the property so that they could advise her co-executrices as to what rental should be paid for her occupation, was refused.

[89] On 25 June 2017 Van Acker complained that she had not provided any input when the four sisters briefed counsel for an opinion. She again stated that in her view the property had been sold at too low a value. She did not address the reason why she regarded herself as entitled to continue causing prejudice to the estate by refusing to pay rental and/or refusing to allow letting agents access to the property. On 26 June 2017 her attorneys indicated that she was not unwilling to have a conference call or Skype meeting with her co-executrices, but that she would first require them to consider the historical correspondence addressed by her to the Master and the curator, and provide an agenda for the meeting and afford her an uninterrupted opportunity to speak. She furthermore required that the meeting take place without legal representation.

[90] In response to this, on 17 July 2017 Andrea Bagnall sent her an email in which she recorded that the four sisters had consulted and sought to co-operate with her to the fullest extent possible, and had suggested that they all agree to be bound by the opinion which was to be obtained from senior counsel, but their proposal had come to naught.

In the circumstances they were of a mind to instruct their attorneys to launch an application for her removal as executrix, or to compel her to sign their request to the Master for a certificate of no objection to the transfer of the immovable property, and she was invited to discuss this during a Skype call which they proposed be held on 20 July 2017.

[91] After an exchange of correspondence, the meeting went ahead as planned on 20 July 2017, and the parties' discussions were wide-ranging. But the outcome thereof was that Van Acker refused to implement the decision of the majority of the executrices to abide by the sale, and advised that she would go to court to have the sale overturned or blocked if need be.

[92] It is furthermore not disputed that during this entire period Van Acker did not pay rental and refused to comply with the decision by the majority of the executrices that the property be let in order to obtain a market-related income, and the expenses be shared between the five heirs.

[93] The only justification offered for her refusal to pay a market-related rental, or to allow the property to be let, was that if she vacated the property it would immediately be placed in the hands of the developer (the Danem Trust), who would commence development. This would allegedly destroy the property and render it unmarketable to the prejudice of the estate. She maintained that she would only vacate the property when it was sold in terms of a legitimate and binding agreement of sale, for value.

[94] Van Acker's contention throughout was that by refusing to permit the property to be conveyed on the terms contained in the Danem Trust agreement she acted in the best interests of the estate, by preventing substantial loss being sustained by the estate. She contended that, by insisting that the property be sold for fair value as required by the Transfer Duty Act 40 of 1949, she had only discharged her duty as executrix, to act in the best interests of the estate. Thus, so it was submitted on her behalf, she should not be removed from office, but be commended for standing her ground; as she has not been stubborn but principled. It was submitted that, should she be removed her four

sisters would sell the property on the terms as set out in the Danem Trust offer, contrary to the best interests of the estate.

[95] It was further submitted that for her sisters to obtain relief, they were required to allege and prove that Van Acker had conducted herself improperly in refusing to endorse and give effect to the sale of the Camps Bay property by the *curator bonis*.

[96] Her counsel further submitted that, in this regard, as Van Acker acted as co-executrix the Court should be very slow to interfere with the exercise of her discretion, unless improper conduct had been clearly established.

[97] Van Acker contended that the claim by her sisters, as set out above, to have her removed, was based squarely on her opposition to the sale of the property to the Danem Trust, which sale, according to her, was invalid and unenforceable, for the reasons which have already been dealt with.

[98] Based on these submissions she averred that her refusal to accept the majority decision of her co-executrices was not irrational, and could not reasonably be censored or disregarded. Moreover, she believed that she acted properly by refusing to consent to the obtaining of a certificate of no objection in terms of section 42(2) of the Administration of Estates Act, and according to her, she would have acted unlawfully if she had done so, in respect of a sale which was not valid and binding.

[99] Consequently, it was submitted that she could not be accused of misconduct insofar as she refused to sign transfer documents as co-executrix, in order to enable the transfer of the property to the Danem Trust.

[100] It was submitted that the position she found herself in was similar to that of an executor who finds himself in the impossible position, on the one hand, of having to fight for a claim as a creditor, and on the other hand, of having to defend the estate against the same claim. And that under those circumstances the executor cannot remain impartial.

[101] It was submitted that she was therefore not unlawfully preventing the discharge by the executrices of their obligation to wind up the estate; on the contrary her conduct was calculated to achieve precisely the opposite effect, namely the lawful discharge by the executrices of such obligation.

[102] In the circumstances her counsel contended that the appellants had failed to make out a proper case for her removal as co-executrix.

[103] The question to consider is whether, in light of the allegations which have been levelled against Van Acker by her sisters, it can be said that she acted against the interests of the estate to such a degree that it warrants her removal as executrix.

[104] It is well-established that a Court should not lightly grant an order for the removal of an executrix, for reasons which are flimsy, or which cannot be properly justified. The rationale for this is that usually an executrix is a person who has been carefully chosen by a testator as someone to whom he is prepared to entrust the duty of preserving and properly winding up his estate after his death, and who in doing so will give effect to his wishes, in the interests of his beneficiaries. In many cases, such as the present one, a family member or family members of the testator is/are chosen to serve in this position, and the removal of an executrix or executor, if not justified, would therefore interfere with the express will and wishes of the testator. In *Volkwyn N.O. v Clarke and Damant* 1946 WLD 456, Murray J, at 464, set out the following test as to what is required before a Court can and will remove an executrix:

'To my mind it is a matter not only of delicacy (as expressed in ***Letterstedt's*** case (supra)) but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has deliberately selected to carry out his wishes. Even if the executor or administrator has acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicates 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.'

[105] In my view, when carefully measured against this standard Van Acker's reasons for obstructing and delaying the due and expeditious winding-up of the estate, in accordance with the wishes and expectations of her late father, and the agreement of sale which was duly entered into on his behalf and in his best interests by the *curator bonis*, are not rational or acceptable, and cannot be justified. There was clearly an agreement in place to sell the property to the Danem Trust, which provided in clear terms that in the event of the death of Mr Bagnall it should continue to remain in force, and should be given effect to. Van Acker, as executrix, decided not to abide by this agreement, and used the fact that the Master had not consented to the agreement, as justification to argue that the sale was not valid, whereas in truth and in fact, it was her conduct which caused the delay in the Master granting consent. Right from the outset it was apparent that she was opposed to the appointment of a *curator bonis* to take care of her father's affairs, and it is clear that she made it difficult for him to exercise his functions in accordance with the powers which were bestowed upon him by the Court, as well as the Master. It was also clear from the outset that there was insufficient funding to take care of Mr Bagnall during his lifetime. She knew that the only asset of value in the estate was the Camps Bay property. She was opposed to the sale thereof from the outset, irrespective of who the purchaser might have been. It was for this very reason, even before the offer from Dr. Kassianides, that the Court seized with the *curator bonis* application had to instruct the *curator bonis* to comply with certain conditions before selling the property. Van Acker was clearly opportunistic right from the outset; firstly, by attempting to use the fact that the Master had not consented to the sale of the property to the Danem Trust prior to the death of the deceased as an excuse to argue that the sale was invalid, whilst she was in fact the reason and the cause for why this condition could not be fulfilled. Secondly, by adopting the stance that the sale to Dr. Kassianides would have yielded a better profit, considering that she was in any event right from the outset opposed to the sale of the property by the *curator bonis*.

[106] I agree with the appellants that her conduct has been untenable, and in conflict with her duties as executrix to act at all times in the best interests of the deceased estate, as opposed to her own. She knew and was aware of what the terms and conditions of the sale to the Danem Trust were. Her conduct was to wilfully obstruct,

and cause a delay in, the finalisation of the administration and winding-up of the estate. She was made aware, as executrix, of an opinion of counsel, that the agreement was not null and void, and was in fact valid and enforceable. At page 556 – 557 thereof, Adv Patrick explained the legal position in clear terms, as follows:

> '[71] Van Acker's contention is that because Bagnall passed away without the Master's office having given its approval to the curator's exercise of his power to sell, the contract 'could never be complete' and 'fell away' on [Bagnall's] passing. Van Acker effectively contends the sale lapsed by reason of the nonfulfillment of the suspensive condition to which it is subject.
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> [72] As appears from what has been set out above, Van Acker's contention is incorrect. Either, the Master indeed must grant or refuse his consent or the Master's consent is no longer required. In both scenarios, however, the contract remains extant. In the first scenario, the sale remains subject to a suspensive condition but 'there is nevertheless created a very real and definite contractual relationship which, in fulfilment of the condition, developed into a relationship of seller and purchaser'.
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> [73] On the second scenario, and for the reasons set out above, the Master's approval is no longer required by reason of Annexure A. What is required - following the death of Bagnall and the executors becoming subject to the obligations in the contract - is a section s 42(2) certificate of 'no objection.'

And at [75]:

> 'The conveyancer already has been instructed to effect transfer. The conveyancer already has applied to the Master for a section 42(2) certificate. In answer, the Master however has declined to process the conveyancer's request, for the reasons that all the executors are not jointly making the request for the section 42(2) certificate."

And at [76]-[77]:

> '. . . Van Acker did not sign the conveyancer's request for a s 42 (2) certificate. Therefore, the remedy of the other executors is to demand, finally, that Van Acker join in their request for a s 42(2) certificate. . .

> [77] Van Acker does not enjoy grounds to refuse to sign the request for the section 42(2) certificate. She is bound by the decision of the majority of the executors and must assent in its implementation.'

[107] Notwithstanding the opinion, and contrary to the expressed wishes of her late father that she should endeavour to co-operate with her sisters in matters involving the administration of his estate, she proceeded nonetheless to file a counter-application in which she sought to have the agreement declared null and void, contrary to her expected duties as co-executrix.

[108] I agree with the submission that her contention that she could not vacate the property because she was afraid that the developers would immediately start to develop it, cannot be accepted, because clause 10.13 of the Danem Trust sale agreement, of which she was well aware, clearly stipulated that the purchaser would not be entitled to make any alterations whatsoever to the property before transfer. From the evidence it is clear that the suggestion of the four executrices was not that she should hand over the property to the Danem Trust, but that she should either pay a market-related rental for it, or that she should vacate the property so that it could be let for a market-related rental. In terms of clause 3.9 of the will, as cited above, there was no basis on which she could resist a perfectly reasonable decision of the majority of the executrices, namely that rental income should be earned from the Camps Bay property.

[109] Her statement that if ultimately the property were to be sold at a price which satisfies her, an account reflecting the value of her accommodation will be prepared and set-off against her share of the inheritance, is also neither tenable nor acceptable. And as pointed out by the four sisters, the total amount owed by her on the basis of a market-related rental, in respect of the free occupation she enjoyed since August 2014, will by now far exceed her one-fifth share of the value of the proceeds from the sale of the property ie R1 251 450. Given the lengthy, and thus far successful campaign she waged against her co-executrices, it is in my view most unlikely that she will in fact consent to the deduction, from her share of the inheritance, of the arrear rental which is owed by her to the estate, for if this were to happen she would receive nothing. And in arriving at this conclusion I have not taken into account any legal costs which the estate

would be entitled to recover from her, in the event that the appeals which are before us, were to go against her. And I agree that, given the manner in which she has conducted herself thus far, the prospects are overwhelming that she will object to such a reconciliation of accounts, and any attempt on the part of executrices to claim what is owing by her in lieu of rental and costs and were such an Order to follow, it would only result in further delay and an enormous further escalation of legal costs. In the circumstances this is not a matter where it is either feasible or tenable that she should continue to remain a co-executrix, and it is imperative and necessary, in the interests of finalizing the winding-up of the estate as soon as possible, that she be removed. I point out that Mr Bagnall passed away some 4 years ago, and in my view it is high time that his estate be finally wound up and effect be given to his will.

[110] In my view it is evident from the manner in which Van Acker has conducted herself that most, if not all, of her objections to the sale of the property to the Danem Trust, even before she became an executrix, were spurious and without merit. And as was said earlier, it is clear that, right from the outset, she objected to the sale of the property, no matter to whom it might have been sold, whilst her father was alive, and even after he passed away it is evident that she was intent on staying in the property for as long as possible without paying any rental. And as pointed out earlier, given the manner in which she proceeded with litigation against her co-executrices, there would be little if anything left of her share of the inheritance by the time that the matters were resolved in Court. It is clear that there was no urgency, on her part, to have the administration of her late father's estate finalized. Her conduct was at all times centred on, and motivated directly by what was in her interests, and not in the interests of the deceased estate and the beneficiaries thereto, other than herself. This is not the conduct expected of an executrix.

[111] This is not a matter where, as executrix, she simply failed to observe the strict requirements of the law or merely acted incorrectly in the mistaken but *bona fide* discharge of her duties. In my view, her actions are indicative of obstructive conduct, at odds with her expected duties as executrix. The deceased's will expressed the wish that the executrices consult and cooperate with one another to the fullest extent in connection with the discharge of their duties, and that they should at all times endeavour

to reach unanimity on any issue arising from, or in connection, with their administration of the estate. There was clearly no real effort, to say the least, on the part of Van Acker to work together with her co-executrices, in order to arrive at an amicable resolution of their differences. It is evident from the attitude which she adopted that she was not prepared to compromise in any way whatsoever and the only way the dispute was going to ever be resolved was if it was on her terms. She knew right from the beginning that it was for the benefit of the deceased, were the property to be sold; this she vehemently opposed. She knew exactly what the reasons were why the *curator bonis* could not accept the Kassianides offer. She did not want to make the property available to a letting agent to make an assessment as to what a market-related rental would be for the property, in order for the estate to earn an income. She has lived, since 2014, in the property rent-free (save for a short period of time) to the detriment of the estate, as well as her co-beneficiaries. At every corner she refused to give her co-operation to the attorneys of the deceased estate, as well as the Master.

[112] She proceeded to litigate at length to the detriment of the estate. She was disingenuous because she knew what the real facts were, regarding the sale of the property. She did not give her co-operation when she was required to sign the relevant form necessary for the Master to issue a s 42(2) certificate of no objection, while she knew that she was bound by the decision of the majority of the executrices. Given the manner in which she has conducted herself thus far, it can be only be expected that in future her conduct will be such as to cause yet further delay in the finalisation of the administration of the estate, for as long as she is an executrix. In my view her co-executrices have made out an overwhelming case for her to be removed. Such an order of removal would not be inconsistent with the will of the deceased, because it was his desire that, in the event that the executrices were to be in a position where they were deadlocked on any issue in connection with the administration of the estate, the decision of the majority should prevail, and as a result of the obstructive conduct of Van Acker, effect could not be given to the will of the majority of the executrices and the beneficiaries.

Appeal by Van Acker against the Order of Le Grange J dated 4 October 2017

[113] The appeal by Van Acker against the Order of Le Grange J was predicated on the fact that she was ordered to join in the request of her four co-executrices to the Master, in terms of s 42(2) of the Administration of Estates Act 66 of 1965, for a certificate of no objection to the transfer of the Camps Bay property. The Order also provided that she sign all documents as may be required to enable the trustees of the Danem Trust to apply for the approval of building plans in respect of the property. This was under circumstances where she was of the view the sale was not valid and binding, and it was unauthorised and subject to an unfulfilled suspensive condition. The respondent concedes that in the event that this Court were to uphold the main appeal against the order of Tonjeni AJ, confirm the validity of the Danem Trust agreement and reverse the Order granted in respect of the counter-application, the appeal against the interim Order of Le Grange J would be rendered moot.

[114] It is clear based on my earlier findings above, that the agreement is valid and enforceable. Because of this, the grounds underpinning the appeal against this Order, fall away. Furthermore, based on my conclusion that it is right and proper that Van Acker should be removed as executrix, this appeal cannot be entertained because there would be no need or cause for Van Acker to be compelled to join her co-executrices in the request to the Master, made in terms of s 42(2) of the Administration of Estates Act 66 of 1965, for a certificate of no objection to the transfer of the property to the Danem Trust. Put simply, if, as I believe is justified, the appeal against the dismissal of the application to have her removed as executrix must be upheld, there will be no need for any reliance on the interim Order directing her to participate in the completion and signature of the requisite forms pertaining to the s 42(2) certificate of no objection by the Master to the transfer of the property, or the other documents which she was required to sign. For these reasons the interim appeal ie the appeal in respect of the interim Order by Le Grange J falls to be dismissed.

Conclusion

[115] In the result, and after having duly considered the issues raised in both appeals, I would consequently make the following Orders:

1. The appellants' application for condonation of their failure to comply with the provisions of rules 49(6) and (7) in respect of the main appeal (ie the appeal in respect of the Orders which were made in the main application under case number 15609/17 by Tonjeni AJ) is condoned, and the appeal is reinstated.
2. The first respondent (Shelley Van Acker) shall be liable for the costs of the application for condonation and reinstatement of the main appeal including the costs of counsel where so employed, save insofar as counsel was engaged on a *pro amico* basis.
3. The main appeal (ie the appeal in respect of the Orders which were made in the main application under case number 15609/17 by Tonjeni AJ) is upheld with costs, including the costs of counsel where so employed, save insofar as counsel was engaged on a *pro amico* basis.
4. The Orders of the Court a *quo* in the main application and the counter-application thereto under case number 15609/17 are set aside and replaced with Orders in the following terms:

> '1. *The application to remove Shelley Van Acker (first respondent) as executrix of the estate of the late DA Bagnall is upheld.*
>
> *2. First respondent shall be liable for the costs of the application, including the costs of counsel.*
>
> 3.*The counter-application by first respondent for an Order 1) declaring that the offer by the Danem Trust for the purchase of erf 2281Camps Bay and the deed of sale which was entered pursuant thereto was null and void and not of legal and binding effect and 2) reviewing and setting aside the decision of the curator bonis to accept such offer and to enter into the aforesaid deed of sale, is dismissed with costs, including the costs of counsel.*

5. The appeal against the interim Order of Le Grange J is dismissed with costs, including the costs of counsel, save insofar as counsel was engaged on a *pro amico* basis.

_____
RCA HENNEY
Judge of the High Court

I agree, and it is so ordered.

_____
P GOLIATH
Deputy Judge-President
of the High Court

I agree.

_____
M SHER

Judge of the High Court