Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 3239/2021

Before: The Hon. Mr Justice Binns-Ward
Hearing: 19 May 2021
Judgment: 25 May 2021

In the matter between:

SALLY ANN BRIMBLE-HANNATH Applicant

and

ERICA LOUISE HANNATH First Respondent
CAROLYN LAURA FISHER Second Respondent
BDO BUSINESS SERVICES (PTY) LTD Third Respondent
MASTER OF THE HIGH COURT Fourth Respondent

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 25 May 2021.)

BINNS-WARD J:

[1] This is a case that should never have come before court if only the parties on both sides had dealt with the issues more constructively than they did. It is unfortunate that it has

because the matter concerns the winding up of a deceased estate of relatively modest value, which, to the disadvantage of everyone concerned, will be materially eroded by the cost of the litigation. The applicant is the widow of the testator, to whom she had been married out of community property with the exclusion of the accrual system. The first and second respondents are the co-executrixes of the deceased estate. They are the daughters of the testator by a previous marriage. The third respondent is a company specialising in the provision of consulting and advisory services that was appointed by the first and second respondents to assist them with the administration of the estate. No relief was sought against the third respondent, and it did not participate in the proceedings. The evidence suggests that the third respondent has attended to the practical administrative work in the winding up of the deceased estate. The Master was cited as the fourth respondent.

[2] The will is a simple one. Apart from a few modest monetary bequests (which are uncontentious), it grants the applicant for the remainder of her life the right to use and reside at the Noordhoek property that had been her and the testator's place of residence at the time of the latter's demise and provides for the residue of the estate, including the forementioned Noordhoek property, to devolve on an existing trust of which the first and second respondents are (with one other) co-trustees and also beneficiaries.

[3] The will did not provide any settlement on the applicant to provide for her maintenance. It is undisputed that she is entitled in the circumstances to make a claim against the deceased estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990.

[4] The applicant's previous attorney did in fact submit a claim under the Act on her behalf in the sum of R6 212 480. It was stated in the baldest terms, with little information to enable the executors to assess its reasonableness with regard to the criteria set out in s 3 of the Act.[1] The executrixes, as they were entitled in terms of s 32 of the Administration of Estates Act 66 of 1965, and quite justifiably in the circumstances, called upon the applicant to substantiate the quantum of her maintenance claim on affidavit. She failed to respond to the

[1] Section 3 provides:
Determination of reasonable maintenance needs
In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:
(a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees;
(b) the existing and expected means, earning capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and
(c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse.

request, notwithstanding a reminder. In the result, the liquidation and distribution account lodged by the executrixes made no provision in respect of her claim. The applicant's maintenance claim was therefore effectively rejected by the executrixes.

[5] The applicant lodged an objection to the liquidation and distribution account and very shortly thereafter, before her objection was determined, instituted the current application for the removal of the executrixes. She has invoked s 54(1)(a)(v) of the Administration of Estates Act, which provides that the Court may remove an executor from office if it is satisfied that it is undesirable that he should act as the executor of the estate concerned. The basis for the application is the applicant's allegation that the first and second respondents are unsuitable to remain as executrixes because they have a conflict of interest.

[6] The alleged conflict of interest is said to arise from the first and second respondent's position as trustees and beneficiaries of the trust to which the testator left the bulk of his estate. In their capacities as trustees, the first and second respondents lodged a claim by the trust against the deceased estate in the sum of approximately R4,4 million predicated on the deceased's debit loan account. The second respondent testified that the deceased had borrowed the amount from the trust to purchase the Noordhoek Property. The trustees' claim is reflected as having been accepted by the executrixes in the liquidation and distribution account they lodged with the Master. The applicant questions the existence of any such claim and complains that the first and second respondents have denied her access to the trust's records to investigate it.

[7] The applicant avers that the trust's claim against the deceased estate 'eats into the finite pie' available in the deceased estate to satisfy her maintenance claim. Judged by the information in the liquidation and distribution account, that is an understatement. From the figures provided in the account it is apparent that were both claims accepted at their stated values the estate would be unable to meet them in full, and accordingly demonstrably insolvent.

[8] The applicant's current attorney (apparently the third she has engaged since the testator's death), who appeared on her behalf at the hearing, argued that the current matter was comparable on its facts to the matter of *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A). He submitted that the Appellate Division's judgment in that matter was dispositive of the current case.

[9] In *Grobbelaar*, the testamentary executor of the deceased estate was one of the testator's sons. The testator had been married in community of property and had a joint a will with his wife in terms of which their estate devolved first on the surviving spouse and thereafter on the couple's children in equal shares. The principal assets in the estate were certain farms. After his wife's death the testator subdivided the farmland to be able to sell part of it to the respondent and to donate another part to another of his sons, Hendrik Petrus, to whom he then also sold an additional portion. To give effect to the forementioned sales and donation the deceased needed the written consent of all his children. All the children duly provided their consent, save for the appellant. The transactions could therefore not be executed, but the deceased registered mortgage bonds over the subject properties in favour of the two sons to whom he had intended to transfer them. The bonds were ostensibly to secure claims by the two sons for the value of improvements that they had effected to the properties. After the testator's death, the respondent, in his capacity as executor, gave notice that because the estate was illiquid it would be necessary to sell the properties by public auction to settle the secured debts, including that allegedly owed to himself. The appellant objected on the grounds that he disputed the validity of the registered mortgage bonds. He sought an interdict prohibiting the sale of the property pending the determination of the dispute as well as an order removing the respondent as executor of the estate on the grounds that he had a material conflict of interest.

[10] At p.724D-725A of *Grobbelaar*, Van Blerk JA summed up the legal position that applied on the facts of the case as follows:

> Dit blyk uit die stukke dat respondent as eksekuteur die kapitale bedrae van die twee verbande van £2,750 en £10,000, ten gunste van homself en Hendrik Petrus onderskeidelik, erken as eise teen die boedel; terwyl appellant die eise betwis. Mnr. *Jacobs* namens respondent het toegegee dat die twee eise verminder moet word met £6,000, synde £4,000 die koopprys van die gronde wat respondent en Hendrik Petrus gekoop het, plus £2,000 die waarde van die grond aan Hendrik Petrus geskenk; maar nêrens in die stukke word hierdie toegewing deur of die respondent of Hendrik Petrus gemaak nie. Die kontensie van appellant is dat die verbande vir fiktiewe eise gegee is, bloot as 'n uitweg om later transport van die beswaarde eiendom vir die verbandnemers te laat kry; iets wat die testateur nie teweeg kon bring nie as gevolg van appellant se weiering om toe te stem tot die kansellasie van die bestaande verband ten aansien van die kinders se moedersportsie.
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> Dit is duidelik dat hier 'n wesenlike botsing bestaan tussen die persoonlike belange van die respondent en die van die boedel waardeur 'n toestand geskep is wat respondent se posisie as

> eksekuteur vir hom onhoudbaar maak. Hy bevind hom in die onmoontlike posisie dat hy enersyds as skuldeiser van die boedel sal moet veg vir sy eis en andersyds in sy hoedanigheid as eksekuteur die boedel sal moet verdedig teen dieselfde eis. In hierdie rol sal hy genoodsaak wees om kant te kies. Hy kan nie onsydig of onpartydig bly nie.
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> 'n Dergelike posisie het ontstaan in die saak van *Barnett v Estate Beattie*, 1928 CPD 482, 'n appèl teen 'n beslissing van die Hooggeregshof van Suid Rhodesië, waar 'n eksekuteur vir die rede uit sy amp ontset is. Daar het die Hof heeltemal tereg daarop gewys dat op hierdie stadium dit nie nodig is nie om in te gaan op die geldigheid van respondent se eis, want die vraag oor wie reg of verkeerd is, is nie hier ter sprake nie.
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> Die toestand wat in die onderhawige geval ontstaan kan slegs verhelp word deur die respondent uit sy amp as eksekuteur te ontset. Alleen daardeur kan myns insiens die belange van die boedel gedien word soos art. 99 van die Boedelwet dit uitdruk.[2]

[11] It was held in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-178 that '(w)*here one man stands to another in a position of confidence involving a duty to protect the interests of that other in a fiduciary relationship he is not allowed to ... place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in* <u>*The*</u> <u>*Aberdeen Railway Company v Blaikie Bros*</u> *..., the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilised system of*

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[2] 'It appears from the papers that as executor the respondent accepted as claims against the estate the capital amounts of the two mortgage bonds in favour of himself and Hendrik Petrus respectively of £2,750 and £10,000, whilst the appellant disputes the claims. Mr Jacobs for the respondent conceded that the two claims fell to be reduced by £6,000, being £4000 in respect of the purchase prices of the portions purchased by the respondent and Hendrik Petrus plus £2000 as the value of the land that had been donated to Hendrik Petrus; but there was not any mention of that concession in the papers by either the respondent or Hendrik Petrus. The contention of the appellant is that the mortgage bonds were registered for fictitious debts, merely as device to facilitate the mortgagees later obtaining transfer of the encumbered properties; something that the testator had not been able to achieve by reason of the appellant's refusal to consent to the cancellation of the existing bond in respect of the children's 'mother's portion'.
It is obvious that we have here a material conflict of interest between the personal interest of the respondent and that of the estate whereby a situation has arisen that makes the respondent's position as executor untenable for him. He finds himself in the impossible position that on the one hand, as a creditor of the estate, he will have to press his claim and on the other hand, in his capacity as executor, he will have to defend the estate against that very claim. He will of necessity have to choose a side. He will not be able to remain neutral or impartial.
A comparable situation arose in the matter of *Barnett v Estate Beattie*, 1928 CPD 482, which was an appeal from a decision of the High Court of Southern Rhodesia, in which an executor was removed from office for that reason. There, the Court quite rightly pointed out that it was not necessary at that stage to go into the validity of the respondent's claim because the question of who was right or wrong was not the issue.
The situation that has arisen in the current case can be addressed by removing the respondent from his office as executor. It is only in that manner that the interests of the estate can be served as it is put in section 99 of the Administration of Estates Act.' (My translation.)

jurisprudence.' It was rightly accepted by both sides in the current matter that an executor stands in a fiduciary relationship to the beneficiaries in respect of his administration of a deceased estate. The first and second respondent stressed that the applicant was not an heir or legatee in the deceased estate. That might be true, but she is undoubtedly a beneficiary. The rule that a fiduciary cannot act in a situation in which he or she has a conflict of interest has been described as '*a strict one*'.[3] It applies '*not only to actual conflicts of interest but also to those which are a real possibility*'.[4]

[12] In the current case it falls to be remembered that an executor also has a duty towards creditors of the estate to exercise his or her powers bona fide and with objectivity. In dealing with a claim an executor is expected to assess its merits on a fair consideration of the facts and its legal merits.[5] Should an executor also be one of the creditors of the estate an unenviable situation will arise in which he or she will have to be the judge of his or her own claim. In my view it is generally undesirable that an executor should find him or herself in such a situation. It not only goes against basic principle that anyone should be judge in their own case, it also posits a potential conflict between the executor's interest as a creditor of the deceased estate and his or her fiduciary duty to administer it for the benefit of the beneficiaries.

[13] Arguing against the relief sought by the applicant, counsel for the first and second respondents questioned the applicant's bona fides. He emphasised her failure to respond to the request by the executrixes for her to substantiate her claim for maintenance on affidavit and her inability to support her suspicions about the genuineness of the trust's loan account claim against the deceased estate. He argued that the applicant had been unable to make any cogent allegations that the executrixes' conduct had been demonstrably improper in any respect. He drew attention to various authorities in which the actual conduct of the trustees or executors had been examined for the purposes of deciding whether it was desirable for them to remain in office. Implicit in the exercise, as I understood the argument, was the submission that a conflict of interest should not give cause per se for an executor's removal, but only conduct by the executor in demonstrable breach of his or her fiduciary duty. He also submitted that the court's primary concern in exercising its discretion in terms of

[3] *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) at para 31.

[4] Id.

[5] *Van Niekerk v Van Niekerk and Another* [2010] ZAKZPHC 85 (17 December 2010), 2011 (2) SA 145 (KZP), [2011] 2 All SA 635, at para 11.

s 54(1)(a)(v) of the Administration of Estates Act should be the welfare of the deceased estate and its efficient administration.[6]

[14] I agree that that applicant has not demonstrated any misconduct by the trustees. It is unfortunate however that the first and second respondents were not willing to be more open in providing the applicant with insight into the affairs of the beneficiary trust so as to demonstrate the validity of its loan claim against the deceased estate. They were no doubt within their rights to decline an informal request by the applicant for disclosure, but whether they were wise to have done so in the peculiar circumstances is questionable. Voluntary transparency might have avoided the current litigation. It is clear that the admittedly strained relationship between the first and second respondents and the applicant is not helping matters.

[15] I also agree that the applicant's own behaviour has not been beyond reproach. It has not been satisfactorily explained why she did not provide the trustees with a substantiated claim in support of her claim for maintenance or why she failed to respond to the request addressed to her to provide an affidavit in support of the claim.

[16] In my judgment, however, once it is demonstrated that an executor finds him or herself in a conflicted situation, that will generally be sufficient on its own to render it undesirable for the executor to remain in office. The position may be different in a case in which the conflict relates to an isolated question in the administration of the estate, which can be satisfactorily dealt with independently by a co-executor not affected by the conflict, but I prefer to refrain from making any determination in that regard for in the current case the terms of the will require the decisions of the executors to be by majority vote and I doubt that the intention of that provision could be satisfied in a situation in which the majority of the executors recused themselves from participation in the decision-making.

[17] I am also not in agreement with the argument that proof of misconduct is required to remove an executor that has a conflict of interest. On the contrary, it is the existence of the conflict of interest by itself that renders it inappropriate that anyone charged with a fiduciary duty affected by the conflict should be the person called upon to fulfil the duty. The rights or wrongs of the conduct or positions of the protagonists in the situation that gives rise to the identification of the conflict of interest are irrelevant. That much is illustrated in the extract

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[6] Cf. *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC), 2007 (3) BCLR 249 at para 56, quoting *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 17F.

from the judgment in *Grobbelaar* quoted above, where Van Blerk JA said of the conflicting attitudes of the appellant and the respondent in that case concerning the validity of the respondent-trustee's claim against the deceased estate '*dit nie nodig is nie om in te gaan op die geldigheid van respondent se eis, want die vraag oor wie reg of verkeerd is, is nie hier ter sprake nie*'.[7]

[18] The issue is whether it is appropriate when a creditor's claim by an executor of a deceased estate who is also a beneficiary in terms of the will is disputed by another beneficiary that the executor should be charged with determining it. I think not; on the trite premise that no-one may be the judge in his own cause. It matters not that there is a remedy available to anyone dissatisfied by the executor's decision by way of objecting to the liquidation and distribution account or recourse to court. That would be the same as suggesting that anyone may be the judge in their own cause so long as a right of appeal is available. It is an obviously untenable proposition. As Margo J (Davidson and Franklin JJ concurring) noted in *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 17D-E, '*In die geval van botsende belange, is die blote feit dat 'n eksekuteur nie onpartydig kan wees by die beoordeling van eise teen die boedel nie, prima facie grond vir sy verwydering. Webster v Webster en 'n Ander, 1968 (3) SA 386 (T) op bl. 388C - D.*'[8] In my view that consideration, when it arises, will ordinarily determine how a court will exercise its discretion in terms of s 54(1)(a)(v) of the Administration of Estates Act. I would therefore respectfully endorse the previously expressed view that the mere existence of a demonstrated conflict of interest affords prima facie sufficient ground for the removal of an executor in terms of the provision. It seems to me to be axiomatic that it would ordinarily be undesirable for an executor affected by a conflict of interest to remain in office.

[19] I am accordingly satisfied, in the context of the applicant disputing of the trust's claim against the estate, woolly as her grounds for doing so might appear to be at this stage, that it is undesirable that the first and second respondents, who are the co-trustees and beneficiaries of the trust, should remain in office as executrixes of the deceased's estate.

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[7] '... it is unnecessary to go into the validity of the respondent's claim, because the question of who is right and who is wrong is not the issue here'. (My translation.)

[8] 'In the case of a conflict of interests, the mere fact than an executor cannot be impartial in the consideration of claims against the estate is prima facie a ground for his removal'. *Webster v Webster en 'n Ander*, 1968 (3) SA 386 (T) at p. 388C – D'

[20] It will consequently be necessary for the Master to appoint a substitute executor to finalise the winding up of the estate. It is evident that a representative of the third respondent has been attending in a professional capacity to the practical work of administering the estate. I do not think that it necessarily follows, because the third respondent was engaged by the first and second respondents, that the individual appointed by the third respondent to do the work is compromised or unable to complete it professionally. In the circumstances, especially having regard to the limited value of the estate and the extent to which its administration has already been completed, I suggest, without in any way intending to be prescriptive, that it might be in the best interests of the estate and the beneficiaries were the Master, with an eye to limiting the incurrence of additional costs of administration, to consider appointing that person as the substitute executor.

[21] The following order is made:

1. The first and second respondents be and are hereby removed as executrixes of the Estate Late Stanley David Hannath (Master's reference 9574/15).
2. The first and second respondents are directed forthwith to return to the fourth respondent their letters of executorship.
3. The fourth respondent is directed to appoint a substitute executor to the forementioned Estate within 15 days of the service of this order at the Master's Office.
4. The costs of this application incurred by the applicant, of the one part, and the first and second respondents, of the other part, including those stood over for later determination in the order granted by Hlophe JP on 23 March 2021, shall be treated as costs in the winding-up of the Estate.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Applicant's attorney:	**Michael Wagener** **Cape Town**
First and second respondents' counsel:	**J.K. Felix**
First and second respondents' attorneys:	**Michael Ward Attorney** **Cape Town**