REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

CASE NO:64484/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
21 SEPTEMBER 2021

In the matter between:

S N N M-S	**FIRST APPLICANT**
B C M	**SECOND APPLICANT**
And	
PETER LE MOTTéE	**FIRST RESPONDENT**
LLOYD ROBERT BALL	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT, PRETORIA	**THIRD RESPONDENT**

CONSOLIDATED WITH:

CASE NO: 10475/2021

In the matter between:

B C M **obo X[....] S[....] M[....]**	**FIRST APPLICANT**
B C M **obo N[....] O[....] M[....] N.O.**	**SECOND APPLICANT**
And	
PETER LE MOTTéE	**FIRST RESPONDENT**
LLOYD ROBERT BALL	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT, PRETORIA	**THIRD RESPONDENT**
MERCIA KHANYILE NGEMA	**FOURTH RESPONDENT**
MBALI NGEMA	**FIFTH RESPONDENT**
NHLANHLA NGEMA	**SIXTH RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 21 September 2021

JUDGMENT

COLLIS J

INTRODUCTION

[1] On 23 April 2021, both applications served before this court for hearing. Initially, and on 9 February 2021, case number: 64484/2020 was enrolled in the Urgent court (*the first application*). On this day Manoim AJ (as he was then) issued an order removing the application from the urgent roll for an allocation by the Acting Deputy Judge President in terms of the Practice Directive applicable to semi-urgent applications.

[2] On 1 March 2021 a new urgent application was launched under case number: 10475/2021 (*the second application*). These two applications essentially raise the same issues, the difference being that issues raised in the replying affidavit filed in the first application are raised in the founding affidavit of the second application.

[3] The directive that was sought from the office of the Acting Deputy-Judge President was that these applications be simultaneously enrolled before the same Judge as a Special Motion.

[4] On the day of hearing, and by agreement the parties requested the court to consolidate the two applications as it was contended by them that the issues in both these applications overlap. As a result of this request, the court granted the consolidation of both applications.[1]

[5] At the centre of the dispute between the parties is the capacity of the respondents to act as executors the Estate late M[....]. In the first application the first and second applicants before this court are

- **seeking the removal of the first and second respondents as executors** from the Estate late: M[....], as well as
- an interdict pendente lite to preserve the estate assets pending determination of an action to have the contested Will dated 15 December 2019 set aside.

[6] In the **second application**, the applicants seek in addition to the removal of the first and second respondents as executors, that the third respondent issue a directive to the executors to desist from selling, transferring or encumbering any of

[1] Court Order 010-4

the property in the estate whatsoever, pending the institution of an action to declare the contested Will of the deceased invalid.

BACKGROUND

[7] The applicants and the beneficiaries supporting them, inherit 94% of the deceased estate of the late Dr X[....] M[....] ("the deceased") who passed away on 4 January 2020 after losing a battle with cancer.

[8] In the first application, the first applicant is the deceased's daughter and the second applicant his widow and mother of their minor child. The applicants in the second application are two minor children of the deceased who are beneficiaries of the deceased estate. They are represented by their biological mother and guardian, Ms B[....] M[....].

[9] The first and second respondents ("the executors") in both applications are nominated for appointment in terms of a will ("the contested will") signed by the deceased on his death bed in the presence of and at the request of the first respondent ["Le Mottee"] on Sunday 15 December 2019, less than three weeks before he passed away.

[10] The contested will marks a radical departure from the deceased's previous will made on 3 August 2007 and a draft update thereof (in terms of which Standard Bank was nominated as executor).

URGENCY

[11] At the hearing the respondents in both applications continued to attack the urgency of the applications and this court after hearing arguments on urgency deemed it prudent to enrol both applications as urgent applications in terms of Uniform Rule 6(12)(a).

LEGAL PRINCIPLES FOR THE REMOVAL OF AN EXECUTOR

[12] At the onset it should be mentioned that the appointment of executors and their actions subsequent to their appointment have legal consequences until such time as the appointment of an executor is set aside by a court.

[13] In the present applications their removal is sought in terms of Section 54(1)(a)(v) of the Administration of Estates Act, 66 of 1965 ("the Administration of Estates Act"). The relevant section is quoted hereunder for ease of reference.

[14] **Removal from office of executor by the Court, Section 54**

> "54 Removal from office of executor
> (1) An executor may at any time be removed from his office-
>
> *(a)* by the Court-
>
> (i) .....
>
> (ii) if he has at any time been a party to an agreement or arrangement whereby he has undertaken that he will, in his capacity as executor, grant or endeavour to grant to, or obtain or endeavour to obtain for any heir, debtor or creditor of the estate, any benefit to which he is not entitled; or
>
> (iii) if he has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his recommendation to the Master as executor or to effect or to assist in effecting such recommendation; or
>
> (iv) if he has accepted or expressed his willingness to accept from any person any benefit whatsoever in consideration of such person being engaged to perform any work on behalf of the estate; or

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

[15] A court approached with an application seeking the removal of an executor is vested with a discretion, and in the exercise of that discretion
the predominant considerations are the interests of the estate and those of the beneficiaries.[2]

[16] In the adjudication of this matter this Court shall also take into account that the executors, were appointed on 25 February 2020, and have been in control of the estate assets for over a year.

[17] In the decision of Volkwyn NO v Clarke and Damant 1946 WLD 456, it was held that it is a matter 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…"

[18] The incorrect exercise of his duties by an executor, and even a failure to strictly observe the strict requirements of the law is not enough. "Something more" is required.

[19] "…*it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity*…"[3]

[20] These principles are equally applicable to the removal of executors.[4]

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[2] Die Meester v Meyer en Andere 1975 (2) SA 1 (T) at 17F, a passage approved by the Constitutional Court in Gory v Kolver NO and Others (Starke and Others Intervening) 2007 (4) SA 97 (CC) at [56].
[3] Sackville West v Nourse and Another 1925 AD 516 at 527.
[4] Die Meester v Meyer en Andere supra at 16H.

[21] This Court in the decision Oberholster NO and Others v Richter [2013] All SA 205 (GNP) after considering the authorities referred to above, held:

21.1 the court should not approach the matter as if it were an application for an interdict, as this misconceives the nature of the application before it;[5]
21.2 the enquiry is whether it is "undesirable" for the executor to continue acting in such capacity;[6]
21.3 "…mere disagreement between an heir and the executor of a deceased estate, or a breakdown in the relationship between one of the heirs and the executor, is insufficient for the discharge of the executor in terms of section 54(1)(a)(v) of the Act. In order to achieve that result, it must be shown that the executor conducted himself in such a manner that it actually imperilled his proper administration of the estate."[7]
21.4 *"…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.";*[8]

[22] In the context of the administration of an estate the above principles translate into the question whether the court is satisfied that the continuance in office of the executor would detrimentally affect the proper administration and winding-up of the estate.[9]

FIRST APPLICATION-CASE 64484/2020

COMPLAINTS LEVELLED AGAINST THE FIRST AND SECOND RESPONDENTS
[23] The complaints levelled against the executors as per the founding affidavit can be tabulated as follows:

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[5] At [21] and [22]
[6] At [22]
[7] At [17]
[8] Ibid.
[9] Van Niekerk v Van Niekerk and Another supra at [9].

23.1 Allowing insurance policies in respect of household property assets to lapse;[10]

23.2 failure to pay the medical aid in respect of the minor child and the applicant;[11]

23.3. Allowing the electricity, water and security account in respect of the Colbyn property to fall into arrears;[12]

23.4 Non-payment of maintenance and school fees of the minor child;[13]

23.5 Sale of the Colbyn and Murrayfield properties which is bequeathed to a testamentary trust, still to be created;[14]

23.6 Liquidation and Distribution account not handed in at the Master;[15]

23.7 Failure to publish advertisement on the Government Gazette regarding sale of estate properties;[16]

23.8 Permitting the estate to incur liabilities for the lease of the Mercedes-Benz cars;[17]

23.9 Allowing the levies in respect of the holiday home situated at Zinzi Estate to fall into arrears.[18]

[24] In answer the first and second respondents replied as follows:

24.1 Save to acknowledge, that as the appointed executors they both have a fiduciary duty toward the estate and the beneficiaries, they both denied that they are in breach of that fiduciary duty.[19]

24.2 Furthermore, they allege that the deceased's estate is asset rich, but cash poor.[20]

24.3 The Applicants however believe that the assets (properties) generate sufficient income to maintain itself.[21]

24.4 The Applicants criticise the executors for fighting the beneficiaries "tooth and nail"[22] and that such conduct is not expected of responsible executors who have the interests of the beneficiaries as their lodestar. This criticism is however inaccurate:

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[10] Founding Affidavit para 7 Index 001-15
[11] Founding Affidavit para 8 Index 001-17
[12] Founding Affidavit para 9 Index 001-17
[13] Founding Affidavit para 10 Index 001-001-17
[14] Founding Affidavit para 23 Index 001-23
[15] Founding Affidavit para 24 Index 001-24
[16] Founding Affidavit para 26.3 Index 001-24
[17] Founding Affidavit para 26.4 Index 001-25
[18] Founding Affidavit para 27 Index 001-27
[19] Answering Affidavit para 48. Index 003-16
[20] First Application, AA, par. 41. Index 003-13; See the report to the heirs on 12 June 2020 (Annexure PLM3) at Index 003-58
[21] First Application, RA, par. 37 Index 009-24.

24.4.1 the widow and her daughter are the applicants in the first application, and the widow (on behalf of her two minor sons, who are two out of ten beneficiaries of the beneficiaries in the testamentary trust are included), are the applicants in the second application;

24.4.2 the executors have no bias or personal vendetta against the widow. The first respondent explains that the deceased expressed the clear wish that the executors were to continue the matrimonial application to ensure that his wishes, as embodied in the contested will, were carried out;[23]

24.4.3. the widow (who describes herself as a businesswoman)[24] never claimed any maintenance from the estate despite being legally represented since December 2019.[25] When she however asked for maintenance in respect of X[....] (her son) she failed to furnish details of the maintenance required despite being invited to do so. [26]

24.5 In answer to their failure to finalise the Liquidation and a Distribution account, they responded that as the matrimonial application is still pending it can only be finalised once that application is finalised. In this regard an extension was requested from the Master and the reasons were provided. The Master is yet to reply to such correspondence directed to its office.[27]

24.6 In answer to the allegations that they failed to advertise in the Government Gazette, the respondents replied that there is no such requirement for properties of a deceased estate to be advertised for sale in the Government Gazette. They contend that the properties were sold at arms' length to purchasers procured by estate agents and neither the estate agents nor the purchasers have any links to the deceased or his estate. As such they contend that these allegations are unfounded and false and are made to portray the respondents as unethical and self-serving.[28]

24.7 As for the Mercedes-Benz motor vehicle, the respondents wish to sell the vehicle privately in order to obtain a better price than if it were to be auctioned and the financial institution has been informed of this development.[29]

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[22] Applicants' Heads of Argument
[23] First Application, AA, Annexure "PLM3" paragraph 4 thereof at Index 003-58 to 003-59
[24] First Application, FA, para 3.1 Index 001-7.
[25] First Application, para 51 Index 003-19.
[26] First Application, AA, para 51.4 Index 003-20.
[27] First Application, AA para 66 Index 003-36
[28] First Application AA para 70 Index 003-38
[29] First Application AA para 71 Index 003-38

[25] It is on this basis that the respondents contend that it cannot be expected of them to let these very serious allegations against them go unchallenged and this is the basis upon which they have opposed these applications.

[26] In an application of this nature, the applicants' carry the onus to persuade this court that it is undesirable for the executors to continue acting as executors of the deceased estate as envisaged by section 54(1)(a)(v) of the Act. In order to achieve this purpose, it is for the applicants to place facts before this court which would have the effect of convincing this court to come to a decision.

[27] The executors in their answering affidavit addressed each and every complaint in detail and have dealt with these complaints comprehensively.

[28] To my mind, and applying these tests to the facts and the executors' response under oath, it dispels any notion of "a dishonest, grossly inefficient or untrustworthy person" whose continued office would detrimentally affect the proper administration and winding-up of the estate.

SECOND APPLICATION-CASE: 10475/2021

[29] In the replying affidavit, the applicants in addition raise several further complaints not initially raised in the founding affidavit on the basis that this information was not at their disposal when the founding affidavit was prepared. The explanation proffered was that this came to their knowledge after delivery of the answering affidavit and upon receiving a reply to the Notice they served on the respondents in terms of Rule 35(12). To put a time line to this request; the answering affidavit was delivered on 14 January 2021, whereas the Rule 35(12) notice was served on 27 January 2021 and the response received on 1 February 2021. It is for this reason that the replying affidavit was only served on 8 February 2021, depicting these additional complaints. These further complaints can be summarised as follows and it forms the basis for the relief sought in the second application:

> 29.1 That the first respondent was responsible for the preparation of the contested will wherein he nominated himself as executor and attorney, which

should have disqualified him in terms of section 4A of the Wills Act to be granted Letters of Executorship by the Master;

29.2 Secondly, both respondents, conspired to mislead the Master at the time when they applied for Letters of Executorship into thinking that the second respondent permanently resided in South Africa when they knew this was not so and they failed to alert the Master that the second respondent was not in South Africa which deprived the Master of his discretion to order the furnishing of security.

29.3 Thirdly, that the applicants received a report from a specialist neurologist to the effect that the deceased was not of sound mind when he signed the will.

DECEPTIONS PERPETRATED ON THE MASTER

[30] As per the second application the applicants seek the removal from office of both executors on the grounds that when the first respondent requested Letters of Executorship for him and the second respondent, the two of them displayed “a want of honesty” or “a want of reasonable fidelity “in that:

30.1. They failed to disclose to the Master that the second respondent was not *in the Republic* at the time when the death of the deceased was reported by the first respondent and he applied to the Master for Letters of Executorship; and

30.2. it was falsely alleged in the second respondents’ application [J190] that he was “*permanently residing in the Republic of South Africa*” when both of them knew that not to be true. In the founding affidavit it is alleged that the second respondent is resident in Australia and does not play any active role in the administration of the estate.[30]

[31] In this regard the applicants had placed reliance on the decision of Sackville West v Nourse and Another 1925 AD 516 at page 527 Solomon ACJ held as follows:

[30] Founding Affidavit para 26 Index 001-2

> "There is very little authority in our law with respect to the grounds which justify a Court in removing trustees from office, and what is still more strange is that there appears to have been an equal dearth of authority on this subject in the law of England. The matter was, however, carefully considered in the case of Letterstedt v Broers (9 AC 371), which came before the Privy Council on appeal from the Cape Supreme Court, and which has laid down the broad principles by which, on this subject, Courts administering the Roman Dutch law should be guided. In his judgment Lord Blackburn quotes a passage from Story's Equitable Jurisprudence (para 1289) as follows:
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> "But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty or conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as endanger the trust property or to show a want of honesty or want of proper capacity to execute the duties, or a want of reasonable fidelity."
>
> He then proceeds to lay down the broad principle that the Court "if satisfied that the continuance of the trustee would prevent the trusts being properly executed," might remove the trustee. The same idea is expressed in different language in a later passage, where he says "In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated that their main guide must be the welfare of the beneficiaries".

[32] On behalf of the applicants, counsel had argued that these principles are equally applicable to the removal of an executor.

[33] It is on this basis that the applicants contend that the first and second respondents should be removed as executors as these two wrongs are material because they deprived the Master of his power in terms of the provisions of Section 23 (2) of the Administration of Estates Act to "refuse to grant or to sign and seal letters of executorship" until the second respondent (who was *not in the Republic* and who *resided outside the Republic*) files security.

[34] Support for this argument can be found in the provisions of section 23(2) of the Administration of Estates Act which reads as follows:

> "Subject to the provisions of section *twenty-five*, every person nominated by will to be an executor and every person to be appointed assumed executor shall be under the like obligation of finding security unless-
>
> ……
>
> *(c)* he has been nominated by will executed after the first day of October, 1913, or assumed by the person so nominated, and the Master has in such will been directed to dispense with such security;
>
> …:
>
> Provided that if the estate of any such person has been sequestrated or if he has committed an act of insolvency or *is or resides or is about to reside outside the Republic*, or if there is any good reason therefor, the Master may, notwithstanding the provisions of paragraph ….. *(c)*, refuse to grant or to sign and seal letters of executorship or to make any endorsement under section *fifteen* until he finds such security."

[35] Section 23(3) of the Administration of Estates Act provides that:

> "The Master may by notice in writing require any executor (including any executor who would not otherwise be under any obligation of finding security) …*who is about to go or has gone to reside outside the Republic*, to find, within a period specified in the notice, security or additional security, as the case may be, to the satisfaction of the Master in an amount determined by the Master, for the proper performance of his functions."

[36] Failure to provide security as directed by the Master can have serious consequences – as appears from Section 54(1)(b) of the Administration of Estates

Act, the Master has the power "at any time" to remove an executor from his (her) office,

> *" if he fails to comply with a notice under section 23 (3) [to find security] within the period specified in the notice or within such further period as the Master may allow".*

[37] Meyerowitz, The Law and Practice of the Administration of Estates and their Taxation (10th edition) states in paragraph 9.7 that:

> "The amount of security required is in the discretion of the Master, but he generally insists on security covering the value of the assets disclosed in the inventory and if he is not satisfied with the value placed on the assets, he may himself have them appraised. Where there is landed property in the estate, the Master may, in special circumstances such as hardship, exclude its value in determining the amount of security required because through the Act and the Deeds Registry Act he is able to exercise effective control over the transfer of the property and prevent the executor from dealing with it in any unauthorised manner."

[38] On this basis the applicants allege that these deceptions to the Master are grounds enough which would warrant the removal of the executors.

[39] On 29 January 2020, the first respondent reported the death of the deceased to the Master. In the said letter he applied to be granted letters of executorship in the estate and as at this date, the second respondent was already in Australia.[31] It is alleged that the second respondent had left for Australia on 9 December 2019.

[40] Following the letter addressed to the Master the two executors were issued with Letters of Executorship on 25 February 2020.[32] In addition to reporting the death of the deceased, the first respondent also submitted to the Master, Forms J190 the

[31] Founding Affidavit Second Application Case no: 10475/2021 para 18 Index 001-19
[32] Founding Affidavit First Application Case no: 64484/2020 Annexure AA2

acceptance of trust as executor, in duplicate for both himself and Peter Herbert Le Mottee. [33]

[41] In respect of the Form J190 completed by the second respondent on 15 January 2020, it clearly depicts the residential address of the second respondent as "[....] T[....] Road, Bryanston, Sandton, Gauteng 2191".

[42] In addition to this the second respondent expressly makes the statement that he is "exempt from furnishing security"; and he expressly states that he is permanently residing in the Republic of South Africa, and undertakes to advise the Master of the High Court immediately …should I proceed to reside outside the Republic of South Africa."

[43] It is on this basis that the applicants allege that the first and second respondents acting in concert, falsely misrepresented to the Master that the second respondent was permanently residing in South Africa, at the time when they applied for letters of executorship, when in truth they should have alerted the Master that the second respondent was not resident in South Africa. In doing so they deprived the Master of his or her power to require security in terms of section 23(2) of the Act before granting Letters of Executorship.[34]

[44] In answer, the first and second respondents deny that they made any misrepresentation to the Master and it is alleged that the second respondent has resided in South Africa since 2005.

[45] In their answering affidavit the first respondent concedes that he did not report to the Master the absence of the second respondent for a period exceeding 60 days, but that he did ultimately report the absence of the second respondent in a letter addressed to the Master dated 2 February 2021.[35] As at date of the filing of the affidavit, he has not received a reply to the letter addressed to the Master.

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[33] Original application, Index 001-123.
[34] Founding Affidavit-Second Application Case no: 10475/2021 para 23 Index 001-22
[35] Answering Affidavit Second Application: Case no: 10475/2021 para 44 Index 004-18

[46] In addition to the above, the first respondent conceded that the second responded has not returned to South Africa, but will do so as soon as he is permitted to travel and when he returns, he will return to the Bryanston property which he left in December 2019.[36]

[47] As to the security which the Master could have asked for, the respondents' allege that such bond of security in any event would be a cost in the administration of the estate and as such, such costs would have no effect on the executors whatsoever.[37]

[48] In the Replying Affidavit, the applicants deny that it is common practice that the Master would not have asked for security where there are joint executors appointed.[38]

[49] In the present application it as telling that the Master elected not to file an affidavit, where a number of issues are raised which affect his office and which could have assisted this Court in adjudicating some of the disputed issues in this application. The service of this application took place on the Master on 11 March 2021 and an election was made by the Master, not to oppose the application.

[50] If the complaints raised against the respondents was of such grave concern against the office of the Master, at the very least some input would have been expected from the Master. The silence as such is deafening and I can only assume is of no significance to the office of the Master.

[51] It is for this reason that I conclude that the respondents must be given the benefit of the doubt in respect of this further complaint.

REPORT FROM THE NEUROLOGIST

[52] As per the founding affidavit and more specifically paragraph 12 thereof, the applicants contend based on the hospital notes that there were times that the

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[36] Answering Affidavit Second Application: Case no: 10475/2021 para 45.2 Index 004-19
[37] Answering Affidavit Second Affidavit: Case no: 10475/2021 para 44.3.2 Index 004-19
[38] Replying Affidavit Second Application: Case no: 10475/2021 para 14 Index 007-20

deceased was confused, very ill and in severe pain. In support of this assertion, they place reliance on a preliminary report obtained from Dr Freda van Rensburg, a specialist neurologist who confirmed that the deceased was not in a sound mind at the time when the contested will was signed by the deceased.[39]

[53] If one has regard to the contents of Annexure "XS1" it is apparent that the report was not made under oath, nor is it supported by the various hospital notes that the specialist seems to have placed reliance upon.

[54] In reply the respondents similarly had taken issue with the fact that the applicant places reliance on several hospital notes that were apparently considered by the specialist, which hospital notes had not been attached to the founding affidavit.[40] In addition, the respondents denied that the deceased was not in a fit state of mind to sign the contested will, and that based on her report intermittent confusing displayed by the deceased was only recorded, the day after the contested will was signed.[41]

[55] *Ex facie* the report compiled by Dr Van Rensburg, it is clear that the specialist never consulted the deceased prior to his untimely death, and based her opinion expressed on what has been recorded in various hospital notes placed before the specialist, the veracity thereof, has not been tested before this court.

[56] As such I am not persuaded to conclude that the deceased was indeed confused and of unsound mind at the time when he attested his will and cannot therefore find this to be a reason that warrants the removal of the executors. As a result, it therefore follows that the interdict pendente lite can as a result also not succeed.

DISQULIFICATION IN TERMS OF SECTION 4A OF THE WILLS ACT

[57] A further ground upon which the applicants rely which qualifies for the removal of the executors is found in the fact that the first respondent wrote out the will and as such he should be disqualified form receiving any benefit from the will. In addition,

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[39] Founding Affidavit Second Application para 14 Index 001-16 and "Annexure XS1"
[40] Answering Affidavit Second Application: Case 10475/2021 para 30 Index 004-10
[41] Answering Affidavit Second Application: Case 10475/2021 para 33 Index 004-11

and in terms of the provisions of section 4(3) that a nomination in a will of a person to act as an executor, shall be regarded as a benefit to be received by that person from that will. On the basis that the first respondent wrote the contested will on his personal computer he as such is disqualified from being appointed as an executor in the estate.[42] Support of this is to be found in annexure "XS2" being an invoice produced by the first respondent wherein he charged a fee of R 3450 detailing the work allegedly performed by him in drafting the contested will.[43]

[58] Section 4A of the Will Act of 1953 provides that any person who "*writes out the will or any part thereof in his own handwriting... shall be disqualified from receiving any benefit from that will*".

[59] On behalf of the applicants it was argued that the first respondent, who is nominated in the contested will as an executor of the deceased estate, does not qualify to be appointed as such in terms of Section 4A of the Wills Act of 1953.

[60] In support of this view counsel for the applicants advanced the argument that it has been held that the appointment as an executor is a benefit from the will in terms of which the appointment was made. To bolster this argument counsel placed reliance on the matter of Smith and Another v Clarkson and Others 1925 AD 501 at page 503 where it was held that:

> "The rule of the *Roman Law*, adopted in our own law, is that no one, in writing out the will of another, can derive any benefit for himself under it; and it has been held by this Court that being appointed executor in a will is a benefit within the meaning of the rule *Benischowitz v The Master* (1921 AD 589)." [44]

[61] In addition counsel further argued that in terms of the contested will:

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[42] Answering Affidavit Second Application: Case 10475/2021 para 17 Index 001-17
[43] Annexure "XS2" Index 001-36
[44] See Smith and Another v Clarkson and Others 1925 AD 501

61.1 The first respondent provided for himself and the second respondent to be nominated as the joint executors (and it is provided that if one of them is "*unable or unwilling to act*", the remaining executor "*shall be entitled to act alone.*" [45] ;
61.2 Furthermore, it was argued that the first respondent, significantly, also included a provision in the contested will that allows him, over and above charging and earning fees as executor, when acting in his capacity as an attorney he is entitled, additionally, to claim fees in both of the following circumstances:

> 61.2.1 "*payment of all usual professional and other fees for business transacted, time and travelling costs incurred by him or any partner or employee of his in connection with (the deceased's) estate* ";[46] and
> 61.2.2 *"payment of all usual professional and other fees for business transacted, time and travelling costs, incurred by him or any partner or employee of his in connection with the Testamentary Trust"*

[63] It is undisputed on the papers that the first respondent "*personally wrote the will on his personal computer where he saved a copy in electronic form.*"[47]

[64] On this basis, counsel for the applicant had contended that the first respondent should be disqualified to act as an executor in terms of the provisions of section 4A (1) of the Wills Act.

[65] In answer to this complaint, the respondents replied, as follows: That there is no portion of the will that was drafted in the first respondent's own handwriting. On the day that the will was signed by the testator, the will was drafted prior to such meeting by the first respondent and when he met the testator and he read out the draft, a handwritten change was made on the request of the testator, which he affected at his house and returned to the hospital on the same day for the testator to sign. [48] On this basis counsel for the respondent had argued, that the provisions of section 4A of

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[45] Contested will Index 001-30 par 2.1
[46] Contested will Index 001-47 par 15.1
[47] Founding Affidavit in second application, paragraphs 17.2 – 17.4 Index 001-18, Answering Affidavit paragraph 38 Index 004-14/15.
[48] Answering Affidavit Second Application: Case 10475/2021 para 38 Index 004-14.

the Wills Act, does not find applicability as no portion of the will was written in his own handwriting.

[66] In is on this basis that it was argued on behalf of the respondents, that this complaint is without merit that there is a conflict of interest on the part of the first respondent as the author of the will. Further that the applicants' concern is also not supported by any evidence that they produced before this Court to suggest that the fees charged by the first respondent as the author of the will was not merited.

[67] In support for the arguments advanced against the disqualification of the executors, counsel had argued that our courts have however long fostered a dislike in the extensive application of the principle embodied in section 4A.[49]

[68] In Smith and Another v Clarkson and Others,[50] our Appellate Division accordingly refused to disqualify an attorney who had dictated the deceased's will, and had it typed by his secretary, from being appointed as executor. Kotze JA observed that:

> "It seems plain, from what has been premised, that neither the Roman law nor the Dutch law is inclined to extend the prohibition or rule, as the various exceptions to it clearly indicate. And it is well observed by MAASDORP, C.J., in Serfonteyn's case (supra, at p. 62) that it is also the policy of our South African Courts, in the absence of fraud, to uphold wills as far as this can be done, and not to extend the authorities any further in the direction of restricting the right of testation than we are absolutely obliged to do."

[69] There is for instance also an exception to the principle - that where the testator subsequently confirms the will, the disposition in favour of the writer is valid. In this regard Kotze JA observed:

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[49] Van der Merwe N.J.; Rowland C.J. Die Suid Afrikaanse Erfreg (Van der Walt, Pretoria, 6th Edition, 1990) at page 233 and the authorities referred to thereat.
[50] Smith and Another v Clarkson and Others 1925 AD 501 at 514.

"*It cannot well be otherwise, for the object of the rule is to prevent the occasion or suspicion of* ***fraud****; and hence, as rightly remarked by the two jurists whose opinion I have already mentioned, no particular virtue exists in the use of the precise words dictavi et recognavi appearing in the text of the Roman Law (Digest, 48.10.1.8). Any equivalent confirmation by the testator amounting in substance to the same thing and which will satisfy the Court that the suspicion of fraud does not exist, will suffice."* [51]

[70] At page 510 Kotze remarked:

"*The Court must not be understood as having laid down that in each and every case the confirmation by the testator of the benefit conferred upon the person who wrote the will must be written and subscribed on the will itself and that in no other manner can such confirmation take place. We have but to bear in mind the passage from Voet, 34.8.4, and the Dutch Consultation 148 there cited by him and what I have already set out; from all of which it clearly appears that confirmation by the testator or testatrix can take place dehors or apart from the will itself; as for instance in a subsequent and independent codicil or by other satisfactory proof of confirmation."*

[71] In Mellish v The Master[52] Maritz J held that:-

"*It seems that if the policy of the Court is to uphold wills as far as possible and not to extend further than is compulsory restrictions on freedom of testation (vide per KOTZE, J.A. in Smith and Another v Clarkson, loc. cit. at p. 514) the tendency must be to accept confirmation at any time after the execution of the will, provided it be active and confirmative and convincingly established. In Thienhaus v The Master, loc. cit. at p. 74. The learned Judge appeared to exclude as confirmation evidence (in the case of impressions) of matters not only before the signing of the will but also at the time of its execution. But if credible evidence suffices to prove a confirmation given months after the execution of the will I see no reason why similar*

[51] Smith and Another v Clarkson and Others supra at 507.
[52] 1940 T.P.D. 271; followed in Ex parte Thole 1968 (1) SA 155 (N) at 158.

confirmation should be rejected if shown to have been given on the day of execution, even at so short an interval after the execution of the will as to fall broadly under the description of being at the time of execution. If our law compels the rejection of the clearest proof that there was no fraud and no suspicion of fraud, but on the contrary the fullest appreciation by the testator of the contents and effect of his testamentary disposition merely because an expressed approbation precedes the formal execution of the will, the ensuing hardships should be mitigated by accepting proof of this type given at the earliest time at which it can logically be termed confirmation, that is immediately after the will has come into existence as such."

[72] Before this court, no evidence has been presented indicating that the disqualification as envisaged by section 4A of the Wills Act, relates to wills also drafted on a computer by the author. On a mere interpretation of section 4A of the Wills Act, it appears that the disqualification only relates to wills written in ones' own handwriting which will amount to a disqualification in terms of section 4A of the Wills Act.

[73] Any prohibition, if it had been intended to include a scenario where a will that is typed out on a computer by the author, would result in a disqualification in terms of section4A, this has not been specified by the aforesaid section. Therefore, to find that the prohibition includes the aforesaid, it would be tantamount to this Court reading into the section that which has clearly been omitted from the section.

[74] For the above reasons, I cannot find a disqualification contemplated in terms of section 4A of the Wills Act.

[75] Given the conspectus of the evidence placed before me, it is clear that the executors are not "*stamped*" with dishonesty, gross inefficiency or untrustworthiness that *"…actually imperilled his proper administration of* the estate…".[53]

[53] See: Oberholster NO and Others v Richter supra referred to in par.42.6 above.

[76] Furthermore, there exists no evidence that the executors' continued office will endanger estate assets or detrimentally affect the proper administration and winding-up of the deceased estate.

COSTS

[77] The applicants in respect of both applicants seeks a punitive costs order, costs de bonis propriis against the respondents, in the event that they should be successful. In the present instance I could find no reason not to order that the costs should follow the result and in the present instance, the applicants are ordered to pay the costs as they are the unsuccessful party.

ORDER

[78] In the result the following order is made:

> 78.1. The applications, namely case no: 64484/2020 and case no: 10475/2021 are consolidated in terms of Rule 11 and shall proceed as one application;
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> 78.2 The application is enrolled as an urgent application in terms of Rule 6(12);
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> 78.3. The application is dismissed;
>
> 78.4. The applicants are ordered to pay the costs of the application.

COLLIS C

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicants	: Adv. C.H.J. Badenhorst SC & Adv. N. Nortje
Attorney for the Applicants	: Aaron Stanger & Associates
Counsel for the 1st & 2nd Respondents	: Adv. J.D. Botha
Attorney for the 1st & 2nd Respondents	: Kotzé & Roux Attorneys Inc
Date of Hearing	: 23 April 2021
Date of Judgment	: 21 September 2021

Judgment transmitted electronically