OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42995/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

13 September 2016 **J. TARICA**

In the matter between:

DERMAN: KAREN ZELDA First Applicant

HIGGS: ANITA DALENE Second Applicant

and

FARTHING: BERNADINE CHRISTINE JANSEN First Respondent

THE MASTER OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG Second Respondent

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J U D G M E N T

TARICA, AJ:

[1] The First and Second Applicants as well as the First Respondent are biological sisters and co-executrices in the estate of their late mother ("the deceased"), the late Theodore Albert van Olst Jansen van Niewenhuizen (Estate No. 21851/2012).

[2] The First and Second Applicants have approached this Court for an Order in terms of which they seek the following:

a. That the First Respondent be removed as executrix in the estate of the deceased in accordance with the discretion conferred upon this court in terms of Section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965;
b. That they (the Applicants) be granted leave by this Court to take all and any steps which may be necessary to recover any assets for and on behalf of the estate and wind up the estate in accordance with the provisions of the Administration of Estates Act 66 of 1965; and
c. That the costs of their application be paid by the First Respondent.

[3] The relevant background facts presented to this Court by the Applicants can be summarised as follows:

a. The deceased passed away on the 25th March 2011 and, at the time of her death, resided at her property in Benoni (which they have defined as "the parental home").
b. Whilst the Applicants left the parental home in the early 1990's, the First Respondent remained in occupation of the said home with the deceased (bar for a few months in 1996).
c. The deceased's death triggered a long history of disagreements between the Applicants and the First Respondent.

d. Despite their initial disagreements, the three sisters agreed to be appointed as co-executrices and that Attorneys Van Rensburg Schoon Inc. should be appointed to administer the deceased estate.
e. The First Respondent has, since the death of the deceased:
    i. Continued to reside rent-free at the parental home, having taken the position that she is the owner of the said immovable property and refusing to agree to its disposal in a manner acceptable to the Applicants; and
    ii. Taken possession and control of all the movable assets of the deceased estate, appropriating them for her own use and benefit and refusing to disclose the details thereof.
f. Van Rensburg Schoon Inc. Attorneys have been unable to finalise the administration of the estate because the First Respondent has refused to reach agreement with her co-executrices about the manner in which the estate must be wound up.

[4] By contrast, the relevant background facts presented to this Court by the First Respondent can be summarised as follows:

a. She confirmed that she had been living in the parental home for the past 44 years and that, until the deceased had passed away, she had taken it upon herself to physically and financially care for the deceased and to take care of all her personal and medical needs as the Applicants had allegedly refused to contribute financially towards these purposes.
b. The Applicants had, prior to the deceased death, refused to accept the First Respondent's suggestion that the deceased's assets be sold so that the proceeds could be used to take care for the deceased in a frail care facility.
c. In addition, the First Respondent had, both before and after the deceased's death, taken care of the deceased's estate by:
    i. Maintaining, repairing and paying for all related expenses and costs of the parental home, amounting to approximately R560 000.00;
    ii. Paying for all the municipal charges of the deceased's two

properties;

iii. Taking care of all the deceased's pets, including their veterinary, grooming and other related expenses); and

iv. Caring for and maintaining the Second Applicant's children who had moved in to the parental home due to the Second Applicant's inability to care for them pursuant to an alleged brain injury suffered in an assault.

d. The deceased had, during her lifetime, assured the First Respondent that she would be reimbursed for all her expenses from the deceased estate after the deceased's death.

e. The First Respondent had twice made an offer to purchase the parental home at an alleged reasonable market value of R450 000.00 which offer the Applicants had refused believing that the said property was worth R800 000.00 and yet they had, unknown to the First Respondent, accepted an offer of R400 000.00 from a Mr. Benlyn.

f. The First Respondent sought compensation from the deceased estate for having paid for the maintenance, repair and upkeep of the deceased estate's property as well as the "costs of winding up" the estate, which claim the Applicants had disputed.

[5] It is clear that the parties are unable to agree on the manner in which the deceased estate must be wound up.

[6] The Applicants contend that the First Respondent is holding the finalisation of the administration of the estate to ransom for as long as the parties are unable to reach agreement about how she is to be compensated for the alleged costs which she advanced to wind up the deceased's estate. They conclude that the First Respondent is clearly conflicted between her duties as co-executrix and her claims as creditor and heir in the deceased estate and that the only manner in which the administration of the estate can be finalised without further delay is if the First Respondent is removed as co-executrix thereof in accordance with Section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965.

[7] Section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965 ("the Act") reads as follows:

"(1) An executor may at any time be removed from his office –

(a) by the Court –

(i) .....

(ii) .....

(iii) .....

(iv) .....

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

[8] If I do remove the First Respondent as co-executrix of the deceased's estate in accordance with this provision, I can, in terms of Section 54(4) of the Act, if necessary, determine the period during which she is incapable of holding such office.

[9] In support of their contention, the Applicants have referred, *inter alia*, to:

a. The judgment of this court in the matter of *Reichman v Reichman and Others* [2012(4) SA 432 (GSJ)] where Scholz AJ, after reviewing the various authorities [at 445I to 450A], found that the court may exercise its power under Section 54(1)(a)(v) of the Act where there is a conflict of interest between the executor in his capacity as executor and the executor in his personal capacity such as where he is a beneficiary in the estate and there is a dispute between the executor and other beneficiaries concerning their entitlement to benefit from the estate.

b. The judgment of the Appellate Division, as it was then called, in the matter of *Grobbelaar v Grobbelaar* [1959(4) SA 719 (A)] where Van Blerk JA found [at 724G to 725A] that, where application is made for the removal of an executor from office on the ground that he has made a claim against the estate which is disputed by the heirs, it is not necessary

to go into the validity of the claim, as the question of who is right and who is wrong is irrelevant. The executor finds himself in the impossible position of, on the one hand, having to fight for his claim as a creditor of the estate and, on the other hand, having as executor, to defend the estate against the same claim. In this position, he is obliged to take sides. He cannot remain impartial and must be removed from office.

[10] The First Respondent is opposing her removal as co-executrix to the deceased estate and denies that she is holding the finalisation of the deceased estate to ransom as alleged by the Applicants.

[11] Before dealing with the main ground upon which the First Respondent is opposing her removal as co-executrix, it is appropriate for me to briefly deal with three other issues which she has raised in her Answering Affidavit:

a. She has produced a handwritten document apparently signed by the deceased on the 24th March 2011 in which the deceased appears to have expressed a dying wish that, *inter alia*, the beneficiaries of her estate should be her three daughters and her six grandchildren and that the estate be divided equally amongst them. Although the said document does not comply with all the formalities for the execution of a will referred to in Section 2(1) of the Wills Act 7 of 1953, the First Respondent has called on the Court to give consideration to the wishes of the deceased. However, as there is no formal application before this Court in terms of Section 2(3) of the said Act for an order accepting the document as the deceased's last will and testament for the purposes of the Administration of Estates Act 66 of 1965, I cannot take this document into account.

b. She has challenged the Second Applicant's *locus standi* to the extent that she has alleged that the Second Applicant should be under curatorship as she is not mentally capable of supporting the application following a brain injury she had suffered pursuant to an assault. This, she states, has, of necessity, placed the validity of the Second Applicant's Power of Attorney in favour of the First Applicant in doubt. However, as the Court

has not been called upon to make a ruling on this issue, these facts are merely noted.

c. She has indicated that Mr. Clyde Berlyn should be joined as a party to the application as he is allegedly funding the Applicant's action and has actively participated in all the meetings regarding the valuation of the deceased's immovable property and the assessment of the First Respondent's claim against the estate. As the First Respondent did not apply for the joinder of Mr. Berlyn as a party to these proceedings, I cannot take this issue into account.

[12] The First Respondent contends that this court, in exercising its discretion under Section 54(1)(a)(v) of the Act, ought to interpret the word "undesirable" objectively, implying either a lack of knowledge of the duties of an executor or improper conduct which is not deserving of the position of executor. In this regard, the First Respondent points out that:

a. The attorneys appointed by the Applicants are there to implement and guide all three Executrices in their duties;

b. She has not acted improperly and alleges that:

i. She has been the only executrix that has paid any monies towards the preservation of the assets of the estate, the Applicants having refused to do so;

ii. She has, *inter alia* by virtue thereof, claims against the estate which must be considered by the Executrices and debated, but which claims have been rejected by the Applicants;

iii. She has tendered two thirds of the reasonable rental value for the parental home by virtue of her occupation thereof which she has suggested be set off against her claims against the estate, but which tender the Applicants have not accepted; and

iv. She has offered to purchase the parental home at a reasonable market value of R450, 000.00 which offer the Applicants refused in place of a lower offer from Mr. Benlyn.

[13] The First Respondent allegedly fears that, if she is removed from office, all these considerations will not take place.

[14] Is there any support for the First Respondent's interpretation of "undesirability" referred to in Section 54(1)(a)(v) of the Act?

[15] The application of section 54(1)(a)(v) of the Act was considered in the matter of *Die Meester v Meyer en Andere* [1975 (2) SA 1 (T)]. In this judgment, Margo J [at p 16] approved of the analysis by Acting Chief Justice Solomon in the matter of *Sackville-West v Nourse and Another* [1925 AD 516 at 527] who, in quoting from the judgment of Lord Blackburn in *Letterstedt v Broers* [9 A. C. 371] (a matter on appeal from the old Cape Supreme Court), stated the following:

"He then quotes a passage from Story, Equitable Jurisprudence... as follows:

'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 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.'

He then proceeds to lay down the broad principle that...

'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.'"

[16] Margo J also referred [at p 17] to the matters of:

a. *Webster v Webster and Another* [1968 (3) SA 386 (T)] where Hiemstra J [at p. 388C – D] stated that, in the case of conflicting interests, the mere fact that an executor cannot be impartial in the assessing of claims against the estate is not *prima facie* grounds for his removal; and

b. *Volkwyn, N. O. v Clarke & Damant* [1946 (WLD) 456 at p464] where Murray J said:

"Both the statute and the case cited (*Letterstedt v Broers*) indicate 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."

[17] If I am to apply the "formulas" suggested in the *Reichman* and *Grobbelaar* judgments (*supra*), all three parties appear to be conflicted as they all stand in dual capacities as executrices and as heirs in the estate. In addition, the First Respondent also stands in her capacity as a creditor to the estate whose alleged claim against the estate is disputed by the heirs. None of the parties can remain impartial as executrices in considering the First Respondent's alleged claim as the acceptance or rejection thereof will affect the benefits they will derive as heirs in the estate either adversely or beneficially, as the case may be.

[18] By the same token, the lack of impartiality by an executrix in assessing a claim against the estate is not a *prima facie* ground for her removal. Nor do I believe that the First Respondent's conduct is such that she can be described as being a dishonest, inefficient or untrustworthy person which would justify her removal as executrix in the estate of her late mother.

[19] I am furthermore not convinced that the removal of the First Respondent as executrix in her late mother's estate will bring an end to the dispute between the parties and accelerate the finalisation of their late mother's deceased estate. In fact, there is a strong possibility that her removal will compound the dispute and lead to litigation in which their late mother's deceased estate could very well be the only victim.

[20] In the final analysis of the facts in this matter, I am of the opinion that this dispute *inter sorores* is, to quote Van Oosten J. in the matter of *Penwill NO and Another v Penwill and Others* [2016 ZAGPPHC 473], tinged with "rivalry, jealousy, greed and hatred……..not uncommon to human nature in the context of heritable expectations and disputes". Van Oosten J. quotes the American writer, Whitney Otto, whose remark is perhaps apt to this matter: "No one fights dirtier and more brutally than blood; only family knows its own weakness, the exact placement of the heart".

[21] Given my analysis of the matter, I have decided to exercise the inherent jurisdiction of this Court, under the alternative relief prayer to the Applicants' Notice of Motion, in referring this deceased estate to the Master of the High Court in Johannesburg, where such estate was reported, for the purpose of appointing an impartial co-executor who is able to mediate in the impasse existing between the parties and to bring the deceased estate to finality as soon as possible. In the event that the co-executor so appointed by the Master is unable to resolve the dispute within 3 (three) months of his or her appointment, I am granting the parties leave to again approach this court on the same papers. In so far as the costs of this application are concerned, I make no order as to costs.

[22] In the circumstances, I make the following order:

22.1 The estate of the late Theodore Albert van Olst Jansen van Niewenhuizen (Estate No. 21851/2012) is referred to the Master of the High Court in Johannesburg for the purposes of appointing an impartial co-executor to mediate in the impasse existing between the parties and to bring the deceased estate to finality as soon as possible;

22.2 In the event that the co-executor so appointed by the Master of the High Court in Johannesburg is unable to resolve the dispute between the parties within 3 (three) months of his or her appointment, the parties are granted leave to again approach this court on the same papers;

22.3 No order as to costs.

It is so ordered:

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J. TARICA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

DATE HEARD:	31st May 2016
DATE OF JUDGMENT:	13th September 2016
COUNSEL FOR THE APPLICANTS: INSTRUCTED BY:	Adv. H.H. Cowley Swanepoel Attorneys
COUNSEL FOR THE FIRST RESPONDENT: INSTRUCTED BY:	Adv. Y. Van Aartsen Attorney Michael J. Shneier