

SOUTH AFRICA / JUDGMENT

Oberholster NO and Others v Richter (A515/11) [2013] ZAGPPHC 99; [2013] 3 All SA 205 (GNP) (12 April 2013)

[2013] ZAGPPHC 99

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P Rabie, H.J. Devos, H-L. Alberts

CASE / FILE NUMBER

A515/11

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG DIVISION, PRETORIA)

Case

no.: A515/11

DATE:12/04/2013

In

the matter between:

J.
OBERHOLSTER N.O.
.....First
Appellant
NORTHPLAN
CHARTERED ACCOUNTANTS
INC.....Second
Appellant
CARDIO-FITNESS
PROPERTIES PTY LTD
.....Third
Appellant
HEIA
SAFARI PTY
LTD.....Fourth
Appellant
and
ALEXANDER
RICHTER.....Respondent

JUDGEMENT

Coram: RABIE J

1. This is an appeal against the judgement and order in this court by Legodi J ordering the removal of the first appellant as the executor of the deceased estate of the late Alexander Franz Richter in terms of the provisions of section 54 (1) (a)(v) of the Administration of Estate Act, Act 66 of 1966 ("the Act"). The appeal is also directed against the order that the appellant must tender his resignation as a director of Cardio-Fitness Pty Ltd within 10 days from the date of the order and that the Registrar of Companies must amend the records of the company accordingly. The court a quo dismissed the appellant's application for leave to appeal but same was granted by the Supreme Court of Appeal. I shall refer to the first appellant merely as "the appellant" and to the other appellants by their proper designation.
2. The deceased passed away on 28 November 2007 leaving a will which formed the subject of the application. The respondent is the son of the deceased and one of the heirs. The other heirs were Gabrielle Burgmer ("Gabrielle") a daughter of the deceased, Gabriella Kunigkeit another daughter of the deceased, Nicole Burgmer a granddaughter of the deceased, and Me Celewi Mbokazi.
3. The relevant bequests to the heirs were the following: to the respondent was bequeathed the shares in the third appellant, Cardio-Fitness Properties Pty Ltd ("Cardio"), conditional upon him having assumed all of the deceased's liabilities, including his liability on debit loan account, to Cardio. To Gabrielle was bequeathed the shares in and claims on loan account against the fourth appellant, Heia Safari Pty Ltd ("Heia"), as well as certain immovable properties, some of which were registered in the name of the deceased and some of which were registered in the name of Cardio. Gabriella Kunigkeit and Nicole Burgmer were both bequeathed sums of money. Me Celewi Mbokazi was bequeathed a sum of money to be administered by the appellant, in trust, together with certain other benefits. A testamentary trust was also established for the benefit of such orphaned children as were in the care of the deceased at the time of his death.
4. During his lifetime the deceased was the sole shareholder and director of both Cardio and Heia. In addition the deceased traded as Heia Safari Ranch, a business which operated a guest lodge. Cardio owns the business known as the Aloe Ridge Hotel. Cardio is also the owner of a number of immovable properties. The respondent was at all relevant times the manager of Cardio and Gabrielle the manager of Heia Safari Ranch which business the deceased conducted on the properties owned by Heia as well as the deceased and Cardio. Heia is also the owner of a number of immovable properties. Heia also conducted farming operations.

5. During his lifetime the second appellant, i.e., Northplan Chartered Accountants Inc, was the auditor for both Cardio and Heia and attended to the deceased's personal finances. The appellant was at all relevant times in the employ of the second appellant and the person who dealt with the deceased and his companies. In his will the deceased appointed the appellant as the executor and administrator of his deceased estate. As executor the appellant was afforded extremely wide powers and rights. So, for example, in clause 5.1 of the will, the following was stated:

"My Executor and Administrator shall, in his respective capacities, have the power to realise the whole or any part or parts of my estate or of any trust created hereunder, as the case may be, in such manner, on such terms and at such time or times as he, in his absolute discretion, may determine and/or to retain for as long as he thinks fit any investment or assets found in my estate on my death; to invest and reinvest all or any sums of money which will from time to time form part of my estate ..., on such terms, in such manner and at such time or times as he may in his absolute discretion decide, ...; to pay and discharge out of the income and, if necessary, the capital of my estate or any trust created thereunder, all expenses and other liabilities which he may in his reasonable discretion incur for the account of my estate or any such trust, and generally to do or cause to be done whatsoever he may reasonably deem necessary or advisable in the interests of my estate...".

6. In paragraph 5.1.2 of the will the appellant was granted, inter alia, the following specific powers:

"to exercise all voting powers attaching to any shares, stocks, debentures or units, in such manner as he may consider in the best interests of my estate

In paragraph 5.1.7 he was granted the specific powers:

"to carry on or terminate in such manner and upon such terms and conditions as he may determine any business of whatsoever nature in which I may have been interested as at the date of my death".

In paragraph 5.1.10 he was granted the specific powers:

"to deal with any shares and other assets in my estate or forming part of any trust created hereunder in such manner as if he was the absolute owner of the assets and/or income flowing therefrom and, in this connection to do all such things relating to or concerning the assets and on behalf of the estate and/or any such trust, as he may in his discretion deem fit, subject always to the express provisions of this my Will."

7. The respondent was clearly unhappy with some of the bequests made by the deceased in his will and the conditions attached thereto. The sustained and bitter animosity which had existed over a number of years between the respondent and Gabrielle exacerbated the position. Matters were driven to a head, however, when the appellant, as executor, appointed himself as director of Cardio and Heia respectively for purposes of administering the deceased estate. The respondent did not take kindly to this and was of the view that he

should have been appointed as director of Cardio. He resented the fact that the appellant, as executor, assumed control over the deceased estate and the companies of the deceased. He was also of the view that he was entitled to certain monies during the course of the administration of the deceased estate. As time went by, the respondent made further claims and demands which were also resisted by the appellant as executor.

8. At some point the respondent appropriated certain sums of money belonging to Cardio to which he was not entitled. As executor the appellant formally obtained legal advice and, based thereon, disciplinary proceedings were instituted against the respondent as employee of Cardio. The disciplinary tribunal found the respondent guilty and proposed that his services at Cardio be terminated. The appellant, however, decided not to implement the proposal. These events were, however, the proverbial last straw.
9. Ultimately the respondent decided to launch the present application to court in order to remove the appellant as the executor and also to have him removed as director of the two companies. The founding papers consisted of 522 pages. The answering affidavit and accompanying documents filed on behalf of the first to the fourth appellant's, including a counter application, consisted of just over 1000 pages. The respondent did not reply to the case put up by the appellants.

10. The respondent's case was based on section 54(1)(a)(v) of the Act which provides as follows:

"Removal from office of executor

(1) An executor may at any time be removed from his office- (a) by the Court- (i) ...

(ii) ...

(iii)

(iv)

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

11. 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). At page 16 the court, per Margo J, approved the prior analysis in *Sackville-West v Nourse and Another* 1925 AD 516 in which Acting Chief Justice Solomon, at p 527, referred to the judgment of Lord Blackburn in *Letterstedt v Broers*, 9 A. C. 371 (a matter on appeal from the old Cape Supreme Court) and proceeded as follows:

"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.'

12. Margo J then proceeded as follows on p 16 H:

"Hierdie beginsels, wat deur SOLOMON, WN. H. R., goedgekeur is, is ook van toepassing op 'n eksekuteur. Sommige van die latere beslissings van ons Howe wat hierdie beginsels illustreer is in *Ex parte Hills*, 1959 (4) S. A. 644 (O. K.) op bl. 647, versamel.

Op bl. 528 van die *Sackville-West* saak het SOLOMON, WN. H. R., bygevoeg dat blote wrywing of 'n vyandige verhouding tussen die administrateur

en die begunstigde nie per se 'n genoegsame rede is vir die verwydering van die administrateur uit sy amp nie tensy dit waarskynlik is dat dit die bereddering van die trust sou verhoed. Soos MURRAY, R., gese het in *Volkwyn, N. O. v Clarke & Damant*, 1946 W. P. A. 456 op bl. 474:

"... the essential test is whether such disharmony as exists imperils the trust estate and its proper administration".

13. Margo J, at p 17B, also referred to the matter of *Volkwyn, N. O. v Clarke & Damant*, 1946 (WLD) 456 where Murray J said the following on p 464:

"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."

14. Margo J in *Die Meester v Meyer* {supra} at p17C however noted:

"Hierdie beginsel is deur MURRAY, R., omskryf slegs in verband met 'acts complained of', d. w. s. die doen en late van 'n eksekuteur wat horn onbevoeg maak om sy pligte uit te voer. Die beginsel is nie veelomvattend nie. Dus, bv. kan omstandighede ontstaan waar 'n eksekuteur horn in 'n onhoudbare posisie teenoor die boedei vind. *Grobbelaar v Grobbelaar*, 1959 (4) SA 719 (AA) op bl. 724G. In die geval van botsende belange, is die blote feit dat 'n eksekuteur nie onpartydig kan wees by die beoordeling van eise teen die boedei nie, prima facie grond vir sy verwydering. *Webster v Webster* en 'n Ander, 1968 (3) SA 386 (T) op bl. 388C - D.

15. In both the Grobbelaar and Webster matters referred to, the executor stood to benefit financially in his personal capacity, depending on what actions he took as executor. In such instances his personal interests are in conflict with the interests of the estate and his inability to be impartial may be a prima facie ground for his removal as executor. Section 54(1)(a)(v) gives the court a discretion and the main consideration remains a consideration of the interests of the estate and the heirs. (Cf *Die Meester v Meyer* at p 17E).
16. In the matter of *Gory v Kolver NO and Others* [2006] ZAGPHC 28; 2006 (5) SA 145 (T) in paragraph [27] Hartzenberg J said the following:

"The applicant has the perception that the first respondent does not want to administer the estate to achieve his best interests. As must be clear, he has reason to think so. If the applicant were the heir from the outset, he would have nominated an executor. Section 54 of the Administration of Estates Act deals with circumstances under which an executor may be removed from office. In terms of s 2(b)(i) the Master may remove an executor who has been nominated by will after the will has been declared void. The first respondent was not nominated by will but he was nominated by intestate heirs who were not heirs. In my view, that is one factor pointing to his removal. Because of the way in which he treated the applicant, I am of the view that it is desirable that he be removed in terms of s 54(1)(a)(v)."

The court found that the executor was, inter alia, obstructive and that he tried his best to steamroller the administration of the estate through on a basis that the

applicant's claim be negated. In this the executor was aided and abetted by the second and the third respondents who were not nominated as heirs in the will. The court also found that the executor ought not to be remunerated for his services with the administration of the estate or to be reimbursed for expenses.

17. The aforesaid authorities confirm that 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. Bad relations between an executor and an heir cannot lead to the removal of the executor unless it is probable that the administration of the estate would be prevented as a result. But, in my view, even in such event, the respective actions of the heir and the executor must be considered, for an heir cannot be allowed to frustrate, through unreasonable and wrong conduct, the actions of an executor which is beyond reproach. A disgruntled heir cannot be allowed to circumvent the administration process by improperly pressurizing the executor to accede to his demands. To remove an executor in such circumstances would not serve any purpose for the same lot would befall the next executor as well. It is not necessary to discuss this issue any further since in the present matter I hold the view that the relationship between the respondent and the appellant is not such that it would prevent the administration of the estate.

18. In the founding papers the respondent made numerous allegations of improper and wrong conduct on the part of the appellant. In support of his contentions the respondent filed a report of an auditor, Mr Prakke. The report of Mr Prakke consisted of approximately 80 pages plus numerous annexures attached to it. The report did not only contain financial issues but adopted facts which could only have emanated from the respondent. Mr Prakke accused the appellant and others in the strongest language possible of the worst possible conduct including incompetence, wrongful acts, financial greed, cover up of wrongful and illegal execution of duties, misrepresentation of true financial affairs, the abuse and willful incorrect interpretation and execution of accounting conventions and statutory obligations, and, in fact, of probably all possible wrongs and improper conduct which a person in the appellant's position could have committed. The attack on the appellant not only related to his actions as executor after the death of the deceased, but also to his actions as auditor over a period of many years preceding the death of the deceased. He was also accused of accepting the executorship in order to advance his own financial benefit and to further his own self-interest. He was also accused thereof that his ultimate goal was to earn the executor fees in addition to audit fees and director fees to be determined by himself.
19. In response to the respondent's case, the applicant addressed each and every issue in detail in his answering affidavit and attached thereto supporting affidavits and expert reports and numerous annexures. One such affidavit was of Me A.J. van den Bergh, a chartered accountant and director of PKF Inc., the firm which conducted the audit and the preparation of financial statements for the year ending 30 June 2007 in respect of Cardio and Heia and the preparation of the financial statements for the same year in respect of the estate of the deceased trading as Heia Safari Ranch. The other expert report was under the joint hand of Mr A. Greyling and Me S. Veale, both chartered accountants contracted to Accountants @ Law Pty Ltd, a company specialising in the provision of forensic accounting services. The GreylingA/eale report which consisted of approximately 200 pages, analysed the Prakke report and dealt with all the contentious issues. It is not necessary to refer to the issues dealt with in the aforesaid reports save to say that the GreylingA/eale report disputed and, in fact, rebutted the allegations and findings of the Prakke report.
20. The respondent did not file a replying affidavit and absent a referral to oral evidence, the relief sought by the respondent fell to be determined on the basis of the facts stated by the appellant together with the admitted or the undenied facts in the respondent's founding affidavit. Facts which are far-fetched and clearly untenable and which can be rejected on the papers before the court, should be ignored. Cf *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 (A). Cf also *National Director Of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) where Harms JA said the following in paragraph [26]:

"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well

established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

21. The court a quo approached the matter as if it were an application for an interdict. The court consequently set out to establish whether the requirements of a final interdict have been met. The court found that there can be no doubt that the applicant "has a clear right in the estate of the deceased". What exactly this "right" was, was not discussed. The court further found that the next requirement was proof of an injury actually committed or reasonably apprehended in the sense of "some sort of interference with the applicant's rights". The court further found that potential prejudice must be shown and that this entails a reasonable apprehension of injury which does not have to be proven on a balance of probabilities. All that is required to be shown is that it is reasonable to apprehend that injury will result.
22. In my view the court a quo misconceived the nature of the application before it. The application was not for an interdict but an application requiring the court to decide whether or not it was "undesirable" for the appellant to continue acting as the executor of the deceased estate as envisaged by section 54(1)(a)(v) of the Act. For this purpose the respondent had to place facts before the court which would have the effect of convincing the court to come to such a decision. Since the principles in the Plascon-Evans matter apply in an application of this nature, the facts which the court should accept for purposes of arriving at a conclusion, are those presented by the appellant and those presented by the respondent which the appellant cannot deny, excluding such facts presented by the appellant which the court is justified in rejecting merely on the papers.
23. The court a quo, approaching the matter as an interdict, set out to relate the facts which it found to be common cause. I do not intend to repeat those facts which were said to be common cause save to say that many thereof were indeed not common cause between the parties but highly contested.
24. I shall now briefly refer to the facts and issues which were mainly responsible for the court a quo coming to its final conclusion.

Before I do so, however, it is necessary to state that the court a quo did not analyse the detailed financial affairs and conduct of the appellant relating to such affairs, as discussed in the Prakke and the Greyling/Veale reports. The court also made no finding in that regard.

25. The court a quo instead referred to certain salient features of the case which seemed to have formed the basis of the final

conclusion.

These were, inter alia, the following: Firstly, that since the respondent accepted the terms of the will on 10 January 2008, he should have been considered to be the de facto shareholder of Cardio. Despite this, so it was found, the appellant caused himself to be appointed as director on 28 January 2008. The court further found that the fact that the appellant became the shareholder in his official capacity, it should "be seen in context". This context was, firstly, that for many years the respondent had been managing Cardio and had been referred to as a "director" of Cardio. Secondly, the deceased in his will did not empower the appellant to act in various capacities other than that of executor. The court found it to be clear from the will that the deceased wanted the respondent to become the shareholder of Cardio once he had accepted the terms of the will. Thirdly, the court found that the deceased must have had confidence in the ability of the respondent to run and sustain Cardio and the Aloe Ridge Hotel as ongoing businesses. Fourthly, the court found that in appointing himself as the sole director of Cardio, coupled with his nomine officio shareholder status, he made it impossible for the respondent to exercise any right of removal of the appellant as director in terms of section 220 of the Companies Act. The court proceeded to state that if the appellant should be removed as an executor, his directorship and shareholding "should go with it".

26. Some of the other main findings of the court a quo⁷ were the following: The court a quo was of the view that the respondent should have retained some control over the estate and should have been appointed as director of Cardio. Apart from the above- mentioned

factors, the court was of the view that the terms of the will envisaged this. The court further found that it was the failure to

appoint the respondent as director which caused the dispute between the appellant and the respondent. The court also found that the appellant improperly retained his position as auditor, accountant and secretary of both companies and charged a fee for such work. The court also found that the appellant sold assets in contravention of the Act and the will of the deceased. The court further found that the appellant misused his powers when he took disciplinary steps against the respondent and that those actions damaged the relationship between the appellant and the respondent beyond repair.

27. In summary, the court a quo found that by his actions, which were mostly unlawful, the appellant had caused irreparable damage to the relationship between himself, as executor, and the respondent and that he should, for that reason, be removed as executor and also as director of the two companies.

28. I shall now deal briefly with the main grounds referred to above.

Regarding the appointment of the appellant as the director of Cardio and Heia:

29. In answer to the submissions by the respondent that the appellant had no authority to appoint himself as director of the two companies, the appellant explained in the answering affidavit that since the deceased had been the sole director of both Cardio and Heia, it

became necessary, upon his death, for a director to be appointed. Having regard to the deceased's approach to the conduct of the business and affairs of both the companies, the appellant deemed it prudent in the circumstances to appoint himself as sole director of both companies. In this regard it is at the outset important to note the extremely wide authority granted to the appellant in clause 5.1.2 and 5.1.7 of the will. Firstly, the deceased decided that the appellant should in his absolute discretion discharge his functions as executor. For this purpose the appellant was, *inter alia*, directed to exercise all voting powers attaching to any shares of the companies. He was also given the right to carry on or terminate in such manner and upon such terms and conditions as he may determine, any business of whatsoever nature in which the deceased may have been interested at the time of his death.

30. These provisions in the will are support for the statements by the appellant that it was indeed the deceased's wish that he should

proceed with the conduct of the business and affairs of the two companies and not abdicate same in favour of the respondent or any other heir. By appointing himself as director, the appellant could effectively exercise all the voting powers attaching to the shares of the companies as envisaged in the will for purposes of discharging his functions as executor and of generally acting in the best interest of the companies and the deceased estate. His appointment as director of the two companies was in fact discussed in a meeting with the respondent and Gabrielle on 14 December 2007. The appellant furthermore stated that his appointment as director had not delayed the finalisation of the estate but had the effect of restoring some of the financial discipline which the deceased exerted during his lifetime. Furthermore that his appointment as director was not and will not be prejudicial to the heirs of the estate.

31. The appellant also indicated that as soon as he would be in a position to transfer the bequeathed assets to the beneficiaries, he would resign as the director of both companies. That would occur once the final liquidation and distribution account had been lodged and duly approved. The appointment was therefore of a temporary nature for purposes of finalising the administration of the estate of the deceased and not to enhance or benefit his own position on the short or the long-term.
32. Regarding the allegations of acting with the purpose of enhancing his financial benefit, the appellant stated that he has not received any financial benefit for acting as the director of any of the companies and that he would not do so unless the respondent and Gabrielle agreed thereto. Even in that event, it would not be more than a nominal amount.
33. The allegation by the respondent that the appellant had extracted large sums of money from his inheritance, was vague and unsubstantiated, but in any event denied by the appellant. According to the appellant he had continuously and persistently attempted to exert some form of supervision over the affairs of the two companies and if he had not done so, their businesses would have suffered irreparably. According to the appellant's evidence he had been actively involved in the businesses in order to preserve them. From the evidence of the appellant it appears that his activities were in fact necessary for this purpose and that these

activities were indeed substantial.

34. In my view the court a quo did not correctly appreciate the position of the respondent pending the finalisation of the administration of the deceased estate. The respondent was not the de facto shareholder of Cardio. It was the appellant, as executor, who took control of the estate and proverbially entered into the shoes of the deceased pending the finalisation of the deceased estate. This happened as a matter of law and was also in line with what the deceased intended in his will by affording the appellant the powers to exercise all voting powers attaching to the shares and by otherwise acting according to his own discretion. Only at the end of the administration process, and depending on how many of the shares, if any, were available for transfer to the respondent, the respondent would be entitled to receive same and do with it what he wants to.
35. Regarding the findings to the effect that the respondent should have some control over the estate, I also respectfully disagree with the findings of the court a quo. From the evidence it is clear that the deceased most definitely did not want the respondent to be the executor and to take the relevant decisions relating to the execution of the will. He entrusted these powers to the appellant in the widest of terms in his will. Furthermore, the evidence of the appellant, which this court has to accept, was that respondent is not and would not be a shareholder until the administration of the estate had been completed.
36. I thus respectfully disagree with the findings of the court a quo regarding the position of director. Firstly, the appointment of a director was necessary to ensure that the companies could continue as going concerns pending the administration of the deceased estate. Secondly, the terms of the will did in fact envisage this and entrusted the appellant to use his official shareholding to do what was necessary in the interest of the estate and the businesses in which the deceased had an interest. Furthermore, insofar as it may have been considered to appoint the respondent as the director of Cardio, the terms of the will and the acrimony which existed between the respondent and Gabrielle, must be taken into consideration.
37. I also disagree with the court a quo relating to the reference to the Companies Act and the position of minority shareholders. I regard those references as not relevant or appropriate. The issues in respect of which the respondent raised complaints arose from the appellant's position as executor and nothing else. Furthermore, the respondent is not and would not be a shareholder until the administration of the estate had been completed.
38. The court a quo also found that the first appellant proceeded to appoint himself as a director without seeking the views of the beneficiaries when there was nothing that stood in the way of the respondent to be appointed as such. It was further found that it would have been proper and convenient to do so taking into account the many years that the respondent had been playing a managerial role in Cardio.

39. This statement of the facts is not correct. Firstly, the appellant did discuss his appointment with the respondent and Gabrielle.

Secondly, there was indeed something standing in the way of the respondent's appointment as director of Cardio. It was the fact that the deceased wanted the appellant to finalise all his affairs upon his death and not any of his children. It is clear from the evidence that the deceased most definitely did not want the respondent to be involved in the administration of the deceased estate. These facts were known to the appellant and he also knew that it had been the wish of the deceased that he should finalise the administration of the deceased estate before the respondent could proceed on his own in respect of Cardio. Furthermore, and this was also known to the appellant, the deceased had never over the years appointed the respondent as a director of any of the companies. In fact, the respondent had not even been given the authority to sign on any of the accounts of the company Cardio, despite the fact that he managed the hotel business of that company.

40. The court a quo found that the appointment of the appellant as the director of Cardio sparked off the dispute between the appellant and the respondent and that it "was bound to have serious implications and friction". After mentioning that the respondent

and Gabrielle had managed the two businesses during the lifetime of the deceased, the court found as follows: "Their father died without any suggestion that he was not happy in the manner in which they were operating. For example, the applicant (the present

respondent) was seen as director. Getting into the management of the business as a newcomer, that is, as director and taking decisions

without consulting with the applicant and fifth respondent was and is going to continue to be a recipe for a disaster."

41. I have indicated before that these factual findings are not correct. The deceased never appointed the respondent as a director and he never regarded the respondent as a director. Secondly, the decisions which the appellant had to take, were taken with reference to the fact that he was also the executor who had to take decisions in the best interest of the estate as a whole. He was not "getting into the management of the business as a newcomer", as found by the court a quo. He discussed his appointment as director with the respondent and Gabrielle. He thereafter took the necessary decisions to preserve the estate and the interests of the estate and did so solely for purposes of executing his functions and obligations as executor.

Earlier actions by the Appellant

42. The court a quo referred to the appellant's alleged conduct and actions which he said was being questioned and then referred to factors which he suggested had a

serious effect on the appellant's ability to function properly as an executor and which had in them, an apprehension of harm or potential harm to the respondent's right. In this regard the court a quo referred to the fact that the first appellant had participated in the drafting of the will but had then continued to retain his position as the auditor, accountant and secretary of Cardio and Heia. Also that the appellant continued to audit the books of the deceased estate and to levy a fee on the work so done. The court found this to be improper and also contrary to the ethical conduct required of the first appellant's profession as auditor.

43. I again cannot concur with the findings of the court a quo. The allegations by the respondent in this regard were not only denied by the appellant but in fact factually disproved by the appellant and the expert evidence presented by the appellant. Furthermore, the appellant did not participate in the drafting of the deceased's will. The deceased was assisted by an independent attorney. The appellant furthermore explained his auditing functions up and until the death of the deceased and the fact that the auditing of the books of the companies for the tax year ending June 2007, i.e., prior to the death of the deceased, was eventually redone by the firm of auditors who eventually took over as auditors. These auditors also performed the audit for the period which followed. The appellant appreciated that given the provisions of section 275 of the Companies Act, his firm, the second appellant, would have to resign as auditor of both the companies. In the light of the potential conflict of interest, the appellant decided that the second appellant should resign as auditor forthwith and that the entire audit should be redone by an independent firm of auditors. These decisions were discussed with and agreed to by both the respondent and Gabrielle. It must also be considered that the first firm of auditors suggested and appointed by the appellant did not accept the appointment and another firm had to be appointed. I refer to these issues again below. It is also not correct to say that the appellant and his firm continued to be the auditors and had audited the books of the deceased estate until 23 April 2008 when the resignation was effected. The appointment of the second set of new auditors may have been effected on this date, but the fact remains that the relevant audit for the period prior to the death of the deceased had been redone by the new auditors. And for the period after his death, they alone were responsible. Consequently nothing turns on the fact that the appellant and his firm only formally resigned when they did.

Regarding the position as Director and Auditor:

44. The respondent accused the appellant of unlawfully being the auditor as well as the director of the two companies. Also that by holding these two appointments, the appellant was in breach of the code of professional conduct of the Independent Regulatory Board for Auditors. It was also submitted that by doing so, the appellant had a conflict of interest. The appellant was also accused thereof that he did not inform the respondent or Gabrielle of the fact that he was going to appoint himself as director. The respondent stated that the appellant consequently compromised his position as a consequence of which he "became engaged in an unwarranted and bitter conflict with the heirs in general and with (the respondent) in particular".

45. The court a quo accepted these allegations as fact and also found that the appellant, as a prudent auditor, should have foreseen a conflict of interest and should have

avoided acting contrary to his own ethical and professional standards and should not have waited for the respondent to raise an objection to the fact that the appellant and his firm were still the auditors. It was further found that this was seen by the respondent as an abuse as the first appellant sought to earn a fee as an auditor and also as an executor and as a director.

46. In my view the court a quo was not correct in accepting these allegations as fact and in coming to its findings in this regard. The appellant denied the allegations on which these findings were based and explained the position in detail. The appointment of the appellant as director was discussed with the respondent and Gabrielle during December 2007. The appellant also advised the respondent and Gabrielle on 24 July 2008 that on his appointment as director on 28 January 2008, all accounting functions performed by him and the second appellant had ceased. On that same day discussions commenced with BDO Spencer Steward to be appointed as the auditor of the companies. Eventually, after much had been done, BDO did not accept the appointment. At that point PFK, one of the larger auditing firms, was approached and eventually appointed as auditor of the companies. The second appellant had prior to the deceased's death substantially completed the audits for the financial year ending 30 June 2007. That was some five months prior to the death of the deceased. However, a complete re-audit of that financial year was eventually done. Regarding the earning of fees in different capacities, the appellant also denied the allegations upon which these findings were based.

47. There can be no doubt that there can be no suggestion of any impropriety on behalf of the appellant in respect of the appellant's

position as auditor and the appointment of a new auditor's firm upon him becoming the director of the companies. Any delay was mainly caused by the fact that BDO at a later stage decided not to accept the appointment. From the evidence it is clear that there was no loss or disadvantage to the estate in respect of this issue and that no conflict of interest existed. All the allegations by the respondent were comprehensively rebutted by the appellant in the evidence which he placed before the court.

48. As far as remuneration as auditor is concerned, the appellant rebutted all the allegations of the respondent. The second appellant

only received payment for what they had done prior to the death of the deceased. PFK, who eventually took over from the second

appellant, used the draft financial statements and working papers that had been prepared prior to their appointment but was responsible

for the audit for the financial year 2008.

49. Regarding the respondent's accusations of double and even triple compensation, it is thus clear that the appellant would only be recovering his executor's fees and nothing else. The appellant effectively rebutted all suggestions and allegations that he acted improperly, unlawfully or unethically.

The sale by public auction:

50. The respondent also accused the appellant that the sale by way of public auction on 17 March 2008, whereat certain of the assets of the estate as well as assets belonging to the individual companies had been sold, was illegal since section 47 of the Act had not been complied with as neither the approval of the Master of the High Court nor the written consent of the heirs had been obtained.
51. However, the following appears from the evidence: Firstly, the assets sold on public auction were not assets which belonged to the estate but belonged to the companies concerned. In this regard it would be recalled that the deceased, in his will, empowered the appellant, as executor, to, inter alia, continue or terminate in such manner and upon such terms and conditions as he may determine, any business of whatsoever nature in which the deceased may have had an interest at the date of his death.
52. But even if these assets should be regarded as assets of the estate, the deceased, in his will, similarly empowered the appellant to deal with his assets in such a manner as if he was the absolute owner of such assets.
53. But furthermore, the appellant had shown that both the respondent and Gabrielle had consented that the farming operations of Heia be discontinued and that the assets used in those farming operations, be sold by public auction on the 17 March 2008. There was written confirmation of these aspects by both the respondent and Gabrielle. Furthermore, the issue of which assets were to be sold and the right of the heirs to exclude any asset from the auction, even on the day of the auction, were recorded between the parties. Both the respondent and Gabrielle were present on the day of the auction and there was no objection in respect of any of the assets sold. Consequently, no finding can be made that the appellant in any way whatsoever acted improperly or unlawfully in respect of the selling of the assets sold on auction.
54. The respondent also accused the appellant of enriching himself through the sale of certain other assets. These allegations were also rebutted by the appellant. According to the appellant he did not derive any fees from the sale of the assets referred to. The only fees that he would be able to charge would be those fees regulated by the Act and such fees are calculated with reference to the value of the assets owned by the estate as at the time of the death of the deceased. The sale of land or other items does not increase the value of the total assets and would not result in additional executor's fees. In any event, the only purpose of the sale was to ensure compliance with the agreement reached between the respondent and Gabrielle to the effect that Heia would cease trading in respect of farming operations.

Disciplinary Enquiry

55. During the course of the administration of the estate the appellant subjected the respondent, as employee of Cardio, to a disciplinary

hearing. The court a quo found that the appellant used his powers as a director of Cardio to charge the applicant with misconduct for alleged misappropriation of funds and that these proceedings had a bearing on the relationship between the appellant as executor and the respondent as beneficiary and also had a bearing on the costs implications for the estate.

56. The respondent accused the appellant that the appellant attempted to show his disgust with the respondent's "interference" in the exercise of the appellant's functions by arranging the disciplinary enquiry against him.

57. The court a quo found that whether or not such proceedings were justified, it had unhealthy consequences for the relationship between the executor and the beneficiaries. The court found that in complying with all the obligations of an executor, the executor would need to consult with and examine the wishes of the beneficiaries. In this regard the court found, with reference to the disciplinary

proceedings, as follows: "Bending on and wasting time considering the dispute between the executor and beneficiaries as it

happened in the present case is likely to abort accomplishment of the executor's obligations and the wishes of the deceased, but even most importantly damaging their relationship to the extent of no repair."

58. I respectfully disagree with the aforesaid findings by the court a quo. In the present matter the role of the executor was extensive.

The estate consisted of a personal estate and also involved at least two operating companies. The administration of the estate would necessarily have taken some time to conclude. In the meantime the whole estate, including the companies as running concerns, had to be preserved and maintained. For that purpose operational decisions had to be taken. The first appellant was entitled and, in fact, obliged to protect the estate against improper actions and to prevent same from occurring. Generally speaking it is of course in the best interests of all concerned and in the best interest of the administration of a deceased estate, that good relationships between the executor and the beneficiaries should exist. However, this can never mean that the executor, in the exercise of his obligations in terms of the Act, must overlook or accept improper conduct on the part of beneficiaries if such conduct were to be detrimental to the estate.

59. The appellant gave a full and comprehensive explanation of this issue. The situation with which the appellant was confronted was the misappropriation by the respondent of funds belonging to Cardio. The appellant did not rush into things. He obtained independent expert legal advice. He tried to convince the respondent of the error of his ways, but to no avail. Different options were considered and it was eventually decided that the more appropriate route would be to follow the provisions of the Labour Relations Act.
60. The entire purpose of proceeding with disciplinary charges against the respondent was to ensure that further misappropriation of the funds of Cardio by the respondent did not take place. An independent advocate conducted the disciplinary proceedings. The respondent was found guilty by the disciplinary tribunal and it was recommended that he and another official, be dismissed from service. The appellant, however, decided not to implement the recommendation to dismiss the respondent.
61. The fact of the matter is that, according to the findings of the disciplinary tribunal, the respondent used money of the company for personal purposes to which he was not entitled. By doing so the respondent acted unlawfully and caused Cardio to suffer enormous

financial prejudice from which it has not recovered and will probably not recover in the short term.

62. The appellant had shown that as executor and therefore the person who was obliged to preserve and protect the assets of the estate, he had no other option but to follow the course which he did. The appellant could not simply turn a blind eye to the respondent's conduct and allow him to use the assets and income of Cardio for his

own benefit and without accountability. The fact that the respondent may eventually receive most or even all of the shares in Cardio, is, as a general proposition, irrelevant during the process of the administration of the deceased estate. The appellant was responsible

for the proper administration of the deceased estate and that included the protection and preservation of the shareholding and

interests in Cardio and the assets thereof. The respondent's allegation that the appellant's actions were prompted by an ulterior

motive, was not supported by any of the evidence before the court.

63. It is clear that if the appellant had not followed the course which he did, the respondent would in all probability have continued to misappropriate funds for his personal use. It is clear that the respondent steadfastly believed that since he would one day be in control of Cardio, he could utilise the assets of Cardio already during the process of the administration of the estate. In this regard the respondent was mistaken.

64. In my view the court a quo also erred by finding that the unhealthy consequences to the relationship between the executor and the beneficiary which resulted from the disciplinary proceedings, are paramount in deciding whether to discharge the first appellant as executor,

despite the fact that the disciplinary proceedings might have been justified. After all, a beneficiary cannot act improperly or illegally and then, when being taken to task by the executor, say that his relationship with the executor had been damaged or even destroyed, and that the executor should, for that reason, be discharged from his position.

Influence over the Deceased:

65. The respondent also accused the appellant of improperly influencing the deceased, during his lifetime, in respect of numerous matters relating to the companies and his personal estate. The respondent also contended that as a result the appellant had a conflict of interest, *inter alia*, because the appellant needed to hide his previous improper conduct. The respondent based his allegations of improper conduct on the part of the appellant, and of the appellant thus being confronted with a conflict of interest, on the assumption that the earlier services rendered to Cardio, Heia and the deceased, were inappropriate and are subject to criticism.
66. These accusations were denied and decisively dealt with by the appellant. The alleged facts and the assumptions which the respondent

referred to, were incorrect as was reflected in the Greyling/Veale report and the answering affidavit of the appellant.

67. Furthermore, according to the appellant the deceased was at all times mentally alert and in possession of all his faculties and was in fact an astute businessman and a strong and fierce negotiator. The manner in which the deceased had built up his empire and the fact that he had retained sole control thereof through the years, is support for these propositions. The appellant also denied the respondent's allegation that he, the respondent, had been exclusively responsible for the management of Cardio. The appellant stated that during the years of his association with the deceased and the business of Cardio, the deceased exerted strict control over the finances of that business and all his other businesses.
68. It is not without significance that over the years the deceased only allowed the respondent to manage Cardio but refused to appoint him as the director of Cardio which would have enabled him to take decisions on behalf of Cardio. In fact, the deceased never even furnished the respondent with any signing authority on the company's bank accounts. The deceased was clearly not prepared to afford the respondent the sole or even a degree of control over the business affairs of Cardio. Through the years the deceased also retained all the shares in the two companies and only bequeathed them to his children in his will. According to the appellant, he witnessed on several occasions arguments between the deceased and the respondent regarding the deceased's refusal to appoint the respondent as a director of Cardio. This was an ongoing bone of contention between the two of them and the deceased maintained his attitude in this regard, despite the respondent's protestations.

69. Regarding the allegation by the respondent that he was regarded as the de facto director of Cardio, the appellant stated that he had never been aware of the respondent being described as anything else but the manager of Cardio. He further stated that he was aware that the deceased did not wish to relinquish any control over the company to the respondent. The letterhead which reflects the respondent to be a director is not the letterhead of Cardio and does not contain its registration number. The business card to which the respondent referred, is likewise not a business card of Cardio. The respondent further referred to the acrimony between the respondent and Gabrielle which was such that during the deceased's lifetime, the respondent on several occasions refused to attend a meeting with the deceased and Gabrielle and the appellant, when Gabrielle was present. The relationship between the respondent and the deceased was also so strained that the respondent failed to attend the deceased's 80th birthday celebration, which took place only a few weeks before his death. According to the appellant, the deceased was very upset by the respondent's absence.
70. The relationship between the respondent and Gabrielle was also acrimonious. They had bitter arguments about many things and the respondent even accused her of criminal conduct. The appellant referred to an e-mail which he described as hatred being shown by the respondent towards Gabrielle.
71. Consequently, on the evidence before this court, the appellant never acted improperly towards the deceased or in respect of his business affairs and he had nothing to cover up as executor. In fact, the history of the matter and the relationship between the deceased and the respondent, and the relationship between the respondent and his sister, Gabrielle, explain why the deceased trusted the appellant to be the executor and administrator of his estate to the exclusion of his children. It also explains in some way why the respondent wanted to be in complete and full control of Cardio immediately upon his father's death.

The relationship between the appellant and the respondent:

72. The respondent described the relationship between himself and the appellant as being hostile. The court a quo clearly accepted this allegation and blamed the appellant for this state of affairs. This was then also the main reason why the court a quo removed the appellant as executor and as director.
- 73.1 unfortunately disagree with the court a quo in respect of the aforesaid. A striking feature of the whole application, especially as emanating from the huge number of correspondence from the appellant's side, is that the appellant had at all times dealt with the respondent in a most courteous and co-operative way. The correspondence further shows that the appellant had gone out of his way to provide the respondent with relevant formation and providing full and unfettered access to the accounts of the companies and the underlying documentation. All accounting processing were reported to the respondent and Gabrielle. The respondent had throughout

communicated extensively about the steps he had taken and intended to take in the administration of the deceased estate. On the other hand, the respondent had on many occasions deliberately frustrated the appellant in the performance of his duties, especially in respect of the appellant's attempts to obtain assistance from the respondent in his management of the hotel and in obtaining cash flow forecasts from the respondent.

74. Another striking feature of the correspondence between the parties and of the affidavits filed in the application is the harsh and unfounded allegations made by the respondent against the appellant in insulting and rude terms, attacking not only the appellant's

capability but also his honesty and integrity, whilst the appellant's responses had always been courteous and reserved. None of the conduct of the appellant reflected any animosity towards the respondent. It is clear that the poor relationship between the respondent and the appellant was caused by the views and actions of the respondent. Furthermore, that that situation cannot be justified by anything which the appellant had said or done. In this regard I consequently respectfully also disagree with the findings of the court a quo.

75. It is clear from the evidence that the respondent took exception to the fact that he could not immediately take control of his inheritance the moment the deceased passed away. He was clearly of the view that he would eventually be the owner of all the shares in Cardio and thus have full control of Cardio. For that reason he thought that he was entitled to be placed in the immediate control of Cardio upon the death of the deceased. When that did not happen, i.e., when the appellant appointed himself as director pending the finalisation of the estate, the respondent began his vendetta against the appellant. The situation became worse from the side of the respondent when the appellant stood firm against him in relation to his management of the Aloe Ridge Hotel.

76. The view of the respondent was wrong. He misconceived his position as heir. Firstly, he could not legally possess any asset which had been bequeathed to him unless and until the liquidation and distribution of the deceased estate had been finalised. Secondly, the fact that certain assets had been bequeathed to him in the will, did not mean that he would necessarily receive the full bequest. It would depend on whether there are sufficient other assets to meet the obligations and liabilities of the estate. Thirdly, the appellant, as executor, had the legal obligation to maintain and preserve the estate pending the finalisation of the process, despite the respondent's right to his inheritance. This legal obligation of the executor was furthermore specifically underlined by the provisions of the will of the deceased.
77. The appellant also knew that to appoint the respondent as the director of Cardio, would probably cause insurmountable problems in the finalisation of the estate. A mere reading of the allegations made by the respondent in his founding affidavit proves that the applicant's view was correct. In the first place, the respondent clearly could not accept the wishes of the deceased as expressed in his will. He accused, for example, the appellant of influencing the deceased against him and in making the bequests as set out in the will. He also attempted to

show that Cardio, or himself, has large claims against the other company or businesses

because of what had allegedly happened in the past. That all related to the fact that the deceased had on certain occasions used some parts of his empire to finance the development of other parts thereof. In this regard the respondent made assumptions which were wrong in law and in fact. At some point it even appeared as if the respondent was placing the validity of the will in dispute.

78. The acrimony between the respondent and Gabrielle would have been another complicating factor. These and other factors leave no doubt that it would have been to the detriment of the deceased estate if the respondent had been appointed as the director of Cardio pending the finalisation of the estate. It is therefore also not without significance that none of the other heirs supported the respondent in the relief which he sought in his application. In fact, the respondent's allegations of the level of animosity between the appellant and Gabrielle and his alleged disdain of her position as heir, was completely rebutted by the appellant. According to him there exists a good and functional relationship between them and he finds it to be co-operative and pleasant and as far as he was concerned she is rendering the assistance necessary for the proper administration of the business of Heia. According to the appellant Gabrielle has the best interests of Heia at heart and does not hesitate to approach him for assistance.
79. Although it may be so that in many cases an executor would appoint the legatee to which shares in a company had been bequeathed, as director of the company pending the administration of the estate, the appellant in this case cannot be faulted for deciding that it would not be in the interest of the estate to do so.
80. There can be no doubt that it was necessary for the two companies to proceed doing business and for decisions to be taken on their behalf in the normal course of business. As such it was necessary to appoint a director. As stated before, the respondent had no right to insist on being appointed as director of Cardio pending the finalisation of the estate. At best for him, the shares in Cardio would in future be transferred to him. At that point, if he is the sole or majority shareholder, he would be entitled to appoint himself as director. Until that time has arrived, he has no right to insist on being appointed the director.
81. The respondent's view of the matter is probably best described in paragraph 27.6 of his affidavit where he said the following: "His (the appellant's) attitude of independently running a business through the businesses that we have inherited, displays an attitude of non-adherence to the will of the testator, the deceased. In the premises I have decided to direct this application to the Honourable Court for the removal of the First Respondent as executor and ancillary relief as set out hereunder." It is clear that the respondent's animosity towards the appellant arose from this misapprehension of his rights as heir and the obligations of an executor.

82. The sole question to be answered therefore is whether the decision by the appellant not to appoint the respondent as director, was such that it can be said that it is undesirable that he should continue in the position of executive of the deceased estate.
83. In my view there can be no doubt that retaining the appellant as executor would not detrimentally affect the finalisation of the estate. If anything, it would be to the advantage of the estate and would ensure the quickest possible finalisation thereof. According to the evidence placed before the court by the appellant, he has administered the estate meticulously in accordance with the provisions of the Act and the wishes of the deceased, and there is no reason to believe that he would not do so until the end. He has also not improperly benefited from his administration of the estate and none of his conduct had caused the respondent or the deceased estate financial prejudice.
84. Consequently the appeal should succeed and the application of the respondent be dismissed. The appellant also launched a counterclaim.

It was submitted on behalf of the appellant that should the appeal succeed, the necessity of making a finding in respect of the counter application, falls away.

85. As far as costs are concerned, there is no reason why costs should not follow the event.

86. In the result the following order is made:

1. The appeal is upheld with costs which costs shall include the costs of senior counsel.

2. The order of the court a quo is set aside and replaced with the following order:

"1. The application is dismissed.

2. The applicant is ordered to pay the costs of the application which costs shall include the costs consequent upon the employment of two counsel, except for the second day of the hearing in respect of which costs of only one counsel shall be paid".

C.P RABIE

JUDGE OF THE HIGH COURT

I agree:

H.J. DEVOS

H-L. ALBERTS

Acting judge of the high court

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