IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 319/2018

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

29 March 2019
DATE

SIGNATURE

In the matter between:

INGRID LABUSCHAGNE	**APPLICANT**
and	
ELLEN NEL IN HER CAPACITY AS NOMINEE OF STANDARD TRUST LIMITED	**FIRST RESPONDENT**
STANDARD TRUST LIMITED	**SECOND RESPONDENT**
MASTER OF THE SOUTH GAUTENG HIGH COURT JOHANNESBURG	**THIRD RESPONDENT**

J U D G M E N T

COLLIS J:

INTRODUCTION

[1] In the present dispute the applicant is seeking the removal of the executor (*first respondent*) of the deceased estate and in addition to this, the applicant seeks damages from the first and second respondents.

[2] The late Robert Attilia Ladanyi (*'the deceased'*) died on 23 March 2012. The deceased bequeathed his entire estate to the applicant in terms of his Last Will and Testament dated 22 September 2008, and amended by him on 16 November 2011.

BACKGROUND

[3] On 22 September 2008, the deceased attested his last Will and Testament.[1] On 16 November 2011, he amended his Will, in the presence of Niel Botes, who later married the applicant. In terms of the amendment to the Will the applicant is named as sole heir.

[4] The deceased in his Will nominated the second respondent or Standard Bank as the executors in his estate, whoever would accept the nomination first.

[5] On 20 May 2012, one Mareese Lucille Joseph and Isabel Pieterse acting in their capacities as joint nominees of Standard Trust Limited, were appointed by the Master of the South Gauteng High Court, as joint executors in the deceased estate.[2]

[1] Founding Affidavit annexure 'FA2' pages 53-55
[2] Founding Affidavit annexure 'FA3' page 56

[6] On 22 November 2014, the deceased's mother, Gizella Ladanyi applied to this court to declare the Last Will and Testament of the deceased null and void. The applicant opposed the application and lodged a counterclaim to be declared sole heir in terms of the amended Will.

[7] On 16 September 2016, the counter-application succeeded and the applicant was declared the sole heir of the deceased estate in terms of the Will.[3]

[8] On 3 May 2017, the first appointees as executors were replaced and substituted by one Louise Van Niekerk, acting in her capacity as Nominee of Standard Trust Limited.[4]

[9] On 13 July 2017 the estate was wound up and the first and final liquidation and distribution account was prepared and certified by the executor.[5] On 24 July 2017, the Liquidation and Distribution account was lodged with the Master and the applicant was advised accordingly. Proceeds of the residue were also paid out to the applicant.[6]

[10] On 10 October 2017, after the resignation of Ms. Van Niekerk, she was replaced by the first respondent in her capacity as the Nominee of the Standard Trust Limited. Such appointment was again made by the Master of the South Gauteng High Court.[7] What followed thereafter was the lodgement of the present application seeking the

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[3] Founding Affidavit annexure 'FA5' pg 58-71
[4] Founding Affidavit annexure 'FA4' pg 56
[5] Founding Affidavit pages 81-91
[6] Answering Affidavit para 10.1 & 10.2 pg 227-228
[7] Founding Affidavit para 12-15 and Answering Affidavit para 28 pg 183

removal of the current executrix and a claim for damages against her and the second respondent.

THE LAW

[11] Section 54(1) (a)(v) of the Administration of Estates Act 66 of 1965 permits a court to remove an executor from his office. It reads as follows:

> "54(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 the effect or to assist in affecting 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 of 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; and**
>
> ....."

[12] The test to be applied when a Court considers the removal of an executor, is whether the continuance of the executor in office will prejudicially affect the future welfare of the estate.

[13] The primary duties of an executor are succinctly set out by the author D. Meyerowitz in Meyerowitz, Administration of Estates and their Taxation, 2010 para 11.4 p 11-2 which states that:

"The executor acts upon his own responsibility, but he is not free to deal with the assets of the estate in a manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the law, which prescribes his duties and the method of his administration and makes him subject to the supervision of the Master in regard to a number of matters."

[14] The learned author states further that, an executor is 'not a mere procurator or agent for the heirs but is legally vested with the administration of the estate.' He adds that….. "Immediately after Letters of Executorship have been issued to him, the executor must take into his custody or under his control all the property in the estate which are not in the possession of any person who claims to be entitled to retain them under any contract, rights of retention or attachment."

[15] Having regard to the responsibilities and duties of the executor *inter alia* set out above, the removal of an executor is a decision which in my view should not be taken easily and certainly just be taken because of a mere conflict between an executor and heirs to the estate. In the case of an executrix testamentary, such as in the present matter, the removal of an executrix involves an interference with the testator's decision

as to who should be responsible for the winding up of his estate. In the present matter the deceased was clear in his will that his estate should be wound up by either a nominee of the second respondent or a nominee of the Standard Bank of South Africa, whoever shall first formally accept such nomination.[8]

[16] An application for the removal of an executor under section 54(1) (a) (v) of the Act was dealt with in the matter of Die Meester v Meyer en Andere 1975 (2) SA 1 (T) at 16, where the Court approved of the views expressed in Sackville West v Nourse and Another 1925 AD 516 where Solomon ACJ at 527, referring to the judgment of Lord Blackburn in Letterstedt v Broers (9 AC 371):

'He then quoted 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 want of reasonable fidelity."

'He then proceeded 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.

[8] Founding Affidavit annexure "FA 2" pg 53

[17] The respondents in opposing the application had raised several *points in limine*.

FIRST POINT IN LIMINE: NO CAUSE OF ACTION AGAINST FIRST RESPONDENT AND SECOND RESPONDENT

[18] The applicant's grounds for complaints in relation to the first respondent are set out in paragraph 26 to the founding affidavit,. In summary, the applicant contends that the first respondent and her predecessors have breached their obligations owed to her as sole heiress in the estate through their maladministration of the estate in the following material respects:

18.1 She/they failed to take possession of the estate's assets in a timely manner;

18.2 She/they failed to manage contracts concluded by the deceased before his death for the financial benefit of the estate;

18.3 She/they failed to ascertain the true market value of assets on or near to the deceased's time of death and only did so nearly five (5) years later;

18.4 She/they only realised assets not encumbered by a Standard Bank loan. i.e the Norwood property and the Nissan Sentra motor vehicle some five years after their appointment and only after her continued and repeated insistence;

18.5 She/they only realised the movable assets encumbered in favour of Standard Bank at the loan settlement value and not their market values;

18.6 She/they turned a blind eye to and allowed Zoltan to unlawfully occupy the main house on the Norwood property, over the period commencing 1 February 2012 up to and including 24 February 2017, without her consent and despite her protestations, well knowing that Zoltan was a third party with no legal entitlement to occupy the said property. During the same period she allowed Gizella to move into the main house

and stay there rent free and against her express wishes. She further failed to monitor Zoltan's liability for rates and taxes, water and electricity usage, which he only paid for up until July 2016, albeit that he only vacated the property on 24 February 2017, thus causing a direct loss to the estate;

18.7 She/they failed to secure the household goods (*save for three items*) on the Norwood property thereby facilitating the theft thereof by Zoltan who sold same prior to his departure from the property.

[19] If one therefore considers how the grounds set out in the applicant's complaints have been formulated, each of these grounds points to specific acts performed or neglected to have been performed by the first respondent and or her predecessors and to that of the second respondent. It is apposite to note that the complaints more often than not have all been phrased in general terms.

[20] In response to the above allegations the first respondent sets out, that the applicant discloses no cause of action for the relief prayed for her removal. Furthermore, that she fails to differentiate between the current executrix being herself, her predecessors and Standard Trust Limited. In addition, she sets out that Letters of Executorship are only issued to individuals, not a company and although a person may be an executrix by virtue only of her office in a company, that fact does not render her as executrix subservient to her employer in regard to the administration of the estate. Her duties as executrix override her duties to her employer if they conflict and the interest of the estate she administers come before those of her employer. The first

respondent further contends that she has done nothing wrong and that the applicant has furnished no reason for her removal.[9]

[21] In this regard, Mr. Porteous on behalf of the first and second respondents had submitted, that the applicant has failed to disclose what act committed by the first respondent personally would render her unfit to continue to act as executor. Furthermore, that the acts or omissions of her predecessors are irrelevant and neither has the applicant attacked the character of the first respondent or her professional ability which might render her unsuitable to act as executor of the estate.

[22] In her replying affidavit, and more specifically paragraph 42 thereof, the applicant sets out, that the removal of the previous executors are irrelevant for purposes of the present application and that the removal of the first respondent is sought. [10]

[23] Importantly, in paragraph 43 she conceded that the first respondent has inherited a mess, but alleges that she stepped into the shoes of the previous executrixes and as such she cannot contend that because her appointment took place more recently that she cannot be tarred and feathered with the same brush as her predecessors. Furthermore, that since the service of the founding affidavit on the first respondent, she has been incapable of winding up the estate and went on to credit her account without explaining where and why these funds have been credited to her.

[9] Answering Affidavit para 8-12 pg 178-179
[10] Replying Affidavit para 42 pg 322

[24] Counsel appearing on behalf of the applicant, echoed the sentiments expressed by the applicant that the first and second respondents, including the first respondent's predecessors, breached their obligations owed to the applicant as the sole heiress in the deceased estate, through their maladministration of the estate. Differently put, counsel contended that any acts of maladministration committed by the predecessors of the executrix can be revisited upon the current executrix.

[25] The prevailing circumstances of the present matter which is common cause between the parties, is that the first respondent was only appointed as executrix on 10 October 2017, this approximately a month after the first and final liquidation and distribution account had been advertised in terms of section 35 of the Administration of Estates Act.[11]

[26] In addition section 35(5) (a) provides as follows:

"5 (a) The executor shall give notice that the account will be so open for inspection by advertisement in the Gazette and in one or more newspapers circulating in the district in which the deceased was ordinarily resident at the time of his death and, if at any time within the period of twelve months immediately preceding the date of his death he was so resident in any other district, also in one or more newspapers circulating in that other district, and shall state in the notice the period during which and the place at which the account will lie open for inspection."

[27] Furthermore, section 35 (7) provides that:

[11] Answering Affidavit para 5.2 annexure "AA1" page 172

"Any person interested in the estate may at any time before the expiry of the period allowed for inspection lodge with the Master in duplicate an objection, with reasons therefor, to any such account and the Master shall deliver or transmit by registered post to the executor a copy of any such objection together with copies of any such documents which such person may have submitted to the Master in support thereof."

[28] Section 35(12) provides as follows:

"When an account has lain open for inspection as hereinbefore provided and

(a) no objection has been lodged; or

(b) ....

(c) .....

the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account....."

[29] Significantly, the applicant makes no reference in her founding affidavit that any of her complaints directed against the first respondent were brought to the attention of the Master upon the Liquidation and Distribution account having lain open for inspection thereby exercising her rights in terms of section 35(7) of the Administration of Estates Act. In the absence thereof, and in terms of the provisions of section 35(12) the executor in the absence of an objection shall forthwith, pay to the creditors and distribute to the heirs what is due to them.

[30] The applicant's failure to raise an objection with the Master on the liquidation and distribution account in terms of section 35(7), to my mind is confirmation of no cause of action having been made out against the current executrix which warrants her

removal. In addition to this, there simply exists no basis in law, to hold the current executrix liable for acts or omissions performed by any of her predecessors.

[31] Consequently, I conclude that the first *point in limine* has merit.

SECOND POINT IN LIMINE: REMOVAL OF EXECUTOR WILL SERVE NO PURPOSE NEITHER HAS A DAMAGES CLAIM BEEN ESTABLISHED

[32] In addition to this, the provisions of section 56(1) of the Administration of the Estates Act provides that upon completion to the satisfaction of the Master of the liquidation and distribution account of a deceased estate, the executor shall be entitled to obtain his discharge from the Master. Furthermore, section 56(2) of the Act, prohibits the institution by any person of legal proceedings against any other person who has been discharged as executor in respect of any claim against the deceased estate or any benefit out of that estate save for any fraudulent dealing in connection with the estate or the liquidation or distribution thereof. In *casu*, and by virtue of section 56(1) the first respondent would be entitled to her discharge from the Master.

[33] The provisions of section 16 of the Administration of Estates Act also bears greater scrutiny. In terms of this section letters of executorship are only issued to individuals so that where an executor appointed in a will is a corporation, (such as the second respondent *in casu*) the letters are not issued to the corporation itself, but to some officer or employee of the corporation nominated by it and for whose acts the corporation accepts liability.[12] Where the applicant contends that she has suffered

[12] Bekker v Republiek Trustees (Edms) Bpk en 'n Ander 1988 (2) SA 250 (T) at 253B-D

economic loss as a result of a wrongful act or delict on the part of the first and/ or second respondent, it was incumbent upon the applicant to plead the nature and extent of any duty of care owed to her by the respondents as well as the alleged conduct in breach thereof in order to found her claim in delict. In this regard the decision of Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd 2009 (2) SA 150 (SCA) at 156F-I, where Brand JA remarked as follows gives direction:

> '[12] Recognition that we are dealing with a claim for pure economic loss brings in its wake a different approach to the element of wrongfulness. This results in the principles which have been formulated by this court so many times in the recent past that I believe that they can by now be regarded as trite. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. By contrast, negligent causation of pure economic loss is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. In the result, conduct causing pure economic loss will only be regarded as wrongful and therefore, actionable if public or legal policy considerations require that such conduct if negligent, should attract legal liability for the resulting damages. See e.g. Minister of Safety and Security v Duivenboden 2002 (6) SA 431(SCA).'

[34] Having regard to the above, the applicant can only succeed with her damages claim, if she is able to prove that employees of the second respondent carried our acts or omitted to carry out certain acts which resulted in damages suffered by her. By

virtue of the executors having been nominees in the employ of the second respondent at all material times, the second respondent could potentially be held vicariously liable for the actions or omissions of its employees. The applicant however would have been required to identify each specific act or omission as well as the specific executor responsible for such act or omission and as argued by counsel for the respondents she has failed to do. This conclusion I am in agreement with.

[35] Given the advance stage that the administration of the estate has progressed, and the failure on the part of the applicant to allege the specific acts or omissions attributable to the current executor, I am not persuaded that any merit exits warranting her removal and by extension that the applicant has proved any damages she has suffered as a result of the actions of the executrix.

[36] Consequently, I find that the second *point in limine* also has merit.

[37] To my mind the two *points in limine* referred to above are dispositive of the entire application. In the circumstances it is not necessary to consider the remaining points..

ORDER

[38] In the result, the following order is made:

38.1 The application is dismissed with costs on an Attorney and Client scale.

C. J. COLLIS

JUDGE GAUTENG LOCAL DIVISION: JOHANNESBURG

APPEARANCES:

FOR APPLICANT:	Adv. J.K. BERLOWITZ
INSTRUCTED BY:	SALANT ATTORNEYS
FOR FIRST AND SECOND RESPONDENTS:	Adv. G.F. PORTEOUS
INSTRUCTED BY:	SAVAGE JOOSTE & ADAMS INC.
DATE OF JUDGMENT:	11 MARCH 2019