REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.6361/10

In the matter between

ELENA ALEXANDROVNA VAN NIEKERK Applicant

and

KATHLEEN MARY VAN NIEKERK 1st Respondent

THE MASTER OF THE HIGH COURT, PIETERMARITZBURG 2nd Respondent

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J U D G M E N T

Del. 17 December 2010

WALLIS J.

[1] Mr Basil van Niekerk died on 11 December 2009. He is survived by his widow, Mrs Elena van Niekerk. In terms of a will executed on 4 December 2009 he appointed his former wife, Mrs Kathleen van Niekerk, from whom he had been divorced since 8 October 1987, as the executrix of his estate and also as the sole heir to the estate. In order to obviate confusion I will refer to the two ladies as the applicant and the respondent respectively. In this application the applicant seeks to have the respondent removed from her office as executrix in terms of s 54(1)(a)(v) of the Administration of Estates Act 66 of 1965 ('the Act').

[2] The applicant and the respondent are at loggerheads over the claims brought by the applicant against the estate of her late husband. The first

of these claims is a claim to half of the estate based on the contention that she and Mr van Niekerk were married in community of property. The respondent stoutly resists that claim. The second claim by the applicant is a claim for the payment of maintenance from the estate in terms of the provisions of the Maintenance of Surviving Spouses Act 27 of 1990. Until the respondent deposed to her answering affidavit on 6 September 2010 that claim was resisted and she still maintains that it requires to be 'calculated' or 'determined' because so she says the 'means and obligations of the applicant have as yet not been established'. In the affidavit she accepts the claim in principle, although her suggestion that the amount be fixed at R3500 per month, plus a medical aid contribution and the wages of a maid, is considerably less than the applicant's assessment of her needs as amounting to R17 175 per month.

[3] Mr van Niekerk's estate appears to be substantial. If the applicant's claim to half of the estate is upheld it will substantially diminish the amounts received by the respondent, in her capacity as the sole heir to the estate. If that claim is unsuccessful its failure will impact upon the widow's claim for maintenance and serve to increase that claim on the basis that the applicant lacks means with which to support herself. As she was considerably younger than her husband her entitlement to maintenance from his estate may extend over a lengthy period that could result in a substantial diminution of the residue of the estate.[1] On either basis successfully resisting the claims offers the prospect of significant financial advantage to the respondent

[4] Before exploring any further the disputes between the applicant and

1 Although the claim is at present advanced on the basis of the widow requiring a monthly payment by way of maintenance it is permissible under the Statute for such a claim to be formulated as a lump sum claim. O*shry v Feldman* [2010] ZASCA 95 paras [51] to [57].

the respondent, it is appropriate to have regard to the statutory provision under which this application is brought. Section 54(1)(a)(v) reads as follows:

'An executor may at any time be removed from his office:

(a) by the court:

(i) to (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.'

In considering an application under this section the court is vested with a discretion and in the exercise of that discretion the predominant consideration will be the interests of the estate and those of the beneficiaries.[2]

[5] Ms Nel for the applicant relied upon the common law principle expressed in *Barnett v Estate Beattie* that the court is vested with a discretion to remove an executor from office 'if his personal interests are in entire conflict with the interests of the estate'.[3] That principle was affirmed by the then Appellate Division in *Grobbelaar v Grobbelaar*[4] and provides an example of a situation where the court will exercise its power of removal under the Act. However in both of those cases the executor advanced a claim in his personal capacity against the estate, which claim was disputed and the acceptance of which would have been contrary to the interests of the beneficiaries in the estate. In *Grobbelaar* van Blerk JA said:

'Dit is duidelik dat hier 'n wesenlike botsing bestaan tussen die persoonlike belange van die respondent en die van die boedel waardeur 'n toestand geskep is wat respondent se posisie as eksekuteur vir hom onhoudbaar maak. Hy bevind hom in die

2 *Die Meester v Meyer en Andere* 1975 (2) SA 1 (T) at 17F, a passage approved by the Constitutional Court in *Gory v Kolver NO and Other (Starke and Others Intervening)* 2007 (4) 97 (CC) para [56].
3 1928 CPD 482 at 485.
4 1959 (4) SA 719 (A) at 724 F-G. See also *Webster v Webster en 'n ander* 1968 (3) SA 386 (T) at 388C-D.

onmoontlike posisie dat hy enersyds as skuldeiser van die boedel sal moet veg vir sy eis en andersyds in sy hoedanigheid as eksekuteur die boedel sal moet verdedig teen dieselfde eis. In hierdie rol say hy genoodsaak wees om kant te kies. Hy kan nie onsydig of onpartydig bly nie.'[5]

The factual circumstances of those cases are accordingly significantly different from this one where (subject only to a point I will refer to in paragraphs [25] and [26] below) the respondent advanced no claim against the estate as creditor and any obligation that she owes to the beneficiaries of the estate is an obligation owed to herself.

[6] In those circumstances Ms Julyan SC, who appeared for the executrix, stressed that the court's power to remove an executrix is not one that is lightly exercised. That is particularly so where the court is dealing with an executrix testamentary because it involves an interference with the testator's decision as to who should have the responsibility of winding up his estate.[6] She stressed that in the passage[7] from *Die Meester v Meyer* approved by the Constitutional Court, it was said that in exercising the jurisdiction the court will have regard predominantly to the interests of the estate and the beneficiaries. Here, she submitted, all the relevant interests cohere in a single individual, the respondent. In resisting the widow's claims the executrix is not pursuing some personal agenda apart from the interests of the estate and the beneficiary but protecting those very interests. Ms Julyan submitted that as the costs of resisting the widow's claim would come out of the estate and therefore diminish the ultimate benefit obtained by the respondent it is improbable that she will

5 'It is clear that a substantial conflict arises between the personal interests of the respondent and those of the estate, in consequence of which a situation is created where the respondent's position as executor is rendered intolerable. He finds himself in the impossible position that on the one hand as a creditor of the estate he must fight for his claim and on the other hand in his capacity as executor of the estate he must defend against the same claim. In this role he would be compelled to choose sides. He cannot remain neutral or impartial' (My translation).

6 *Die Meester v Meyer en andere, supra,* 16E-F.

7 1925 AD 516 at 527.

be profligate in resisting proper claims.

[7] In dealing with the power of removal of trustees Solomon ACJ in *Sackville West v Nourse and Another* noted that there was little authority on this topic in our law and said:

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

These principles are equally applicable to the removal of an executor.[8]

[8] Ms Julyan also drew my attention to and laid considerable stress upon the judgment of Murray J in *Volkwyn NO v Clarke and Damant*[9] where the learned judge having quoted the passage just cited went on to say:

'To my mind it is a matter not only of delicacy …but of seriousness to interfere with the management of the estate of a deceased person by removing from the control thereof persons who, in reliance upon their ability and character, the deceased has

8 *Die Meester v Meyer en andere, supra,* 16H.
9 1946 WLD 456 at 463- 464.

deliberately selected to carry out his wishes. Even if the executor or administrator has acted incorrectly in his duties, and has not observed the strict requirements of the law, something more is required before his removal is warranted. Both the statute and the case cited indicates 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.'

[9] It is important to bear in mind that both of these cases dealt with professional people appointed to the offices of trustee and, in the latter case, also executor. The persons concerned were businessmen and attorneys, with whom it appears that the founders of the trusts in question had enjoyed a professional relationship. It was for that reasons that they had been appointed as trustees. And it is in that context that Murray J expressed the view that there should be a finding that they were dishonest, grossly inefficient or untrustworthy before they could be removed. If that is treated as a universal test it would operate to cut down the 'broad principle' approved in *Sackville West*. There the court asked whether the continuance in office of the trustee would prevent the trusts being properly executed. In the context of the administration of an estate that translates into the question whether the court is satisfied that the continuance in office of the executor would detrimentally affect the proper administration and winding up of the estate.

[10] The position of the administrator of an estate is slightly different from the position of a trustee in terms of a trust *inter vivos.* The reason is that a trust consists of assets that are to be administered in accordance with defined objects for the benefit of identified beneficiaries. The

executor of an estate has broader responsibilities. The executor is given the custody and control of all the property in the estate (s 26(1) of the Act). The executor is not a mere agent for the heirs.[10] As soon as possible after letters of executorship have been granted the executor must cause a notice to be published calling upon all persons having claims against the estate to lodge such claims (s 29(1)). The executor must consider these claims and, having done so, may dispute them (s 32) and reject them (s 33). Thereafter the admitted claims and any rejected claims that are proved against the estate in legal proceedings must be included in the liquidation and distribution account and paid, in order of preference, before the claims of legatees and heirs.

[11] In my view, the executor is obliged to exercise these powers *bona fide* and with a measure of objectivity. In dealing with a claim he or she should assess its merits on a fair consideration of the facts and its legal merits. To my mind it is not proper for an executor to reject claims against the estate without some good reason to do so. Any other approach would enable the executor to abuse their position as the following examples illustrate. Take the case of an executor, who is also the sole heir to the estate, who rejects all claims of R10 000 or less on the basis that the cost of establishing those claims will be such that a number of the claimants will abandon them. That would be an abuse aimed at personal enrichment. Some claimants (widows, dependent children, domestic workers, etc) may be in a vulnerable position and ill-equipped to enforce a claim against a recalcitrant executor. If the executor is well provisioned, because the estate is a substantial one, they may be able to mount a campaign of attrition against claimants, resisting their claims on grounds

10 D Meyerowitz, *The Law and Practice of Administration of Estates and Estate Duty* (2004 Ed) §12.20, p12-18 says: 'He has no principal and represents neither the heirs nor the creditors of the estate …'

no stronger than personal dislike. That is not what the Act contemplates by way of the proper performance of an executor's duties. Where the exercise of its powers in this way is directed at personal financial advantage that is even less the case.

[12] That is not to say that an executor may not resist a claim and resist it strenuously. In many cases it will be entirely proper for the executor to do so. However, that is where a fair consideration of the claim and the grounds upon which it is advanced leads the executor to conclude that there are proper grounds for disputing it. The mere fact that an executor resists a claim, even on fairly flimsy reasons, will not provide grounds for contending that they are not properly attending to the winding up of the estate. However, where it is apparent from the executor's conduct that it is their purpose and intent to use the office to resist all claims, or all claims from a particular source, irrespective of their merits and without any fair-minded consideration thereof, that may, in my view, constitute good cause for their removal in terms of s 54(1)(a)(v). That view would be strengthened where the motive was to secure personal financial benefit in their capacity as heirs. The office of executor should not be used in order to pursue a private agenda.

[13] I turn then to consider the attitude that the executrix has adopted towards the widow and her claims against the estate. In the first place it must be remarked that the executrix seems reluctant even to recognise the applicant's position as the wife of the deceased and his widow. That much is apparent from a document that she annexed to a supplementary answering affidavit handed in at the hearing of this application. The document is a complaint lodged by her with the KwaZulu-Natal Law Society against the attorney who had drafted the will on behalf of Mr van

Niekerk and lists a number of complaints about the conduct of the attorney to whom she had entrusted the administration of the estate. No fewer than seven of these – the principal complaints – relate to the applicant, who is throughout referred to as Ms Karipova. By comparison the respondent describes her position in the following terms:

'On the 11 December 2009 my ex-husband, Basil Harold Brian van Niekerk whom I was married to for twenty-three years passed away and I was appointed as the Executrix of his Estate.'

Significantly, she does not mention that the marriage had terminated twenty-two years earlier; that Mr van Niekerk had subsequently concluded four other marriages and that she has lived away from South Africa for many years. The picture is of a person who regards herself as the true spouse and the applicant as an interloper.

[14] The document includes a complaint about the payment of maintenance to the widow expressed in the following terms:

'Ms Karipova's lawyer requested that she be paid maintenance every month. Mr Michau did not at any point inform me that the Estate did not have to pay this until Ms Karipova actually proved that she was entitled to these monies. The reason that Ms Karipova needed to prove her entitlement was because of the confusion surrounding her marriages to Mr van Niekerk. He said that the monies must be paid but that we could negotiate on the amount. Mr Michau also advised me that the Estate should pay Ms Karipova's maid and her electricity account. Again it was never made clear that this was an option not a given.'

This stance is not consistent with the proper exercise of the powers of an administrator in terms of s 26(1A) of the Act, which is designed to ensure that in a proper case the executor will make payments to a widow for her maintenance. In this case it is not disputed that the applicant has no other source of income and the estate is clearly in receipt of funds from the letting of immovable property. The attitude of the attorney about which the respondent complains seems to involve a proper exercise of the powers of an executor and her attitude is consistent with her desire to resist any claim by the applicant.

[15] It is correct that there is an issue concerning the matrimonial regime governing the applicant's marriage to her late husband. There is not, and never has been, however, any dispute that she was legally married to him at the time of his death. The only question was whether that was in consequence of the marriage concluded between them in the city of Volgograd in the Russian Federation, on 2 August 2005 or a subsequent South African marriage on 9 November 2008. The matrimonial property regime applicable to the marriage between the applicant and Mr Basil van Niekerk depends upon which of these was the governing marriage. However, there was no confusion at all about the fact that the applicant was married to Mr van Niekerk at the time of his death and accordingly entitled to claim maintenance as she had done. The complaint is undated and it is unclear whether it was formulated before or after the main answering affidavit, which was sworn on 6 September 2010. If it was before then it is apparent that until shortly before the delivery of that affidavit the respondent was resisting the notion that maintenance was payable to the applicant. If the complaint comes after the affidavit, the concession contained in the affidavit is of little worth in the light of the respondent's stance in the complaint.

[16] The applicant complains that the actions of the respondent are directed at forcing her out of the matrimonial home, without the payment of maintenance. In this regard she says that the electricity to the house was cut off and her maid's salary was not paid. It is clear from the complaint that the instructions to do this came from the respondent. Indeed, one of her major complaints was that she wanted the attorney 'to arrange to have Ms Karipova removed from the Estate premises at 38 Old Howick Road'. On 2 July 2010 at 10 pm a letter was delivered to the applicant and her school-going daughter saying:

'Please note that you are illegally occupying the above premises – as you do not have the permission of the Executrix of the estate to reside at the said premises.

You are hereby given notice to vacate the said premises with immediate effect.'

The respondent gives no explanation either for the tone of this letter or for the circumstances of its delivery. She merely records that she is taking proceedings to evict the applicant from the premises and there are apparently proceedings to this purpose pending in the Magistrates' Court. This has been done without any endeavour to resolve the key issue, which is whether the applicant's claim to be a co-owner of the property by virtue of a marriage in community of property is valid. Instead it seems that the applicant is being harried in various ways in order to induce her to leave the property.

[17] It should be noted that the applicant's claim is not without foundation. She and Mr van Niekerk were married in Russia in 2005. It does not appear that Mr van Niekerk abandoned his South African domicile prior to the marriage. If the principle of the law of the matrimonial domicile [11] is applied to determine the matrimonial property

11 *Sperling v Sperling* 1975 (3) SA 707 (A) at 716 E-H; LAWSA Vol 2 Part 2 (2nd Ed) para 309.

regime it follows that they may have been married in community of property according to South African law. Alternatively the marriage may have been governed by the Family Code of the Russian Federation No.223-F2 of December 29, 1995 (as amended), which is freely available in an English translation on the internet and provides in article 33(1) that:

'The legal regime of the spouses' property shall be the regime of their joint property. The legal regime of the spouses' property shall operate, unless otherwise is stipulated by the marriage contract.'

Article 34.1 goes on to say that the property acquired by the spouses during their marriage shall be joint property. Article 36.1 appears to exclude from the regime of joint property any property belonging to the spouses before entering into the marriage, as well as donations or inheritances received during the course of the marriage, but that is subject to article 37, which appears to have the effect that certain excluded property may become joint property in consequence of value added to it during the course of the marriage.

[18] It is unnecessary to determine this question or to say anything beyond the fact that there are clearly grounds for the applicant's contention that in whole or in part the matrimonial regime was one of community of property. The position is further complicated by the fact that on their return from Russia she and her husband went through a marriage ceremony in South Africa on 1 December 2005 prior to which an ante-nuptial contract was executed. Thereafter at a time when Mr van Niekerk was apparently threatened with the prospect of facing serious criminal charges a divorce settlement agreement was executed and on 22 February 2008 a divorce order was granted by the High Court sitting in Pietermaritzburg. The effect of that order is disputed because it referred only to the South African marriage and not the prior Russian

marriage. Thereafter, and apparently when the fear of criminal prosecution had receded, the applicant and Mr van Niekerk remarried and once again an ante-nuptial contract was concluded. The executrix places considerable reliance on these matters for contending that the Russian marriage terminated and that the only marriage subsisting between the applicant and Mr van Niekerk at the time of his death was the South African marriage subject to the ante-nuptial contract registered on 17 November 2008. The applicant contends that insofar as these transactions might otherwise be given legal effect they were procured by misrepresentations made to her at the time that render them null and void.

[19] It is likewise unnecessary to consider, much less to resolve, any of the legal conundrums arising from these facts. It suffices to say that for so long as the two Mrs van Niekerks persist in their current stances there will be major conflict between them over this issue. Indeed, reverting to the respondent's complaint against the attorney one of her major issues with his conduct was that he obtained senior counsel's opinion in regard to the applicant's matrimonial regime and, because it proved favourable to the applicant, acted upon it. The respondent says that she does not agree with the opinion and obtained a separate opinion from an advocate in Pretoria. That opinion apparently focused on the effect of the divorce order granted by the High Court in Pietermaritzburg. According to the attorney's response to the Law Society the reason for the dispute arising between him and the executrix is because of her dispute with the widow and a difference of view between him and her in regard to the correct approach to the widow's claims.

[20] It is apparent from all this that the executrix is absolutely determined to resist the claims by the widow. Although she has somewhat grudgingly

accepted that there is an entitlement to maintenance her attitude is that 'this amount would have to be calculated'. The amount tendered by her is low when one has regard to the fact that prior to her husband's death the applicant was living in a house in one of the leading suburbs of Pietermaritzburg, fully furnished, with a swimming pool and the services of a domestic worker and was driving a Mercedes Benz motor vehicle. A tender of R3000 in respect of maintenance, rent, water and lights, together with a medical aid payment and a payment in respect of a maid, without any amount in respect of food, clothes, pharmaceutical expenses and the other costs of day-to-day living, bears little relationship to the standard of living enjoyed by the applicant whilst she was married. It must be borne in mind that there is no challenge to the proposition that Mr van Niekerk was a man of significant wealth. Nor is it disputed that the tender in the answering affidavit is not reflected in any actual payment to the applicant. Her allegation that she is being assisted to feed herself and her daughter by way of food parcels donated by members of the church of which she is a member is likewise not refuted.

[21] The last aspect of this sorry litany of events appears in paragraph 20 of the founding affidavit where the applicant says:

'On 3 July 2010, the first respondent had her son forcefully enter the immovable property by breaking the automatic driveway gates and entering the premises. He threatened me and my daughter that should we not vacate the property, as it belonged to him and the First Respondent, he would kill us. On the 12 July 2010 I obtained a protection order against him from the police. A copy of the order is annexed hereto marked "I".'

The executrix has had two opportunities to respond to these allegations. In her first answering affidavit she said that the allegation that her son threatened to kill the applicant 'is devoid of truth'. She went on to say that 'there is a dispute of fact relating to this incident' and that her son

was opposing the application for an interim protection order. She also made some passing points about the order being issued by the Magistrates' Court and not the police. That affidavit was sworn on 23 August 2010. A fuller answering affidavit was sworn on 3 September 2010 and it responded to paragraph 20 in the following terms:

'Ad paragraph 20

41.1 The averments referred to herein pertain to a protection order obtained by a Magistrate against my son;

41.2 I do not intend dealing in this affidavit with those averments save to state that the Applicant is being deliberately obstructive in not vacating the property. This is an aspect that is still being attended to in the Magistrates' Court.'

(This latter reference is not a reference to any dispute over the protection order but refers to the proceedings commenced by the executrix to evict the applicant from the matrimonial home).

[22] This response is a wholly inadequate answer to the serious allegations made by the applicant. They cannot be disregarded as having nothing to do with the respondent, because the allegation is that her son was acting on her behalf. Were that not true one would have expected it to be rebutted vigorously. The fact that it is not is consistent with the attorney's response to the Law Society, which suggests that the respondent and her son and daughter are acting together in resisting the claims by the applicant. Thus he records[12] that the relationship between him and the respondent became strained when a dispute arose between her and her daughter and son on the one part and the applicant on the other. Later[13] he records that he was instructed by the respondent to take instructions from her son. This material was placed before the court by

12 In paragraph 5 of his response.
13 In paragraph 19.2.

the respondent without any attempt to indicate any respect in which she contended that the attorney had misstated the facts.

[23] As regards the incident itself had it not occurred or if the applicant was exaggerating what happened or fabricating a version of events, one would have expected an affidavit to be delivered by the respondent's son. No such affidavit was forthcoming and the respondent chose not to address the issue. The applicant's allegations accordingly stand unchallenged.

[24] To sum up the respondent has manifested her reluctance to accept the deceased's marriage to the applicant. She has only reluctantly, and then without actually paying it, conceded an obligation to pay maintenance in terms of the relevant legislation. Her tender of maintenance is parsimonious and wholly inconsistent with what emerges on the papers as the financial position of the deceased and the mode of life that he and his wife enjoyed prior to his death. There will clearly be a dispute in regard to the applicant's proprietary claims arising out of her marriage to the deceased and the tenor of that dispute, on the basis of past history, will be acrimonious from the side of the respondent. Apart from her failure to accept the applicant's need for maintenance and to make adequate provision therefor, she has apparently embarked on conduct to make her life a misery in order to force her to vacate the marital home. Apart from withholding maintenance, she has caused the electricity to the home to be cut off and the salary of the domestic worker not to be paid. Her son has made threats against the applicant and her daughter, broken into the property in which they are living and, according to the complaint to the magistrate, removed a number of items. The respondent is alleged to have associated herself with this and she has certainly not dissociated herself from it. Lastly it is plain that she has terminated the mandate of

the attorney primarily because of his approach to the applicant's claims and his unwillingness to adopt the hostile stance to the applicant and her claims that she has evinced.

[25] It is manifest in those circumstances that the respondent is incapable of behaving in a fair and impartial manner towards the applicant and dealing with her claims accordingly. She seems intent on using her position as executrix to resist the applicant's claims at all costs. Any residual doubt over this was dispelled after judgment had been reserved. As mentioned earlier in this judgment the applicant's case was advanced on the basis of the principle in *Grobbelaar* and opposed on the basis that the respondent is not a creditor of the estate. In reply Ms Nel drew my attention to paragraph 10 of the supplementary answering affidavit, which read as follows:

'What also has to be taken into consideration is the fact that I was married in community of property to the deceased. The bonds of marriage were dissolved by divorce, and accordingly the joint estate subsisting between us was divided. We had never effectively divided the estate and there are certain items of property, which remain jointly owned by reason of my marriage to the deceased in community of property. All of these issues have to be resolved.'

As Ms Nel pointed out the effect of this allegation is to render the respondent a creditor of the estate having to adjudicate upon the validity of her own claims against the estate, in circumstances where it would be advantageous to her by those means to procure that the unspecified items of property referred to in this paragraph are removed from the deceased estate prior to any consideration of the claims of the applicant. There was clearly some force in the argument.

[26] In a transparently cynical *volte face*, after judgment had been reserved on Friday 3 December 2010, a further affidavit was delivered by

the respondent on Tuesday 7 December 2010. In it she refers to paragraph 10 and says:

'I wish to record that I do not intend to pursue such claims, and hereby abandon any claim that I may have against the deceased estate, arising from my marriage in community of property to the deceased and the subsequent divorce.'

As I say this was a transparently cynical manoeuvre directed at overcoming a legal argument seen as posing a significant risk to the respondent's position as executrix. What it demonstrates is her willingness to do almost anything to preserve her position as executrix. That in turn will enable her to continue her acrimonious resistance to the widow's claims.

[27] I accept that *Grobbelaar's* case is distinguishable from the present one in that, after the withdrawal of her claims as a creditor to unspecified property in the estate, the respondent's interest in the estate is as the sole beneficiary thereof, so that the type of conflict of interest reflected in that case does not exist. I also accept that the fact that there is acrimony between a beneficiary and the executor would not, on its own, justify the latter's removal. The same must be so where the acrimony is between a creditor and the executor. However, the history of the matter demonstrates that in dealing with a significant claim against the estate the respondent is incapable of adopting a fair-minded and impartial approach, but intent on resisting it at all costs, irrespective of its merits. Whether or not this is her motivation, her conduct is directed at securing her own financial advantage.

[28] Whilst the executor of an estate may be vigorous in resisting a claim that he or she regards as doubtful and this may result in acrimony between the executor and the claimant, the proper execution of the duties

of an executor demands, in my view, a measure of impartiality and fair treatment in dealing with claims against the estate. The respondent has demonstrated that, at least insofar as the claims by the applicant are concerned, she is incapable of exercising that level of impartiality and treating the claims fairly. I see little or no prospect of her dealing fairly with the applicant's claim. In so doing it seems that the administration of this estate will be held up and there is a real risk of protracted litigation. In addition a widow, who is alone in a foreign country and lacks the means to support herself, may be forced into destitution by the respondent's conduct. The authorities recognise that it is appropriate to remove an executor on the grounds of a want of proper capacity to exercise the duties of that office. Where the executor lacks the capacity to execute the duties properly by dealing fairly and impartially with claims against the estate then they lack the capacity to execute the duties of their office.

[29] In those circumstances, it is in my view appropriate, in the exercise of my discretion in terms of s 54(1)(a)(v) of the Act, that the respondent be removed from office as executrix. I accordingly make the following order:

1. The first respondent be and is hereby removed as executrix of the Estate Late Basil H.B. van Niekerk, appointed in terms of letters of executorship dated 17 December 2009, Master's Reference number 13794/2009/PMB;
2. The first respondent is directed forthwith to return to the second respondent the aforesaid letters of Executorship;
3. The first respondent is to pay the costs of this application in her personal capacity.

DATE OF HEARING	3 DECEMBER 2010
DATE OF JUDGMENT	17 DECEMBER 2010
APPLICANT'S COUNSEL	MS C A NEL
APPLICANT'S ATTORNEYS	JACOBS & PARTNERS
1ST RESPONDENT'S COUNSEL	MS J A JULYAN SC
1ST RESPONDENT'S ATTORNEYS	CHETTY ASMAL & MAHARAJ