Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: 739/2020

In the matter between:

IZAK ANDRIES JACOBUS VAN NIEKERK (JNR)	**First Appellant**
IZAK ANDRIES JACOBUS VAN NIEKERK (JNR) N.O.	**Second Appellant**
and	
FREDERIKA WILHELMINA VAN NIEKERK	**First Respondent**
CAROLINA THEODORA VENTER	**Second Respondent**
MASTER OF THE HIGH COURT, KIMBERLEY	**Third Respondent**
YOLANDI ADRI VAN NIEKERK	**Fourth Respondent**
NATASHA CAROLINA VAN NIEKERK	**Fifth Respondent**

CORAM: WILLIAMS, LEVER JJ et CHWARO AJ

JUDGMENT

CHWARO AJ:

Introduction

[1] This appeal lies against the whole judgment and order granted by the court *a quo* in its refusal to remove the second appellant as a sole executor of the estate of his late father, Izak Andries Jacobus van Niekerk (snr), ("*the deceased*"), but instead ordering the appointment of a co-executor to administer the estate with the second appellant.

[2] An application for leave to appeal was refused by the court *a quo* and the appeal to this Court is with leave of the Supreme Court of Appeal, which was granted on 25 November 2021.

[3] The appellants failed to prosecute the appeal within the time periods provided for in rule 49 of the Rules of Court. The delay necessitated a substantive application for condonation and reinstatement of the appeal, which was not opposed by the first and second respondents. Upon hearing counsel for the appellants, this Court was satisfied that a proper case was made and granted condonation and reinstated the appeal for hearing,

Background facts

[4] The deceased met his demise on 2 November 2010 and left a last will and testament dated 4 March 2010, ("*the will*"). The deceased nominated the first appellant and one Wilmans, a senior partner at Elliot Maris Wilmans & Hay Attorneys of Kimberley, as co-executors of his estate.

[5] On 15 November 2010, acting in accordance with the testamentary wishes of the deceased, the Master granted letters of executorship to the first appellant and Wilmans, to assume office as joint executors in the deceased estate. Wilmans resigned as an executor during August 2011.

[6] Acting pursuant to the provisions of section 18(5)(a)(ii) of the Administration of Estates Act[1], ("*the Act*"), the Master granted letters of

[1]Act No. 66 of 1965

executorship to the first appellant on 17 October 2011, effectively rendering the first appellant to assume office as the sole executor of the estate.

[7] During his lifetime, the deceased was married to the first respondent. They divorced prior to his death. The second respondent is the deceased's adopted daughter, and the first appellant is the deceased's son.

[8] The deceased bequeathed, to the first respondent, an amount of R100 000-00 (one hundred thousand rand), to the second respondent, payment of an amount of R2 500 per month, derived from the income from farming operations at *Vlakpan Suid*, escalating with 6% per year, for the rest of her life and a usufruct over a residential flat situated at *Danielskuil* or the proceeds of rental of such flat for the rest of her life. To the first appellant, the deceased bequeathed all farm properties, including *Vlakpan Suid*, with the condition that he may not sell or incumber the said property within ten years from the death of the deceased together with the residue of the estate.

[9] On 8 May 2020, some nine years after the appointment of the second appellant as the sole executor of the estate, the first and second respondents launched an application for his removal as an executor. Their application was premised on what they considered to be a direct conflict of interest between his personal interests and those of the estate.

[10] In substantiating their case, the first and second respondents contended that the second appellant failed to pay the second respondent as provided for in the will and coerced her into signing a redistribution agreement to her prejudice, he failed to open a banking account for the estate, he failed to appoint a co-executor after the resignation of the previous co-executor, despite being in control of farms measuring 2988 hectares for a period of nine years, he could only reflect an income of R303 467-49 in the liquidation and administration account prepared earlier.

[11] Lastly, the first and second respondents submitted that in the application brought by the executor for the relaxation of restrictions contained in the will, he indicated that he used his personal financial resources to fund the deceased estate's farming operations thus rendering

himself a potential creditor of the estate and that he failed to finalise the estate for a period of nine years.

[12] The application was opposed by the appellant, in his personal and nominal capacities, who contended that the estate did not have enough cash flow because of the prohibitions contained in the will relating to the sale or incumbrance of immovable properties for a period of ten years after the death of the deceased. The appellant also contended that the Master could allow the executor to administer the estate without opening an estate late banking account.

[13] The second appellant further stated that the liquidation and distribution account drawn by his previous attorneys which reflected income of R303 467-49 was wrong and that a newly drawn up liquidation and distribution account reflects income of more than R7 million and expenses of R9 million and that as a residual heir, he was entitled to utilise personal funds to ensure that the estate benefits remain intact.

[14] The Master filed his report on the progress registered in the administration of the estate. The report confirmed that the second appellant was never granted permission by the Master to use a personal banking account for the operations of the estate and that he did not lodge a final liquidation and distribution account. The report further recorded that the purported redistribution agreement concluded between the second appellant and the second respondent was not accepted by the Master.

Findings and order of the court *a quo*

[15] The only issue for determination before the court *a quo* was to enquire into whether the second appellant was in any way incapacitated to act as the sole executor of the deceased estate and therefore susceptible to be removed from office as contemplated in the provisions of section 54(1)(a)(v) of the Act.

[16] In its analysis of the different versions placed before it, the court *a quo* concluded that there were material factual disputes from the evidence presented to determine the capacity of the second appellant to hold office as the sole executor and as such, it was not prepared to grant the relief sought by the first and second respondents.

[17] In arriving at this conclusion, the court *a quo* reasoned as follows at paragraph 24 of the judgment:

> "*I cannot decide the alleged financial maladministration on the papers, a number of issues are in dispute including the liquidity of the estate; availability of funds to pay the First Applicant; the hike of operational expenses and whether loans were paid to the Second Respondent's children, or they loaned capital [to] the estate. The new liquidation and distribution account is not signed and has not been lodged with the First Respondent as per the filed report. Audited financial records, and auditor's reports will be required for that purpose. The papers must be supplemented with same. I am accordingly unable to find that the Second Respondent is dishonest and grossly inefficient and untrustworthy*".

[18] At the end, the court *a quo* declined to remove the second appellant from office as executor. The court did not dismiss the application but, on what it considered to be the correct interpretation of the deceased's will, held that there was a need to appoint a co-executor to assist the second appellant in the finalisation of the estate.

[19] In coming to the said conclusion, the court *a quo*, held, at paragraph 26 of the judgment, that the *"removal of the [s]econd [r]espondent as executor forthwith, is not in the best interest of the estate and welfare of the beneficiaries. For expeditious finalisation of the estate, it is ideal that he is retained as co-executor".* The court *a quo* then went on to determine that the first and second respondents were entitled to nominate an attorney of their choice to be considered for appointment by the Master to assume the role of co-executor with the second appellant.

Grounds of appeal

[20] The first and second appellants seek to assail the judgment and order of the court *a quo* on various grounds. In the notice of appeal, the appellants list the following as their grounds of appeal:

> *"1. Her Ladyship granting relief which differed substantially from that which was sought by the applicant. The first and second respondents (who were the applicants in the court below) sought the removal of the appellants (who were the second and third respondents in the court below) as executor, but the court granted the appointment of a co-executor instead;*
>
> *2. Her Ladyship's finding that the Court had jurisdiction to order the Master to appoint a co-executor to the estate of the late Izak Andries Jacobus van Niekerk (Snr), despite the Administration of Estates Act containing no such provision;*
>
> *3. Her Ladyship's finding that it was competent in law that the first and second respondents be granted a discretion as to the person chosen to act as the co-executor to be appointed by the Master. The relief so granted infringed upon the Master's statutory discretion, in contravention of the doctrine of separation of powers;*
>
> *4. Her Ladyship's finding that the deceased's Last Will and Testament required that there must at all times be two executors in the deceased estate, while the Will only provided for the initial appointment of such two executors, and contained no provision for further appointment if one of the executors resigned. The finding infringed upon the statutory discretion of the Master, and the deceased's freedom of testation;*
>
> *5. Her Ladyship's finding that the final relief was competent, despite the existence of material disputes of fact, which could not be*

resolved upon the papers, thereby not properly applying the Plascon-Evans rule;

6. *Her Ladyship not having dismissed the application, despite finding that it would not be in the best interests of the estate to remove the appellants as executor, thereby negating the Court's statutory jurisdiction to interfere with duties of a duly appointed executor under section 54(1)(a)(v);*

7. *Her Ladyship's finding that the appellants had failed to open a bank account for the deceased estate, in circumstances where it was disputed upon the papers, and the appellants' version under oath was that an account had been opened with Standard Bank,"*

[21] Though the appellants sought to compartmentalise the various grounds of appeal in the manner set out above, considered in their proper context, the only issue to be determined by this Court is this: Whether the court *a quo* was correct in the exercise of its discretion in terms of rule 6(5)(g) of the Rules of Court, by declining to grant an order for the removal of the second appellant as an executor due to factual disputes but nonetheless, proceeding to order that a co-executor be appointed to administer the estate with the second appellant.

[22] The determination of the above issue ought to be undertaken with due regard to the powers of the Master to appoint executors as contained in sections 14 and 18 of the Act, the true intention of the deceased with regard to the number of executors who should administer his estate as contained in the will.

Evaluation

The proper application of the *Plascon-Evans* rule

[23] The court *a quo* made a finding that it was unable to decide the material issue, being the incapacity of the second appellant to hold office, as

there were material factual disputes on the papers before it. Placing reliance on the established *Plascon-Evans* rule[2], the appellants contend that as soon as the court *a quo* made such a finding, it was obliged to have dismissed the application with costs. Rule 6(5)(g) of the Uniform Rules of Court is instructive on this issue and provides as follows:

> *"(g) Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."*

[24] The default position in resolving factual disputes in motion proceedings is trite. The court will only grant final relief, if the facts as alleged by the respondent, together with the admitted facts contained in the applicant's affidavit, justify such an order.[3]

[25] A survey of the authorities[4] on the application of rule 6(5)(g) reveal that where there are material factual disputes, a court dealing with the case will exercise its discretion as to the future course of the proceedings but bearing in mind the wide discretion given to a court to ensure a just and expeditious decision. The traditional approach being either to refer the specific issues for oral evidence, or to refer the entire matter to trial with specific directions as to the status of the papers already filed.

---

[2]This is a factual dispute resolution mechanism adopted by the court in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) and has since been applied as the leading case in cases dealing with factual disputes.
[3]Plascon Evans case, fn 2 above
[4]Room Hire Co. (Pty) Ltd v Jeppe Mansions (Pty) Ltd 1949 (3) SA 1155 (T), Adbro Investment Co Ltd v Minister of the Interior 1956 (3) SA 345 (A)

[26] The court *a quo* did not opt for any of the traditional approaches referred to above but adopted a robust approach by not dismissing the application outright but, having regard to the vexed issue before it relating to the interests of the estate, the beneficiaries, and the need to obtain speedy finalisation of the estate, ordering that a co-executor be appointed. This conclusion, it appears, was also premised on what the court a quo considered to be the meaning of clause 5 of the deceased's will relating to the number of executors who should, at all times, act as such.

[27] Contrary to the view propounded by the appellants, the *Plascon-Evans* rule is not sacrosanct and may be departed from in exceptional circumstances and depending on the vexed question before the court.[5] There cannot be a closed list of circumstances under which this rule may properly be departed from but a court faced with such facts, will, in the exercise of its wide discretionary powers , make such a call.

[28] It follows that the court *a quo* had a wide discretion to deal with the matter before it as it deemed fit. It was not limited to either dismissing the application outright or referring identified issues for oral evidence or trial. The fact that the exercise of its discretion resulted in an order which might be assailable does not translate into a failure to properly appreciate and apply the well-known Plascon-Evans rule.

[29] Consequently, I am of the view that the court *a quo* did not err in failing to dismiss the application after having found existence of material factual dispute on the main issues for determination, including the matter related to the opening of a banking account. It had a discretion, located within rule 6(5)(g) of the Uniform Rules of Court, which it exercised as it deemed fit under the circumstances.

The granting of an order not sought in the notice of motion

[5]Trollip v Du Plessis en 'n Ander 2002 (2) SA 242 (W) at 245E-F, Mahala v Nkomombini and Another 2006 (5) SA 524 (SE) at para 10 and LS v RL 2019 (4) SA 50 (GSJ) at paras 2-3

[30] In their application, the first and second respondents (*qua* applicants) cast their colours to the mast in outlining the primary relief that they sought, being the removal of the second appellant as an executor due to what they considered as the direct conflict between his personal interests and those of the estate.

[31] It is axiomatic to state that the relief sought was premised on the statutory powers of the court to remove an executor as enunciated in the provisions of section 54(1)(a)(v) of the Act, which provides as follows:

> *"(1) An executor may at any time be removed from his office-*
>
> **(a)** *by the Court-*
>
> *.....*
>
> *(v) if for any other reason the Court is satisfied that it is undesirable that he should act as an executor of the estate concerned;..."*

[32] In determining whether there were sufficient facts provided by the first and second respondents to demonstrate the incapacity of the second appellant to continue holding office as sole executor, the court *a quo* found that no such evidence was provided as there were factual disputes on material issues to be determined. As elaborated above, despite this finding, the court *a quo* nonetheless, considered the option of a possible appointment of a co-executor as a viable *via media* which, in its view, was intended to protect the interests of the estate, the beneficiaries and to ensure an expeditious finalisation of the estate.

[33] Our adversarial system dictates that a party seeking a particular relief must set out its case in the founding papers in a lucid and precise manner as well as the specific relief sought so as to alert the other party of the case that he is expected to meet and the court, to appreciate the nature and extent of the issues that it is called upon to determine. This means that the evidence

underscoring the relief being sought must have been presented in a logical and intelligible manner.[6]

[34] Though the first and second respondents' notice of motion contained the usual all-encompassing prayer for "*further and/or alternative relief*", it is my view that such a prayer is of no assistance to the determination of the issue confronting this Court.

[35] It is settled law that a prayer for "*further and/or alternative relief*" can only be invoked to justify the granting of an order significantly different from the one set out in the notice of motion where the basis for such a different relief is pleaded in the founding and such further papers placed before court.[7]

[36] It is common cause that the issue pertaining to a possible appointment of a co-executor was never raised nor canvassed in the papers by either of the parties but was only debated, for the first time, when the court *a quo* raised it with the legal representatives during argument.

[37] In **National Stadium South Africa (Pty) Ltd and Others v FirstRand Bank Ltd**[8] the court held as follows regarding reliance on the prayer for alternative relief:

> "*.. The court also relied on the prayer for alternative relief. It erred because this superfluous prayer does not entitle a court to grant relief that is inconsistent with the factual statements and the terms of the express claim, especially where, as in this case, the last affidavit of the Bank made it clear that the only relief sought against the City was one for costs*."

---

[6]National Director of Public Prosecutions v Phillips and Others 2002 (4) SA 60 (WLD) at para 36
[7]Port Nolloth Municipality v Xhalisa; Luwalla and Others v Port Nolloth Municipality 1991 (3) SA 98 (C) at 112D, Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd 1984 (4) SA 87 (T) and Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd 2003 (1) SA 265 (C) at para 11
[8]2011 (2) SA 157 (SCA) at para 45

[38] That there was no factual basis upon which relief which was ultimately granted by the court *a quo* is common cause. This is borne out by the record and confirmed by both counsel for the parties during argument before us. There was no factual or legal basis for the court *a quo* to have opted for a different relief than that was sought, especially under circumstances where this aspect was not properly canvassed by either of the parties in their papers.

[39] In the absence of a cross-appeal by the first and second respondents, the approach adopted by the court *a quo* cannot be salvaged by the invocation of the provisions of section 19(d) of the Superior Courts Act[9], as *Ms Sieberhagen*, counsel for the first two respondents, urged us to do. This aspect was not even raised in the first two respondents' heads of argument before us nor canvassed with much vigour during argument.

[40] The wide powers granted to a court of appeal by the provisions of section 19(d) referred to above are not without limitations. Various authorities[10] demonstrate that a court of appeal has wide powers to ensure that a palpably wrong and legally untenable judgment is not left undisturbed in certain instances and that a court of appeal would often intervene where the interest of justice calls for such an intervention.

[41] However, courts have consistently held that where there is a failure by a party to appeal against a legally untenable judgment, the salutary rule is to allow the parties, through a notification before the appeal hearing, of the court's intention to consider an order or legal point that is neither taken on appeal or cross-appeal.

[42] In **Octagon Chartered Accountants v Additional Magistrate, Johannesburg and Others**[11] after analysing the authorities on the subject, the full court held as follows on the need to afford the parties an opportunity

[9]Act No. 10 of 2013
[10]See Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 23F and Government of the Republic of South Africa and Others v Abo 2011 (5) SA 262 (SCA) at paras 18-19
[11]2018 (4) SA 498 (GJ) at para 33

to canvass the intention of the appeal court to invoke its wide powers in section 19*(d)* of the Superior Courts Act:

> *"It is a salutary rule that, before a court exercises its power on appeal in terms of what is now s 19(d) of the Superior Courts Act, against or potentially against the wishes of a party, it should give notice to the party affected thereby..."*

[43] As in the court *a quo*, neither of the parties in the appeal sought nor rigorously canvassed the issue of the exercise of the powers vested in a court of appeal in terms of section 19*(d)* of the Superior Courts Act. It would therefore not be desirable nor in the interests of justice that this Court exercises these powers on its own and where no substantive submissions have been proffered by the parties.

[44] In the premises, though the court *a quo* opted for what it considered to be a sensible and practical approach under the circumstances taken in the interests of the estate, the beneficiaries and speedy finalisation of the estate, it erred in granting an order for the appointment of a co-executor under circumstances where no case for such an order was pleaded in the founding or replying papers nor sought in the notice of motion.

The interpretation of clause 5 of the Will

[45] The appellants further contend that the court *a quo* 's interpretation of the provision of the deceased will, to the effect that it provided that there should, at all times, be two executors appointed to administer the estate, was incorrect and infringed upon the statutory powers of the Master and the deceased's freedom of testation.

[46] In order to provide a proper context to the issues, it is apposite to reproduce the contents of clause 5 of the deceased's will hereunder:

" *5.*

> *As Eksekuteurs van my boedel stel ek aan my seun IZAK ANDRIES JACOBUS VAN NIEKERK sowel as die Senior Vennoot van tyd tot tyd van die Prokureursfirma ELLIOT MARIS WILMANS & HAY van Kimberley met die mag van assumpsie en dit sal nie nodig wees vir my Eksekuteurs om enige sekuriteit te verskaf vir die uitvoering van hulle pligte nie".*[12]

[47] The court *a quo* seems to have adopted a view that the said clause in the deceased will required that there should always be co-executors of the estate, with one of them being an attorney. This view is expressed in the following sentiments found at paragraph 27 of the judgment:

> "*The failure to open or use the estate account; failure to pay the Applicant their monetary benefits; use of personal accounts and conflicting interests, are all matters that would have been prevented, as submitted by the Applicants, if the Second Respondent complied with the provisions of paragraph 5 of the deceased's will and appointed an attorney as his co-executor. The Applicants also failed to enforce the clause*".

[48] The court *a quo* 's interpretation of clause 5 of the deceased's will is, in my view, not supported by the facts or the law. In its judgment, the court *a quo* not only omitted to provide justification for its conclusion, it also did not do any justice to the basic tenents of interpretation normally accorded to clauses contained in a will to arrive at its conclusion as detailed above.

[49] It is trite law that a court seeking to give proper meaning to the contents of a will must strive to ascertain the true wishes of the testator from the language used in the will, regardless of how clumsily worded a will might be.[13] This rule of interpretation has also found favour in a different but equally binding decision of **Natal Joint Municipal Pension Fund v Endumeni Municipality**[14] where the following was stated regarding the general interpretation of various documents:

---

[12]"*As Executors of my estate, I appoint my son, IZAK ANDRIES JACOBUS VAN NIEKERK as well as the Senior Partner from time to time of the law firm ELLIOT MARIS WILMANS & HAY of Kimberley with the power of assumption and it shall not be necessary for my Executors to provide any security for the execution of their duties*" (My own translation)
[13]See Robertson v Robertson's Executors 1914 AD 503 at 507 and Raubenheimer v Raubenheimer 2012 (5) SA 290 (SCA) at para 23
[14]2012 (4) SA 593 (SCA) at para 7

"*Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production*.."

[50] Applying the above principles of interpretation of a will in the present case, if the deceased intended to have his son as an executor together with an attorney at all times, such a peremptory wish could have been included in the will together with a clear condition attached thereto to the effect that " *daar sal te alle tye minstens twee eksekuteurs die amp beklee*"[15] or something similar to such a provision, to ensure, without any doubt, that the testator's intention was to have his estate administered by two executors at all times.

[51] Earlier cases on the subject also indicate that in the absence of a specific provision in the will providing for the appointment of two executors at all times, once the other executor becomes unavailable either by death or resignation, the remaining executor may continue to act without the appointment of another.[16]

[52] Despite the interpretation that the court *a quo* sought to ascribe to clause 5 of the deceased's will, following the resignation of Wilmans as co-executor during August 2011, the Master exercised his discretion and saw it fit to grant letters of executorship to the first appellant to proceed as a sole executor in the winding up of the deceased's estate. As I elaborate in detail below, this decision of the Master stands as valid as it was never challenged by the first and second respondents or anyone else.

[53] In the premises, the interpretation that the court *a quo* ascribed to clause 5 of the deceased will and relating to the need to have two executors of the deceased estate at all times cannot be sustained.

---

[15] Loosely translated as "There will be at least two executors holding office at all times"
[16] See Goosen v Bosch and the Master 1917 CPD 189 at 224 and Administratrix, Estate Turner v Assistant Master 1940 GWLD 71 at 80

The statutory powers of the Master to appoint an executor nominated in terms of a Will

[54] The appellants contend that since the resignation of Wilmans as a co-executor, the Master exercised his discretion, located in sections 14(1)(a) and 18(5)(a)(ii) of the Act, and issued letters of executorship to the second appellant to hold office as a sole executor. In their view, the deceased, as testator, never intended that there must always be two executors, one being an attorney, to administer his estate.

[55] Section 14(1) of the Act provide as follows:

> *"(1) The Master shall, subject to subsection (2) and sections 16 and 22, on the application of any person who-*
>
> *(a) has been nominated as executor by any deceased person by a will which has been registered and accepted in the office of the Master; and*
> (a) *is not incapacitated from being an executor of the estate of the deceased and has complied with the provisions of this Act,*
>
> *grant letters of executorship to such person."*

[56] On the other hand, section 18(5) of the Act provides thus:

> *"(5) The Master may at any time –*
>
> (a) *if, in the case of two or more persons-*
> *(i) ……*
> *(ii) who are the executors in any estate, one or more of them cease to be executors thereof, grant letters of executorship to the remaining executor or executors; or authorize the remaining executor or executors to liquidate and distribute the estate, as the case may be; or……."*

[57] At the core of the appellants' complaint is that the court *a quo* impermissibly took away the powers of the Master given by the enabling legislation quoted above to issue letters of executorship to a person nominated by the deceased in terms of a will. In their view, the enabling legislation does not permit a court to direct other persons, to the exclusion of

the executor testamentary, to nominate a potential executor, who would then be granted letters of executorship by the Master.

[58] Linked to the above challenge, the appellants also contend that without a proper review and setting aside of the decision of the Master to appoint the second appellant as sole executor, either through the self-contained review procedure contemplated in section 95 of the Act or through mechanism of the Promotion of Administrative Justice Act (PAJA review) , it was impermissible for the court *a quo* to have made an order providing for the nomination and possible appointment of a co-executor as this flies against the powers granted solely to the Master and also offends the separation of powers principle.

[59] The general scheme of the Act and its provisions giving specific powers to the Master is without controversy. The Act recognises and enforces testamentary freedom. It envisages that where a testator has nominated a possible executor in the will, absent any grounds of disqualification recognised in law, then the Master is obliged to appoint such a nominee. These are specific powers granted to the Master in terms of section 14(1) of the Act.

[60] Similarly, where a co-executor who was nominated in a will and subsequently resigns from office, the Act gives the Master the discretionary power to decide, given the facts at hand, to either issue letters of executorship to the remaining executor to proceed as the sole executor or decide otherwise and proceed to consider granting such letters to an executor dative. At the core of the Master's decision are the wishes of the testator and the prevailing circumstances at hand. These powers are located within the provisions of section 18(5) of the Act.

[61] In the present case, soon after the resignation of Wilmans as co-executor, and presumably after applying his mind, the Master decided to issue letters of executorship to the first appellant to proceed as the sole executor of the deceased estate. In so doing, the Master was fully aware of the provisions of clause 5 of the deceased's will, which provided for the initial

appointment of two executors. The Master's decision is this regard, remains valid and enforceable until set aside following due process.

[62] In launching the application which is the subject-matter of this appeal, the first and second respondents did not seek to challenge or question the decision of the Master to issue letters of executorship to the first appellant to act as a sole executor nor did they seek to assail the legality of such a decision. Absent any challenge premised on either section 95 of the Act or any of the grounds of review found in PAJA, the court *a quo* was not entitled to, *mero motu*, review the decision of the Master exercised in accordance with the provisions of section 14(1) read with section 18(5) of the Act and seek to propound for the appointment of a co-executor.

[63] In the result, the grounds of appeal relating to the improper exercise of the court a quo's powers to provide for the nomination of an individual who was to be appointed by the Master as co-executor with the second appellant must be upheld.

Concluding remarks

[64] We would be remiss if we do not express our dissatisfaction with the manner in which the Master has handled the winding up of the deceased estate. The Master seems to be oblivious of his functions and responsibilities in terms of the Act to ensure that the second appellant is held accountable in the execution of his duties.

[65] The fact that the second appellant conducted the financial affairs of the deceased estate through his personal banking account for some time prior to opening the late estate account and that the lodgement of the liquidation and administration account has been delayed are matters that should have drawn the attention of the Master earlier and necessary corrective action being taken.

[66] A period of almost ten years has elapsed since the second appellant was entrusted with the administration of the estate and the sooner the estate

is wound up, the better for the beneficiaries and the estate itself. The second appellant and those who are assisting him need to direct their energies towards the finalisation of the estate as soon as it is practically possible. All these must happen under the direct control and supervision of the Master.

Costs

[67] The determination of costs is a matter for judicial discretion, exercised with due regard to the particular facts at hand. The first and second respondents approached court seeking to ventilate their rights to ensure the finalisation of the estate. The opposition of the application by the appellants cannot be regarded as being unmeritorious or done in bad faith.

[68] All parties involved in this litigation are testamentary heirs to the estate and given the factual matrix outlined above, this is an appropriate case where the successful party ought to be denied costs of appeal.

Order

[69] In the premises, the following order is made:

1. The appeal is upheld.

2. The order of the Court *a quo* is set aside and substituted with the following order:

   "1. The application is dismissed.

   2. The first and second applicants are ordered to pay the costs, jointly and severally, the one paying the other to be absolved."

3. There is no order as to costs in the appeal.

4. The Registrar is directed to ensure that a copy of this judgment is brought to the attention of the Master of the High Court, Kimberley.

O.K. CHWARO
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY
I agree

C.C. WILIAMS
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

I agree

L.G. LEVER
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

DATE OF HEARING: **23 January 2023**

DATE OF JUDGMENT: **17 March 2023**

REPRESENTATION:

For the First and Second Appellants: **Adv. A. Coertze**
Instructed by:
Duncan & Rothman
Kimberley

For the First and Second Respondents: **Adv. A. Sieberhagen**
Instructed by:
PGMO Attorneys
Kimberley