IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
DATE	**SIGNATURE**

CASE NO: 51034/2013

DATE: 12/1/2015

IN THE MATTER BETWEEN

GREGORY ANDREW SALZWEDEL N.O. (in his capacity as Executor of the Estate Late Catharina Margaretha Salzwedel)	APPLICANT
AND	
SARINA ROSSOUW N.O. (in her capacity as Trustee of the Karien Rossouw Familie Trust IT.1800/02)	1st RESPONDENT
GREGORY ANDREW SALZWEDEL N.O. (in his capacity as Trustee of the Karien Rossouw Familie Trust IT.1800/02)	2nd RESPONDENT
THE MASTER, PRETORIA	3rd RESPONDENT
SARINA ROSSOUW	4th RESPONDENT
SAMUEL ROSSOUW (in his capacity as guardian of the minor child Rhode Rossouw)	5th RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This case turns mainly on the interpretation of certain clauses in the will of the late testatrix, Ms Salzwedel, ("the deceased").

There is also a counter-claim by the first, fourth and fifth respondents to have the applicant removed from his office as executor of the estate of the late deceased in terms of the provisions of section 54(1)(a)(v) of the Administration of Estates Act no 66 of 1965.

[2] Before me, Mr Klopper appeared for the applicant and Mr Van Ryneveld appeared for the first, fourth and fifth respondents.

[3] The third respondent, the Master, did not play an active role in the proceedings.

Introduction, affidavits and applications exchanged and some notes about the chronology of the case

[4] The deceased, by all accounts, was a very active and successful business woman. She won some awards for her enterprising work. She was evidently involved in pursuits such as insurance brokerage, advising on finances and risk management. In the process she floated a number of companies of which she was, for the most part, the sole director.

[5] The deceased used to be married to the fifth respondent, Mr Samuel Rossouw. From this marriage two daughters were born, the first respondent (also the fourth respondent), in her own right a business woman evidently also involved in risk management activities

and now 28 years old, and a younger daughter, Rhode, who turned 18 very recently and who is being assisted by her father, the fifth respondent. Technically, Rhode has now attained the age of majority, so that, strictly speaking, she can now be substituted as the fifth respondent in place of her father who, up to now, featured as her guardian. When the hearing before me took place, Rhode was still a minor. Nothing turns on this.

[6] In about February 2002, the deceased founded the Karien Rossouw Familie Trust. The trust was duly registered in terms of the Trust Property Control Act, no 57 of 1988 under no IT.1800/02. The original trustees were the deceased, Ms Nerine Botes and Ms Jennifer Anne Hall. At one stage, Ms Botes resigned but she was later, indeed only in November 2013 and when this case was well underway, reappointed. The relevant letters of authority issued by the third respondent and dated 1 November 2013, features the applicant, the first respondent and Ms Botes as the present trustees. No mention was ever made of Ms Hall, so that she must have resigned somewhere along the way. At one stage the applicant's attorney of record, Mr L A Meyer, was also a trustee but he resigned as recently as on 10 June 2013 after the attorney acting for the first, fourth and fifth respondents raised some questions about his involvement, given the nature of this case.

[7] In terms of the Trust Deed of the Karien Rossouw Familie Trust ("the trust") and, in particular, clause 4.1 thereof, the beneficiaries are the deceased and her descendants, namely the two daughters. There are no other descendants and there is no record of any other trust which has been created for the aforesaid beneficiaries (clause 4.1.3 of the Trust Deed).

In terms of clause 6.1 of the Trust Deed the trust will become dissolved upon the death of the deceased on condition that the trustees, in the exercise of their discretion, may dissolve the trust either before or after such demise. This issue did not receive attention before me, but it is fair to assume that the trustees decided not to dissolve the trust upon the death of the deceased on 13 September 2012.

In terms of clause 9.2 of the Trust Deed, the beneficiary has a conditional right to receive benefits from the trust and one of those is that the beneficiary must be alive. On strict application of this clause, it would mean that the only beneficiaries are the daughters. There is another, somewhat contradictory, clause (9.3) which provides that if the beneficiary is no more alive, the trustees may decide to pay the benefit to the estate of the beneficiary or to dispose of the benefits in such a manner as if the beneficiary never lived. This issue was never debated before me, and for present purposes, I assume that the sole beneficiaries are the two daughters. In any event, given the nature of the case and the dispute, to which I will refer, nothing turns on this.

[8] The deceased and the fifth respondent were divorced in 2001. On 20 September 2003 the deceased and the applicant got married to each other out of community of property. According to my calculations, the deceased was then 41 years old and the applicant 35. The applicant also has two children from a previous marriage.

[9] On 12 December 2007, the deceased signed her last will and testament ("the will") which forms the subject of this dispute. In terms of the will, the applicant was appointed as the executor.

[10] On 13 September 2012, as I have said, the deceased passed away from natural causes, evidently after some illness. No details about the illness appear from the papers.

[11] After the death of the deceased, and while the estate was to be administered and finalised, a number of disputes emerged, and were identified, between the applicant on the one side and the first, fourth and fifth respondents on the other side. For the sake of brevity, I will refer to them as "the opposing respondents".

[12] The main dispute, which forms the subject of this case, involves the question whether the will should be interpreted in such a way that all shares owned by the deceased at the date of her death (and also all loan accounts listed in her favour) including specifically 58 very valuable shares held in Gulfstream Energy (Pty) Ltd with registration number 2006/031199/07, is to be included in the legacy to the applicant, personally, or in the legacy of the trust beneficiaries (in fact, the two daughters).

[13] In an effort to resolve the dispute, the applicant, in his capacity as executor of the deceased estate, launched this application, in August 2013, for declaratory relief to the effect that the mentioned shares and loan accounts are to be included in his legacy.

[14] The opposing respondents filed an opposing affidavit coupled with a counter-application seeking orders for the removal from his office as executor of the applicant in terms of section 54(1)(a)(v) of the Administration of Estates Act no 66 of 1965 and for the applicant to be directed to return the Letters of Executorship dated 2 November 2012 issued to him by the third respondent.

[15] Then followed a flurry of activity: there was a replying affidavit, an application to amend the notice of motion, an opposing affidavit to the counter-application and a replying affidavit thereto.

Thereafter, the opposing respondents filed a duplicating affidavit which inspired the applicant to file an application to strike out the duplicating affidavit, with a supporting affidavit thereto, and an affidavit opposing the application by the opposing respondents to file the duplicating affidavit. This was met with a notice of intention to oppose the application to strike out as well as a replying affidavit to the opposing affidavit to the application to file the duplicating affidavit. Not to be outdone, the applicant also, as a precautionary measure, filed an answer to the duplicating affidavit.

[16] In the end, the parties managed to generate a record running into some 477 pages.

[17] During the course of the proceedings, Mr Klopper indicated that the filing of the duplicating affidavit was no longer an issue. For purposes of this judgment, I considered the contents of all these papers.

<u>The dispute forming the subject of this application</u>

[18] I have broadly outlined the details of the dispute, but it is useful to quote the first two paragraphs of the notice of motion:

> "1. That it is declared that the correct interpretation of paragraph 5.1 of the last will and testament of the late Catharina Margaretha Salzwedel executed on 12 December 2007 at Centurion is that all shares owned by the testatrix on the date of her death on 13 September 2012, including

specifically (but not limited to) the 58 shares held in Gulfstream Energy (Pty) Ltd with registration number 2006/031199/07, is to be included in the legacy to her husband, the applicant;

2. that it is declared that the correct interpretation of paragraph 5.1 of the last will and testament of the late Catharina Margaretha Salzwedel executed on 12 December 2007 at Centurion is that all loan account(s) listed in favour of the testatrix on the date of her death on 13 September 2012, including specifically in (but not limited to) Gulfstream Energy (Pty) Ltd with registration number 2006/031199/07, is to be included in the legacy to her husband, the applicant."

[19] In the opposing affidavit, the opposing respondents pointed out that there is a contradiction in the manner in which the relief is sought: the relief is sought for the benefit of the husband, Gregory Andrew Salzwedel, personally and not for the applicant. The husband is litigating in his capacity as the executor of the estate. He did not, for example, join himself in his personal capacity as a co-applicant. The relief can therefore not be sought for the benefit of "the applicant". To cure this apparent discrepancy, the applicant amended the notice of motion by replacing the last phrase in each paragraph with the following: "... is to be included in the legacy to her husband, Gregory Andrew Salzwedel". The applicant ascribed the discrepancy to a "typing error". The amendment was not opposed.

[20] The case really turns on the 58 shares which the deceased held in Gulfstream Energy (Pty) Ltd ("Gulfstream") at the time of her death. No details were supplied, in the proceedings before me, about loan accounts and other shares, as mentioned in the notice

of motion. Nevertheless, the result of the decision made in respect of the relief sought in terms of paragraph 1 of the notice of motion, will be reflected in the decision in respect of paragraph 2.

[21] The terms in the will which the applicant seeks to have interpreted in his own favour in his personal capacity are paragraphs 5 and 6 of the will which read as follows:

> "5. **Legacies**:
>
> I bequeath my estate as follows:
>
> 5.1 To my husband, Gregory Andrew Salzwedel, all my shares, and any credit loan account in INTRA FINANCIAL ADVISORS HOLDINGS (PTY) LTD, INTRA FINANCIAL ADVISORS (PTY) LTD, HORUS MANAGEMENT CC, INTRASURE INSURANCE BROKERS (PTY) LTD AND ALEXANDER HUTCHINSON (PTY) LTD.
>
> 5.2 To the Trustees of the KARIEN ROSSOUW FAMILIE TRUST (NO IT.1800/02), a cash amount equal to the amount due to me by the said trust as at date of my death, to be administered for the benefit of the trust beneficiaries in terms of such Trust Deed.
>
> 6. **Heirs**:
>
> 6.1 The residue of my estate to the Trustees of the KARIEN ROSSOUW FAMILY TRUST (NO IT.1800/02), to be administered for the benefit of the trust beneficiaries in terms of such Trust Deed."

[22] In his founding affidavit, the applicant gives an overview of the business career of the deceased, describing her as a dynamic and well experienced business woman who "received many awards" and was a business woman of note.

Details of this overview, which are, by and large, common cause, can be summarised as follows: the deceased kicked off in the 1980's with a catering business and a florist business. In the mid 1990's she started her own insurance brokerage and also developed her own financial risk management product which she marketed to Shell in the late 1990's. During 1998 she started the business Intra Financial Advisors (mentioned in paragraph 5.1 of the will) as a marketing and management company. In 2003 she moved to Pretoria to expand the Intra Financial Advisors business and also established a holding company, Intra Financial Advisors Holdings (also mentioned in paragraph 5.1 of the will) and another property holding entity, Horus Management Services (also mentioned in the will). She also established another short-term insurance brokerage, Intra-Sure (also mentioned in the will) and in 2006 she purchased another brokerage, Alexander Hutchinson Brokers (also mentioned in the will).

[23] Perhaps the most critical part of this case, in my view, is the fact that Gulfstream (or its predecessor, as I will explain) is not mentioned in the will. The same, obviously, applies to the shares and loan account of the deceased in Gulfstream at the time of her death.

In the founding affidavit, the applicant points out that the deceased, during 2006, as part of the group of businesses referred to, started the business Intra Credit Risk Management (Pty) Ltd with registration number 2006/031199/07. It will be noted that this is the same registration number as the one of Gulfstream, mentioned in the notice of motion. The

reason for this is that the name of Intra Credit Risk Management (Pty) Ltd (which I will refer to as "ICRM", to avoid confusion and to distinguish it from the other Intra companies) was changed on 2 October 2009 to Gulfstream Energy (Pty) Ltd.

[24] Unlike the other Intra companies and other businesses of the deceased, as described above, ICRM was not mentioned in the will, although it came in existence about a year before the will was signed in December 2007. It came into existence about three years after the deceased married the applicant and the will was signed about four years after that happy event.

[25] According to the applicant, the purpose of floating ICRM was to use it to promote the financial risk management product the deceased had developed and successfully sold to Shell and to other companies within the petroleum industry. The idea was to channel business through ICRM to avoid any potential conflict of interest between Shell and the other fuel companies. The opposing respondents, on the other hand, state that ICRM was started in order to split the insurance business from the risk management done for the fuel companies. There were no fears regarding a conflict of interest.

[26] It is common cause that, according to the financial statements of ICRM, it conducted very little or no business from its registation until the latter part of 2009. It seems that the new business, aforementioned, was simply channelled through Intra Financial Advisors. It is noteworthy that in the financial statements the deceased is listed as the sole director.

[27] The applicant states that during the latter part of 2009 the business known as Gulfstream Energy (Pty) Ltd was started by himself and a business associate, Mr Shane Jegels. The opposing respondents deny this, stating that the business was started by the deceased and Mr Jegels.

The applicant then states that it was decided to place the shareholding in the name of the respective spouses (the deceased and Ms Jegels), "... as BEE requirements and in particular women empowerment was, and still is, a key driving factor in obtaining licensing and doing business in the petroleum industry". Where the applicant appears to openly admit having been guilty of what is generally described as "fronting", it also seems that, in the process, he was hoisted by his own petard.

The applicant goes on to confirm that the name of ICRM was changed on 2 October 2009 to Gulfstream Energy (Pty) Ltd and the share capital of 120 was divided between the two spouses to the tune of 58 for the deceased and 62 for Ms Jegels.

The applicant goes on to state that from its inception in 2009 Gulfstream was then developed into a thriving business showing a turn-over in excess of R1,6 billion in the "last financial year" which would have been, probably, 2012.

The opposing respondents deny allegations by the applicant that he was the driving force behind Gulfstream, that it was his brain child and that he was working in the position of managing director. They point out that Mr and Ms Jegels had made a major contribution towards conducting the business both in their time, effort and money. They repeat that the deceased was listed in the financials as the sole director. They also referred to the

shareholders agreement entered into in November 2009 between the deceased and Ms Jegels. In terms thereof, upon the demise of one of the shareholders, the remaining shareholders "shall be obliged to purchase the shares". The shares are to be valued and then sold to the remaining shareholders. On the weight of the evidence, in this case, the shares have since been valued at some R5,2 million and Ms Jegels has offered to purchase them. This transaction, according to the applicant, is being resisted by him. He states that the transaction is "simply being put on ice" and that the "payment" is being kept in trust on an interest bearing investment pending the finalisation of this application for a declaratory order.

[28] In contesting the argument of the applicant that the will should be interpreted on the basis that it was the intention of the deceased that all her shares and loan accounts, including those relating to Gulfstream, were bequeathed to the applicant in his personal capacity, the opposing respondents argue as follows: if this was the case, there is no reasonable explanation for the fact that the deceased, including all her other businesses, specifically excluded ICRM from her will, which was already signed more than a year after ICRM was floated.

Moreover, if the deceased, as an exceptional business woman, well versed in the activities of all her companies, had the intention of bequeathing the shares in ICRM (and later in Gulfstream) to her husband, she could quite easily have amended the will, something which she refrained from doing. Even when she entered into the shareholders agreement with Ms Jegels, she gave no indication that she wanted the shares to devolve upon her husband. At the time of her demise, in September 2012, Gulfstream was already up and running and doing very well, on the applicant's own version, since three

years earlier in 2009. As the sole director and the major shareholder, the deceased would have been well aware of this. Had she had any intention of giving the shares to her husband, there was nothing stopping her from doing so.

[29] Moreover, the opposing respondents point out that when the will was signed in 2007, Gulfstream, in its present form, was not yet known to the deceased. They argue that the applicant now wishes this court to interpret the will as including an entity not yet known to the testatrix when she signed the will.

[30] In my view, there is much to be said for the arguments advanced by the opposing respondents.

[31] The applicant also submitted in his founding affidavit that the "normal and natural meaning of the words 'all my shares' should be indicative of the intention of the testatrix that she referred to all her shares at the date of her death and not to some part thereof". This is a reference to the wording of clause 5.1 of the will. The opposing respondents counter this by arguing that if that had been the intention of the deceased she would not have mentioned the entities, the shares of which she was bequeathing to her husband. The fact that she by name mentioned the relevant entities is, so they argue, indicative that those entities not mentioned, are excluded. I also find myself in respective agreement with this argument.

[32] In his argument, counsel for the applicant referred to the case of *Ex Parte Weir's Executors* 1939 CPD 340 where the testator bequeathed "my shares" in a certain company and it was held that these shares included certain preferent shares acquired by

the same testator in the same company subsequent to the making of the will. This state of affairs is clearly distinguishable from the present: the deceased bequeathed all her shares in specifically identified companies. She bequeathed no shares at all in the entities that are relevant to this case, namely ICRM and, later, Gulfstream.

Mr Van Ryneveld argued that where these last-mentioned entities are specifically excluded from the will, or, for that matter, from a subsequent will, the maxim *expressio unius est exclusio ulterius* is applicable (meaning "vermelding van een is uitsluiting van die ander" or "expression of one thing is the exclusion of the other" – see Hiemstra and Gonin *Trilingual Legal Dictionary* 2nd ed p196). In this regard, I was also referred by counsel to *Dison and others v Hoffmann and others NNO* 1979 4 SA 1004 (AD) at 1016A-E.

[33] In his diligent address, Mr Klopper also urged me to recognise the significance of the comma used in the first line of clause 5.1 of the will: "... all my shares, and any credit loan account in ..." If I understood the argument correctly, it is this: "all my shares" should be distinguished from "any credit loan account ...", so that the specified companies are only brought in line with the loan accounts whereas "all my shares" means all the shares of the deceased including those in the specified entities. I cannot accept this argument: there is no apparent or conceivable reason why the deceased would divorce the shares from the credit loan accounts in the specified entities. Both shares and credit loan accounts are assets in those companies. This is what the deceased bequeathed to her husband. There is no conceivable reason why she would embark upon such a complicated and cryptic exercise to separate the destiny of the shares from the credit loan accounts and only specify the entities relating to the latter.

It should also be born in mind that the applicant chose to approach the court by way of motion, so that no *viva voce* evidence was offered to advance the case of the applicant or to throw further light on the subject.

[34] Another argument offered on behalf of the applicant for the exclusion of ICRM (and, perhaps later, Gulfstream) from the will, is the fact that ICRM was dormant in 2007 when the will was signed. This argument was countered on behalf of the opposing respondents on the basis that if this were the case, no clearer proof can be found that the deceased did not intend including ICRM in the will! This would also be in line with the authorities to the effect that in interpreting a will the court is entitled to have regard to the material facts and circumstances known to the testator when he made it: it puts itself in the testator's arm-chair – see *Dison*, *supra,* at 1035G-1036B, and also the passage quoted there from *Allen and another NNO v Estate Bloch and others* 1970 2 SA 376 (C) at 380A-E. See also, generally, *Campbell v Daly and others* 1988 4 SA 714 (TPD) at 717I-719D.

[35] In all the circumstances, I have come to the conclusion that the applicant failed to make out a case which supports his proposed interpretation of the will.

In my view, the failure of the testator to mention ICRM with the other Intra entities in the will (or, for that matter, to introduce a reference to ICRM or Gulfstream by way of a later amendment to the will) inevitably points to the inclusion of the Gulfstream shares (and, for that matter, any credit loan account which the deceased had in Gulfstream) and, if applicable, any other unspecified shares and credit loan accounts, as part of the

residue of the estate of the deceased which has to be administered for the benefit of the trust beneficiaries as specified in clause 5.2 and clause 6 of the will.

[36] In the result, the application must fail.

[37] Before turning to the question of costs, I must deal with the counter-application.

The counter-application

[38] The relevant paragraphs of the notice of motion of the counter-claim read as follows:

> "1. That in terms of section 54(1)(a)(v) Gregory Andrew Salzwedel NO be removed from his office as Executor of the Estate Late Catharina Margaretha Salzwedel;
>
> 2. That Gregory Andrew Salzwedel NO forthwith and immediately return the Letters of Executorship dated 2 November 2012 to the Master, High Court, Pretoria."

[39] Prayer 2 is in line with the provisions of section 54(5) of the Administration of Estates Act, no 66 of 1965.

[40] Section 54(1)(a)(v) of the Administration of Estates Act no 66 of 1965 ("the Act") reads as follows:

> "54. **Removal from office of executor.** - (1) An executor may at any time be removed from his office –
>
> (a) by the Court –
>
> (i) ...

(ii) ...

(iii) ...

(iv) ...

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

[41] The other subsections preceding (v) have not been shown to apply to this case.

[42] What is plain from a general reading of the papers is that the parties are at arm's length and that their relationship has broken down to such an extent that I see no reasonable prospect of trust and goodwill ever being restored between them. I refer to the applicant on the one hand and the first, fourth and fifth respondents on the other hand. For example, the applicant alleges that the fourth respondent was influenced by the fifth respondent and their attorney to make certain allegations in her papers. This she denies. There is a hot debate on the papers as to whether or not the applicant, as a co-trustee, took sufficient steps to timeously have a third trustee appointed after the resignation of the applicant's attorney. The applicant describes the fourth respondent's allegations in this regard as "false". The appointment had to take place because, in terms of clause 10.1.2 of the Trust Deed, should there be less than three trustees, all the powers of the remaining trustees are suspended except the power to appoint a third trustee. In passing, I mention that the newly appointed trustee, Ms Botes, (who was also one of the first trustees as I have explained) was not officially joined as a party to this litigation. The opposing respondents raised this issue but never proceeded with an argument for non-joinder. On a general reading of the papers I am under the impression that Ms Botes

(now Ms Schoeman-Botes) is aware of this pending application. I am not persuaded that a failure of justice occurred through the non-joinder and decided not to *mero motu* take the issue any further.

Still on the issue of the appointment of a third trustee, the following exchange between the parties illustrates the poor relationship and state of aggression that prevails: the fourth respondent, in the opposing affidavit of October 2013, makes the following allegation:

> "15.10 In the interim and until a third Trustee has been appointed, the trust cannot really act without a resolution. I can quite emphatically state that Salzwedel would never have agreed in the present circumstances to sign a resolution in his capacity as Trustee to allow me to act in my capacity as Trustee and to oppose the applicant's application on behalf of the trust."

The applicant responded as follows:

> "The content is blatantly false and another example of the fact that the content of the affidavit was prepared by a drafter who did not obtain proper instructions from Sarina Rossouw and that she herself did not read the contents before signing same."

The fact of the matter is, however, that the applicant, not only as executor of the estate but also as a trustee, and bearing in mind his fiduciary duties towards the trust, contends for an interpretation of the will which militates against the interests of the trust and is aimed at depriving the trust beneficiaries of a substantial bequest from the deceased.

This is a clear case of a clash of interests and a point raised repeatedly in the papers by the opposing respondents but the applicant, throughout, remained silent on this particular issue. What is plain, is that he is not prepared to resign as a trustee or, for that matter, as the executor of the estate.

It is also clear from a number of affidavits deposed to by the fourth respondent, a 28 year old business woman, that she fully supports the stance adopted by the opposing respondents and it is clear that she has not been influenced to make submissions which she does not agree with. She also indicated that she was, even without a resolution from the trust, opposing the application on behalf of the trust in the interest of justice. In this regard, she relies on the provisions of clauses 10.12.11 and 10.17 of the Trust Deed. The last-mentioned provision reads as follows:

> "Alle handelinge te goeder trou verrig deur die trustees sal geldig bly ten spyte van enige gebrek in die aanstelling van die trustees."

In their answering affidavit, the opposing respondents complain that in his notice of motion, the applicant seeks a costs order against any opposing respondent whilst, for himself, if the matter were to remain unopposed, he asks for the estate to pay the costs. They complain that he also does not observe the utmost good faith (*uberrima fides*) towards the trust. In denying this, the applicant alleges that the first, fourth and fifth respondents and their attorney are motivated by "nothing but greed" judging by the manner in which they approached the application.

These are some examples from the papers illustrating the high level of aggression between the two camps. There are many more examples, which I will not dwell upon.

[43] There are other areas of deep conflict between the parties which are described in the papers including in lengthy and, at times, acrimonious correspondence between the respective attorneys. I briefly mention some of them:

1. The attorney of the opposing respondents wrote in a letter, already dated 19 December 2012, some three months after the passing of the deceased, that he had met with the applicant to discuss the finalisation of the estate. According to the attorney, the applicant told him that he wanted to create a new trust also featuring his own two children from a previous marriage, together with the two daughters, the fourth respondent and Rhode, as beneficiaries. The applicant then wanted to transfer some of the properties bequeathed to the Karien Rossouw Family Trust in terms of the will, into the name of the new trust. This idea was rejected by the opposing respondents. The fourth respondent, in deposing to one of a number of affidavits referred to, alleged that the applicant stated that if the beneficiaries turn down his suggestion of a redistribution of assets, as explained, he would file personal claims against the estate to decrease the value of the inheritance of the beneficiaries.

2. According to the correspondence, Rhode already moved out of the home of the deceased, which she had occupied with the deceased and the applicant, at the end of 2012. This is because the relationship between the applicant and the two daughters was deteriorating rapidly.

3. There was a dispute about the bank account of the deceased at Rand Merchant Private Bank in which monies were deposited, including pay-outs from insurance policies, and the reluctance on the part of the applicant to "freeze" the

account and to preserve the assets. These allegations are not necessarily common cause, but they illustrate this particular area of dispute.

4. There was unhappiness about the applicant's continued residence in the house of the deceased without official authority for him to do so. He states in his papers that he is renting the house at a market related rental, but furnishes no particulars.

5. There was an objection by the opposing respondents about the continued use by the applicant of the assets, movable and immovable, of the deceased, as though nothing had happened. It was pointed out to the applicant in correspondence that he was supposed to administer the assets to the benefit of the trust and its beneficiaries and not to use the assets for his own benefit.

6. I have referred to the sale of the contested Gulfstream shares, valued at R5,2 million, to Ms Jegels. In the duplicating affidavit, the fourth respondent alleges that Mr Jegels, who told her about this transaction, also told her that the applicant had requested him (Mr Jegels) not to disclose details of the transaction to the fourth respondent. This allegation was not specifically denied by the applicant. He did, however, allege, as I mentioned earlier, that the "payment" was being kept in an interest bearing "investment" pending the finalisation of this case. There is an allegation by the opposing respondents that the applicant was dissipating the assets of the estate, but this he denies.

7. After lengthy discussions, over many months, the applicant now appears to have lodged a claim, in his personal capacity, against the estate, to the tune of some R2,7 million. The bulk of the claim has to do with an insurance pay-out following the death of the deceased. There is also a claim for interest, alleged expenses and 50% of the profits of the sale of a property. It clearly appears from the papers that these claims are hotly contested by the opposing respondents,

who also claim that this state of affairs makes the position of the applicant as executor untenable: he will play a role in deciding whether or not to admit his own claim against the estate. In this regard, for example, the provisions of sections 29, 31, 32, 33 and 35 of the Act will come into play: in terms of section 29 he must publish invitations in the *Gazette* and local newspapers to all persons having claims against the estate to lodge them with him (the executor, in this case the applicant himself) within a certain time. This invitation must be published "as soon as may be after Letters of Executorship have been granted to him (the executor)". The applicant must therefore invite himself to lodge his own claim. It is not clear whether this was done given that the deceased already passed away more than two years ago. The Letters of Executorship issued to the applicant is dated 2 November 2012, more than two years ago. Section 31 makes provision for the filing of late claims and for the consequences if that happens. Section 32 provides for disputed claims. If the executor disputes any claim against the estate he must take certain steps. In this case it is unlikely given what he says in the papers, that he will dispute his own claim. This is an untenable situation. It is also unlikely that he will reject his own claim as foreshadowed in section 33. It can be assumed that in terms of section 35 he will include his own claim in a liquidation and distribution account which will probably then be disputed by the opposing respondents and referred to court. The parties will remain at loggerheads. This state of affairs cannot be in the interests of the beneficiaries, the trust and the estate in general.

[44] In summary, there is a clash of interests between the applicant in his capacity as executor and in his personal capacity. There is a clash of interests between the applicant in his

capacity as executor and personal capacity on the one hand and the trustees (beneficiaries of the will) of the trust of which the applicant is a co-trustee. At the same time, there is a clash of interests between the applicant in both his capacities and the beneficiaries of the trust of which he is a trustee. Lastly, there is a clash of interests between the applicant in both capacities, and the heirs and/or legatees mentioned in the will.

[45] In *Reichman v Reichman and others* 2012 4 SA 432 (GSJ) the learned Judge, at 445I, points out that "in a number of cases our courts have had to consider the position of an executor who had a conflict between his personal interests and his duties as the executor of an estate or trustee of a trust". The learned Judge then proceeds to provide a useful summary of the relevant case law and the principles enunciated in those cases. See, generally, the judgment at paragraphs [14] to [20] at 445I-450A. I refer briefly to some of these decisions dealt with by the learned Judge in *Reichman*.

[46] In *Lindenberg v Giess NO and another* 1957 3 SA 30 (SWA) at 33G-34A the following is said:

> "The question of costs must be considered. The executor was faced with an objection to the account. He acted on a valuation not in terms of the will. When confronted with another valuation of Van Helsdingen he was placed in a position where his fiduciary functions, which required the exercise of the utmost good faith, conflicted with his own interests. He followed the line dictated by his own interests. Such conduct cannot be allowed to stand ..."

It appears that in this case the first respondent (seemingly the executor) being personally interested and having acted in his own interests in a position where his own interests conflicted with his duty, was ordered to pay the costs *de bonis propriis*.

[47] In *Grobbelaar v Grobbelaar* 1959 4 SA 719 (A) VAN BLERK, JA said the following at 724G-725A:

> "Dit is duidelik dat hier 'n wesenlike botsing bestaan tussen die persoonlike belange van die respondent en dié van die boedel waardeur 'n toestand geskep is wat respondent se posisie as eksekuteur vir hom onhoudbaar maak. Hy bevind hom in die 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 sal hy genoodsaak wees om kant te kies. Hy kan nie onsydig of onpartydig bly nie.
>
> 'n Dergelike posisie het ontstaan in die saak van *Barnett v Estate Beattie* 1928 CPD 482, 'n appèl teen 'n beslissing van die Hooggeregshof van Suid Rhodesië, waar 'n eksekuteur vir die rede uit sy amp ontset is. Daar het die hof heeltemal tereg daarop gewys dat op hierdie stadium dit nie nodig is nie om in te gaan op die geldigheid van respondent se eis, want die vraag oor wie reg of verkeerd is, is nie hier ter sprake nie." (Emphasis added.)

It appears, therefore, that when considering an application to remove an executor from his office in terms of section 54 of the Act, it is not necessary, at this stage, to consider the validity of his claim against the estate.

This is over and above the fact that the applicant in the present case seeks an interpretation of the will which furthers his personal interests and militates against those of his co-trustees, the beneficiaries of the trust and the heirs/legatees in terms of the will.

[48] In *Harris v Fisher NO* 1960 4 SA 855 (A) the learned Judge of Appeal, at 861H-862E, also refers to other cases including *Grobbelaar, Sackville West v Nourse and another* 1925 AD 516 at 533-534 and the following passage from Story *Equity Jurisprudence*, 2nd ed p212:

> "Executors or administrators will not be permitted, under any circumstances, to derive a personal benefit from the manner in which they transact the business or manage the assets of the estate."

[49] In *Reichman*, the learned Judge, at 447I-449G, offers a full discussion of the judgment in *Die Meester v Meyer en andere* 1975 2 SA 1 (T) where a full court was faced with an application to remove an executor in accordance with section 54(1)(a)(v) of the Act. I only refer to a few of those passages.

In fairness to the applicant, the learned Judge in *Reichman* at 448D-F refers to the following passage from *Meyer* at 16C-17F:

> "Die hof sal nie ligtelik 'n eksekuteur van sy amp onthef nie, veral waar hy 'n eksekuteur-testamentêr is. Tog is hierdie oorweging nie deurslaggewend nie. In *Port Elizabeth Assurance Agency and Trust Co Ltd v Estate Richardson* 1965 2 SA 936 (K), het VAN WINSEN R, op bl 940, gesê:
>
> 'I have no doubt that in the exercise of its power to appoint or remove an administrator the Court will pay close attention to the wishes of the testator as

> expressed in or implied from the terms of the will. The Court cannot, however, necessarily be bound by these wishes even to the detriment of the beneficiaries to whose interest it must equally clearly have regard.'"

In *Meyer*, (the details appear from *Reichman* at 449B-G) the learned Judges also deal with an important principle mentioned in *Volkwyn NO v Clarke and Damant* 1946 WPA 456 at 474:

> "... it must therefore appear, I think, that the particular circumstances of the acts complained of are such as to stamp an 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."

The learned Judges in *Meyer*, dealing with the words of MURRAY, J, in *Volkwyn*, then say the following (the reference is at *Reichman* 449E-G):

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

> Hoe dit ook al sy onder die gemene reg en ingevolge die gewysdes onder die ou Boedelwet 24 van 1913, is die hof nou gemagtig kragtens artikel 54(1)(a)(v) van die huidige Boedelwet om 'n eksekuteur te verwyder indien dit onwenslik is dat hy as eksekuteur van die betrokke boedel optree. Die hof het hier 'n diskresie en myns insiens bly die oorheersende oorweging die belange van die boedel en van die begunstigdes." (Emphasis added.)

[50] In *Oberholster NO v Richter* [2013] 3 All SA 205 (GNP) the executor was held to be beyond reproach. At 210c-f the learned Judge held, by reference to earlier authorities, that -

> "Mere disagreement between an heir and the executor of a deceased estate, or a break-down in relationship between one of the heirs and the executor, is insufficient for the discharge of the executor in terms of section 54(1)(a)(v) of the Act. In order to achieve that result, it must be shown that the executor conducted himself in such a manner that it actually imperilled his proper administration of the estate. Bad relations between an executor and an heir cannot lead to the removal of the executor unless it is probable that the administration of the estate would be prevented as a result ..."

Nevertheless, the learned Judge recognised the principles laid down in *Meyer* by referring thereto at some length and also dealing with *Volkwyn* – see *Oberholster* at 208d-209h. At 209g-h the learned Judge said:

> "In both the *Grobbelaar* and *Webster* matters referred to, the executor stood to benefit financially in his personal capacity, depending on what actions he took as executor. In such instances his personal interests are in conflict with the

interests of the estate and his inability to be impartial may be a *prima facie* ground for his removal as executor. Section 54(1)(a)(v) gives the court a discretion and the main consideration remains a consideration of the interests of the estate and the heir."

[51] In my view the present case is distinguishable from *Oberholster* where the conduct of the executor was held to have been beyond reproach. It was held that his conduct had caused no prejudice to the estate.

[52] In the present case, the counter-claim is based on the principles adopted in *Reichman, Grobbelaar, Meyer* and other cases.

[53] In *Meyer*, the executor was removed from his office and it was ordered that the costs dealing with the interpretation of the will had to be paid by the estate whereas the remainder of the costs (presumably those flowing from the application to remove the executor), had to be paid jointly and severally by the executor and the second respondent (a firm of attorneys). The liability for costs of the executor was fixed on the *de bonis propriis* scale.

[54] In all the circumstances, I have come to the conclusion, in the spirit of section 54(1)(a)(v), that it is undesirable that the applicant should act as executor of the deceased estate. Accordingly, the counter-claim ought to succeed.

<u>The costs</u>

[55] Before me, both counsel were in agreement that the costs of the application for declaratory relief ought appropriately to be paid by the estate.

[56] As to the costs of the counter-application, I am not impressed with the conduct of the applicant. In my view, his insistence on remaining in his office as executor under these circumstances is inappropriate. The same applies to his consistent failure to deal with allegations of his breach of his fiduciary duties as a trustee. Nevertheless, although costs are sought against the applicant in his personal capacity on a punitive scale in the counter-application, I understood Mr Van Ryneveld, in the end, to suggest that a costs order directing the estate to pay the costs in respect of the counter-claim would also not be inappropriate. To that extent, I will exercise my discretion in favour of the applicant.

The order

[57] I make the following order:

1. As to the application:

    1.1 The application is dismissed.

    1.2 The costs of the application are to be paid by the deceased estate.

2. As to the counter-application:

    2.1 The counter-application is upheld, and the executor, Gregory Andrew Salzwedel, is removed from his office as executor of the estate late Catharina Margaretha Salzwedel.

    2.2 The applicant is ordered, in terms of the provisions of section 54(5) of the Administration of Estates Act, to forthwith return his Letters of Executorship to the third respondent.

2.3 The third respondent is requested to, as soon as possible, exercise his powers under the Administration of Estates Act to appoint and grant Letters of Executorship to such person or persons whom he may deem fit and proper to be the executor or executors of the estate of the deceased.

2.4 The costs of the counter-application are to be paid by the deceased estate.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

51034-2013

HEARD ON: 27 AUGUST 2014
FOR THE APPLICANT: J C KLOPPER
INSTRUCTED BY: D B M ATTORNEYS
FOR THE 1ST, 4TH AND 5TH RESPONDENTS: P M VAN RYNEVELD
INSTRUCTED BY: SAVAGE JOOSTE & ADAMS