

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO: 571/2021
Date heard: 12 August 2021
Date delivered: 24 August 2021

In the matter between:

CHRISTIAAN JOHANNES BARNARD	First Applicant
JACQUES MARTHINUS BARNARD	Second Applicant
JOHANNES BARNARD	Third Applicant
JEANIE BARNARD	Fourth Applicant
ZHANE BARNARD	Fifth Applicant
JUAN BARNARD	Sixth Applicant

and

THE MASTER OF THE HIGH COURT, GRAHAMSTOWN	First Respondent
WILLEM JACOBUS VAN JAARSVELD N.O.	Second Respondent
WILLEM JACOBUS VAN JAARSVELD	Third Respondent

JUDGMENT

LOWE, J

INTRODUCTION

[1] In this matter Applicants applied for the removal of the executor of the Estate Late Jacobus Marthinus Barnard (the Deceased), being Second Respondent.

- [2] The application is framed as a two-part application in the notice of motion. The founding affidavit indicates that Applicants, in the first place, seek a final order removing Second Respondent and seek the relief in Part A pending the removal application.
- [3] Second Respondent is the executor of the Deceased's Estate, which has not been wound-up yet. The Deceased passed away on 19 January 2019 and the Second Respondent was appointed on 27 February 2019.
- [4] There have been delays in winding-up the estate.
- [5] Applicants' case is that Second Respondent has misused assets belonging to the Estate and abused his office. Second Respondent denies these allegations.
- [6] The Deceased owned 12 Van Riebeeck Street, Komani (the Property), vehicles and a variety of movable property. Both tenants and heirs of the Estate reside at the Property, and the tenants pay rental.
- [7] Applicants' case is that (other than having failed to wind-up the Estate) Second Respondent has failed in his duties and more specifically abused or neglected the property and abused the rental income.
- [8] The main facts stated by Applicants are that Second Respondent:
- [8.1] Has been unresponsive and/or unaccountable in his duties;

[8.2] Has appropriated funds belonging to the Estate, and more particularly rental income;

[8.3] Took vehicles for his own use, and that he does not know what has become of them;

[8.4] Caused the Deceased's business to shut.

[9] Second Respondent denies these allegations and:

[9.1] Explains that there is conflict between himself and Applicants and poor communication between them;

[9.2] Denies that he has appropriated funds;

[9.3] Explains that rental income is received and that this is managed by a rental agent (and attaches a statement and confirmatory affidavit by the agent);

[9.4] Admits that he has had use of one vehicle (an H100 bakkie); that Applicants appropriated a vehicle (a BMW 320), which Applicants admit; and that he sold a Proton Arena bakkie;

[9.5] Denies that he caused the closure of the Deceased's business and states that it was not a going concern at the time of the deceased's death.

THE CRUX OF THE ISSUE AS TO COSTS

[10] Importantly having regard to what follows, Second Respondent set out in answer to the allegations that no liquidation and distribution account had been lodged, as follows:

- “28. Although Christiaan does not expressly say so, he appears to believe that I have not lodged a Liquidation and Distribution Account with the Master. This is incorrect. His attorneys could have ascertained the latter by asking the Master or to correspond with me, which they failed to do.
- 29. I attach the most recent revised Amended First and Final Liquidation and Distribution Account which was lodged with the master as annexure “WVJ1”, the published notice (placed in The Representative on 18 September 2020), as annexure “WVJ2”, and in the Government Gazette, as annexure “WVJ3”.
- 30. The estate is in the final stages of being wound-up. I understood that of the Last Will and Testament (“the Will”) of the Deceased required that the Property to be transferred directly to the heirs and I made preparations to do this.”

- [11] To this Applicants respond (as to paragraph 28) that this is "*denied*", and that even if the liquidation and distribution account had been lodged that it is clear that the Executor was delaying and using the assets and money of the estate in an unauthorized manner.
- [12] In the replying affidavit paragraphs 29 and 30 of the answer are not dealt with at all.
- [13] The Answering Affidavit attaches WVJ1 which is an amended first liquidation and distribution account signed on 7 September 2020 and advertised as required in a newspaper on 18 September 2020 and in the Government Gazette on the same date, proof of which is attached.
- [14] The Second Respondent in answer to a request for details regarding the winding up of the Estate from the Master¹ on 20 November 2020, and on 10 December 2020 addressed the Master and Respondents' Attorneys:

"For the record, the prescribed Section 29 and 35 notices/claims, respectively, were placed/lodged. The L&D Account was amended due to calculation errors and the Section 35 notices were placed twice after your minor queries were duly handled. We have sent proof of the latter and still await confirmation of receipt."

¹ CJB9.

[15] It is clear from the above that by 10 December 2020 Applicants were placed in possession of the information relevant to the fact that *“the L&D Account as amended”* had been lodged and that this took into account the queries raised by the Master.

[16] The remaining issues were hotly contested in the Application and were not susceptible to resolution by application proceedings raising irresolvable disputes of fact.

[17] Notwithstanding all of the above and in Applicants’ replying affidavit, Applicants persisted in seeking an order in terms of the Notice of Motion.

[18] Ms Teko, who appeared for Applicants, in her heads of argument which were filed considerably out of time (through no fault of hers as I understand it) quite correctly accepted that:

“4. In essence, the issues between the parties has become moot as the Respondents have answered the Applicants’ case and the application was launched after the final Liquidation and Distribution account was lodged with the First Respondent on 14 January 2021.

5. The only issue before court now is for the exercise of the courts’ judicial discretion and to determine the issue of costs.”

[19] Her argument for costs was premised simply on the submission that *“out of desperation”* Applicants had sought details on 19 November 2020 as to compliance with the Administration of Estates Act 66 of 1965, and that in

essence no satisfactory information was forthcoming, and that it was accordingly necessary to have launched this application.

[20] Ms Teko despite her best attempts was unable to overcome the documentary history of the fact that a Liquidation and Distribution Account had indeed been lodged and advertised well prior to the launch of the Application and this drawn to Applicants' attention in correspondence dated 20 November 2020.

[21] In the result Applicants were bound to fail in this respect and in respect of the other issues had raised factual issues which could not be determined in this application as was recognised by Ms Teko.

[22] As to costs then these must follow the result, the Application being such as to be inevitably dismissed.

[23] Whilst Respondents sought such costs on an attorney and client scale, I am persuaded that such costs should be on the ordinary scale, the application not being vexatious or an abuse of the proceedings.

[24] There was merit in Respondents' submissions that Applicants had failed to index and paginate the papers, and that Respondents' Attorneys had done so out of necessity, and further that Applicants' heads of argument and practice note were substantially out of time. I am of the view, however, that this default, although most unfortunate, is not such as to warrant an attorney and client costs

order, and no doubt this failure cannot be attributed to the Applicants themselves.

ORDER

[25] The application is dismissed with costs.

M.J. LOWE
JUDGE OF THE HIGH COURT

Appearances:

Obo Applicants:

Adv A E Teko

Instructed by:

Gilindoda Attorneys, Grahamstown

Obo Second Respondent:

Adv J Barker

Instructed by:

Netteltons, Grahamstown