

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28070/2015

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
<u>22/09/2015</u>	
DATE	SIGNATURE

In the matter between:

**JILLIAN GLYNIS PEARSAL-JONES**

**APPLICANT**

and

**WILLIAM EDWIN JONES  
WILLIAM EDWIN JONES N.O  
(As Executor of the estate late Owen Jones)  
WILLIAM EDWIN JONES N.O  
(As Trustee of the Owen Jones Investment Trust)  
ISMAX (PTY) LTD  
TELHIRE (PTY) LTD  
RAFIA MANUFACTURERS (PTY) LTD  
R HOEK & COMPANY (PTY) LTD  
ULTRA BADGE & METAL (PTY) LTD  
THE ASSISTANT MASTER OF THE SOUTH  
GAUTENG HIGH COURT JOHANNESBURG  
THE MASTER OF THE SOUTH GAUTENG  
HIGH COURT JOHANNESBURG**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT  
FOURTH RESPONDENT  
FIFTH RESPONDENT  
SIXTH RESPONDENT  
SEVENTH RESPONDENT  
EIGHT RESPONDENT  
NINTH RESPONDENT  
TENTH RESPONDENT**

---

## JUDGMENT

---

COLLIS AJ:

### INTRODUCTION

[1] The applicant and the first respondent are siblings. Their parents are both deceased and the first respondent was appointed the executor in both the deceased estates. The present dispute centres on his appointment as executor of the aforesaid estates and the wills of the deceased.

### BACKGROUND

[2] In the present application the applicant seeks a wide range of different relief arising from the administration of the estate late Owen Jones. As against the first respondent the applicant seeks his removal as executor of Owen's estate and costs in his personal capacity (i.e. costs *de bonis propriis*). In addition thereto, the applicant wishes to rescind two findings dated 14 July 2015, in the directive issued by the ninth respondent, who acted at all material times as a representative of the Master (tenth respondent).

### THE LAW

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

*"54(1) An executor may at any time be removed from his office;*



(a) by the court-

(i) .....(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."

[4] Section 35(10) of the same act, permits any person aggrieved by a direction of the Master or the refusal of the Master to sustain an objection so lodged, to apply by motion to the court within 30 (thirty) days after the date of such direction or refusal or within such further period as the court may allow, for an order to set aside the Master's decision. The court may make such an order as it may think fit.

[5] As per the Notice of Motion the following relief is sought:

"1. That the direction of the ninth respondent dated 14 July 2015, of which annexure X hereto is a copy, is set aside and replaced with this order;

2. That it is declared that the last will and testament of the late Owen Jones (the deceased), the deceased bequeathed his shareholding in Fourth to Eight Respondents to the Applicant and the First Respondent in equal shares;

3. That the Second Respondent, alternatively the executor to be appointed in the estate late Own Jones is directed to forthwith issue the Applicant and the First Respondent, respectively, with the share certificates in accordance with the aforesaid bequest;

4. That all dividends which had in the past and which would in the future be declared by the shareholders of the Fourth to Eight Respondents, and to which the Applicant and the First Respondent became, or would become entitled to, shall accrue to the

*Applicant and the First Respondent in accordance with the rights derived from their respective shareholding in the Fourth to Eight Respondents;*

*5. That the Second Respondent is removed as executor of the estate late Owen Jones;*

*6. That the Tenth Respondent is directed to forthwith appoint an executor for the administration of the estate late Owen Jones Estates after consultation with the Applicant;*

*7. That the executor so appointed is granted leave to take all and any steps which may be necessary to recover any assets for and on behalf of the estate late Owen Jones which were disposed of, transferred or alienated during the Second Respondent's appointment as executor of the said deceased estate;*

*8. That the costs of the application are to be paid by the First, Second and Third Respondent's jointly and severally by those Respondent's opposing the relief sought herein;*

*9. Further and/or alternative relief."*

[6] In respect of the relief sought in prayers 1-4 of the notice of motion, the first respondent has made an election to abide by the Court's finding. In respect of the remainder of the relief sought, although he does not believe that there is any factual or legal justification for his removal as executor, he has nonetheless agreed to step down as executor in order to bring the administration of their father's estate to a prompt and efficient end.<sup>1</sup> In respect of the costs order sought against him, he opposes this portion of the relief sought.<sup>2</sup>

---

<sup>1</sup> Answering Affidavit para 6-9 pages 158-160

<sup>2</sup> Answering Affidavit para 10-11 page 160



[7] This Court in deciding whether the first respondent should be ordered to pay the costs of this opposed application in his personal capacity must have regard to the following principles:

7.1 It is unusual to order an unsuccessful litigant in a fiduciary position to pay costs *de bonis propriis*. The appointment to such a fiduciary position whether it be as a curator *ad litem* or curator *bonis*, or trustee, guardian, executor, administrator or even company director usually afford *prima facie* protection against personal liability for costs of unsuccessful litigation.<sup>3</sup> The default judgment was not granted in error as there had been proper service of the summons in the action on the defendants *domicilium citandi et executandi*.<sup>4</sup>

7.2 There must be good reason for ordering costs *de bonis propriis*, such as improper or unreasonable conduct or lack of *bona fides*. Before such an order is made, the Court must be satisfied that the conduct of the officer is *mala fide*, negligent or unreasonable.<sup>5</sup>

7.3 Costs *de bonis propriis* is awarded where there is a material departure from the responsibilities of office.<sup>6</sup>

7.4 The mere fact that an executor has been guilty of an error of judgment and has not taken what eventually may turn out to be the best course, does not warrant an order for costs *de bonis propriis* against him.<sup>7</sup>

[8] The factual matrix are that on 19 August 2013, Owen Jones (the father of the siblings) died of natural causes. Subsequent thereto, his estate was registered with

---

<sup>3</sup> Grobbelaar v Grobbelaar 1959 (4) SA 719 at 725

<sup>4</sup> Answering Affidavit page 80 paragraph 7 and page 88 paragraph 14.7

<sup>5</sup> Vermaak Executor v Vermaak Heirs 1909 (TS) 679 at 691

<sup>6</sup> Blou v Lampert & Chipkin NN.O and Others 1973 (1) SA 1 (A) 14

<sup>7</sup> Wilkinson v Estate Steyn 1947 (2) SA 740 (C)

the Master. Upon his death Owen Jones left a number of shares in various companies. The relationship between the shareholders in these companies was governed by the terms of the shareholders agreement, which provided that its terms were enforceable against their heirs and executors of the shareholders.<sup>8</sup>

[9] The shareholders agreement with reference to clause 2.2.5 provided as follows:

*'In the event of the death of O. Jones all his shares shall be transferred to a Trust for the benefit of the beneficiaries contained therein.'*

[10] In his last Will and Testament, Owen Jones bequeathed his shares in the various companies to his children subject to a lifelong usufruct in favour of his wife, June Elizabeth Jones.<sup>9</sup> June Jones died on 18 February 2014, approximately 183 days after her husband. The will of Owen created a conflict. In terms of the shareholders agreement all shares would vest in a trust for the benefit of his beneficiaries and on the other hand his will provided that the shares were to vest in his children personally. As a result of this, the first respondent, as executor, created the Owen Jones Investment Trust into which the shares bequeathed to the applicant and the first respondent would vest.

[11] He thereafter approached the Master for a direction and on the 14 July 2015, the Master gave a direction wherein it was confirmed that the shareholders agreement would take precedent over the Last Will and Testament of Owen Jones.<sup>10</sup>

---

<sup>8</sup> Founding Affidavit page 59-60 (para D)

<sup>99</sup> Founding Affidavit page 76, Clause 4.4

<sup>10</sup> Founding Affidavit page 9, para 2



[12] The applicant in her founding affidavit describes the first respondent's decision amongst others to register the Owen Jones Investment Trust, as an irregularity.<sup>11</sup> This objection made by her against the registration of the Owen Jones Investment Trust was overruled by the Master.<sup>12</sup>

[13] As a consequence I cannot agree that this decision taken by the first respondent in this regard was unreasonable, *mala fide* or negligent as a direction was specifically sought by him from the Master.

[14] The removal of the first respondent as executor now falls to be determined. As mentioned in paragraph 3 *supra* such removal can only be ordered by the court, if a court is satisfied that it is undesirable for such a person to continue to act as executor. In this regard, the applicant contends that the first respondent was dishonest when he acted as executor in the following respects:

#### *14.1 The preparation and signature of Annexure "FA12"*

In her founding affidavit, she alleges that this occurred shortly after the death of her father and both she and her mother were still in grief and emotionally vulnerable.<sup>13</sup> The applicant further contends that the purpose of this agreement must have been intended by the first respondent to assert full control over the finances of June and the affairs of the companies. In respect of Annexure "FA12", the first respondent contends, that this document was produced from notes prepared by the applicant at the bedside of Owen Jones and which she in the presence of their deceased father and mother

---

<sup>11</sup> Founding Affidavit page 27 para 39

<sup>12</sup> Founding Affidavit page 10 para 1

<sup>13</sup> Founding Affidavit page 130-131

had agreed to implement. This the applicant denies in her replying affidavit.<sup>14</sup> It is not in dispute that the first respondent has never sought to implement the terms of "FA12" or to provide for its terms in the Liquidation and Distribution account of Owen Jones.<sup>15</sup> Moreover, the events relating to the signature of Annexure "FA12" do not establish a basis for the removal of the first respondent as executor nor can it give rise to a conclusion that the first respondent has abused his trust or that he has sought to exercise his duties as executor contrary to the terms of the will of the late Owen Jones.

#### *14.2 Death Certificate of Owen Jones*

The applicant contends that the first respondent had a hand in recording Owen Jones' date of death as 20 August 2013. She later had it rectified to reflect the date of death as 19 August 2013. The applicant contends that because the first respondent at the time of Owen's death had a general power of attorney to manage the affairs of Owen, this gave him full access and control to the bank accounts of Owen. The applicant contends that upon closer inspection of the accounts of the first respondent, it transpired that on 19 August 2013, two deposits were made from the accounts held by Owen into the account of the first respondent and as such the reason to record his date of death as 20 August 2013. In her founding affidavit at paragraph 87, she alleges that the first respondent's unauthorised appropriation of Owen's money in itself demonstrates a willingness to only serve his own interests. In response thereto, the first respondent admitted that the death certificate reflected an incorrect date as the date of death.<sup>16</sup> He went on to stipulate that the recordal on the death certificate was an error which must have occurred when the notice of death form was completed by

---

<sup>14</sup> Replying Affidavit page 208-209 para 22

<sup>15</sup> Answering Affidavit page 165 para 24.7

<sup>16</sup> Answering Affidavit page 166-167 para 26



either the funeral parlour or the medical staff employed at the Elphin Lodge. The applicant save to persist with her contention that it was the first respondent who provided the incorrect date on the death certificate, provided no objective facts in support of her contention. In her replying affidavit, she merely insists that it was the first respondent who provided the incorrect date, with no supporting objective facts.<sup>17</sup> In respect of the transfer of the funds from the accounts of Owen to his accounts, the first respondent avers that this was done in order to make provision for the maintenance of June Owen and that the money so transferred was included in the Liquidation and Distribution account and that there was simply no appropriation of funds made by him. The applicant, in her replying affidavit, does not deny that the moneys so transferred were indeed reflected in the Liquidation and Distribution account. In fact in her replying affidavit she points out that had it not been for her pointing it out, the moneys would not have been corrected.<sup>18</sup> In relation to the applicant's contention of the appropriation of funds, and given the fact that these funds were properly accounted for in the Liquidation and Distribution account, I could find no basis to show any wrongdoing on the part of the first respondent.

#### 14.3 Fraudulent Drafting of a Codicil

In paragraph 94 of her founding affidavit, the applicant states that she suspects that the codicil is a fraudulent document.<sup>19</sup> In this regard she alleged that the signature reflected on page 1 of the document, does not reflect the signature of her late father and that such signature had been forged with the first respondent having a hand in it.<sup>20</sup> In reply hereto, the first respondent denies that the codicil was a fraudulent

---

<sup>17</sup> Replying Affidavit page 211 para 25.2

<sup>18</sup> Replying Affidavit page 212 para 26.4

<sup>19</sup> Founding Affidavit page 48 para 94

<sup>20</sup> Founding Affidavit page 48-50 para 94

document and confirmed that his late father signed the document whilst in bed.<sup>21</sup> As confirmation of his father's signature, the first respondent obtained a forensic report marked annexure 'AA2' confirming his late father's signature on the codicil. Albeit, that the applicant in her replying affidavit, obtained her own handwriting expert report, her handwriting expert could merely confirm that the signature as it appears on the codicil was probably not that of the late Owen.<sup>22</sup> As far as the signatures thus are concerned this court is confronted with two expert reports rendering conflicting opinions. It is not necessary to make a finding in this regard. However, the said codicil does not change the beneficiaries in the deceased estate. All that it served to do, was to provide for the formation of a company in which shares would vest as opposed to the shareholders agreement which provided for the formation of a trust.<sup>23</sup> The first respondent went on to state that given the circumstances, the shareholders agreement would take preference and that he never sought to enforce the codicil contrary to the wishes of the applicant.

[15] Given the totality of the evidence presented and the cases referred to in paragraph 7 *supra*, I am not convinced that the applicant has succeeded in demonstrating that the conduct of the first respondent, given his fiduciary position, was either *mala fide*, negligent or unreasonable.

#### Costs

[16] The first respondent as mentioned in para 6 *supra* did not oppose his removal as executor and has tendered same. But he has opposed the granting of a costs order

---

<sup>21</sup> Answering Affidavit page 169 para 32

<sup>22</sup> Replying Affidavit page 215 para 32.5

<sup>23</sup> Answering Affidavit page 171 para 36



against him *de bonis propriis*. Having regard of the facts already alluded to in this judgment, it is my considered view, that the applicant should be ordered to pay all costs associated with the application after the date of delivery of the answering affidavit.

## ORDER

[17] In the result the following order is made:

1. The direction of the Ninth Respondent dated 14 July 2015, is set aside and replaced with this order;
2. It is declared that in the last will and testament of the late Owen Jones ("the deceased") the deceased bequeathed his shareholding in the Fourth to Eight Respondents to the Applicant and the First Respondents in equal shares;
3. The executor to be appointed in the estate late Owen Jones is directed to forthwith issue the Applicant and the First Respondent respectively with the share certificates in accordance with the aforesaid bequest;
4. That all dividends which were in the past, and which would in the future be declared by the shareholders of the Fourth to Eight Respondents, and to which the Applicant and the First Respondent became, or would become entitled to, shall accrue to the Applicant and the First Respondent in accordance with the rights derived from their respective shareholding in the Fourth to Eight Respondents;
5. The Second Respondent, as agreed, is to step down as executor of the estate late Owen Jones;
6. The Tenth Respondent is directed to forthwith appoint an executor for the administration of the estate late Owen Jones after consultation with the Applicant and the First Respondent;

7. That the executor so appointed is granted leave to take all reasonable steps to recover any assets for and on behalf of the estate late Owen Jones which were disposed of, transferred or alienated during the Second Respondent's appointment as executor of the said deceased estates;

8. The Applicant is ordered to pay all costs associated with the application after the date of delivery of the Answering Affidavit, such costs to include the costs for the filing of Heads of Argument and the hearing of the application.



---

C. J. COLLIS

ACTING JUDGE GAUTENG LOCAL DIVISION JOHANNESBURG

APPEARANCES:

FOR APPLICANT: Adv H.H.Cowley

INSTRUCTED BY: Van Rensburg Schoon Inc

FOR FIRST RESPONDENT: Adv W.B. Pye

INSTRUCTED BY: Edward Nathan Sonnenbergs Inc

DATE OF HEARING: 01 August 2016

DATE OF JUDGMENT: 22 September 2016