IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Civil Case No. 1973/2003

In the matter between

BEUKES LODEWIKUS WILLEMSE N.O.	Applicant
And	
JEREMIJA DE LA ROUVIERE RENS N.O.	First Respondent
THE MASTER OF THE HIGH COURT, SWAZILAND	Second Respondent
THE MASTER OF THE HIGH COURT, PIETERMARITZBURG	Third Respondent
Coram	Annandale, ACJ
For Applicant Adv.	P.Z, Ebersohn
Instructed by	P M Sbilubane.
For First Respondent Advocate	P.E. Flynn,
Instructed by	Robinson Bertram Attorneys
For Second and Third Respondents	No Appearance

6th February 2004

This is an application in terms of Section 84 of the Swaziland Administration of Estates Act, 1902 (Act 28 of 1902) (the "Act") wherein the applicant, one of the two co-executors, applies for the removal of the other co-executor in the deceased estate of the late Petrus Joubert van der Walt, estate No. E.H. 183/98. The deceased, a farmer at Kubuta aged 93 at the time of his death, passed away on the 24th January 1998. The co-executor, Rens (first respondent) vigorously opposes the application for removal while the two Masters of the High Court, both in Swaziland and Pietermaritzburg, South Africa, indicated in their papers filed of record that they will abide by the decision herein reached.

Section 84 of the Act which regulates the removal of executors reads that:-

"Every executor, tutor or curator shall be liable to be suspended or removed from his office by order of the High Court, if such court is satisfied on motion, that by reason of his absence from Swaziland, other avocations, failing health, or other sufficient cause, the interests of the estate under his care would be furthered by such suspension or removal; provided that in every case of suspension the court may substitute some fit and proper person to act during such suspension, in his place... " (my emphasis).

The terms of the Will of the deceased are not in issue as far as the present matter is concerned. He therein nominated both the applicant and first respondent as co-executors of his estate. Both were eventually appointed as co-executors by the Masters of the High Court in Swaziland and at

Pietermaritzburg, South Africa, as assets were left in both countries respectively estate number E.H. 183/98 and 1368/98.

As is often done, but without any formal sanctioning or of legally binding consequence, the co-executors made practical arrangements inter partes to facilitate the business of winding up the estate. Essentially, it entailed that the applicant would oversee and administer the South African assets while the assets in Swaziland would be administered and taken care of by the first respondent. Such a working arrangement is practicable and in order, but it does not dispense with any legal requirements or separate the estate. As co-executors, mutual agreement on the affairs of the estate remains to be kept intact and the co-executors do not acquire the powers

or abilities that a sole executor may have had. They do not by such working arrangement become two separate sole executors of one and the same deceased estate.

A South African accountant, Mr. Vos, was employed to assist in the administration of the South African part of the estate. On the 11th February 1999 the first liquidation and distribution account was signed by the co-executors, Willemse and Rens, and approved of by the Master in South Africa. Thereafter, on the 29th September 1992 the second and final liquidation and distribution account was co-signed by the applicant and first respondent in their nominal capacities as co-executors of the estate, which was likewise approved by the Master in South Africa.

Both these accounts dealt with the assets of the estate in both Swaziland and South Africa, except the farm at Kubuta, Swaziland.

Unless an extension is granted by the Master, on application, the Act requires under Section 52 that the liquidation and distribution account of a deceased estate is to be filed by the executor within a period of six months after his/her/their appointment, otherwise liability for criminal prosecution arises.

Despite this legal requirement, the first respondent prima facie did not comply with the Act. Six months came and went without a liquidation and distribution account being filed with the Master of the High Court in Swaziland. Since their appointment to date, without any extension having been applied for, as far as the papers before court indicate, no account has yet been filed and there is no indication of any steps taken by the Master to rectify the situation. The Registrar of the High Court is directed to bring this to the attention of the Master forthwith, who is to report within 7 days to the Court via the Registrar why this matter was not expedited and why the appointed co-executors were not compelled to comply with the requirements of Section 52 of the Act, and what steps have been taken to avoid recurrences. The dilatory conduct of duly appointed executors result in the frustration of countless beneficiaries in Swaziland, causing unnecessary hardship and costly delays to finalise deceased estates, including expensive litigation like the matter under consideration.

Voluminous papers have been placed before Court in this application. Applicant filed a comprehensive and detailed founding affidavit supported by detailed and explanatory annexures in support of the relief sought. A bird's eye view of the surrounding circumstances, as placed before this Court, is given to provide a perspective of the matter.

According to the papers, during his lifetime the deceased formed a healthy relationship with the applicant and his brother, one Gideon Trater Willemse. This resulted in a codicil to his will wherein the deceased made a bequest to the latter in that "the farm at Kubuta in Swaziland is let to Mr. Gideon Willemse for 5 years (five years) at a nominal amount." Following the death of van der Walt, Willemse took occupation of the farm as tenant in terms of the bequest.

Apparently, this bequest had a sting to the tail as the first respondent wrote in the inventory furnished to the Master at Mbabane that the farm was "abandoned for years, in bad condition." This seems to have been the result of the farm not being given the proper care and attention it required for a number

of years by the deceased, prior to his death. It is common cause that the farm was in a neglected state at the time of dies venit.

The will of the deceased also contained a complicating clause, dealt with in the ancillary matter, under civil case number 1974/1993. It purported to create a trust, namely the "R.O.C. Trust Fund". The trustees thereof are the applicant, Saunders Douglas Wales and the daughter of the first respondent, Ms. Madhi Rens. As was proper to do, the applicant caused copies of the Notice of Motion and the founding papers herein to be served on the other two trustees, both of which chose not to apply to be co-joined in this matter.

In the ancillary matter under civil case number 1974/2003, the same applicant seeks a declarator that the R.O.C. Trust failed and did not come into being. The papers in that application are incorporated into the papers of this application by way of reference. This Court has also heard that application and will deal with it in a

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separate judgment (Civil Case No. 1974/2003), which judgment will be handed down together with this judgment.

Following occupation of the farm, the R.O.C. Trust Fund, apparently in view of the fact that the Trust was to utilise the income of the Trust only to achieve the objectives of the Trust, entered into a lease agreement with Willemse on the 29th July 1999 (annexure "N" to the founding affidavit). With regards to the farm "...let to (Willemse) for 5 years at a nominal amount", the following is recorded in the heading:-

"As per the codicil to the will dated 22 January 1998 the farm Kubuta (Portion H of the farm Kubuta 222, situated in the Shiselweni District, Swaziland) was to be leased by G.T. Willemse for a period of five years at a nominal value. The parties hereto agree that the codicil was not clear as to terms and conditions and the parties now agree as follows:"

Conditions of the lease contract were then set out in annexure "N" as if the Trust were the owner of the farm.

According to the papers, the co-executors of the estate did not themselves enter into a lease of the farm with Willemse, Nor did they have an agreement with Willemse to cancel the bequeathed five-year lease with him. For all practical purposes, the testamentary clause prevails, wherein the deceased bequeathed the farm to Willemse for a period of five years at a nominal amount.

It seems to me that the contracting parties laboured under a misapprehension as to the legal position of their functions as co-executors of a deceased estate and a beneficiary under the same will. It is not the Trust, which was to enter into the lease agreement with Willemse, but the applicant and first respondent qua co-executors of the estate. The trust had no legal standing or locus standi to enter into a lease contract with Willemse, who obtained the right to lease "at a nominal amount" by virtue of a testamentary codicil. The farm did not stand to be dealt with by the R.O.C. Fund Trust, as if it was the owner.

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Subsequently, on the 30th July 1999, a further "Agreement" was entered into between Willemse and the R.O.C. Fund Trust (annexure "O").

The heading of the "Agreement" reads that: -

"The R.O.C. Fund Trust are the owners of the farm Kubuta (Portion H of the farm Kubuta 222, situate in the Shiselweni District, Swaziland) by virtue of the will of the Late Petrus Joubert van der Walt, but the Trust did not inherit any money from the Estate. The Trustees are therefore at present not in a position to give effect to the objectives of the Trust.

The Trustees of the R.O.C. Fund Trust are wilful to continue with the Trust as formed by the Late Petrus Joubert van der Walt per his will dated 13th September 1991. As the Trust does not have financial means to give effect to the objectives of the Trust, and as G.T. Willemse is willing to assist the Trustees in obtaining these means, THE PARTIES HEREBY AGREE AS FOLLOWS:"

It is clear that the Trust never was the owner of the farm.

In the "Agreement" it is recorded that the trustees would form a company in Swaziland and transfer the property into the name of the company and in the year 2000 the trustees would sell to Willemse 50% of the issued shares of the company and would also appoint Willemse as a director of the company. It is also recorded that as the trustees did not have the finances to give effect to the winding up of the estate and the formation of the company, Willemse agreed in the "Agreement" to advance such sums as may be necessary to give effect to the agreement and the price of the 50% shares would be E400 000. Of this, E200 000 was payable upon the signing of the share transfer forms and Willemse's appointment as a director, less amounts already advanced by him. The further E200 000 was payable not later than one calendar year after payment of the first amount of E200 000, free of interest.

It was further agreed between the parties as to which areas of the farm would be allocated to the Trust and which to Willemse and that each party would lease "their

part" of the farm from the company at nominal rates to cover the costs of the company as may be determined between the parties from time to time.

Hereafter, with "his portion" being so defined, Willemse started to improve "his portion" of the farm at Kubuta. It is common cause that he started to plant new trees, pruning others and that he caused electricity to be laid on. Annexure "Q10 (a)" to the founding papers sets out what Willemse considered to be improvements and what he costs it out to be. In all, the (subjective) total of listed improvements amounts to the princely sum of El 022 159 to which no mora interest has yet been added. This figure is not audited or otherwise substantially and independently verified, but suffice to say that it represents a significant financial outlay.

This agreement was, however, clearly against paragraph l(a)(iii) of the will of the deceased, which paragraph prohibited the sale by the Trust of fixed property found in the estate of the deceased.

As happens in so many ventures, the exercise ran into difficulties. In time, it transpired that the scheme to use a company as vehicle for the "agreement" was not possible in terms of the laws of Swaziland. To complicate matters, against advice, the deceased foregone professional advice and drew up his complicated will in "do-it-yourself fashion. A questionable or unworkable Trust was involved and bequests that exhausted the funds available to the estate were made. This made it effectively impossible for the Trust to generate sufficient income to effectively achieve the objectives of the Trust.

The farm has two dwellings, one of which Willemse allowed the first respondent and his wife, Churie to move into. At that stage, the relationship between them seems to have been sound.
Thereafter, events took a turn for the worse, with friction arising between Willemse and the first respondent, as the latter seems to have started interfering with Willemse's occupation and activities on the farm. "The pot calls the kettle black", so to speak, as allegations and counter allegations arose. The friction escalated to such an extent that whereas the first respondent initially welcomed Willemse on the farm, the first

respondent apparently became antagonistic towards Willemse and wanted him off the farm.
Subsequent thereto, the Trust, by a majority decision, "cancelled" the lease agreement (Annexure "O"

to the founding papers) basing the "cancellation" on an alleged late payment of the rent, it allegedly being paid "late" despite the clause of the codicil not providing for such a remedy and right against Willemse, in the second place, following non-provision for the "agreement of lease" in the first place. In this regard, Willemse, instead of paying the rent on the 31st March 2000, did so on the 3rd day of May 2000, with an explanation as to why it was late. Payment was accepted by the Trust, yet it soon thereafter decided to "cancel" the lease because of late payment. In the previous year, the Trust also accepted a late payment, but without such consequence. As said above, the purported "agreement of lease" between Willemse and the Trust was ultra vires the provisions of the codicil. It had no binding legal effect between the parties, as Willemse occupied and leased the farm "at a nominal rent" in terms of the codicil, and not under the conditions of the purported lease agreement. Therefore, the Trust could not lawfully cancel the lease with Willemse as it sought to do.

The decision to cancel the lease was not taken unanimously by the Trustees, with the result that the decision was invalid. In COETZEE v PEET SMITH EN ANDERE 2003 (5) SA 674 (TPA), a significant judgment delivered sometime ago but only very recently reported, which I respectfully agree with, van Dijkhorst J. found that there were good grounds for the rule that trustees had to act jointly and decide unanimously as assets of a trust were normally transferred in co-ownership to trustees and that co-owners had joint right of ownership, use and control of the joint property, that a majority vote did not apply, and that decisions regarding the property had to be taken jointly and unanimously to be valid when more than the pro rata share of the separate co-owners was involved. It is clear that the decision of the trustees to cancel the lease did not comply with the norms set out in the COETZEE case. It is clear that the first respondent actively involved himself in this decision through his agent, his wife Churie.

More bizarre events seem to have followed. According to Willemse, he was threatened with forceful removal from the farm by way of legal action. The court is not aware of any such legal action instituted against Willemse, from the papers filed of record. Willemse further claims that he and his workers were prevented from entering the farm by armed guards, said to have been placed there by the first respondent. By all accounts, the inescapable conclusion is that the first respondent was the driving thrust behind the Trust in its actions against Willemse. Such conduct cannot be condoned and it reflects in the costs order infra, as a measure of censure of such conduct. Following his compelled eviction from the farm, Willemse lodged a substantial claim against the estate. Prima facie, it seems as if Willemse may have positive prospects in succeeding for recompense for improvements he effected on the farm bona fides as well as the possibility of a claim for damages arising from a loss of income from the farm during the remaining five year period of the lease, following his eviction.

According to the filed correspondence between the parties, there were acknowledgements that Willemse had to be compensated for some of the improvements, later to be disputed whether he should be compensated at all. The first respondent also took part in this correspondence. It should be noted that persons with no legal training caused agreements to be entered into and caused acts to be done to serious potential hazard and prejudice of the estate itself. When the applicant called for professional legal advice Madhi Rens and Wales scoffed at his suggestion.

Thereafter, Willemse indicated that he considered taking legal action against the estate. It is clear that such legal action could become protracted and very costly. If successful, it could even have as a result that the estate could lose the farm as an asset and a recovery of monies paid out to beneficiaries in terms of bequests in the will and codicils.

In his founding affidavit, applicant sets out several aspects, which caused him serious concern. The major one, and main subject of this application, is to seek the removal of the first respondent as co-executor of the estate. He tenders to thereafter relinquish his own appointment as co-executor, seeking the appointment of a professional executor to resolve the matters of the estate with alacrity and in accordance with the

law, to the best interest of the estate itself and all persons involved and concerned. For this, he inter alia relies on the following aspects and questions: -

A) Whether the Trust actually came into being or whether it failed;

B) Whether the Trustees were entitled to deal with the assets or the estate of the deceased in Swaziland prior to the assets being awarded to the Trust in an approved liquidation and distribution account, and in any event without the trustees having had their appointments as trustees of the Trust in South Africa recognised in Swaziland by the second respondent.

C) Should the theorem in "A" supra be answered in the negative, what then is the legal position and consequences regarding the "agreement" entered into between by the trustees with regard to assets of the Swaziland estate which have not yet been awarded to the Trust?

D) Is it not so that the amount of the "nominal rent" that had to be paid for the lease of the farm, was the only aspect that had to be agreed upon between Willemse and the executors, and were the other conditions imposed upon him by the "agreement of lease" not invalid, vis-a-vis the codicil and could the Trust itself have entered into the "lease" and "sale" with Willemse, and were these "agreements" binding between the contracting parties?

E) Was the first respondent entitled to unilaterally deal with assets of the estate in Swaziland without the knowledge and consent of the applicant, qua co-executor, and could the first respondent utilise assets of the estate in Swaziland for his own benefit?

F) Was it in the best interest of the estate that the first respondent acted in the manner in which he did and could the first respondent impartially and unbiased act on behalf of the estate in view of his differences of opinion with, and in clear antagonism towards Willemse, in the way he did, as transpires from the heated correspondence filed in this matter?

G) Was it not fit and proper that first respondent be removed as co-executor from the estate as provided for in Section 84 of the Act and that the applicant thereafter resign as aforesaid, to have the matter be dealt with professionally.

To further compound matters, it appears as if the trustees of the Trust in fact never had their appointments as trustees recognised in Swaziland by the Master of the High Court in Swaziland, and that their actions where they purported to act as trustees of the Trust in Swaziland and to deal with assets of the Trust in the Kingdom were null and void with the result that the "lease agreement" (annexure "N") and the subsequent "agreement" (annexure "O") appears to be null and void ab initio on that ground alone. Furthermore, the "lease" in itself, clearly contradicts clause 6 of the codicil, annexure "C3" to the founding papers, and appears, in that regard, also to be invalid.

Before dealing further with the facts of the matter, it is useful to briefly look at the law relating to the removal of an executor. Such applications frequently feature on the rolls of this court and are usually dealt with on an uncontested basis, with the Master filing a semi-standardised reply.

Section 84 of the Act superseded the common law and the test regarding the removal of an executor is rather light, the only requirement being that the interests of the estate be furthered by such removal.

In his argument on behalf of the first respondent, Mr. Flynn referred the court to several South African reported decisions, stressing the argument that the test was not light. These cases were, however, based on the common law, as the South African administration of Estates Act, 1913 (Act 24 of 1913), did not contain a clause similar to that that appears in Section 84 of the Swaziland Act. Such a clause was only introduced in Section 54(l)(a)(v) of the (new) South African Administration of Estates Act, 1965 (Act 66 of 1965), which sub-section reads 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 executor of the estate concerned."

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Thus, the current South African test for removal is also light, with it only being necessary for the applicant to prove on a balance of probabilities that it is undesirable that the executor should further act in such capacity.

The latter version of the South African Act was judicially considered in DIE MEESTER V MEYER EN 'N ANDER, 1975 SA 1 (T). In that case, the executor was guilty of misleading and dishonest conduct. There was also a clash of interest and the executor received benefits from the estate to which he was not entitled. Margo J indicated at page 16 C - E that section 54 introduced the "new" ground that in fact superseded the common law approach. At page 16 E - I the court referred to PORT ELIZABETH ASSURANCE AGENCY TRUST COMPANY LTD. V ESTATE RICHARDSON 1965(2) SA 936(C) and quoted with approval what van Winsen J stated at p 940: -

"/ 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. "
Margo J then referred with approval to a passage from Story, Equitable Jurisprudence: "Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust."

The Court (per Margo J) summarily removed Meyer from his appointment as Trustee stating that it was undesirable that Meyer should act any further as executor. There is thus not much difference between the Swaziland and the current South African acts in this regard and in both countries the Court has a final discretionary say in the matter of removal of a trustee.

Mr. Flynn, in his well-prepared Heads of Argument, referred to further South African cases. He conceded that in terms of the cases of ADAMS AND OTHERS V JALALDIEN NO 1919 CPD 17 and EXPARTE SULEMAN 1950 (2) SA 373(C), an

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executor would be removed by the Court on the grounds of misadministration or absence of administration.

It must be pointed out that both cases were decided before the new South African Administration of Estates Act, No. 66 of 1965, came into operation, which Act lightened the onus resting upon an applicant. He also referred to SACKVILLE WEST V NOURSE 1925 AD 516 where the court dealt with mere negligence and did not remove the executor, the executor having had an acceptable explanation. The facts of that case are clearly distinguishable from the facts of the case before this Court. Relying on the decisions in LETTERSTEDT V BROERS 9 A.C.370 and the SACKVILLE case Mr. Flynn argued that the test this Court had to apply was whether the continuance in office would prejudicially affect the future welfare of the estate and that the first respondent's removal was not necessary and called for. This Court disagrees with Mr. Flynn in at least four respects with reference to the two cases. Firstly, the facts of the two cases and the facts of the case before this Court are clearly distinguishable, secondly, the test set out in section 84 of the Swaziland Act is different from what Mr. Flynn postulated the test to be, thirdly, the proven conduct of the first respondent is such that he simply cannot remain on as a co-executor, and, fourthly, the interests of the estate under his care would be furthered vastly by his removal which is the test laid down in section 84 of the Act. Mr. Flynn also referred to VOLKWYN NO V CLARK AND DAMAST 1946 WLD 456 at 464. The facts of that case are also distinguishable from the facts of the case before this Court. In the VOLKWYN case the executor gave meticulously detailed answers to all the allegations made in the papers against him, which reply the Court accepted. The reference by the Court therein to proof required of a "dishonest, grossly inefficient or untrustworthy person" is obiter and given as a mere example and is not part of

the ratio decidendi of the case. The conduct of the first respondent in casu can, however, and in any case, be classed as "dishonest, grossly inefficient and untrustworthy". The case of EX PARTE HILLS 1959(4) SA 644 (E) at 547 to which Mr. Flynn also referred does not assist the first respondent in this regard. With reference to EX PARTE SULEMAN 1950 (2) SA 273(C) at 376 and 377, Mr. Flynn argued that the authorities quoted by him indicate that the Court should not lightly remove the first respondent and that the Court should be satisfied that if he continued in office, the estate would not be prejudiced. What Mr. Flynn set out was, however, not the test

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according to section 84 of the Act but this Court is in any event satisfied that if the first respondent continued in office as co-executor the estate would be seriously prejudiced. Mr. Flynn conceded with reference to HARMS V FISHER N.O. 1956(4) SA 855 at 862, that an executor's private interests should not conflict with those of the estate and that he must not derive a personal benefit from the manner in which he has managed the estate. The Court is satisfied that the applicant succeeded in proving that the first respondent managed the affairs of the Swaziland portion of the deceased's estate in such a manner that he derived a personal benefit from the estate which benefit he failed to disclose. None of the arguments raised by Mr. Flynn persuaded the Court not to grant the application against the first respondent, as will more fully appear infra

The allegations against the first respondent now fall to be considered, starting with the annexures contained in bundle "Q" of the founding affidavit.

These documents in toto seem to me to substantiate the allegations levied against the first respondent. Despite this, in the answering affidavit (paragraph 5 (a)) the first respondent replies bluntly to paragraph 16, which incorporates bundle "Q", that "the contents of this paragraph are (sic) denied. "

The effect of this is also that by necessary implication, it repudiates and denies the letters written by his attorney on his instructions, letters written at his behest by, and signed on his behalf by his wife, letters written by his daughter Madhi Rens, letters written by Willemse, letters by the applicant, letters by Wales and letters by his attorneys at the time, attorneys Millin and Currie. Attorney Currie filed an affidavit to confirm the correspondence between Millin and Currie and Attorneys Robinson Bertram. No affidavits to contest that were filed by Robinson Bertram, Mrs. Churie Rens, Madhi Rens or Wales. There is no allegation that they were not available or not amenable to depose to affidavits disputing the correspondence. The inevitable question then arises as to why the first respondent would deny under oath before this Court the existence of and contents of the various letters and documents that form part of the filed correspondence. It lends credence to the applicant's case, not his. He did not elaborate on this aspect.

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His denial is hard to find as genuine, if not impossible, bordering if not moving into the category of a blatant lie and an attempt at deception. It is not worthy of an administrator of an estate and serves as a misguided attempt to frustrate the application and the consequences of the documents.

Therefore, this Court rejects the first respondent's denial of the correspondence as false and untrue.

I will now deal with the various annexures contained in annexure "Q":-

a) "Ql (a)": This is an undated letter which was written apparently on the 28th February 1999 by Willemse to the Trust wherein Willemse gave an account of the income and attached a cheque in favour of the Trust and Willemse raised 6 points of concern and then set out proposals as to the planting of trees on the farm and asked the Trust's consent thereto.
b) "Q2 (a)": This is a letter dated the 10th June 1999 by the Trust to Willemse. In paragraph 4 thereof permission was granted to Willemse to plant litchi, avocado and mango trees, as was suggested by Willemse in Ms letters under reply.
c) "Q3": This is a letter from Robinson Bertram, the attorneys of the first respondent, dated the

24th February 2000, addressed to the one trustee Madhi Rens. In the letter the late Mr. Bertram, of Robinson Bertram attorneys, clearly details the interpretation difficulties and practical problems regarding the will and the codicils.

d) "Q4": This is a letter from Robinson Bertram dated the 7th July 2000, addressed to Willemse. In the letter the problem of subdividing the farm of the deceased is raised.

e) "Q5": This is a letter from Robinson Bertram dated the 26th July 2000 addressed to the first respondent. In the letter the late Mr. Bertram again clearly depicts the interpretation and practical problems regarding the will and the codicils.

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f) "Q6": This letter dated the 11th September 2000 was sent by the Trust to Willemse. It followed from a meeting of the trustees of the Trust and the first respondent's wife Churie Rens, who is not a trustee but who actively participated in the meeting and the deliberations, held on the 8th September 2000 at which meeting:

(i) The one trustee, Madhi Rens, voiced her opinion to the effect that there never would be a successful cooperation between her father, the first respondent, and Willemse and that the position was deteriorating continuously;

(ii) The wife of the first respondent, Churie Rens, who wrote letters on behalf of the first respondent and acted on his behalf, informed the trustees that she and her husband, the first respondent, felt that they could gather the harvest if Willemse leaves the farm. This contention was in fact astounding in view of the fact that Willemse was entitled to the harvest and it must be noted here that the harvest apparently was in fact gathered after Willemse was forcibly evicted from the farm but the harvest was not accounted for in the liquidation and distribution account which was later forwarded to the applicant to sign by the first respondent and the question then arises as to what happened to the money realised from the harvest;

(iii) The applicant, who is also a trustee, voiced his concern about the farm being managed by the Trust and was against it and stated that he felt that things on the farm were not too bad;

(iv) Three options were then discussed:

(a) The lease with Willemse being maintained and Willemse being notified that certain matters on the farm be rectified;

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(b) In view of the "breach" of the lease, annexure "N" to the founding papers, by the late payment the lease be cancelled forthwith and a new lease being entered into, despite the fact that the Trust accepted the late payment of the rent made on the 3rd May 2000;

(c) In view of the "breach" of the lease, annexure "N", the lease is cancelled and financial compensation is to be paid to the lessee, Willemse, for capital expenditure.

v) A vote was taken, in which vote Churie Rens most remarkably, also voted, although she was not a trustee, and with a majority of 3 to 1 it was decided in favour of option (c) referred to in the preceding paragraph. The applicant voted against the proposal. The decision was clearly not unanimous as is required by law and is thus without any legal effect. See in this regard COETZEE V PEET SMITH TRUST EN ANDERE (supra). In terms of this judgment all decisions by trustees of a Trust must be unanimous otherwise they are invalid. As was pointed out above, Willemse in any case occupied the farm in terms of the codicil and that right which was granted to him

by the codicil to the will was never cancelled.

g) "Q7": The "Sale", annexure "O" to the founding papers, was never cancelled and on the 14th December 2000 Willemse wrote "Q7" to Robinson Bertram attorneys enquiring about the progress made with the winding up of the estate and reminding them of the fact that the Trust sold shares to him in a company which was to take transfer of the farm and asking whether he should forward more money to Robinson Bertram to finance the process.

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h) "Q"; On the 10th January 2001 Robinson Bertram acknowledged per "Q8" receipt of annexure "Q7" wherein Mr. Bertram advised that he would communicate with the executors and trustees with regard to the formation of the company and the transfer of the shares to Willemse.

i) "Q9": On the 19th January 2001 Robinson Bertram wrote to Willemse wherein the late Mr. Bertram referred to a clash of interest the attorneys, now professed to be between Willemse and the estate/first respondent and which apparently didn't bother them before, and under cover of which they returned the amount deposited with Robinson Bertram by Willemse and wherein Mr. Bertram raised many problems and legal aspects. In paragraph 7 of the letter stated the following:

"7. The Trustees realise that you have made certain improvements such as installing electricity and they are prepared to discuss reasonable compensation to you to be paid on termination of the lease for the improvements made by you."

j) "Q10": It is a letter written by Willemse to an attorney Van der Walt who wrote a letter to Willemse after the meeting of the trustees, related to in paragraph f) supra, where annexure "Q6" was dealt with, on behalf of the Trust and in the letter and the annexures thereto Willemse gave particulars of amounts expended by him on the farm.

k) k)"Qll": Wales, the one trustee, then wished to resign as a trustee and informed Madhi Rens thereof and she informed the applicant of his attitude. The applicant considered the matter and then faxed the letter annexure "Qll" to her on the 16th March 2001. In the said letter the applicant informed Madhi Rens that the Trust was a very complicated Trust with family ties making it very difficult for the trustees to administer the Trust fairly and the applicant suggested to her that they should rather appoint a professional person with experience in the administration of Trusts. The applicant asked her to consider it,

l) "Q12": Madhi Rens then advised the applicant that Wales did not agree with them about a professional person. The applicant then faxed the letter annexure "QD12" to her on the 27th March 2001. In the said letter the applicant informed Madhi Rens that it was in the interest of the Trust to appoint a professional person

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who could see to it that the Trust was professionally managed and that although he agreed with her that it would cost the Trust money the Trust would benefit in the long run.

m) "Q13" On the 20th April 2001 Millin & Currie wrote this letter to Robinson Bertram wherein problems encountered on the farm by Willemse was detailed.

n) "Q14" On the 14th May 2001 Millin & Currie wrote this letter to Robinson Bertram wherein problems encountered on the farm by Willemse were again detailed and also the alleged role played by the first respondent therein detailed.

o) "Q15" On the 18th May 2001, Robinson Bertram wrote this letter to Millin & Currie wherein the

allegations of Willemse detailed in annexure "Q14" were denied.

p) "Q16": On the 18th May 2001, which date appears to be incorrect as the letter was only received by Millin & Currie on the 29th June, 2001, Robinson Bertram wrote this letter to Millin & Currie, wherein Robinson Bertram quoted verbatim remarks made by the first respondent which clearly shows a clash of personalities between the first respondent and Willemse.

q) "Q17": On the 13th June 2001 Madhi Rens e-mailed to the applicant a copy of this letter received by her from the other trustee namely Wales. In this letter Wales wrote as follows:
"Madhi - Please inform Mr. B.L. Willemse that the thought that two people should spend their time and own money improving Trust property without any security or guarantee is obscene in the extreme and only worthy of a Willemse, from whom we have come to expect such filth. While the Trust has any assets to give as collateral for services rendered it is obliged to do as such, or terminate the said service with immediate effect,"

r) "Q18": On the 13th June 2001 Millin & Currie wrote this letter to Robinson Bertram wherein Millin & Currie enquired whether the farm was transferred to the Trust.

s) "Q19": On the 11th October 2001 Millin & Currie wrote this letter to Robinson Bertram and again enquired whether the farm was transferred to the Trust and

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particulars were given of Willemse's claim. The particulars of the claim are the same as that contained in annexure "Q10" supra. Robinson Bertram acknowledged receipt of annexure "Q19" and advised that they were referring it to their clients, including the first respondent, for instructions.

t) "Q20": On the 26th February 2002 Millin & Currie wrote this letter to Robinson Bertram and Attached thereto a copy of a letter received from Willemse. In his letter Willemse set out his attitude with regard to his claim.

u) "Q21": On the 1st March 2002 Millin & Currie wrote this letter to Robinson Bertram wherein a chronological background of the matter was given and certain proposals were made to resolve the issue.

v) "Q22": On the 7th March 2002 Robinson Bertram wrote this letter to Millin & Currie wherein receipt of annexure "Q21" was acknowledged and wherein it was stated that the Trust was considering a lease for another year to Willemse.

w) "Q23": On the 27th May 2002 the applicant sent an e-mail to Madhi Rens wherein he complained about the attitude of Madhi Rens and Wales and their lack of response to his various letters and calling for a 5-year business plan for the Trust to be drawn up to see what could be done with the Trust. The applicant stated in this regard that there were, in his opinion, too many unanswered questions about what was going on and what the future held for the estate and the Trust.

x) "Q24": On the 29th May 2002 Madhi Rens responded to the applicant's letter by e-mail wherein she inter alia stated that the Trust had no financial means to implement any projects and suggested that the farm be let to a tenant, (other than Willemse.)

y) "Q25": On the 7th June 2002 Madhi Rens, Wales and the applicant had a meeting and the applicant drew up "Q25" being a summary of what was discussed and in the summary the applicant placed on record the reluctance on the part of the other two trustees, Madhi Rens and Wales, to inform him about trust matters and the applicant again refers to a professional person to be appointed to manage the trust.

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z) "Q26": On the 8th July 2002 Millin & Currie received this letter from Robinson Bertram, which letter obviously could not have been written on the 19th May 2001 being the date which appears on the letter and which apparently was a computer mistake, wherein Robinson Bertram stated that Willemse was to vacate the farm by the 31st July 2002, otherwise eviction proceedings would be instituted against him. Millin & Currie replied in writing to this letter on the 9th July 2002 and informed Robinson Bertram that Willemse claims El 116 765.00 compensation and if it were not paid the matter would have to go to arbitration,

aa) "Q27": The applicant then had a discussion with Madhi Rens about the matters of the Trust and wrote her an e-mail letter wherein he referred to the fact that letters were being written on behalf of the Trust without him being aware of the contents thereof. He also referred therein to the distrust between the trustees. In this regard the applicant stated that Madhi Rens informed him that she didn't want to be a trustee of the Trust with her father, the first respondent, as he was too difficult to work with.

bb) "Q28": On the 23rd July 2002 the applicant had a telephone discussion with the first respondent and the applicant thereafter, prima facie, on the same day, wrote annexure "Q28" to him. In the letter the applicant confirmed that the first respondent advised him that he unilaterally decided to lease the farm to an acquaintance of his, one Barry Forbes, and that he had entered into a written lease with Forbes and that he took full responsibility for his actions. The applicant stated that he told the first respondent that it was not a question of taking responsibility but that he could not unilaterally act in matters concerning the estate as he could only do it with the applicant's knowledge thereof and consent which consent was not obtained. The text of the letter reads as follows :-

"Dear Rouviere,

In 1998 you were very keen to lease the farm to Gideon. On 1998-02-25 I wrote a letter to you stipulating that we cannot lease trust property without advertising and getting a few tenders in writing prior to leasing the property (See paragraph number 3). Today I phoned you and you gave me the following information.

You made a unilateral decision to lease the farm to Barry Forbes. You entered into a written lease agreement with Barry Forbes. You informed me that you take full responsibility, personally, for these actions. Please indicate in your reply if the above statements are correct. I herewith also request that you inform me in writing of any actions taken by yourself, as executor of the estate, during the last 2 years, including letters and agreements.

Temba."

cc) "Q29": On the 24th July 2002 the applicant received this fax from Madhi Rens and the applicant was advised by her that she was requested by her mother, Churie Rens, who normally conveyed messages on behalf of the first respondent, to inform the applicant that they were busy with a takeover of the operations on the farm by Forbes of OKH Farms (Pty) Ltd in terms of a lease of 3 years and that the rent for one year was paid in advance. The applicant in his founding affidavit stated that he was never consulted about such an agreement and was completely taken by surprise. The applicant stated further that he telephoned the first respondent and asked him to explain to the applicant what he was doing and what right he had to let the farm unilaterally without his knowledge and consent. According to the applicant the first respondent promised to send the applicant an explanation and a copy of the lease but nothing had arrived at the time the founding affidavit was deposed to.

dd) "Q30": On the 25th October 2002 the applicant sent this letter to Madhi Rens. In the letter he referred to the fact that he suggested that when Wales wanted to resign as a trustee in 2001 that they get a professional as trustee but instead she and Wales wanted to appoint the first respondent's son Imam as trustee in the place of Wales, which was not acceptable to the applicant. In the letter the applicant proposed an attorney O'Cornell as trustee. Madhi Rens and Wales did not accept his suggestion.

ee) "Q31": On the 12th December 2002 the applicant received this letter from the first respondent, written and signed on his behalf by his wife Churie Rens. In the said letter he referred to the fact that Willemse wanted to visit the farm with some people. The applicant stated that Willemse made such a request to him and that he telephoned the first respondent whom he felt should be consulted and the first respondent gave his permission and the applicant advised Willemse accordingly. Apparently Willemse

wanted to take his advisors along. The first respondent thereafter refused them permission to enter the farm thus the letter by the first respondent to the applicant. The applicant stated that he was of the opinion that there ought to be nothing to hide from Willemse and his advisors. In the letter the first respondent confirmed that there was a new lessee. No lease contract was, however, attached.

ff) "Q32": On the 12th December 2002 the applicant received another faxed letter from the first respondent with the heading "re: your letter PROFESSIONAL AS TRUSTEE". In the letter the first respondent stated that he failed to see any sense in appointing an attorney, a certain O'Connell, as a trustee.

gg) "Q33": On the 21st December 2002 the applicant faxed this letter to the first respondent calling for a copy of the agreement with Forbes and for an account as to what happened to the alleged payment in advance of the first year's rent by Forbes. The applicant stated that he did not receive a reply thereto.

hh) "Q34": On the 5th February 2003 the applicant wrote this letter to the first respondent and his wife calling for particulars regarding what had happened and reiterated that Willemse was proceeding with his claim against the estate.

Late in April 2003 the applicant received annexure "R" from the first respondent. Annexure "R" is a letter addressed by Robinson Bertram to the first respondent and attached to it was a draft Liquidation and Distribution account with regard to the estate of the deceased's Swaziland assets.

On annexure "R" the wife of the first respondent wrote a handwritten note for the applicant that (translated) reads as follows:

"Temba,

Sign please and send as soon as possible back to Madhi. Please keep the document confidential.

Churie."

The applicant stated that he perused the draft liquidation and distribution account and found it unacceptable to him in view of the following:

(a) The rent paid by Forbes was not reflected therein;
(b) The first respondent, after Willemse left the farm, used and utilised estate property, this being the house on the farm and the harvest which was gathered after Willemse was forcibly evicted from the farm, for his own benefit without accounting to the estate in that regard;
(c) The amount of E9 914,00 could not have been paid to Robinson Bertram as the farm had not yet been transferred;
(d) The estate was not liable for counsel's fees in the amount of E5 000.00;
(e) No provision was made for the claim of Willemse against the estate and the estate could

not be wound up until the claim was resolved.

The applicant conveyed his refusal to sign the liquidation and distribution account to the first respondent.

After the applicant had deposed to the founding affidavit on the 26th June 2003, the first respondent's wife, Churie Rens, on behalf of the first respondent, wrote a letter dated the 23rd July 2003. Therein, a scathing attack was made on the applicant, accusing him of delaying the winding up of the estate and stating that the farm was not leased to Forbes but to a company called OKH (Pty) Ltd. First respondent conceded in the letter that he didn't consult the applicant, his co-executor, in the matter but that he took advice from a Mr, Nxumalo, Madhi Rens and Wales, and that they had no objections to the lease. The first respondent apparently did not enclose a copy of the lease agreement with his letter but stated the following therein:-

"2,6 The lease agreement is at your disposal to be viewed at any time. We (the other two trustees and I) are, and have always been, of the view that we cannot risk sending you a copy/copies of any confidential documents concerning the Trust, as well as the Estate, as your loyalty does not lie with the Trust/Estate but with your brother. He has no connection, and has nothing to do with the ROC FUND TRUST, and is therefore not to have any insight in its affairs."

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The first respondent did not see fit to file a copy of this "confidential" lease agreement with his answering affidavit either.

With regard to the eviction of Willemse by force from the farm, the first respondent stated in his letter to the applicant, attached to his answering affidavit as annexure "F", that no force was used against Willemse and that he was also there together with the workers of OKH (Pty) Ltd and also with workers of the ROC Fund Trust. In paragraph 48 of the answering affidavit, the first respondent contradicts himself, however, and stated that he was not even present when Willemse "vacated" and that all workers on the farm were employed by OKH (Pty) Ltd and that there was thus no way that he could have instructed the guards to act against Willemse. It is a worrying factor that even at the time when Willemse was forcibly evicted from the farm, that workers of OKH (Pty) Ltd were already present on the farm, bearing in mind that the first respondent alleges that the lease with OKH (Pty) Ltd only came into being much later. The question then arises as to what the armed guards of OKH were doing on the farm much earlier than the time the lease was allegedly entered into with OKH. Clearly, in this regard, the first respondent again is not frank and open with the court. The absence of candidness and a sparing application of the true facts raises the inevitable question, as to whether the first respondent was not perhaps in cahoots with others to have Willemse evicted from the farm to enable the first respondent and those in favour with him, to utilise the now improved farm. From the facts before court it is difficult to come to any other conclusion.

There is no basis from which the first respondent properly could have entered into an agreement of lease with OKH (Pty) Ltd. One would further be very hard pressed to accept that attorney Nxumalo of Robinson Bertram would have been properly consulted by the first respondent in this regard. It is trite that the first respondent could not have properly entered into such a contract without the assistance, knowledge and consent of the applicant, whether in his capacity of co-executor or as trustee. As said, one would further be hard pressed to accept that after proper consultations with him, attorney Nxumalo could have given his professional go-ahead to such an agreement.

Further, it seems to be out of place and unacceptable that the first respondent, despite the legal obligation upon him to consult with and account to the applicant, his co-

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executor and co-trustee, with regard to matters of the estate, failed to obtain the consent of the applicant before entering into the lease agreement and his failure to furnish the applicant with a copy of the lease agreement.

A further aspect raised by the applicant was that the first respondent was utilising an asset of the estate for his own purpose and benefit, without accounting to and compensating the estate for it. Clearly, the first respondent occupied the one house on the farm during the tenancy of Willemse, with Willemse's permission, while the latter occupied the farm during the lease. When the lease with Willemse was "cancelled" by the Trust, the right granted by Willemse in favour of the first respondent to occupy the house on the farm would ipso facto have fallen away, if Willemse occupied the farm in terms of the lease with the Trust. Thereafter, the first respondent would have had to vacate the house and leave the farm, or he would have had to seek and obtain the consent of the estate, as represented by the co-executors, to continue with his occupation. There is no indication that the first respondent had done so. He carried on with his occupation of the house on the farm of the estate and he thus, on his own version, become indebted to the estate for the value of his occupation of the house. He did not disclose this fact in the draft liquidation and distribution account, nor is it shown that he compensated the estate with what was due to it. This negatively impacts on his capacity as co-executor of an estate in his fiduciary role and on the face of it, smacks of improper conduct.

A further aspect remains to be dealt with. In his papers the first respondent tried to make out a case that the applicant was endeavouring to further the aims, claim and position of Willemse, his brother, and that the applicant in that fashion was thus bringing the application with an ulterior motive. Advocate Flynn raised the same argument in his heads of argument. That this cannot be found as a correct position is abundantly clear. The allegation is unfounded and stands to be rejected as false and malicious, an attack made in desperation to cloud the merits of the application. The Court unequivocally rejects the allegation. It is the applicant's endeavour to have a neutral, impartial and professional person appointed to administer the estate and bring it to finality, not to favour himself or his kin. It is the first respondent who does not wish such a person to be appointed. It is the unacceptable conduct of the first respondent in his capacity as co-executor that is the cause of this application. In my

view, there is ample cause to sustain the prayer for removal of the first respondent as co-executor, in the best interests of the estate.

From what has been dealt with supra in the judgment of this Court the following is found: -

1) The first respondent did not properly fulfil his obligations as co-executor in the estate of the deceased;
2) The first respondent utilised assets of the deceased's estate, inter alia the house on the farm, without any quid pro quo or accounting for it to the estate;
3) The first respondent was not candid with the court and forwarded untruths for consideration in an attempt to frustrate the application. He furthers his own personal aims to the detriment of the estate;
4) The proven conduct of the first respondent is such that he is found to be unfit to continue being a co-executor in the estate;
5) The interests of the estate would best be furthered by the first respondent's immediate removal from his appointment as co-executor and that the estate would in fact be prejudiced if this is not done forthwith;
6) The applicant was not only entitled but duty bound to bring this application in view of the unacceptable and improper conduct on the part of the first respondent;
7) The application should therefore be granted.

Regarding the question of costs, applicant indicated that a costs order was sought against the first respondent on the attorney-client scale. Such costs are only ordered in exceptional and deserving cases. In NEL V WATERBERG LANDBOUWERS KO-OP VEREENIGING 1946 AD 597, Tindall J.A. stated the following with regard to such costs:

"(t)he true explanation of awards of attorney and client costs not expressly authorised by Statute

seems to be that, by reason of special considerations

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arising either from the circumstances which give rise to the action or from the conduct of the losing party, the Court in a particular case considers it just, by means of such an order, to ensure more effectually than what it can do by means of a judgment for party and party costs, that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation. "

In view of the conduct of the first respondent as indicated in this judgment, his untruthfulness, his failure to be candid with the Court and furnishing untruths under oath, his failure to carry out his obligations as co-executor and his unwarranted attack on the applicant, the Court finds that this matter is such an exceptional case where such costs should be granted against the first respondent. In the opinion of this Court the first respondent should not have opposed the application in the first place but should have conceded that he was not fit to retain his appointment as co-executor. His conduct which caused the application to be brought exacerbated the situation by his vigorous but misplaced opposition to the application, clutching to his appointment to the detriment of the estate in respect of which he has a fiduciary and legal duty to administer like a bonus paterfamilias (see the MEESTER case (supra) at page 19-G).

The applicant further seeks a declarator to the effect that he was entitled to bring the application on behalf of the estate. I have no hesitation in making such an order, which makes the estate liable for the legal costs incurred by the applicant in the event that the first respondent fails to pay the costs. Prior to this taking effect, the Registrar of the High Court of Swaziland will first be required to certify that all remedies taken against the first respondent to recover the costs have failed and that in his opinion, it could not be prudent or viable to further proceed with execution for costs, against the first respondent.

Mr. Flynn argued in his Heads that the application should not have been brought against the first respondent nomine officio, but against him in his private capacity. This is cosmetic dressing and nothing much turns on this point. The applicant and first respondent were both before court and the matter was properly ventilated and arg ued. In any event, the first respondent was not brought to court for what he did in his personal and private capacity but for his conduct qua co-executor in the estate. The whole object of this matter was to seek his removal from appointment as co-executor. This argument falls to be rejected.

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The following is ordered: -

1) The application succeeds and Jeremija de la Rouviere Rens is removed with immediate effect as co-executor in the estate of the late Petrus Joubert van der Walt, Swaziland estate number EH 1974/03, in terms of the provisions of Section 84 of the (Swaziland) Administration of Estates Act, 1902 (Act 28 of 1902). The first respondent is ordered to submit to and hand over to the Master of the High Court his letters of executorship and all relevant documents and papers that relate to the administration of the Estate, within a period of 21 (twenty one) days after this judgment.

2) The applicant is ordered to tender his resignation as co-executor in the Estate described above, within one calendar month following the date of this order. The Master of the High Court of Swaziland is not obliged to accept the resignation. The Master is however enjoined to give proper consideration to the appointment of an independent professional executor with legal qualifications and with expertise in the field of the administration of deceased estates.

3) It is declared that the applicant was entitled to approach the Court on behalf of the estate of the said deceased and to bring this application and the estate of the said deceased will be liable for all legal costs incurred by the applicant in the event of the first respondent not paying the costs of the application, subject to certification by the Registrar of the High Court as set

out in this judgment. For the sake of clarity, it is ordered that the first respondent is not entitled to have his costs of the application paid by the Estate of the Late Petrus Joubert van der Walt.

4) The first respondent is ordered to pay the costs of this application on the scale of attorney and client, out of his own pocket. The costs are also to include the costs of counsel, both in the drawing of the papers and appearing in court at the hearing, also for the drawing of Heads of

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Argument. Counsel's costs are certified to fall under the provisions of Rule 68(2) of the High Court Rules.

ANNANDALE, ACJ