IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 2026-005605

CASE NO: 2025-091366

In the matter between:

ETHEL PRUDENCE SAGE Applicant

and

ROBERT JAN PICARD First Respondent

(in his personal capacity)

ROBERT JAN PICARD N.O. Second Respondent

(as executor of the Estate of the late Vera Sage)

ROBERT JAN PICARD N.O. Third Respondent

(as trustee of the Vera Sage Testamentary Trust)

DAVID JACK SAGE Fourth Respondent

(in his personal capacity)

DAVID JACK SAGE N.O. Fifth Respondent

(as executor of the Estate Late Vera Sage)

DAVID JACK SAGE N.O. Sixth Respondent

(as trustee of the Vera Sage Testamentary Trust)

BRENT BURGER Seventh Respondent

BB BURGER BELEGGINGS (PTY) LTD Eighth Respondent

BETINA SUSAN DE ARAUJO Ninth Respondent

MASTER OF THE HIGH COURT, CAPE TOWN Tenth Respondent

REGISTRAR OF DEEDS, CAPE TOWN Eleventh Respondent

RUTH LINDA SAGE Twelfth Respondent

In Re: Case no: 2025-091366

DAVID JACK SAGE N.O. First Applicant

(as executor of the Estate Late Vera Sage)

DAVID JACK SAGE N.O. Second Applicant

(as trustee of the Vera Sage Testamentary Trust)

And

ETHEL PRUDENCE SAGE First Respondent

RUTH LINDA SAGE	Second Respondent
All other unlawful occupiers of Erf 6[...],	
Constantia at Cape Town	Third Respondent
City of Cape Town	Fourth Respondent

HEARD: 11 May 2026

DELIVERED: 18 August 2026

Administration of Estates- Executors- Trustees- Removal of office- not lightly done Testamentary Trust – realisation of bequeathed property - Section 6(1) of the Trust Property Control Act 57 of 1988 is peremptory -regulates the control of trust property - Section 11(1) of that Act, which obliges a trustee to identify and register trust property as such, is subject to section 40 of the Administration of Estates Act 66 of 1965 -liquidation and distribution of the estate - the property destined for a testamentary trust remains an asset of the deceased estate under the administration of the executor – realisation not invalid- at most, the trust has a vested personal right to claim, in due course, delivery of what the distribution account allocates to it.

JUDGMENT: 18 AUGUST 2026

Le Grange ADJP

Introduction:

[1] This matter came before me as a consolidated hearing of two applications. The first application, under case number 2026-005605, is brought by Ethel Prudence Sage ('the

applicant'). She seeks, among other relief, orders setting aside the sale of Erf 6[...], Constantia, Cape Town ('the Constantia property') and the sale of the deceased's one-sixth share in Portion 27 of the Farm Bosjemansdrift No 174, Bonnievale ('the farm property'). She also seeks the removal of Robert Jan Picard and David Jack Sage as executors of the deceased estate and as trustees of the Vera Sage Testamentary Trust ('the Trust'). The second application, under case number 2025-091366, concerns the eviction from the Constantia property of the applicant and Ruth Linda Sage under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE').

[2] The applications were heard together. Their factual and legal foundations overlap substantially. It is therefore appropriate that they be determined in a single judgment.

[3] Although the dispute has acquired a considerable procedural history and has generated serious allegations between members of the Sage family, the principal legal question is comparatively narrow. It is whether immovable property forming part of a deceased estate, but bequeathed as part of the residue to a testamentary trust, becomes trust property immediately upon the death of the testatrix so that any subsequent disposition of it is an act by trustees regulated by the Trust Property Control Act 57 of 1988; or whether, pending liquidation and distribution of the deceased estate, the property remains under the administration of the executors and may lawfully be realised by them in that capacity.

<u>Procedural history and the application to strike out</u>

[4] The proceedings have not followed a straightforward course. The applicant initially attempted to have the removal application heard as one of urgency on 21 January 2026. The Judge President found that the matter was not urgent and struck it from the roll.

[5] Thereafter, by agreement between the parties, the matter was postponed to the semi-urgent roll to be heard together with the PIE application on 11 May 2026.

[6] The applicant subsequently instituted a further urgent application on 20 March 2026 seeking to interdict transfer of the Constantia property. Nziweni J also struck that application from the roll, with costs.

[7] At the start of the consolidated hearing, the respondents sought to strike out paragraphs 5 to 24 of the applicant's replying affidavit dated 22 April 2026. Their objection was that those paragraphs introduced matters arising after the opposing affidavit had been delivered and did not constitute a legitimate answer to matters raised in opposition.

[8] Replying affidavits are not ordinarily the place in which an applicant may reconstruct the case advanced in the founding papers or introduce a materially different factual foundation for the relief originally sought. Fairness requires a respondent to know from the founding affidavit the case it must meet.

[9] I have considered the impugned paragraphs in their context. They concern events occurring after the opposing affidavit and do not properly respond to the case made in opposition. They introduce new matter rather than answer the respondents' case. The objection is therefore well founded, and paragraphs 5 to 24 fall to be struck out.

The testamentary scheme

[10] Vera Sage ('the testatrix') died on 1 May 2024. Her estate included the Constantia property and a one-sixth share in the farm property.

[11] Her will is central to the dispute and must be construed as a whole. Clause II bequeathed her personal effects, furniture, household effects and vehicles in equal shares to her three children, Ruth Linda Sage, David Jack Sage and Ethel Prudence Sage.

[12] Clause III dealt differently with the residue. It provided: 'I BEQUEATH the residue of my Estate to my hereinafter appointed Trustees IN TRUST for the following ends and purposes and subject to the terms and conditions more fully set out in Clause V below.'

[13] Both immovable properties formed part of the residue. Clause V conferred extensive powers upon the trustees. Those powers included powers to realise, invest and reinvest capital, dispose of assets, acquire immovable property, enter into contracts, borrow money, furnish guarantees and determine questions concerning capital and income.

[14] Clause V(b) is of particular significance to the applicant's asserted entitlement to occupy the Constantia property. It authorised the trustees to make tangible assets available for the use of the testatrix's children or their descendants. It contemplated, in particular, that the trustees might retain the testatrix's home for the free use of her children for their lifetimes, or for so long as they wished. The language is permissive, not mandatory. It confers a discretion upon the trustees. It does not confer upon an individual beneficiary an indefeasible lifelong right of occupation.

[15] Clause XI also afforded the executors and trustees extensive discretionary powers concerning the time, manner and conditions upon which assets might be sold.

[16] The will accordingly reveals two related but legally distinct stages. The first is the administration of the deceased estate by the executors. The second is the administration by the trustees of the property which, upon completion of the estate-administration process, is delivered or transferred to them in accordance with the will and the liquidation and distribution account.

[17] The failure to keep those stages analytically distinct lies at the root of the applicant's case.

<u>The sales</u>

[18] Picard and Sage were appointed as executors of the estate and were also designated as trustees of the testamentary trust. Letters of Authority were subsequently issued authorising them to act as trustees.

[19] On 23 January 2025, acting as executors of the deceased estate, they concluded an agreement to sell the Constantia property to Betina Susan de Araujo. The agreement contained a suspensive condition relating to the Master's consent, which was subsequently obtained.

[20] The farm property was likewise sold, and the Master's consent to that transaction was also obtained.

[21] The executors' explanation is that the estate was not sufficiently liquid to pay its administration expenses and liabilities while achieving the purposes contemplated by the will. They considered the realisation of assets necessary. They also considered it wasteful to transfer immovable property to the Trust first, only for the trustees to sell it and thereby incur additional conveyancing expenses.

[22] The applicant challenges that course. Her argument rests largely on the proposition that the Trust came into existence upon the testatrix's death; that the two immovable properties were bequeathed to the Trust; that they therefore became trust property upon death; and that their subsequent sale was necessarily an exercise of the powers of the trustees.

[23] If that final proposition were correct, the consequences of s 6(1) of the Trust Property Control Act would be material. In my view, the difficulty is that the proposition conflates the existence of the testamentary trust with the proprietary character of assets that have not yet passed from the deceased estate into the administration of its trustees.

<u>Statutory architecture</u>

[24] The question is best answered by reading the Administration of Estates Act 66 of 1965 and the Trust Property Control Act together. The former regulates the administration, liquidation, and distribution of deceased estates, while the latter regulates the control and administration of trust property. The statutes are complementary. Neither should be construed so as to collapse the distinct functions of the executor and the trustee.

[25] The definition of 'trust' in s 1 of the Trust Property Control Act is instructive. In broad terms, it encompasses an arrangement in which property is transferred or bequeathed to a trustee for administration or disposal under the trust instrument. However, the definition expressly excludes the administration of another's property by a person acting as executor, tutor, or curator under the Administration of Estates Act.

[26] That exclusion is not incidental. It marks a legislative boundary. Property does not become subject to the regulatory regime governing trust property merely because its ultimate testamentary destination is a trust. So long as it remains property administered by an executor under the Administration of Estates Act, the executor administers it in that capacity.

[27] Section 6(1) of the Trust Property Control Act provides: 'Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master.' The phrase 'in that capacity' is important. Section 6(1) governs conduct undertaken as trustee. It does not invalidate conduct lawfully undertaken by the same individual in a distinct juridical capacity as executor. Section 11(1) of the Trust Property Control Act reinforces that point. The trustee's obligation to identify and register trust property as such is expressly made subject to s 40 of the Administration of Estates Act.

[28] Section 40, in turn, regulates the process by which property administered in a deceased estate is transferred to a testamentary trustee. With respect to movable

property, the executor must deliver to the trustee the property that, according to the distribution account, is to be delivered to the trustee. With respect to immovable property, the executor must procure the appropriate endorsement of the title deeds and deliver the relevant deeds to the trustee.

[29] The statutory reference to the distribution account is decisive. It recognises that the testamentary direction identifies the destination of the residue but does not remove the property from the process of estate administration.

[30] The residue can be ascertained only after the estate's liabilities and the expenses of administration have been dealt with. Section 35(12) similarly contemplates distribution after the liquidation and distribution account has been open for inspection and confirmed.

[31] A testamentary beneficiary's entitlement is necessarily subject to the prior administration of the estate. The beneficiary takes what the estate can transmit after discharging its liabilities. Section 6(1) of the Trust Property Control Act is peremptory. A person appointed as trustee may act in that capacity only after being authorised in writing by the Master. But that prohibition applies only when the person concerned acts as trustee. It does not convert an executor administering property of a deceased estate into a trustee merely because the will directs that whatever ultimately remains of the residue be administered in trust.

Vesting and ownership

[32] The distinction between a vested testamentary entitlement and ownership of the property which is the subject of that entitlement is well established.

[33] In Greenberg and Others v Estate Greenberg 1955 (3) SA 361 (A), Centlivres CJ explained that under the modern system of deceased-estate administration a legatee does not acquire ownership of the bequeathed property immediately upon the death of the testator. What vests is a right to claim delivery or transfer in due course. In the case of immovable property, ownership passes only upon transfer by the executor.

[34] The significance of Greenberg for present purposes extends further. Where the property must be realised to meet the debts of the estate, the legatee may never acquire ownership of the property itself. The testamentary entitlement operates upon the estate that remains available for distribution.

[35] The same conceptual distinction is reflected in Booysen and Others v Booysen and Others 2012 (2) SA 38 (GSJ). An heir or legatee cannot vindicate property forming part of the deceased estate merely because it has been bequeathed to him or her. Pending completion of the administration process, the executor controls the estate, and the beneficiary possesses a personal claim to payment, delivery or transfer in accordance with the confirmed liquidation and distribution account.

[36] In Oberholster NO and Others v Richter [2013] 3 All SA 205 (GNP), the Full Court likewise emphasised that a beneficiary cannot treat a bequeathed asset as already his or her property before the liquidation and distribution process has been completed. Whether the beneficiary ultimately receives the particular asset depends, among other things, upon the sufficiency of the remaining estate to meet its obligations.

[37] Those principles apply with equal force where the beneficiary of the testamentary disposition is a trust. The creation of the testamentary trust upon death and the transfer of particular assets to the trustees are conceptually distinct events.

[38] The applicant relies upon the proposition discussed in Cameron et al, Honoré's South African Law of Trusts, that a testamentary trust comes into existence upon the testator's death. For present purposes that proposition may be accepted without qualification. It does not decide the present case.

[39] The question is not when the trust exists. The question is when the particular property ceases to be property under the executor's administration and becomes property administered by the trustee.

[40] The distinction is fundamental. A testamentary trust may exist before every intended asset has ultimately been transferred or delivered to its trustees. Its existence does not divest the deceased estate of property which the executor is obliged by statute to administer. This also explains the debate reflected in Kropman NNO v Nysschen 1999 (2) SA 567 (T) and Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W). Whatever theoretical formulation is adopted concerning the moment at which a testamentary trust comes into existence, the statutory administration of the deceased estate cannot be bypassed. The executor remains responsible for the assets pending their lawful distribution.

<u>Section 6(1) and the Simplex line of authority</u>

[41] The applicant's reliance on Simplex (Pty) Ltd v Van der Merwe is misplaced. Simplex establishes the peremptory character of s 6(1). A person appointed as trustee may not perform juridical acts in that capacity before the Master has authorised him or her in writing. An act undertaken as trustee in breach of that prohibition is not rescued merely by subsequent authorisation.

[42] That principle is important and must be respected. The present case does not require its dilution. But Simplex first requires identification of the capacity in which the impugned act was performed. Section 6(1) cannot invalidate an act performed qua executor simply because the executor happens also to have been nominated as trustee under the same will. The distinction is one of legal capacity, not nomenclature.

[43] If Picard and Sage had purported, before being authorised as trustees, to alienate property already under their administration as trustees, Simplex would squarely arise. But that is not what occurred on the facts accepted in these proceedings. They sold property forming part of the deceased estate while administering that estate as executors.

[44] The applicant's argument, in my view, started at the wrong juridical point. It assumes that because the properties were destined for the Trust, every dealing with them after death was necessarily a dealing with trust property. Reading the statutory scheme in context, it certainly demonstrates otherwise. Until the process contemplated by s 40 of the Administration of Estates Act has occurred, property destined ultimately for a testamentary trust remains under the executor's administration. The trust's entitlement is to receive, in due course, what the liquidation and distribution account lawfully allocates to it.

[45] Describing the Constantia and farm properties as 'trust assets' at that stage confuses their intended testamentary destination with their existing proprietary and administrative status.

<u>The executors' power to realise the properties</u>

[46] An executor is the legal representative of the deceased estate. The executor assumes control of its assets, preserves them, ascertains its liabilities, prepares the liquidation and distribution account and, after satisfaction of the statutory requirements, distributes the net estate according to law and the will.

[47] The interests of creditors necessarily precede the interests of beneficiaries in the distribution of the estate. A testator can determine the destination of the estate that remains available for distribution, but cannot, by testamentary direction, exempt assets from the lawful claims of creditors or the expenses properly incurred in administering the estate.

[48] It follows that where the estate cannot meet its liabilities without realising an asset, the executor is entitled — and where necessary obliged — to realise it. A beneficiary's claim then operates upon what remains for distribution.

[49] In the present case the executors explain that the estate lacked sufficient liquidity, and that realisation of assets was necessary to meet the expenses and liabilities of administration and to place the testamentary scheme on a financially sustainable footing. There is no sufficient evidential foundation upon which that explanation can be rejected. Nor has the applicant established that the estate's liabilities could have been discharged

without realisation of the properties, or that some viable alternative arrangement was tendered which would have preserved the properties while permitting the executors properly to discharge their statutory duties.

[50] The will itself, moreover, confers wide powers concerning the sale and realisation of assets. The executors' decision cannot therefore be characterized as contrary to the testamentary scheme merely because the testatrix contemplated that the trustees might retain the Constantia property for use by her children. The testamentary power to retain an asset is not a testamentary command that it must invariably be retained.

[51] Accordingly, the sale of the Constantia property and the sale of the estate's one-sixth share in the farm property were not dispositions by Picard and Sage acting as unauthorised trustees. They were dispositions of estate property by the executors in the course of administering the deceased estate.

[52] The challenge based on s 6(1) of the Trust Property Control Act must consequently fail.

<u>Removal of the executors</u>

[53] The applicant also seeks to remove Picard and Sage from office as executors. Section 54 of the Administration of Estates Act authorises a court, in the circumstances contemplated by the section, to remove an executor. That power is not exercised merely because relations between an executor and a beneficiary have deteriorated or because a beneficiary strongly disagrees with an administrative decision.

[54] Removal of a fiduciary from an office conferred by a testator is a serious intervention. The court's concern is not to adjudicate personalities or family disagreements. Its concern is the proper administration and protection of the estate.

[55] As stated in Segal v Segal 1979 (1) SA 503 (C), removal is a drastic remedy and is not granted lightly. The authorities similarly recognised that not every error, disagreement or failure in administration justifies removal. The relevant inquiry is directed to whether the executor's conduct demonstrates dishonesty, want of fidelity, incapacity, gross inefficiency or some other circumstance from which the court can reasonably conclude that continuation in office imperils the proper administration of the estate.

[56] In Brand v D.B and Another (A106/25; 13157/2024) [2026] ZAWCHC 216 at paras 34-44, the predominating consideration was identified as the interests of the estate and its beneficiaries. That formulation appropriately directs attention away from personal antagonism and toward the future administration of the estate. Brand likewise shows that a breakdown in relations between an executor and an heir does not, by itself, establish a case for removal. If disagreement alone were sufficient, a beneficiary could effectively procure the replacement of a properly functioning executor simply by making cooperation impossible.

[57] The applicant's principal complaint against Picard and Sage is that they decided to sell the two properties. I have found that the premise underlying that complaint — namely, that they unlawfully disposed of trust property — is unsustainable. There is no adequate

evidence that either executor has been dishonest, grossly inefficient or unfaithful to the office, or that their continued administration poses a material risk of loss to the estate.

[58] The threshold for judicial removal has accordingly not been established.

Removal of the trustees

[59] Section 20(1) of the Trust Property Control Act governs removal of trustees. The court may remove a trustee where satisfied that removal will be in the interests of the trust and its beneficiaries. The inquiry is objective. Misconduct or mala fides is not invariably a prerequisite. As Tijmstra NO v Blunt-MacKenzie NO and Others 2002 (1) SA 459 (T) makes clear, the power exists to protect the trust and its beneficiaries and must be exercised with circumspection.

[60] The question is whether the trustee's continued office is likely to prevent the trust from being properly administered or otherwise operate to the beneficiaries' detriment.

[61] The applicant's case for removing the trustees largely repeats her complaints about the sale of the properties. Those complaints do not establish that Picard and Sage are incapable of administering the Trust, that they have acted dishonestly in relation to it, or that their continued trusteeship threatens the interests of the Trust or its beneficiaries.

[62] There is another consideration. They were the testatrix's chosen fiduciaries. Testamentary choice is not immune from judicial supervision, and a court will intervene when the statutory standard for removal is met. But the testatrix's deliberate choice is nevertheless a matter of weight. It should not be displaced in the absence of a proper

factual basis showing that the interests of the trust and its beneficiaries require it. No such basis has been established. The application to remove them as trustees must therefore also fail.

The eviction application

[63] Turning to the PIE application. The applicant's opposition to eviction depends principally upon two propositions: first, that the sale of the Constantia property was invalid; and secondly, that the will gives her a right to remain in occupation. The first proposition fails for the reasons already given.

[64] The second depends upon the proper interpretation of the will. Clause V(b) empowers the trustees to make tangible assets available for the use of the testatrix's children and contemplates that the home may be retained for their free use.

[65] But the provision is framed as a discretionary power. It does not grant each child a personal right of habitatio or an unconditional right to occupy the Constantia property for life. That distinction is important. A beneficiary cannot convert a discretionary power conferred on the trustees into a vested right by insisting that the discretion be exercised in a particular manner.

[66] Once the executors lawfully determined that the property should be sold, the applicant had no independent right under the will to defeat that decision by remaining

indefinitely in occupation. Her continued occupation is therefore without lawful authority to possess the property. That conclusion does not, by itself, conclude with the PIE inquiry. PIE requires a court to determine whether eviction is just and equitable, having regard to all relevant circumstances.

[67] On the papers before me, I am satisfied that the requirements for eviction have been established. Ruth Linda Sage no longer opposes the relief. As to the applicant, insufficient evidence shows that eviction will render her homeless or expose her to circumstances that would make eviction unjust or inequitable.

[68] At the same time, an order for immediate eviction would not appropriately recognise the personal and familial circumstances in which the occupation arose. The applicant did not enter the property as a stranger or ordinary commercial occupier. The property was her late mother's home, and the will itself contemplated the possibility that the children might be permitted to use it. Those circumstances do not create a right of indefinite occupation, but they are relevant to the period which should be afforded for relocation.

[69] A period of approximately two months from the date of this judgment provides a fair accommodation among the applicant's circumstances, the requirements of the estate's administration, and the purchaser's entitlement to vacant possession.

[70] It is accordingly just and equitable that the applicant and any person occupying through her vacate the property by 18 October 2026, failing which the Sheriff may evict on 19 October 2026.

<u>Costs</u>

[71] Ordinarily, successful parties are entitled to their costs. But the rule that costs follow the result is not inflexible. Costs remain within the court's judicial discretion and are exercised in light of the circumstances of the litigation. These proceedings arose during the administration of a family estate and escalated into an acrimonious dispute among siblings and fiduciaries chosen by the deceased. The litigation has plainly deepened an already fractured relationship.

[72] That consideration does not excuse unsuccessful litigation. Nor should a costs order be withheld merely to spare a litigant the ordinary financial consequences of failure. However, a genuine legal issue underlies the dispute concerning the interface between the administration of a deceased estate and the operation of a testamentary trust. The applicant's case ultimately fails because it fails to maintain the necessary distinction between the vesting of a testamentary entitlement and the administration and transfer of the underlying estate property.

[73] In the particular circumstances of this family dispute, and having regard to the nature of the issues and the interests of finality, I consider it appropriate that each party bear their own costs in both applications.

[74] It follows that the relief sought by the Applicant in Case No: 2026-005605 is dismissed. The relief sought by the Applicants in Case No: 2025-091366 succeeds.

[75] In the result, the following order is made:

1. The Respondents' application to strike out paragraphs 5 to 24 of the Applicant's replying affidavit is granted.

2. The application to set aside the sale agreement concluded on 23 January 2025 in respect of Erf 6[…], Constantia, Cape Town ("the House") is dismissed.

3. The application to set aside the sale of the sixth share in Portion 27 of the Farm Bosjemansdrift No. 174, Bonnievale ("the Farm") is dismissed.

4. The application for the removal of Robert Jan Picard and David Jack Sage as executors of the Estate Late Vera Sage is dismissed.

5. The application for the removal of Robert Jan Picard and David Jack Sage as trustees of the Vera Sage Testamentary Trust is dismissed.

6. ETHEL PRUDENCE SAGE, the First Respondent, and RUTH LINDA SAGE, the Second Respondent, in case no: (Case No. 2025-091366), are declared to be unlawful occupiers of Erf 6[…], Constantia, and must vacate the property by no later than 18 October 2026, failing which the Sheriff of this court shall evict them and all other persons who unlawfully occupies the property under their name(s) on 19 October 2026.

7. Costs: Each party to bear its own costs in both matters.

Le Grange, ADJP