REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO: A5005/2011

DATE:23/09/2011

NOT REPORTABLE

In the matter between

ZELDA BERNADETTE SCHOFIELD	**FIRST APPELLANT**
KEENIN FRANK SCHOFIELD	**SECOND APPELLANT**
KYLE JOHN SCHOFIELD	**THIRD APPELLANT**

and

SHAWN THOMAS BONTEKONING	**FIRST RESPONDENT**
VALERIE JEAN BONTEKONING	**SECOND RESPONDENT**

Rescission of rule nisi and its confirmation – refused in court below - appeal to full court – defence on merits of application in which orders were granted re-considered – executor of deceased estate failing to comply with s 47 of the Administration of Estates Act 66 of 1965 when immovable properties sold - non- joinder to application of interested parties - application not served on those parties - appeal upheld.

J U D G M E N T

VAN OOSTEN J:

[1] This is an appeal against the dismissal by the court a quo (Masipa J) of an application to rescind a court order, made against the first appellant. The appeal is before us with leave of the Supreme Court of Appeal.

[2] In order to understand the proper context of the application for rescission it is necessary to set out in some detail the background to the matter. The first appellant is the mother of the second and third appellants. The first appellant's husband and father of the second and third appellants (the deceased) died on 15 August 2003. In terms of his will the deceased bequeathed his estate to the second and third appellants subject to the first appellant's usufruct for life. The estate consisted *inter alia* of two agricultural holdings (the properties). On 30 March 2006 the Master of the High Court appointed one Howard Woolf as executor in the deceased's estate as provided for in the will. On 12 September 2007, Woolf acting in his capacity as executor sold the properties to the respondents for R1,6m. The authorization of Woolf to sell the properties as well as the first appellant's awareness and knowledge of the transaction, were hotly disputed in the papers, to which I will revert in due course. On 16 October 2008 the first appellant obtained an order from this Court removing Woolf as executor and appointing her as executor of the deceased estate. On 31 March 2009 the respondents obtained an order from this Court by way of a rule *nisi* against the first appellant, in essence compelling her to effect transfer of the properties into the names of the respondents. The rule *nisi* was confirmed on 7 April 2009 (the April 2009 order). On 19 May 2009 the Master of the High Court issued letters of executorship appointing the first appellant as executor of the deceased estate.

[3] During June 2009 the appellants launched an application for the rescission of the April 2009 order which is the subject matter of this appeal. In argument before Masipa J two substantial grounds for the rescission were relied on, firstly, on the merits, that Woolf, the previous executor, was not authorised by the appellants to sell the properties to the respondents and secondly, on the procedure that was followed, that the respondents had failed to join the second and third appellants to the application in which the April 2009 order was made and, furthermore, that the application had not been served on any of the appellants. The learned Judge a quo decided both issues against the appellants and dismissed the application for rescission with costs. I turn now to deal with each of these grounds.

[4] It was accepted at the hearing of the application before Masipa J that the provisions of s 47 of the Administration of Estates Act 66 of 1965 (the Act) applied to the sale of the properties to the respondents. Applied to the sale of the properties in this matter, compliance with the section required the executor to sell the properties "in the manner and subject to the conditions which the heirs who have an interest therein approve in writing" and, moreover, as the second and third appellants were minors at the time and heirs to the properties, to obtain the approval of the Master as to the "manner and conditions" of the sale. It is interesting to note in passing that the deceased's will specifically deals with this aspect. It (clause 7.14) empowers the executor to sell any of the assets in the estate "in such manner and upon such conditions as they shall deem to in the best interest of my Estate, and such mode of realization may include sale by tender, by private treaty, out of hand sales, and sales on terms of installments and accordingly the provisions of Section 47 of Act 66 of 1965 shall not apply to the liquidation or administration of my Estate whether the Trustees be acting as executors or Administrators or Trustees of the Trust hereby created". The exclusion by the testator of peremptory statutory provisions, it is trite, must be regarded as *pro non scripto*.

[5] It is common cause that neither the consent of the appellants nor the approval of the Master had been obtained in respect of the sale of the properties to the respondents. The non-fulfillment hereof, Masipa J held, was of no moment and had "become purely academic as it was overtaken by the rule *nisi*". I respectfully disagree with the reasoning adopted by the learned Judge. The rule *nisi*, in my view, cannot in any way be interpreted as an order to secure compliance with the requirements of s 47. Nor could the non-compliance be cured by a court order. That in any event was not the case the respondents had made out in order to obtain the rule *nisi.* The provisions of s 47 of the Act are peremptory, and cast a duty on the executor to fulfill the requirements of obtaining the consent of the heirs and in addition, where the second and third appellants were still minors at the time, the approval of the Master. The reliance by the respondents on the first appellant's knowledge and awareness of the transaction is misplaced: such knowledge did not and

could not constitute compliance with the provisions of s 47. It follows that the appellants have shown a sustainable defence on the merits of the application in which the April 2009 order was made (the application).

[6] Next, I turn to the procedural issues. The second and third appellants were not joined to the application. They, as heirs of the estate, had a vital interest in the matter. The court a quo reasoned that the first appellant was aware of the transaction and that it was therefore, "highly improbable that the first applicant would not have told her two children about the sale". The probability of the second and third respondents having been informed by their mother of the application, in my view, cannot be regarded as a substitute for service of the application on them. The second and third appellants were necessary parties to the application, they had a direct and substantial interest in the outcome thereof and their joinder to the proceedings, therefore, was necessary. The appeal, as rightly conceded by counsel for the respondents, accordingly should succeed on this ground alone.

[7] Finally, it is necessary to deal briefly with the service of the application. It is common cause that neither the application nor the rule *nisi* was served on any of the appellants. Provision was made in terms of the rule *nisi* for service thereof on the first appellant "c/o Manfred Jacobs", who is an attorney practicing in Boksburg and who had in a previous matter appeared for the first appellant. The service on Manfred Jacobs, it is apparent, was ordered *ex abudanti cautela* and therefore was not intended to provide for substituted service. Be that as it may, the first appellant stated in the rescission application that Manfred Jacobs had not been appointed to act on her behalf in the application, but that he, after service on him of the rule *nisi* had brought it to her notice. I accordingly do not think that the absence of service in the technical sense avails the first appellant. Of more fundamental importance however, remain the non-joinder of and absence of service on the second and third appellants which constitute procedural defects which should have led the court below to grant rescission.

[8] One last observation: the *locus standi* of the first appellant was much debated. At the time of launching the application the first appellant had

already been appointed as executor in terms of an order of this Court but the letters of executorship were only thereafter issued by the Master. This led to the argument that the first appellant, at that time, was not empowered to act as executor and further, that the relief sought and granted against her in her capacity as executor, was improper. We were referred to the recent unreported judgment of Bertelsmann J in *Ex Parte The Master of the High Court of South Africa (North Gauteng)* (NGHC case no 28042/11 27 June 2011) where the learned Judge held that "no judge of the High Court of South Africa has authority or jurisdiction to effect any appointment" of trustees/liquidators and the like, in insolvency proceedings, as authority for the proposition *pari passu* that the court had no authority or jurisdiction to appoint the first appellant as executor, on 16 October 2008. I do not think this is the opportune time to pronounce my views either on the correctness of the judgment of Bertelsmann J or the extension of its application to executors in deceased estates. Suffice to say that the judgment of Bertelsmann J, even on the interpretation contended for by the appellants, does not render the appointment of the first appellant as executor nugatory. It is however true that the first appellant, at the time that the application was launched, had not been issued with the letters of executorship and that the order granted against her in that capacity, may well be improper. But I do not think it is necessary to explore this aspect any further as the appeal, for the reasons I have already dealt with, must in any event be upheld.

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

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and substituted with the following order:
    1. The rule *nisi* issued on 31 March 2009 and the confirmation thereof on 7 April 2009 in case no 09/13756 is rescinded.
    2. The applicants are granted fifteen days from 23 September 2011 to file answering affidavits in the application under case no 09/13756.

3. The costs of the application for rescission of the said orders are ordered to be costs in the application under case no 09/13756.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

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NF KGOMO
JUDGE OF THE HIGH COURT

I agree.

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V NOTSHE
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPELLANT	***ADV AP BRUWER***
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DATE OF HEARING	***22 SEPTEMBER 2011***
DATE OF JUDGMENT	***23 SEPTEMBER 2011***