IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)

JOHANNESBURG

CASE NO: 43899/10

DATE: 2011-02-24

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 3/6/2011 SIGNATURE

In the matter between

KATZ, MYRNA SHIRLEY	Applicant
and	
KATZ, ARNOLD HILTON	1st Respondent
JK HOLDINGS	2nd Respondent
[Not on record]	3rd Respondent

J U D G M E N T

C J CLAASSEN, J:

[1] The applicant is a beneficiary in the estate of her late mother, Ada Katz. The first respondent is her brother, and also the executor in the estate of their late mother. The third respondent is a company controlled by the first respondent. A certain amount of the applicant's inheritance was invested in the third respondent by the first respondent.

[2] The applicant has been living in the United States of America for some time. The dispute between the parties relates to three aspects: (i) One is the payment over to the applicant of the amount of her inheritance. (ii) The second is the accounting by the first respondent to the applicant in terms of two powers of attorney that she had furnished to the first respondent to look after her affairs in South Africa. (iii) Once an account had been rendered, and its correctness is placed in dispute, the applicant will require debatement thereof and payment of whatever is due.

[3] It is no longer in dispute that the amount of the applicant's inheritance due to her emanating from the estate of her late mother, amounts to R546 859.68. When the application was issued, the applicant was of the view that the amount owed to her was only R388 917.00. She was not aware as to what the first respondent had done with the inheritance in her absence. It was only when the answering affidavit was filed that it became clear that her inheritance had been invested in the third respondent by her brother, the first respondent.

[4] It also now appears from the answering affidavit and the attachments thereto, in particular annexure 4, that the amount was invested in the name of the third respondent in ABSA bank, account number 923680303. The original amount while so invested had grown to the amount now claimed.

[5] One wonders why it was necessary for the applicant to launch this application against her brother for payment of what was due to her.

It has never been denied by the first respondent that the applicant was entitled to her inheritance. Yet, for some reason the first respondent was reticent to pay the amount to the applicant.

[6] In order for the applicant to obtain the money, she employed the services of local attorneys, Allan Levin & Associates, who are also her attorneys of record. The first request for payment of her inheritance occurred during or about April 2010. The first respondent replied in an e-mail, (see annexure "MSK16" to the founding affidavit and dated 13 May 2010), stating that the money had not yet been paid over because the applicant allegedly refused to take transfer thereof whereupon he invested it on her behalf.

[7] Now, the next refusal to pay her her inheritance was based on an allegation contained in a letter dated 5 July 2010, (see annexure "MSK19" attached to the founding affidavit) written by first respondent's attorneys, wherein it was stated that the first respondent was of the view that the matter should be settled between him and his sister without the intervention of attorneys. On 7 July 2010, (see annexure "MSK21" attached to the founding affidavit) the first respondent e-mailed the applicant stating the following:

> "I received an instruction from your attorney to pay your full inheritance for the Estate of Ada into his trust account. I feel I should convey to you that I do not feel that it would be advisable to pay the whole amount of your inheritance to him as there is the risk that large sums would be extinguished against legal fees, before transferring a smaller amount to you. If Mr Levine got your full inheritance he could use this money for litigious purposes and you would be forced to come out to South Africa for court cases, which you do not seem keen to do, in any case.
> I am once again requesting your banking details to transfer

your inheritance directly to you, failing which we cannot be held responsible for anything if you insist on him getting the full amount."

[7] Applicant's attorneys responded in a letter dated 26 July, (see annexure "MSK22" attached to the founding affidavit). stating that neither they nor the applicant had any difficulty if her inheritance was paid directly to her. For this purpose, her banking details were provided to the first respondent.

[8] On 6 August 2010, (see annexure "MSK23" attached to the founding affidavit) the first respondent e-mailed the applicant directly stating that he found it strange that she wanted the money to be sent to a bank in New York and not nearer her home. He informed her for the first time that her inheritance was invested with the third respondent for her benefit. The letter further stated that it would be better for the applicant to come to South Africa so that she could understand the complications of trying to "sort some things out". The letter further informed the applicant that Mr Levin was of the view that the applicant wished her inheritance to be paid into a bank account, and that she also wanted to revoke the powers of attorney that she had given the first respondent. The e-mail concludes with the following:

"If you want attorneys to do things for you, you are looking for arguments all the time. Your entire inheritance may be eaten up, but this is your affair."

[9] One would have expected that the first respondent now would

adhere to her requests to transfer the money, since he realised that dealing with attorneys was her choice. The applicant is a grown and mature woman, and there was no reason, in my view, to object in any way to her explicit requests. This was, however, not to be.

[10] The next letter, dated 13 August 2010, (see annexure "MSK24" attached to the founding affidavit) is from the applicant's attorneys to the first respondent, attached to which was a copy of her USA passport. To this, the first respondent replied on 13 September, (see annexure "MSK25" attached to the founding affidavit) that a hearing at Beth Din was scheduled for the next day "relating to our problems", which never took place. He maintained that she should come out to South Africa to attend family weddings, but still failed to transfer the money to her bank account. On 27 September, (see annexure "MSK27" attached to the founding affidavit) the first respondent wrote to the applicant's attorneys of record, stating that the applicant's inheritance was deposited in ABSA bank, where it is earning interest. The first respondent demanded that the copy of her passport should be certified. In response thereto, the applicant's attorneys of record wrote on 29 September, (see annexure "MSK28" attached to the founding affidavit) as follows:

> "3. Our client's position has been made plain and we have repeatedly advised you that we are mandated to act on her behalf. Your letter under reply constitutes nothing other than obfuscatory conduct on your part, which necessitates the launching of proceedings which ought to be avoided...
>
> 4. Save in the event of your complying with that which is required of you as set forth, yet again, in paragraph 2 above and immediately upon your receipt of this letter, proceedings will be instituted."

[11] The first respondent replied in a letter to the applicant's attorneys of record, dated 13 October 2010. Once again, he, for some unknown reason, intimated that the applicant's attorneys of record "may only have a limited mandate to act" for the applicant. Where he got this idea, is not stated, and in my view there was no basis for him to doubt the mandate of the applicant's attorneys of record. He also refused to send to the applicant the original powers of attorney, as he was of the view that he needed to keep them in order to be able to prove that he had acted as executor within the letter of the law over the past 15 years.

[12] This is a strange comment to make, considering the fact that the estate had already been wound up to all intents and purposes. The first respondent had already made an affidavit stating that he had paid all amounts due to the beneficiaries of the estate, which, of course, is not correct, as this amount due to the applicant had not yet been paid over to her. It is also of significance that he wanted to retain the power of attorney in his possession in order to protect him for the entire period for which the powers of attorney were issued. The powers of attorney were issued in 1993, which is about 17 years prior to the letter of 13 October 2010. He acted on her behalf during those years, and wanted to be protected against any accusations of wrongdoing. This is relevant to the dispute on the papers as to whether or not the first respondent acted in terms of the powers of attorney in matters arising out of the powers of attorney.

[13] The mother died on 22 June 2001, which is only nine years ago. It is inexplicable why the first respondent wanted to retain the

powers of attorney if he only acted on her behalf in respect of the deceased estate.

[14] At the time when the powers of attorney were issued in 1993, their mother was still alive, and there would have been no need for the applicant to issue these powers of attorney to the first respondent to act exclusively in the event of the mother passing away. It is obvious to me, on the first respondent's own showing, that the powers of attorney were issued by the applicant to the first respondent to act on her behalf in matters which may have been necessary even prior to the death of their mother. And it is also perfectly clear that the reason for the applicant doing so was that she was in America and not able to deal with all her affairs in South Africa. She trusted her brother, and therefore issued the powers of attorney well before the deceased estate of the mother was wound up.

[15] Things came to a head when the first respondent made further demands for documentation before being willing to transfer the amount to the applicant. In the letter of 13 October 2010, to which I have already referred, the first respondent now wanted an originally certified copy of her passport, a certified copy of her South African Identity Document, and a copy of a utility bill not older than three months, before he was willing to transfer the money. It is at that point that the applicant realised the only way to obtain payment of her inheritance would be a court order against the first respondent, obliging him to transfer her inheritance to her.

[16] This application was then launched on 28 October 2010. The

relief sought was for the payment of her inheritance plus interest, the redelivery of the original powers of attorney, and an account, delivered within 20 days, in respect of the first respondent's dealings on behalf of the applicant pursuant to the powers of attorney issued to him by the applicant, particularly in regard to the inheritance, but not excluding other aspects. It was only upon receipt of the Answering Affidavit that the applicant for the first time was aware of the exact amount due to her, and in which account with the third respondent the money was deposited by the first respondent. It was, therefore, necessary for the applicant to launch this application, first of all to identify where her inheritance was being kept, and secondly, to stop the first respondent from further obfuscating the issue with all kinds of demands prior to his paying that which was due to the applicant.

[17] The question which now has to be dealt with is whether it was necessary to launch the application for purposes of obtaining the original powers of attorney. It is common cause that such original powers of attorney were ultimately delivered to the applicant's attorneys of record only a week ago. In my view, it is clear that the applicant was forced to launch this application also for purposes of obtaining the original powers of attorney, after she had terminated the first respondent's mandate. The first respondent's attitude in failing to deliver the original powers of attorney to the applicant or her agent, (as he wanted to retain them for purposes of proof that he stayed within the letter of the law for the past 15 years), is inexcusable.

[18] In this regard, it will be appropriate to refer to *Doyle v Board of*

Executors, 1999 (2) SA 805 (C) at 198C-D, where Slomowitz AJ stated the following:

> "And so, at last, to matters of principle. The right to an account is at once two distinct concepts. It is both substantive and procedural. It is a right as well as a remedy. The duties of good faith, which are owed by an agent to his principal, are no different in kind to those which fall on a trustee...
> An agent who accepts a mandate is bound to execute it. If he fails to do so without sufficient legal excuse, he is liable for the loss which follows. In an action for the damage, the *onus* is on the agent to show that he is not liable. The degree of care owed by the agent seems to be an open question. It is not clear whether his liability extends to slight negligence. Whatever the answer to that conundrum may be, the duty falls on an agent to demonstrate that he acted with whatever care and skill the occasion demanded. An agent must keep his principal's property separate from his own and must deliver up to his principal that which is his. If he mixes the two, that which he, the agent, cannot prove to be his own is presumed to belong to his principal.
> Inextricably bound up with this by no means exhaustive compendium of obligations is the agent's duty to *give an accounting* to his principal of all that he knows and has done in the execution of his mandate and with his principal's property..."
>
> It follows that one of the substantive duties falling on an agent is, in Silke's words (at 331),
>
> 'to *maintain* accounts, i.e. he must at all times be ready with correct accounts of all his dealings and transactions carried on during the currency of the mandate.'"

[19] It is common cause that despite the first letter (see annexure "MSK18" attached to the founding affidavit) demanding such an account, sent by applicant's attorneys of record to the first respondent, no such accounting was afforded to the applicant. (See in this regard paragraph 2.3, in the letter dated 28 June 2010, and annexure "MSK18" attached to the founding affidavit). In paragraphs 6.1 and further of the same letter, the following is demanded from the first

respondent:

> "6.1 A copy of the liquidation and distribution account as confirmed;
> 6.2 an accounting in respect of her entitlement, the accrual of interest thereon and the detail of where her entitlement has been 'invested;
> 6.3 the immediate payment of our client's entitlement into our trust account, the detail of which is..."

[20] The trust account and its number were then supplied. Since 28 June 2010 and after that letter was sent to the first respondent, no accounting occurred in regard to his actions on behalf of the applicant for the period of 15 years that he was in possession of her powers of attorney.

[21] It was only in the answering affidavit when, for the very first time, the first respondent stated:

> "9.6 Prior to receipt of the application in these proceedings, applicant at no time, other than as set out above, requested any accounting from me. This is so as she is fully aware of the fact that there is nothing that I need to account to her for, more especially in relation to my having done anything on her behalf in terms of either or both of the powers of attorney.
> 9.7 The only matters that I have attended to on behalf of the applicant, in terms of the powers of attorney, were in relation to:
> 9.7.1 The signing of the redistribution agreement, annexure MSK3, page 56, on her behalf; and
> 9.7.2 The placing of the inheritance monies together with interest that had accrued thereon with the third respondent as outlined by me above.
> 9.8 No assets, whether movable or immovable, have been purchased or sold by me on her behalf."

[22] In my view, this conflicts with his refusal to return the powers of attorney to protect him for 15 years of acting on her behalf. Furthermore, the first respondent stated further:

"As stated above,
28.3.1 Applicant was not an heir in our father's estate.
28.3.2 The R4-million referred to comprised of a number of other amounts in addition to the amount payable to the applicant from our mother's estate which only forms a small portion of that. The make-up of the R4-million is not relevant to these proceedings...
28.8 As recorded, during or about October/November 2009 and in a conversation with the applicant, I offered to pay to her the full amount due to her on the estate. She declined the invitation stating that she wanted to be paid the full amount of R4-million. In regard to the R4-million, I refer to what I have stated above."

[23] The first respondent obviously does not deny that in a conversation with the applicant, the figure of R4-million was mentioned. Nor does he deny that such amount exists. In my view, the mere fact that the first respondent failed in his answering affidavit to state exactly in respect of what the R4-million was, is indicative of the fact that the applicant may be entitled to hear from the first respondent, in the form of a proper agent's account, in what respects that R4-million is of no relevance to her current claim against him.

[24] The actual debatement of any accounts, or any account to be delivered by the first respondent, does not fall within the ambit of the present application. It will, however, become an issue for resolution by a Court, if there is a dispute in regard to any account that the first respondent is ordered to deliver. Be that as it may, I am of the view that the applicant may have a clear case for the delivery of a proper account by her agent, the first respondent, in regard to what he has done on her behalf for the last 15 or so years. For all of those reasons, I am of the view that the application was well motivated and brought and, that adjudicated upon the respondent's own version, applicant made out a

clear case for the relief set out in the Notice of Motion.

[25] The next issue is the question of costs. I am of the view that the first respondent will be liable for the costs, due to his unjustified refusal to comply with the legitimate requests of the applicant's attorneys of record, which she had appointed well before the launching of this application. His own version counts against him when he states that paying to her attorneys whatever was due to her was her affair. It was, after all, her money, and she, as a major, was entitled to decide how she wanted the money to be paid over.

[26] She was also entitled to demand the return of the powers of attorney after termination of his mandate. And in this regard, she was also entitled to demand that the powers of attorney be delivered to her attorneys of record. This application could have been prevented if the first respondent acted prudently and had not assumed for himself the role of a curator, allegedly protecting the applicant's interest. As agent, he was duty bound to deliver full accounting at any time during the period that the mandate was in force. It would therefore seem to me that the first respondent is at fault, and should be mulcted with the costs of this application.

[27] The final issue is whether or not the applicant's claim had become prescribed. I will not dwell on this aspect, as the law on this question has been settled for many years. Our law of agency is similar to that expressed by the House of Lords in *Knox v Gye,* 1871 72 LR 5 (HL) 656, and the Court of Appeal in *Vetemann v Vetemann* 1895 2 All ER 4 74. The following was stated:

> "For each day that the partner who is in breach of his fiduciary duties fails to give proper disclosure and to secure the ratification of his conduct, the right of action continues, and is in effect renewed daily in its entirety. It might be said that the action in these circumstances accumulates each day with all the consequential loss for the onus ascribed to the breach of fiduciary duty so that any action for account sought must relate to the relevant conduct of that attorney, no matter how far back in the partnership's affairs that conduct first took place. Only when the partnership relationship is terminated, will the daily obligation to make full and frank disclosure end. And from that time will the action accrue or mature in the sense that after six years the action will be statute barred... Perhaps a more appropriate approach to the rationale of this principle of limitation law is to regard the action in these cases as not accruing each day, as the concept of accrual is inappropriate. Rather each day that the partner failed to disclose to his co-partners the fact of his breach of fiduciary duties himself, constitutes and creates a fresh action, which is nonetheless in effect a renewal of the action which enured when the initial breach of the fiduciary duty took place. Accordingly where an action for account is sought in these cases or partnership transactions, they can be the subject of the action, even those from the beginning of the partnership and those which arose more than six years from the time the action was initiated."

28 In *Barnett and Others v Minister of Land Affairs and Others*, 2007 (6) SA 313 (SCA) at 321C-D, the following was stated:

> "Departing from this premise, the answer to the prescription defence is, in my view, to be found in the concept which has become well-recognised in the context of prescription, namely that of a continuous wrong. In accordance with this concept, a distinction is drawn between a single, completed wrongful act - with or without continuing injurious effects, such as a blow against the head, on the one hand, and a continuous wrong in the course of being committed, on the other. While the former gives rise to a single debt, the approach with regard to a continuous wrong is essentially that it results in a series of debts arising from moment to moment, as long as the wrongful conduct endures."

[29] In my view, the law of agency in South Africa is quite clear, namely that a failure to comply with the agent's fiduciary duty to account constitutes a continuing wrong for every day after such account had

been demanded. Prescription will therefore not play a part. Prescription will only run as from the date of termination of the agency contract between the principal and agent. If after such termination the principal fails to institute action within a period of three years, the claim for an account would have become prescribed. Those principles of law are equally applicable to the present case. The mandate between the applicant and the first respondent was withdrawn and terminated not even a year ago, with the result that prescription cannot apply, and the first respondent will, therefore, be under a duty to account for whatever he has done on behalf of the applicant in terms of the powers of attorney she had submitted to him during 1993 up to the date upon which the agency had been terminated.

I therefore make the following order:

1. The first and/or third respondent is ordered to pay the applicant the amount of R546 859.68 together with interest accrued as held in the third respondent's account with ABSA bank, account number 9236803039.

2. The aforesaid amount and accrued interest is to be paid to the applicant by depositing the amount into the applicant's attorney's trust account, namely Allan Levin & Associates trust account, Standard Bank, account number 420941924, Sandton branch, with branch code 019205.

3. The first respondent is ordered to furnish within 20 days of today, a full account to the applicant in respect of all his dealings on behalf of the applicant, in respect of her affairs,

flowing from the powers of attorney, annexures RESP7 and RESP8 attached to the answering affidavit as from 14 September 1993 to the date upon which such powers of attorney were terminated, being 26 July 2010.

4. The aforesaid accounting to be delivered by the first respondent is to be in relation to the applicant's inheritance from the deceased estate of Ada Katz, under Master's reference 15625/2001 as well as in relation to any benefits or entitlement of the applicant arising from the Eureka Trust, the third respondent, or of any nature whatsoever, including the R4-million as referred to by the first respondent in paragraph 28.3.2 of the answering affidavit.

5. The aforesaid accounting is to be supported by relevant vouchers, receipts, investment statements and any other relevant documents.

6. The first respondent is ordered to debate the aforesaid accounting with the applicant or her attorney of record within 20 days of the furnishing of such accounting to the applicant's attorneys of record.

7. The applicant is granted leave to approach this Court on duly supplemented papers if necessary in respect of any unresolved issue in relation to the aforesaid accounting and debatement.

8. The first respondent is ordered to pay the costs of the application.

CLAASSEN J

JUDGE OF THE HIGH COURT