REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

18 October 2016
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DATE

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SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 2013/62385

In the matter between:

TREVOR THOMAS KEYES NO 27/10/16 Plaintiff

and

CHRIS ELLINAS First Defendant

JANGO ELLINAS Second Defendant

REGISTRAR OF DEEDS, JOHANNESBURG Third Defendant

JUDGMENT

PETER AJ:

Introduction

[1] There are three issues for determination in this matter. First, the validity of the appointment of the plaintiff as an executor of the deceased estate, in which capacity he brings this action. Secondly, whether or not ownership in an immovable property, which was an asset of the deceased estate, was validly transferred to the second defendant, and thirdly, whether or not the appointment of an executor in Cyprus was operative in removing the impediment referred to in section 13(1)*(h)* of the Prescription Act, 1969.

The facts

[2] Nikos and Angela Ellinas were born and married in Cyprus. Shortly after the Second World War they relocated from Cyprus to South Africa. They had four children, a daughter

Maroulla and three sons Chris, George and Andrew. During the 1990s they retired from active work and returned to Cyprus. During the course of their marriage and working life they acquired interests in at least three immovable properties, one in Benoni, east of Johannesburg consisting of mixed residential and commercial use ("the property") – which forms the subject matter of this action – and two residential properties in Cyprus. Nikos died in 1996 and Angela inherited his interest in the properties. In January 1997, Angela executed a last will and testament in Germiston, in terms whereof she nominated her son Chris to be her executor, and bequeathed her estate to her four children in equal shares. On 29 September 1997, under deed of transfer T45790/1997, ownership of the property which Angela had inherited, was transferred to her. In 1998, Angela transferred a one third share in one of the Cypriot properties to Maroulla. It appears that prior to his death, Nikos had given Maroulla a one third share in the same property. In August 2002, Angela executed another will in Limassol in Cyprus, revoking, cancelling and withdrawing any and all previous wills. In terms of this will, Angela recorded that the acquisition by Maroulla of the interests in the first mentioned Cypriot property was the reason for bequeathing the second Cypriot property, apparently then Angela's residence, to her three sons, to the exclusion of her daughter Maroulla. The entire remainder of her movable and immovable property, located both in Cyprus and abroad, was bequeathed to her four children in equal shares and a nomination of a Cypriot lawyer to be appointed as an executor. For convenience in this judgment I make use of Anglicised spelling of Greek names and have ignored both the variations which appear in the documents and the omission of the gender sensitive terminal "s" in respect of the feminine in their transliterations.

[3] On 26 October 2005, and at Nicosia in Cyprus, Angela executed a written power of attorney appointing Chris with the power to act, conduct and manage all her affairs and properties in South Africa, whether movable or immovable, and generally to represent her in business affairs and dealings in South Africa. In terms of the power of attorney, Chris managed the property and collected rents from tenants occupying the property. On 18 December 2009, Chris, acting in terms of the power of attorney, entered into a written agreement of sale, on behalf of Angela as seller, in terms whereof the property was sold to Chris' son Jango for the sum of R650 000. On 28 December 2009, Chris, acting again in terms of his power attorney, executed a special power of attorney to a conveyancer to convey ownership in the property from Angela to Jango. Angela died on 12 January 2010. On 5 May 2010, by the authority of the Provincial Court of Lemessos in Cyprus, the jurisdiction in which Angela died, a Cypriot attorney Ms Maria Dionisiou was appointed to be the executor to Angela's estate. On 11 May 2010, a written deed of transfer was executed in the deeds registry of the third defendant, under deed T000014436/2010, in terms whereof the conveyancer ceded and transferred to Jango in full and free property, the property held by Angela under deed of transfer T45790/1997, and renounced all right and title which Angela had to the property in favour of Jango.

[4] The sale and transfer of the property has given rise the present dispute. Maroulla, who has for some time lived in Cyprus, and Andrew, who has for some years lived in Australia and been somewhat disconnected from the rest of the family, have taken issue with the transaction. George, who has remained in South Africa, appears to have taken no active part in the dispute. On 22 October 2012, the Master of the High Court in Johannesburg appointed the plaintiff, a practising attorney apparently independent of the parties, as the executor of Angela's estate, at the instance and request of Maroulla and Andrew. In early October 2013, prior to the first anniversary of his appointment, the plaintiff served summons on Chris and Jango, as first and second defendants, making three claims. First, payment of the purchase price of the property from Chris who had received the purchase price from Jango but not paid it over to the plaintiff, as claim A. Secondly, the rendering of an account from Chris for his management of the property pursuant to the exercise of his power of attorney as claim B. Thirdly, damages being the difference between the market value of the property and the sale price on the grounds that the sale was a fraudulent and collusive scheme between Chris and Jango to defraud the estate, alternatively the negligent exercise by Chris of his power of attorney, as claim C. On 17 October 2013, an appearance to defend the action was delivered on behalf of both Chris and Jango. In July 2015, the plaintiff amended the summons. The effect of the amendment was to claim the cancellation of the deed of transfer to Jango and payment from Jango for the net rents after deduction of operating costs, received by Jango after registration of transfer of ownership to him, as a primary alternative to the claims for the purchase price and damages, all consolidated in a claim A. The claim for a statement of account from Chris was preserved as claim B. The Registrar of Deeds, Johannesburg was joined as a third defendant and did not participate in this action. I refer to Chris and Jango collectively as the defendants.

[5] At the commencement of the trial I made an order of a separation of issues, by agreement between the parties in terms of the provisions of High Court rule 33(4). The effect of the order was to deal first with the primary relief in claim A relating to the validity of the transfer of ownership and part of the claim for net rents from Jango, arising from an account which Jango had rendered for the period from registration of the property into his name to 28 February 2015. The claim for net rents after 1 March 2015, the three alternatives in claim A for payment of the purchase price and damages for a fraudulent collusion alternatively a negligent sale, together with claim B for the rendering of account were postponed for future determination. In terms the separation, I was also required by the parties to deal with a common legal issue which had been raised by the defendants in four special pleas of prescription. The first special plea was raised in answer to the claim against Chris for an account; the three remaining special pleas were raised in answer to the three alternatives in claim A. The common legal issue was an allegation made in all four special pleas that, when Ms Dionisiou was appointed in Cyprus as the executor of Angela's estate, the impediment to the completion of

prescription referred to in section 13(1)*(h)* of the Prescription Act, 1969, ceased to exist. Mr *Oosthuizen*, who appeared for the plaintiff, characterised the primary relief as a *rei vindicatio*. The executor was recovering not only the property which was an asset of the deceased estate but also the fruits, represented by net rents, on the basis of the doctrine of accession; that the fruits are owned by the owner of the property. At the time of making the order I expressed a concern in relation to the convenience of including the claim against Jango for net rents at this stage of the proceedings, having regard to the manner in which the parties wish to proceed with two days of trial time. The *rei vindicatio* is a possessory remedy, to recover possession of property, which lies in the hands of the owner. The claim against Jango sought the payment of money, fungible property, not identified and not earmarked as part of a particular fund, nor readily identifiable at all, as in the case of a calf born to a cow in the case of natural accession, leading to difficulties in characterising the claim simply as a *rei vindicatio*. In addition, a claim such as this might be affected by issues as to whether or not Jango was a bona fide possessor, the extent to which he might have effected improvements to the property and unjust enrichment. Later in the trial, the parties agreed to a variation of the order of separation so as to exclude the claim for payment of the net rents, which in my view was convenient.

The appointment of the plaintiff – section 95 of the Administration of Estates Act

[6] The plaintiff was cited in the summons "as the duly appointed executor of the estate of the late" Angela. The defendants denied this averment, challenging the validity of the appointment of the plaintiff by the Master in terms of the Administration of Estates Act, 1965 ("the Act"). Mr *Oosthuizen*, submitted that section 95 of the Act subjects every appointment by the Master to appeal or review by the High Court at the instance of any person aggrieved thereby. This procedure is the only remedy and it ought to have been followed within a reasonable time, which had not been done. Further, the defendants are not entitled to raise a "collateral challenge" to the validity of the appointment and that there had been a material non-joinder of the Master.

[7] The general provisions of section 95 of the Act, provide an internal remedy to persons aggrieved by the exercise of the Master's powers under the Act. These provisions might well preclude a more general review, or direct challenge, under the provisions of the Promotion of Administrative Justice Act, 2000 ("PAJA") by reason of the provisions of section 7(2)(*c*) of PAJA. In my view these provisions do not preclude a collateral challenge, if such is otherwise competent. The class of potentially aggrieved persons contemplated in section 95 would ordinarily include heirs, next of kin of the deceased, persons competing for the position of executor, the executor and other persons interested in the administration of the estate. There is nothing in the wording of the section which appears to compel a debtor or alleged debtor of the

estate to use this procedure provided in section 95 to challenge or enquire into the validity of an executor's appointment when called upon to answer to a claim.

Collateral challenge and joinder

[8] Mr *Oosthuizen's* submissions in respect of the collateral challenge were as follows. On the authority of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), unlawful administrative action is presumed to be valid until set aside by an order of court, at 241 – 242 paragraph 26, and a collateral challenge is permitted where a public body brings a coercive action to compel compliance with an unlawful administrative act, at 244 paragraph 32. This was not a coercive action by a public body and accordingly a collateral challenge could not be raised. Unless and until the decision of the Master to appoint the plaintiff had been set aside, it was presumed to be valid and thus could not be challenged.

[9] In my view, the statement that *Oudekraal* is authority for the proposition that the unlawful administrative act is presumed to be valid until set aside is an oversimplification and misconstrues what is stated in the judgment. Paragraph 26 of *Oudekraal* is authority for the proposition that the unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside. This is explained in the succeeding paragraphs, that although legally invalid and thus not existing in law, the action exists in fact and the fact of its existence, until set aside, may give rise to the legal validity of later decisions or acts. In those circumstances, the unlawful action cannot simply be wished away or ignored. Unlawful administrative action cannot simply be ignored by a public official, instead of using the correct legal process to set aside the action. This would be contrary to the rule of law amounting to self-help; the public official is usurping the function of the courts, see *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC), at 511 – 513. This however does not preclude a collateral challenge, where permissible. The statement in paragraph 32 in *Oudekraal* that in cases where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act, the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising the defence of collateral challenge, is not necessarily to be interpreted as an exhaustive statement of the circumstances under which a collateral challenge may be made. Rather, the statement is an illustration of the principle that there are instances in which consequences depend for their legal force on the substantive validity of administrative action as opposed to any factual existence of a contested administrative act. This is followed up, at 247 in paragraph 36, that a collateral challenge is permissible where the validity of the administrative act constitutes the essential prerequisite for the legal force of action that follows. This was recently applied in *South African Local Authorities Pension Fund v Msunduzi Municipality* 2016 (4) SA 403 (SCA) in which a pension fund sought to claim contributions

from a municipality on the strength of an amendment to pension fund rules, the validity of which were dependent on the lawful administrative action of the Registrar of Pension Funds approving the amendment.

[10] The claim of the plaintiff against the defendants, to set aside the transfer of ownership in the property, and the liability of the defendants to answer to the claim of the plaintiff, depend on the substantive validity of the plaintiff's appointment by the Master. Accordingly, the defence is a permissible collateral challenge.

[11] The effect of a valid objection of non-joinder is dilatory, preventing further proceedings, until the necessary party is joined. Where, in response to a claim, a defence is raised that requires the joinder of a necessary party, the plaintiff cannot simply ask for consideration of the claim and judgment, without consideration of the defence on account, of the non-joinder. A plaintiff who wishes to proceed ought to join the necessary party. By reason of my view on the merits of the challenge, it is not necessary to consider non-joinder further.

The substance of the challenge

[12] Mr *Meijers*, who appeared for the defendants, submitted that the appointment by the Master was invalid for want of compliance with the provisions of section 18(1)(*b*) of the Act in that effect was not given to the testamentary nomination of the Cypriot attorney as executor.

[13] The following are provisions of the Act relevant to this matter. Section 13(1) of the Act expressly prohibits the liquidation or distribution of the estate of any deceased person except under letters of executorship granted or signed and sealed under the Act or pursuant to an endorsement of an assumed executor, not relevant for present purposes, by the Master. Section 14(1), subject to subsection (2), the disqualification provisions of section 16 and the provisions of section 22, requires the Master to grant letters of executorship to any person, nominated by a deceased person in a will which has been registered and accepted in the office of the Master, on the written application of the nominated person. To be appointed, the person must not be incapacitated from being an executor and must have complied with the provisions of the Act. Section 14(2) permits the Master to register and accept a copy of a will of a deceased person where the original is not in the Republic, provided that the copy is certified by a competent public authority in the country or territory where the will is situated. Section 21 permits the Master to sign and seal foreign letters of executorship from certain states and territories, which do not include Cyprus. Section 18(1) confers a general discretionary power on the Master to appoint executors and grant letters of executorship. This discretionary power exists where one of six jurisdictional facts provided for in paragraphs (*a*) to (*f*) of section 18(1) are present. For present purposes only paragraphs (*a*) and (*b*) are relevant. Section 18(1)(*a*)

provides for the situation where a person has died without having by will nominated any person to be his executor. Section 18(1)(*b*) provides for where the whereabouts of a person nominated in a will to be an executor is unknown, such person is dead, incapacitated or refuses to act as executor or, when called upon by the Master by notice in writing to take out letters of executorship within a period specified in the notice, fails to take out such letters. The discretionary power is to appoint any person or persons whom the Master may deem fit and proper to be executor. As an alternative to such an appointment, and where the Master deems it necessary or expedient, the Master may by notice published in the *Gazette* and such other manner as in the Master's opinion is calculated to bring it to the attention of the person concerned, call upon a surviving spouse, the heirs and other persons having claims against the state for the purposes of recommending an appointment to the Master.

[14] The plaintiff's letters of executorship were issued by Ms De Klerk, an Assistant Master in the office of the Master of the High Court, Johannesburg, who was called as a witness for the plaintiff. Ms De Klerk testified that she had made the appointment in terms of section 18(1) upon the written request of the attorney representing Maroulla and Andrew. Ms De Klerk further testified to having received a copy of the Cypriot will, executed in Greek, together with a sworn translation. The copy was not accepted and registered because it had not been certified by the competent public authority in Cyprus. Since the will was not accepted, and there was in any event no application in terms of section 14(1), no appointment was made under section 14(1). Having not accepted and registered the copy of the Cypriot will,+ nor any other will, Ms De Klerk considered the provisions of section 18(1)(*a*) satisfied. Further having considered that the plaintiff was nominated on the request of two of the heirs, was known as a practising attorney and had provided security for the administration of the estate, Ms De Klerk considered the plaintiff fit and proper without proceeding any further to call for recommendations. Ms De Klerk was an impressive witness with an extensive working knowledge of the Act. Although Ms De Klerk testified that it is usual practice for the Master to follow the recommendations of the majority of the heirs, and it was pointed out to her in cross examination that only two of the four heirs nominated the plaintiff, I find that there is nothing in the provisions of section 18 which fetters the discretion of the Master to require an absolute majority of the heirs to concur in an appointment before making the appointment. In the circumstances reliance on section 18(1)(*a*) was proper and the provisions of section 18(1)(*b*) were not applicable. I find no fault with the Master's appointment of the plaintiff as executor.

Transfer of Ownership

[15] In South African law, the passing of ownership is generally the result of a composite transaction comprising both an underlying contractual transaction, such as a sale, and a proprietary transaction by which ownership is transferred. The contractual transaction is

referred to in our Afrikaans jurisprudence as the "*verbintenisskeppende ooreenkoms*" which translates into English as "obligatory agreement" – a transaction by which rights and obligations are created, including the right to receive, and the obligation to transfer, ownership. The underlying cause for the transfer of ownership is to be found in the obligatory agreement. The proprietary transaction comprises two elements. First, a mental element consisting of an intention to transfer ownership on the part of the transferring owner and a corresponding intention to receive ownership on the part of the transferee, and secondly, a physical element consisting of an act of delivery. In the case of movable corporeal property, the delivery may constitute a physical transfer of possession, or one of a number of constructive methods of delivery. In the case of immovable property the act of delivery is the registration of a deed of transfer in the relevant deeds registry; this comprises the acceptance and execution of the deed by the relevant registrar. In the case of movable incorporeal property, which has only a metaphysical state, such as a debt, the act of delivery is constituted by only the mental element, see *Botha v Fick* 1995 (2) SA 750 (A). The mental element of the proprietary transaction is referred to in our Afrikaans jurisprudence as the "*saaklike ooreenkoms*" which translates into English as "real agreement". The existence of the obligatory agreement may provide evidence to prove the existence of the real agreement.

[16] South African law has long adopted the abstract theory of the passing of ownership as opposed to the competing causal theory, certainly in respect of moveable property. According to the abstract theory, the passing of ownership is determined exclusively by the proprietary transaction, namely an act of delivery or transfer accompanied by the requisite intention. Thus ownership can be transferred in circumstances where the underlying cause does not exist on account of the invalidity of or other defect in the obligatory agreement. The causal theory on the other hand, requires a valid obligatory agreement as a prerequisite to a valid transfer of ownership. Thus where an owner has been induced to enter into an obligatory agreement by a fraudulent misrepresentation, the exercise of undue influence or the obligatory agreement is a nullity by reason of the failure to comply with a statutory formality, ownership will nevertheless pass where there is an act of delivery accompanied by an intention that ownership passes. The application of the abstract theory had the effect that where an obligatory agreement was induced by undue influence and the obligatory agreement was later rescinded, the former owner of immovable property was permitted to vindicate and recover immovable properties transferred to, and at the time of the action held by, the recipient who was a party to the obligatory agreement, but not permitted to vindicate and recover ownership of properties which had been subsequently transferred to third parties, see *Preller and Others v Jordaan* 1956 (1) SA 483 (A). The application of the abstract theory to immovable property was authoritatively and expressly confirmed in *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) at 44 paragraph [21].

[17] A summary of Mr *Oosthuizen's* submissions as to the invalidity of the transfer of ownership is that a power of attorney lapses on the death of the principal; on the death of Angela, the power of attorney granted by Angela to Chris was revoked by operation of law, as was the power of attorney granted by Chris to the conveyancer. On the date of registration of transfer neither Chris nor the conveyancer had authority to act for and behalf of Angela and Angela did not have any intention to pass ownership. On the basis of the foregoing, the relief sought was an order in terms of section 6(1) and (2) of the Deeds Registries Act, 1937 for the cancellation of the deed in favour of Jango, with an order for the cancellation of the endorsement on Angela's pre-existing deed, evidencing the registration of the cancelled deed in favour of Jango. A summary of Mr *Meijers'* argument is that the requirements for a valid propriety transaction were present, the mental element attributable to Angela is to be inferred from the power of attorney and the sale agreement executed by Chris and Jango. The authority under the power of attorney granted to Chris was not revoked on Angela's death as it was an authority coupled with an interest, and as such irrevocable. The judgment of *Tromp & Playfair v Currie NO* 1966 (2) SA 704 (RAD) was cited as authority in support of this proposition.

[18] Before analysing these submissions, it is necessary to deal with the nature of agency, the revocability of an agent's authority by a principal, in particular with reference to an authority coupled with an interest, and ownership of assets in a deceased estate.

Agency and capacity

[19] In a recent unreported judgment of *Chevron South Africa (Pty) Ltd v Ufudu Transport (Pty) Ltd and Others* 2010/14665 (GJ), I discussed the nature of the authority delegated in an agency relationship and set out a detailed historical analysis and comparison of US, English and South African case authority relating to the revocability of an agent's power and the doctrine of the revocability of authority when coupled with an interest. That case concerned a voluntary and deliberate act of revocation by a principal. For the purposes of this judgment I do not intend to repeat the detailed analysis, but summarise some of the principles and concepts referred to therein that are relevant to the determination of the present dispute.

[20] The general capacity to enter into contractual relationships and perform juristic acts is an incident of, and derives from, the exercise of a competency of personality – one's status as a person in law attaching to personality. This capacity I refer to as "personal competency". In respect of natural persons this is a function of age, state of mind and to some extent solvency. The capacity of a person to deal validly with property and transfer rights in property, requires both personal competency and a status in relation to that property or rights in the property. I refer to this status as "real competency". Thus for a person to validly transfer ownership in property, personal competency is required for the "real agreement" and real competency in the

sense that the transferor is the owner. A person of unsound mind cannot transfer ownership of his or her property to a third person, by reason of the lack of personal competency. Similarly a person of perfectly sound mind cannot transfer ownership of property which he or she does not own. This is by reason of the lack of real competency. In the institution of agency, there is a delegation of the personal competency, within the limits and scope of the authority, and in respect of dealings with property, an accompanying delegation of the principal's real competency. The agent has the power to act in the name of, and on behalf of, the principal, exercising the principal's competencies and can thereby pass title or grant rights in the principal's property to a third party. An agent acts as a substitute for and in the name and on behalf of a principal.

Revocation generally

[21] The general principles of the Roman Dutch common law are set out in Voet *17.1.17.* Authority is generally capable of revocation at the will of the principal. In some instances, a revocation might result in a damages claim by the agent against the principal. One exception is recorded – agency *in rem suam* with a cession of actions. This exception was a reference to a device to circumvent the rule in early and classical Roman law that debts were considered too personal in nature as to be capable of being ceded. The recognition of transfer of ownership in incorporeal property by way of cession was a later development, see *Ex parte Kelly* 1943 OPD 76 at 83 and Zimmermann *The Law of Obligations* pp 58 – 67. Seen in its modern context, this means no more than where there has been a cession of a debt, the cessionary's "authority" to collect the debt on behalf of the cedent could not be revoked. This is not a question of authority and its revocability, in the sense of agency, but rather the irrevocability of a transfer of ownership or rights in property.

Coupled with an interest

[22] By the end of the 18th century in English law, the general principle was that a power of attorney was revocable at the will of the principal subject to some exceptions, which included the grant of an authority "coupled with an interest". This doctrine was received into US law, see Story *The Law of Agency* and in particular §477. In 1823, in the US Supreme Court decision of *Hunt v Rousmanier's Administrators* 8 Wheat 174, 21 US 174, the meaning ascribed to the interest in the expression "coupled with an interest" was an interest in the subject matter of the power, as opposed to an interest in that which is produced by the exercise of the power; the power "must be engrafted on an estate in the thing". The delegation of this power survives the death of the principal. In his work, in §150, Story refers to a power coupled with an interest in the property and in §164 that the authority is properly executed in the name of the agent and not in the name of the principal. This is not a delegated authority of a principal but the exercise

of a real competency, vesting in the so-called "agent" who is a transferee of real rights. This reconciles with the Roman Dutch "exception" of a transfer by way of cession.

[23] During the 19th century a different meaning was ascribed by the English courts to the expression "coupled with an interest". This was an authority "given for the purpose of securing some benefit to the donee of the authority", see *Smart v Sanders* (1848) 5 CB 895 at 917, 136 ER 1132 at 1140, *Clerk v Laurie* (1857) 2 H & N 199 at 200, 157 ER 83 and *In re Hannan's Empress Gold Mining and Development Company, Carmichael's Case* [1896] 2 Ch 648. However, even where the authority was granted for the purpose of being a security and securing a benefit to the grantee, the power of the grantee to sell an interest in a ship, given as security for a debt, lapsed on the death of the principal. In *Watson and Another v King* (1815) 4 Camp 272, 171 ER 87, Lord Ellenborough posed the rhetorical question: "How can a valid act be done in the name of a dead man?".

[24] Early South African decisions regarded such an authority as irrevocable "where the authority is given for the purpose of being a security or part of the security", see *Marcus' Executor v Mackie Dunn & Co* (1896) 11 EDL 29, *Natal Bank Ltd v Natorp and Another* 1908 TS 1016 and *Hunt, Leuchars & Hepburn, Ltd. In re Jeansson* (1911) 32 NPD 493 – the last mentioned case gave effect to a power of attorney after the death of the principal. In *National Bank of South Africa Ltd v Hoffman's Trustee* 1923 AD 247 at 249, Innes CJ referred to the analysis in *Rousmanier* and held that, short of a transfer of rights by cession, the authority was construed as being limited to act "in the name of the principal and do what the principal could rightly have done at the moment of action". The agent's act is the vicarious exercise of the principal's capacity and it follows that the agent's authority is confined within the limits of the principal's capacity.

Revocation on death

[25] Mr *Oosthuizen* quoted *The Law of South Africa* ("*LAWSA*"), as authority for the proposition that a power of attorney lapses or is revoked by operation of law on the death of the principal. The relevant current paragraph is 147 in volume 1 of the third edition. This proposition derives from the general principle that the authority is a continuing authority; it relies on the continuous will of the principal. Where the will of the principal is no longer capable of being exercised, by reason of a change of status, it no longer continues and the authority is thus revoked, see *Kelly* at 83 and in the case of a loss of sanity on the part of the principal, see *Tucker's Fresh Meat Supply (Pty) Ltd v Echakowitz* 1958 (1) SA 505 (A). Mr *Oosthuizen* further cited *Incorporated Law Society, Transvaal v Meyer and Another* 1981 (3) SA 962 (T) at 973A – D where it was held that it was improper conduct for a conveyancer to continue to act under a power of attorney after the principal's death because any reasonably

prudent and competent conveyancer would have known that the power lapsed, without any discussion of the principle. The Roman Dutch common law is stated in Voet *17.1.15*, in which the general principle is set out subject to seven exceptions, the last of which is a mandate of a kind that the principal had been previously bound to fulfil. An example is given of a seller having given a mandate for unencumbered possession of a farm to be delivered to a buyer where the seller died before delivery ensued. Such performance by the agent appears to be valid, where the performance is "without objection from the heirs". In *In Re Archibald Robertson (Deceased)* (1890) 11 NLR 280, this passage was applied to permit the posthumous registration of transfer of immovable property, under a power of attorney passed by a deceased person, where the property had been sold three months after the signing of the power of attorney, the purchase price had been paid and the proceeds distributed among the creditors of the insolvent estate of the deceased. Before analysing the exceptions to revocation on death, it is convenient to discuss ownership of the assets in a deceased estate.

Ownership of the assets of a deceased estate

[26] The ownership of assets of a deceased estate appears to be a question of academic uncertainty, see MM Corbett, G Hofmeyr & E Kahn *The Law of Succession in South Africa* 2 ed (2001) at 14 – 17 and Van der Merwe, Rowland & Cronje *Die Suid Afrikaanse Erfreg* 6 ed (1990) at 7 – 11. This appears to have arisen from a number of decisions and in particular *Estate Cato v Estate Cato & Others* 1915 AD 290; *Estate Smith v Estate Follett* 1942 AD 364; *Commissioner for Inland Revenue v Estate Crewe & Another* 1943 AD 656 and *Greenberg & Others v Estate Greenberg* 1955 (3) SA 361 (A). These cases were concerned with the enquiry relating to whether a testamentary benefit had vested in a beneficiary. The question of vesting is concerned with whether or not a beneficiary has acquired ownership of a transmissible right to claim a benefit from a deceased estate – something to which I shall return.

[27] The most convenient starting point to address this question is the judgment of De Villiers CJ, in *Fischer v Liquidators of The Union Bank* (1890) 8 SC 46, which summarises the historical origins and development of the law relating to the administration of deceased estates. In early Roman, the law principle of universal succession applied. On death, the heirs stepped into the place of the deceased, acquiring *dominium* in the assets in the estate and assuming all the liabilities of the deceased. In respect of a "necessary heir", the praetor permitted the separation of the assets of the deceased estate from the personal assets of the necessary heir and limited the creditors of the deceased to recovering from the deceased's assets which came into the hands of the necessary heir. A necessary heir was a slave of the deceased who was granted freedom in the deceased's will and appointed as an heir. This was required where the deceased had no other heirs, but occurred more commonly where the solvency of the estate was in doubt. The device was employed to avoid the ignominy that would otherwise fall on

the natural heirs by reason of insolvency, see Roby *Roman Private Law in the Times of Cicero and of the Antonines*, (1902) vol 1, 195 – 198. The Emperor Hadrian granted a special favour to a person to relinquish an inheritance on account of a large debt which came to light only after the person had entered into the inheritance. The Emperor Gordian extended this favour to all soldiers. Justinian extended this favour to all subjects of the empire, providing what became known as the benefit of inventory which, when exercised, permitted the heir to make an inventory of the estate, pay funeral expenses, the costs of compiling the inventory and the creditors, without incurring any liability for any deficiency. This was carried through to the Dutch law although the procedures for securing a period to consider whether or not to accept or repudiate the inheritance and avoid liability for a deficiency were more elaborate and complicated. The distinction between "necessary" and other heirs was not recognised. Executors, as administrators to carry into effect the last will of testators were introduced. There were three important features associated with the office of executor. Executors were only permitted where there had been a testamentary nomination, could not commence administration until the heirs had accepted the inheritance and they acted as agents for the heirs. The Dutch system of administration, carried through to the Cape, was radically altered by the introduction of the modern English system of executorship in the Cape Ordinance 104 of 1833; section 19 of which is the predecessor of section 13 of the Act.

[28] What is clear from this history is that Roman law provided for the transmission of ownership of, or *dominium* in, the assets of the estate of a deceased person to the heirs upon the deceased's death. Save possibly for the period of deliberation in which an election was made whether or not to accept or repudiate the inheritance, none of the developments in Roman and Dutch law, as received into Cape, altered this position. The *dominium* in the assets of the estate of a deceased person, was coupled with full powers of administration and management and was accompanied by the deceased's liabilities, which became the liabilities of the heirs, capped, by the benefit of inventory, to the value of the estate assets. This was immediate, certainly at least from the time of the election to accept the inheritance, and the role of the executor, where employed, was that of agent of the heirs.

[29] The legislation governing the administration of deceased estates which altered the Roman Dutch law, as received in the Cape, does not appear to have addressed the question of in whom ownership resides of the deceased's assets from the time of death to the time of due and proper distribution in terms of an approved liquidation and distribution account. The modern system of executorship, introduced by the colonial statutes and currently provided for in the Act, is concerned with the proper posthumous administration of the deceased's assets, the payment of creditors and the distribution of the surplus, if any, to legatees and heirs in terms of a will, where applicable, or the laws of intestacy governing the devolution of such assets.

The modern system has also radically altered the nature of an inheritance. The modern inheritance consists of the right of the beneficiary "to claim from the executors of the estate of the deceased, or his legal right to claim, such property derived from the will"; the entitlement "after confirmation of the executors' account, to certain rights of action against the executors to claim what is due to him whether it be payment of money or delivery of movables or transfer of immovable property" – per Watermeyer JA in *Estate Smith v Estate Follett* at 383. Similarly in *Estate Crewe* at 692, in a minority concurring judgment, Centlivres JA held that "what is vested in the heirs is the right to claim from the deceased's executors at some future time, after confirmation of the liquidation and distribution account, satisfaction of their claims under that account." In modern times *dominium* in the assets and an inheritance have diverged.

[30] In *Estate Cato* reference is made at pages 300 – 301 to the Roman Dutch position that the heirs were vested with the *dominium* in the assets. In *Greenberg*, at 364G – 366A, Centlivres CJ held, in the context of an enquiry into the vesting of a legacy, that a legatee acquires a vested right on death but does not acquire the *dominium* in the property bequeathed until it is transferred by the executor. This is so because the property may be required to pay the debts of the estate and the legatee might never acquire *dominium* in the property. Whether or not vesting has occurred in a legatee, it is irrelevant where the underlying *dominium* is said to reside. In this context, earlier cases had erroneously laid stress on the residence of the *dominium* because a legatee or an heir does not acquire "the *dominium* in the legacy or inheritance immediately on the death of the testator: all he acquires is a right to claim that legatee or inheritance". The substance of the inheritance is the right to claim from the executors what is due upon the confirmation of a liquidation and distribution account, following a due and proper administration of the estate; what is relevant is whether or not, and when, this right becomes vested. In relation to the possible hiatus between the date of death and the date upon which the heirs accept the inheritance, the answer appears to lie in the judgment of van den Heever JA in *Crookes NO & Another v Watson and Others* 1956 (1) SA 277 (A) at 298A: repudiation is a resolutive event.

[31] In my view none of these cases are necessarily authority for the proposition that underlying *dominium* no longer vests in the heirs. The modern system has separated the power of administration from underlying *dominium* and removed such power of administration from the heirs. Section 13 of the Act forbids the exercise of any such power by anyone other than a person acting under the authority of the Master in terms of the Act. In this context, the underlying *dominium* is a bare *dominium*, which is bereft of control and the right to use and enjoy, while the estate is being administered – not the full *dominium* that previously passed. How much of the bare *dominium* ultimately translates into full *dominium* depends on the requirements of administration leading to the confirmation of a liquidation and distribution

account. The modern system has brought about, in respect of deceased estates, a situation akin to what is now referred to as a bewind-trust; the beneficiaries own the trust assets but the administration and control of those assets are vested in a trustee, see *Honore's South African Law of Trusts* 6 ed 272 – 277. The bare *dominium* is distinct from a right which might have vested to claim full *dominium* by way of a distribution of trust assets by the trustee to the beneficiaries at a later date. Importantly, real competency vests in the executor by reason of section 13, and not the heirs, or whoever else might hold the *dominium* in the estate's assets.

Absence of real competency and exceptions to revocation on death

[32] I have gone to some length in analysing ownership of the property in the deceased estate. This is because the validity of the transfer of ownership to Jango depended not only on the continuing validity of Angela's power of attorney to Chris, which relates to the intention element of the property transaction – the "real agreement". The validity of the transfer of ownership to Jango also depended on the existence of a real competency of Angela, the principal on whose behalf the conveyancer was executing such deed of transfer, assuming the power of attorney to execute such transfer had not been revoked. Once it is appreciated that the ownership purportedly transferred no longer resided in Angela, irrespective of the continuing validity of the power of attorney, the purported act of transfer of Angela's ownership, which simply did not exist on the date of purported transfer, could not result in Jango acquiring ownership. The real competency delegated by Angela ceased to exist on her death. An agent cannot give what the principal no longer has.

[33] In relation to the posthumous validity of the power of attorney, it is necessary to deal with the exception referred to in Voet *17.1.15*, its application in *Donaldson* and the case of *Jeanson*. Voet was writing prior to the modern system. The application of such an exception might well be justified where the obligation to a third party was incurred by the deceased, has been transmitted to the heirs and the deceased had given an authority for the performance of such obligation to an agent. The agent's performance is the discharge of the heir's inherited obligation. Seen in the circumstances, the continuing validity of the power of attorney is effectively a power of attorney to act on behalf of the heirs. This exception can no longer be applied as it is inconsistent with, and repugnant to, section 13 of the Act. *Jeanson* permitted a transfer of property pursuant to a power of attorney executed by an owner prior to death. The rationale was that the authority was given as a security and thus was an authority coupled with an interest. *Jeanson* is irreconcilable with the US law as expressed in *Rousmanier* and the English law in *Watson* and strongly criticised in *LAWSA* 3 ed vol 1 para 149.

[34] *Tromp & Playfair* does not assist the defendants. That case concerned the payment, made by a debtor after the death of a creditor, of a mortgage bond instalment to a third party

who had been nominated by agreement between the debtor and the creditor. The third party is known as the *adjectus solutionis gratia*, and although described in a certain sense as an agent for the creditor, see generally Wessels *Law of Contract in South Africa* vol 2 §§ 2194 – 2201, is not truly an agent. The payment by the debtor to the *adjectus* is a valid discharge of the obligation, not because the *adjectus* has an authority delegated by the principal to receive payment, but rather because this is the agreed method of performance of the payment obligation. Thus a posthumous payment to the *adjectus* is good performance of an obligation which is co-relative to the right to receive payment, forming part of the deceased estate, unless and until the executor alters the nomination, if this is possible in terms of the agreement.

[35] The interest relied upon by Mr *Meijers* in his submissions was a provision in the power of attorney that permitted Chris to use, deposit and withdraw any monies coming into Chris' hands and use such money for Chris' benefit. This may be disposed of by two observations. First, the power in question was the appropriation of monies and the benefit was one produced by the exercise of power. No power was given to sell the property to produce a benefit to Chris. Secondly, in no way could the power be described as being given for the purpose of being a security, or as part of the security.

The absence of a valid property transaction

[36] By reason of the foregoing, I come to the conclusion that the transfer of ownership in the property to Jango, that purportedly took place on 11 May 2010, was null and void. This conclusion is based on four grounds. First, the power of attorney granted to Chris by Angela, and the derivative power given by Chris to the conveyancer was terminated on Angela's death by operation of the general principle that the authority delegated was dependent on the continuous will of Angela which ceased to exist upon her death. Secondly, the power of attorney cannot be considered as one "coupled with an interest" and in any event, any such power, short of the transfer of a property right to Chris, is not irrevocable and thus is subject to the application of the general principle I have referred to. Thirdly, the continuing validity of the power of attorney to deal with assets falling within the deceased estate, and in particular the purported transfer as a substitute for and in the name and on behalf of Angela, is inconsistent with, and repugnant to, the provisions of section 13 of the Act. Lastly, irrespective of whether or not the power of attorney was revoked on death, the purported transfer and behalf of Angela had no legal validity as on 11 May 2010, Angela was not the owner – Angela's ownership ceased on 12 January 2010, the date upon which Angela died. Any real competency that Angela delegated by the power of attorney ceased to exist.

Prescription

[37] Section 13(1)*(i)* of the Prescription Act, 1969 provides that the completion of the period of prescription is delayed, on the occurrence of eight factual circumstances, referred to as impediments, until one year after the date upon which the relevant impediment ceased to exist. This delay is operative where, but for section 13(1)*(i)*, the period prescription would otherwise have been completed before or within the one year of the cessation of the impediment. The eighth impediment is contained in section 13(1)*(h)* – the creditor or the debtor is deceased and an executor of the estate in question has not been appointed.

[38] As a preliminary observation, it appears to me that a distinction should be drawn between prescription that has commenced to run prior to the death of the creditor or debtor concerned and the commencement of prescription after death. This involves a distinction between debts which became due prior to the death of the creditor and debts which become due after death. The section is clearly applicable to a debt which becomes due prior to death. The period of prescription cannot be completed until at least one year after the appointment of an executor. In the case of a debt that has not become due, and prescription has not commenced to run prior to the death of the creditor or debtor concerned, prescription can only begin to run on or after, but not before, the appointment of an executor. If, for example, a loan is to be repaid on a date one month after death, the debt could not be due prior to that time in terms the provisions of section 12(1). If the borrower were deceased, the debtor, being the person charged with the obligation of making the repayment, can only be the executor. Until the date of the executor's appointment, the creditor could not possibly have knowledge of the identity of the executor as contemplated by the provisions of section 12(3). Conversely, if the lender were deceased, the only person who could claim repayment of the debt, would be the executor. The executor, once appointed, could then acquire knowledge of the identity of the debtor and the facts from which the debt arises, only on or after the date of appointment. For these reasons. it appears to me, the "creditor" and "debtor" referred to in section 13(1)*(h)* refer to the creditor and debtor at the time upon which the debt became due.

[39] Three of the four claims, to which the special pleas relate, concern debts which became due after Angela's death and claims advanced only in the alternative to the vindicatory claim. Accordingly, upon my interpretation of section 13(1)*(h)*, the subsection does not apply to the prescription of such claims and further, to the extent that the plaintiff succeeds on the first of the alternatives in claim A, the three alternative claims and these three special pleas fall away. However, the first special plea is to the claim against Chris for a statement of account for his

administration of the property prior to Angela's death up to the date of registration of transfer of the property to Jango. But for the provisions of section 13(1)*(i)*, any claim in respect of the period prior to 22 October 2009, shortly before Angela's death, would have become prescribed on 21 October 2012, the day prior to the appointment of the plaintiff as executor. If the appointment of Ms Dionisiou as the executor in Cyprus, was operative in removing the impediment, all such claims would have become prescribed, notwithstanding the provisions of section 13(1)*(i)*, together with all claims up to the death of Angela which would have become prescribed on 11 January 2013. If however such appointment were not so operative, then the claim for a statement of account for the period after 13 January 2007 would not have prescribed, prior to 21 October 2013, by reason of the operation of section 13(1)*(i)* in relation to the appointment of the plaintiff.

[40] By agreement between the parties, an affidavit of Ms Dionisiou, dealing with certain matters relating to the laws of Cyprus, requested by both parties, was admitted as evidence. In this affidavit, Ms Dionisiou testified that the authority did not extend to the deceased's South African estate; the executor of a deceased estate in Cyprus does not have the power and jurisdiction to contend with assets which are located outside of Cyprus. In so far as this is a reflection of laws of Cyprus, I accept it as such. This is in accordance with the general principle that letters of executorship are territorial; they are confined to the jurisdiction in which they are issued, see *Segal and Others v Segal and Others* 1979 (1) SA 503 (C) at 505. Furthermore and irrespective of whatever power the relevant authority in Cyprus might have authorised a Cypriot executor to do, even if the express wording of such authority were to permit the administration of a South African estate, such authority would have no force or effect by reason of the provisions of section 13(1) of the Act, which forbids the liquidation or distribution of any estate except under authority of the Master granted under the Act.

[41] That being so, the appointment of Ms Dionisiou with the powers of an executor in Cyprus was not operative in terminating the impediment under section 13(1)*(h)* of the Prescription Act; the "estate" referred to therein is a South African estate and the "executor" an executor authorised by the Master under the Act.

Costs

[42] Mr *Oosthuizen* asked for the plaintiff's costs to include the costs of senior counsel. Mr *Oosthuizen* was elevated to the status of senior counsel at the end of 2015. He was however

briefed in this action and signed the particulars of claim to the summons in 2013, while a junior counsel. The rule of practice, in South Africa, as I understand it, has always been that where junior counsel has been elevated to the status of senior counsel and increases his or her charge rate for services, by reason of such elevation, such increase is applicable where briefed as a senior counsel. Where initially briefed as a junior counsel, it is appropriate to charge the rate applicable to such junior status, subject to annual inflationary increases. This practice is possibly kinder than that which I understand applies in New South Wales where, upon elevation to silk, counsel is required to return every brief held prior to such elevation and wait to be briefed only in accordance with such new status. In the circumstances, and having regard to the value of the property concerned, it would not be appropriate to make such a costs order.

[43] In the result I make the following order:

1 The Registrar of Deeds, Johannesburg is authorised and directed, in terms the provisions of section 6(1) of the Deeds Registries Act, 1937, to cancel the deed of transfer T000014436/2010, dated 11 May 2010.

2 The Registrar of Deeds, Johannesburg is authorised and directed, in terms the provisions of section 6(2) of the Deeds Registries Act, 1937, to cancel the relevant endorsement on deed of transfer T45790/2007, evidencing the registration of the deed T000014436/2010.

3 The second defendant is ordered and directed to deliver, the originals of deeds of transfer T45790/2007 and T000014436/2010 to the plaintiff's attorneys, on or before 31 October 2016.

4 In respect of the first, second, third and fourth special pleas of prescription, it be and is hereby declared that the appointment of Ms Dionisiou with the powers of an executor in Cyprus was not operative in terminating the impediment under section 13(1)*(h)* of the Prescription Act, 1969.

5 The first and second defendants are ordered and directed, jointly and severally, to pay the plaintiff's costs occasioned by the separated hearing in respect of the issues raised in paragraphs 1 – 14 of the particulars of claim as amended and dated 8 July 2015, read with paragraphs 1 – 12 of the first and second defendants' plea and the replication thereto and in respect of the question determined in respect of the prescription defences. Such costs are to include the fee of Ms Dionisiou in the sum of €500 in respect of the preparation of her affidavit evidence.

6 Such issues as remain relevant and raised in paragraphs 15 – 20 of the particulars of claim, together with the relief related thereto, read with paragraphs 13 – 28 of the first and second defendants' plea and the prescription defences in the special pleas are postponed *sine die* for future determination.

John Peter

J R PETER
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearance for plaintiff:
Mr *H F Oosthuizen SC*, instructed by Richard Meaden & Associates, Johannesburg; Rooth & Wessels Inc Pretoria

Appearance for the first and second defendants:
Mr *G V Meijers*, instructed by Paul Farinha Attorneys, Johannesburg; Strijdom Attorneys, Pretoria

Date of hearing:
12 and 13 May 2016

Date of judgment:
~~18~~ October 2016
27