IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NO: 2498/07 &

CASE NO: 4247/07

In the matter between

VALERIE MABEL DA SILVA	First Applicant
VALENTIA DA SILVA	Second Applicant

and

MATTHEWS JOSEPH DA SILVA N.O.	First Respondent
DONALD CLIFFORD WICHMAN &	
WILNA JOY WICHMAN	Second Respondent
MASTER OF THE HIGH COURT	Third Respondent

JUDGMENT DELIVERED ON 19 NOVEMBER 2007

ZONDI, J

INTRODUCTION

[1] In the Notice of Motion issued on 5 March 2007 under case number 2498/07 the applicants seek the following relief:

"4. An Order

4.1 Declaring that the value of the Estate Late Elizabeth da Silva was worth in excess of R125 000-00 on the date of her death namely 26 July 2004;

4.2 Declaring that the Master of the High Court, Cape Town was not entitled to make an appointment in terms of section 18(3) of the Administration of Estates Act 66 of 1965;

4.3 Reviewing and setting aside:

4.3.1 the appointment of the First Respondent dated 3 August 205 as the representative of the Master to take control of the assets of the Estate Late Elizabeth da Silva in terms of section 18(3) of the Administration of Estates Act 66 of 1965 (annexure "NoM.1");

4.3.2 the certificate and/or permission granted by the Master of the High Court, Cape Town dated 15 February 2005 in terms of section 42(2) of the Administration of Estates Act 66 of 1965 granting permission for the property to be transferred from Estate Late Elizabeth da Silva to the Second Respondent is set aside;

4.4 Setting aside the agreement of sale concluded between the first respondent and the second respondent in respect of the property concluded on or about 22 February 2007(annexure "NoM.2").

4.5 Directing the First Respondent (and such other Respondent(s) as may oppose this order jointly and severally with the First Respondent, the one paying the other to be

absolved) to pay the costs of this application.

5. Granting such further and/or alternative relief as this Honourable Court may deem fit".

[2] At the hearing hereof *Mr Berthold,* who appeared for the applicants, indicated that the applicants were no longer seeking relief as set out in para 4.2 of the Notice of Motion.

Factual Background

[3] During her life-time the Late Elizabeth da Silva ("the testatrix") was the registered owner of the immovable propery namely erf 5200 Hout Bay, Cape Town ("the property"). This was the only asset of any value in her estate. The testatrix died on 26 July 2004, leaving a Last Will and Testament in which she appointed her son, the Late Tim William John da Silva as her executor. The Late Tim William John da Silva predeceased the testatrix, and there was therefore no executor testamentary.

[4] The Late Tim William John da Silva ("John da Silva") was married to the first applicant and there are four children born of the marriage between them. The second applicant is one of them.

[5] The first respondent, being the only surviving brother of the Late John da Silva and son of the testatrix, reported the estate to the Master of the High Court, the third respondent and later secured an appointment in terms of the Letters of Authority issued on 3 August 2005. These Letters of Authority were issued by the third respondent in terms of section 18(3) of the Administration of Estates Act, 66 of 1965 ("the Act") on the basis that the value of the estate was not more than R125 000-00. A municipal valuation obtained by the first respondent from the City of Cape Town and filed with third respondent indicated that the value of the property was R79 000-00 as at 29 March 2005. The Letters of Authority authorised the first respondent "to take control of the assets of the Estate of the Late Elizabeth Da Silva… to pay debts, and to transfer the residue of the estate to the heir/heirs entitled thereto in law"

[6] Clause 6 of the testatrix's Last Will and Testament provided as follows:

" I further direct that in the event that Tim William John Da Silva should no longer wish to occupy the said property and elect to sell it or upon his death, whichever occurs first, that the proceeds of any sale of the said property should be divided equally amongst the three beneficiaries of this Will or failing any of them, their off-spring through representation per stirpes."

[7] On about 17 April 2006 the first respondent, purporting to be acting as a representative of the estate, sold the property to the second respondents for the sum of R120 000-00. On 4 July 2006 the first respondent sought permission from the third respondent to have the property transferred into the names of the second respondents. The permission was sought in terms of section 42(2) of the Administration of Estates Act.

[8] The third respondent requested the first respondent to obtain and submit to it a sworn valuation of the property as minor children were involved in the estate. The first respondent submitted to the third respondent a valuation report compiled by one P.N. Habutzel on 13 February 2007 confirming that the fair and reasonable open market value of the property was R120 000-00.

[9] On 17 January 2007 the then first respondent's attorneys wrote to the first applicant advising her of the sale of the property to the second respondent and also informing her that she had 10 days within which to lodge an objection, if she had one. The applicant's attorney of record in a letter addressed to the first respondent's attorneys and copied to the third respondent on 9 February 2007 noted an objection on behalf of the first applicant to the sale on the ground that the purchase price was less than the market value of the property and that it was not in the interest of the other heirs and stating that the market value of the property according to valuation report compiled by Prop-T Real Estate was R135 000-00. The letter also pointed out that there was an offer on the property for R140 000-00. In a letter dated 27 February 2007 the third respondent informed the applicant's attorneys that a section 42(2) endorsement was granted on 15 February 2007. The applicants then brought the present application.

Statement of the issues

[10] The issues which remain for determination are the following:

1. What is the fair market value of the estate; and

2. Whether the third respondent's decision to appoint the first respondent in terms of section 18(3) of the Administration of Estates Act should be reviewed and set aside.

[11] That the decision taken by the third respondent is reviewable is beyond question. Section 95 of the Administration of the Estates Act is the answer to this question. Any decision taken by the third respondent in terms of the Act is reviewable under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and the point is clearly emphasised by O'Regan J in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs** 2004(4) SA 490 (CC) at 504G – 505B:

> "The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself. The groundnorm of administrative law is now to be found in the first place not in the doctrine of *ultra vires,* nor in the doctrine of parliamentary sovereignty, nor in the common law itself, but in the principles of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its force from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case-by case basis as the Courts interpret and apply the provisions of PAJA and the Constitution".

[12] *Mr Berthold*, who appeared on behalf of the applicants, attacked the correctness of the third respondent's decision on two grounds. Firstly, he argued that the third respondent's decision not to revoke the appointment of the first respondent in terms of section 18(3) of the Act after it had been brought to its attention that the value of the estate was above R125 000-00, was irregular. Secondly, he argued that the appointment of the first respondent as a representative of the estate had been irregularly obtained by the first respondent. In this regard it was submitted by *Mr Berthold* that the first respondent had deliberately furnished

factually incorrect information to the third respondent in order to persuade the latter to authorise the first respondent to represent the estate. The first respondent is accused of having failed to disclose in both the Death Notice and Next of Kin Affidavit particulars of the descendants of the deceased.

[13] *Mr Beale,* who appeared on behalf on the first and second respondents, submitted that the decision of the third respondent to appoint the first respondent in terms of section 18(3) of the Act was correct. He argued that the third respondent was correct in appointing the first respondent as a representative of the estate because the value of the estate was less than R125 000-00. The municipal valuation of the property reflected that its value was R79 000-00 and that municipal valuation is a fair and reasonable means of determining the value of the estate for the purpose of section 18(3) of the Act. He further submitted that other methods used to determine the value of the property confirmed that its value was below R125 000-00.

Discussion

[14] The question is whether the third respondent was correct in appointing the first respondent to represent the estate in terms of section 18(3) of the Act. Section 18(3) of the Act provides as follows:

> " If the value of any estate does not exceed the amount determined by the Minister by Notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which such estate shall be liquidated and distributed." (Amount determined under Government Notice No. R.1318 in the Government Gazette 25456 of 19 September 2003 is R125 000-00).

[15] It is clear from the provisions of section 18(3) of the Act that if the value of the estate does not exceed R125 000-00 the third respondent is entitled to dispense with the appointment of an executor and give directions as to the manner in which such estate is to be liquidated and distributed. In making that decision the third respondent is guided by the information which is presented to him in the inventory by the person who is the deceased's nearest relative. In the present case the value of the estate was indicated in the inventory by the first respondent to be R79 000-00 and this was based on the municipal valuation provided by the City of Cape Town. There is nothing preventing the third respondent from relying on the municipal valuations as a means to determine the value of the immovable property. It is common cause in the present matter that the only asset of value was the immovable property.

[16] It is not suggested by the applicants that when the third respondent made a section 18(3) appointment on 3 August 2005 he was aware that the value of the estate was being challenged. The first complaint which was addressed by the first applicant to the third respondent on 3 August 2006 did not relate to the value of the estate. It was about the manner in which the first respondent administered the estate. He was accused of failing to consult with other heirs when taking decisions affecting the estate. On 29 August 2006 the first applicant wrote to the third respondent requesting him to "rescind the Letters of Authority" which he granted to the first respondent and suggesting that "an executor from outside the family" be appointed. Again the complaint was not about the misrepresented value of the estate but was about the conduct of the first respondent.

[17] The first time that the third respondent became aware that the value of the estate was being challenged was on about 9 February 2007. In a letter dated 9 February 2007 the applicants' attorney of record informed the first respondent's attorneys that the applicants were objecting to the sale of the property to Mr and Mrs Wichman for R120 000-00 as according to them its market value was R135 000-00 and that there was an offer on the property for R140 000-00.

[18] On 15 February 2007 the third respondent granted a section 42(2) endorsement allowing the first respondent to transfer the property to Mr and Mrs Wichman. Section 42(2) of the Act provides that no transfer pursuant to a sale can be effected without obtaining the Master's Certificate that no objection exists to the transfer.

[19] In my view it was improper for the third respondent to issue a section 42(2) certificate in circumstances where he was aware that there had been an objection to the sale as well as the grounds upon which such objection was based. The applicants lodged an objection with the third respondent on 12 February 2007. In any event the provisions of section 42(2) of the Act do not apply in section 18(3) estates. The third respondent should have revoked first respondent's appointment in terms of section 18(3) as soon as it became aware that the value of the estate exceeded the section 18(3) limit. In granting a section 42(2) certificate the third respondent thus misdirected himself. The third respondent's decision was not rationally related to the purpose for which the power was given and for that reason it ought to be set aside as it was unlawful. (**Pharmaceutical Manufacturers of SA: In Re Ex Parte President of the RSA.** 2000(2) SA 674 (CC) para 85). He should not have granted a section 42(2) certificate in the face of the objection by the applicants. In disregarding the applicant's objection the third respondent acted unlawfully.

[20] The third respondent, however, contended that it was entitled to grant a section 42(2) certificate even though there was a higher offer. It relied upon a decision of **Gray v The Master** 1984(2) SA 271(T) in support of its contention. The reliance by the third respondent on the decision on **Gray v The Master** is misplaced. The decision does not support the third respondent's contention. In that case a sale having been concluded at a public auction, the Master refused to grant his certificate under section 42(2) because a higher offer had been received subsequent to the auction. The question was whether the mere fact that a higher offer was received after the conclusion of a sale precluded the Master from issuing a section 42(2) certificate and therefore released the executors from the obligations imposed upon them in terms of the contract concluded.

[21] The answer to this question is to be found at 275G-H of the judgment where McCreath, J had this to say:

> "I am of the view that the Master is required to consider whether at the time when a sale is concluded the executors have acted within the powers conferred on them by the provisions of the will, and whether the sale is a *bona fide* and genuine sale and whether the circumstances existing as at the time of the sale are such as to warrant any objection to the sale at the figure to be paid by the purchaser. In the absence of any such objection to the sale, the sale is in my view a valid contract and is binding upon the executor and the

purchaser".

[22] *The Ratio* of the decision therefore is that the mere fact that after the conclusion of the sale, a third party makes a better offer cannot be used as a valid reason to prevent the transfer of the property to the purchaser and that consequently the Master should not refuse to issue his certificate on that account.

[23] The case of **Gray v The Master** does not assist the third respondent in this case because the present case deals with a section 18(3) estate and the provisions of section 42(2) do not apply to such an estate. In other words the Master cannot issue a section 42(2) certificate in a section 18(3) estate. Therefore the moment the operation of the provisions of section 42(2) of the Act is triggered, the Master should revoke an appointment in terms of section 18(3) of the Act. The third respondent should accordingly have refused to issue a section 42(2) certificate when the applicants objected to the sale at the figure to be paid by the purchasers (second respondents).

[24] It was contended by *Mr Beale* that the applicant's application should be dismissed as there is a dispute of fact regarding the value of the property and that in so far as that dispute of fact is concerned the matter should be decided in the first respondent's version. He cited the case of **Plascon-Evans Paints v Van Riebeeck Paints** 1984(3) SA 623(A) in support of his contention. According to **Plascon-Evans** case whenever a dispute of fact has arisen in affidavits in motion Court proceedings when final relief is sought and there is no request for the matter to be referred to oral evidence the Court makes its decision, in so far as any dispute of fact is concerned, on the basis of the version of the respondent party unless that version is so far fetched or clearly untenable that the Court is justified in rejecting it merely on the papers or the denial by the respondent of a fact alleged by the applicant is such as not to create a real or genuine or *bona fide* dispute of fact. In a case where the respondent's version is so far fetched or so untenable that the Court is justified in rejecting it merely on the papers or where the denial by the respondent of a fact alleged, by the applicant is not such as to create a real or *bona fide* dispute of fact, the Court must include the fact alleged by the applicant among the facts it takes into account on deciding whether or not to grant the final relief.

[25] In the present case there is no genuine dispute concerning a fair market value of the property. The value of R79 000-00 is not based on the open market value of the property but is based on a municipal valuation. Mr P.N. Habutzel, the first respondent's valuation expert and upon whose report the first respondent relies, estimated the open market value of the property to be in the region of R 120 000-00 as at 13 February 2007. This approach was wrong. The property should have been valued as at July 2004. The only reliable and credible valuation is one done by one Quentine Pavin. He used the comparable sales method in undertaking the valuation exercise and he valued the property as at the date of death of the deceased namely 26 July 2004. In his opinion the market value of the property is R160 000-00 as at the relevant date. In the circumstances the Court cannot decide the matter on the basis of the first respondent's version because that version is based on facts which are not reliable and credible.

The Cost Order

[26] The next question to consider is one relating to costs of this application as well as costs which were reserved in the application which was brought by the applicants under case number 13813/2007. The applicants were successful in that application. The third respondent did not oppose either the present application or the application brought under case number 13813/2007. In the circumstances the third respondent will not be ordered to pay costs of either application.

[27] The second respondents gave a notice of their intention to oppose both applications through their then attorneys of record, Rob Green and Associates. Thereafter the second respondents did not file their answering affidavit. In the circumstances there is no reason to order the second applicants to pay costs of the applications. In both applications the applicants cited the second respondents by virtue of the fact they bought the property from the first respondent. It is not suggested by the applicants that the second respondent acted *mala fide* in buying the property from the first respondent or in occupying the premises during August 2007.

[28] As far as the position of the first respondent is concerned, different considerations apply. He opposed the application in his capacity as a representative of the estate by virtue of his appointment by the Master in terms of section 18(3) of the Act. The general rule is that an executor who litigates on behalf of an estate is not mulcted in costs. However the executor can be ordered to pay the costs *de bonis propriis* where there was mala fides, unreasonable or negligent conduct on his part or where he acted against the interests of the estate.

[29] The value of the estate is substantially low. It is in the region of R160 000-00 and any costs order against it will have an effect of depleting its value which clearly is not in the interest of the other heirs. The estate should not be exposed to costs which are incurred by an executor in the course of pursuing a matter which he knows is not in its own interest or has no authority to bind the estate. The first respondent did not have authority to enter into a lease of the estate property. (**Amod's Executor v Registrar of Deeds** 1906 TS 90). He therefore acted without authority when he concluded a lease agreement with the second respondents and allowing them to occupy the property on 15 August 2007. It then became necessary for the applicants to bring an application under case number 13813/2007 for an order evicting the second respondents from the premises and restoring the premises to them. It is the first respondent's unauthorised conduct which exposed the applicants to costs. The applicants succeeded in their application and are accordingly entitled to costs on a party and party scale. The first respondent is accordingly ordered to pay the applicants costs *de bonis propriis*.

[30] As far as costs of the present application are concerned, I find it quite unreasonable for the applicants to insist that the first respondent's section 18(3) appointment be set aside on the ground that the value of the estate exceeds R125 000-00 even though the second respondents had increased their offer. In my view they should have allowed the sale of the property to the second respondents to proceed in light of the fact that they were prepared to increase their offer to purchase to R160 000-00. Had the applicants accepted the second respondents' amended offer further administration costs to the estate would have been avoided. It is clear that they wanted to have the property sold to their own preferred purchaser. In doing so they acted against the interests of the estate and for this reason they should be deprived of costs of this application.

The Order

[31] In the premises I make an order in the following terms:-

1. It is hereby declared that the value of the Estate Late Elizabeth da Silva was in excess of R125 000-00 on the date of her death on 26 July 2004;

2. The appointment of the first respondent dated 3 August 2005 as the representative of the Master to take control of the assets of the Estate Late Elizabeth da Silva in terms of section 18(3) of the Administration of Estates Act 66 of 1965 is reviewed and set aside;

3. The certificate and/or permission granted by the third respondent (Master of the High Court, Cape Town) dated 15 February 2007 in terms of section 42(2) of the Administration of Estates Act 66 of 1965 granting permission for the property to be transferred from Estate Late Elizabeth da Silva to the second respondents is set aside;

4. The agreement of sale between the first respondent and the second respondents in respect of the property concluded on or about 17 April 2006 is set aside;

5. The first respondent is ordered to pay d*e bonis propriis* the applicants' costs as between party and party scale in the application brought under case number 13813/2007

6. Each party to pay its own costs in the application under case number 2498/2007.

ZONDI, J