

Republic of South Africa
In the High Court of South Africa
Western Cape High Court, Cape Town

CASE NO : 19879/2008

ALLAN LEONARD GRADUS	First Plaintiff
VICKI GRADUS	Second Plaintiff
RICHARD CHARLES PIERCE	Third Plaintiff
SHARON ADRIENNE PIERCE	Fourth Plaintiff
MAURICE DAVID JOHN STOCK	Fifth Plaintiff
ANDREA JOY STOCK	Sixth Plaintiff

and

SPORT HELICOPTERS also known as	First Defendant
SPORT AVIATION	
CHARL ANTON VAN ZYL	Second Defendant

JUDGEMENT: 28 NOVEMBER 2012

MATTHEE, AJ

1. In this matter in terms of an order of court, by agreement the following issues were separated for prior determination:

"(a) Whether the plaintiffs' claims against the first defendant have become prescribed in terms of the Prescription Act, Act 68 of 1969, dealt with in paragraphs 7 and 20 of the plaintiffs' particulars of claim (as amended) read with paragraphs 1 to 6 of the defendants' Amended Plea pursuant to the Amendments effected to the Plaintiffs' Claims.

(b) The issues raised in paragraph 7 of the plaintiffs' particulars of claim (as amended) read with paragraph 8 of the defendants' Amended Plea pursuant to the Amendments effected to the Plaintiffs' Claims".

2. Messrs Engers SC and Van der Nest SC, who appeared for Plaintiffs and First Defendant respectively, were in agreement that my finding on the issues under (b) would automatically determine the outcome of (a).

3. Accordingly I will commence by addressing the issues raised in (b).

4. For purposes of this judgment I shall refer to the current owner of Sport Aviation/Sport Helicopters, who is the First Defendant, as Robert MacDonald and his father, as ESD MacDonald.

5. The cause of action arose from a helicopter accident which occurred on 23 February 2006. At the time ESD MacDonald owned the business known as Sport Aviation/Sport Helicopters which operated the

helicopter involved in the accident. The Plaintiffs were passengers in the helicopter. Sport Aviation/Sport Helicopters was a sole proprietorship.

6. ESD MacDonald died on 9 December 2006. In paragraph 5.5 of his Will he bequeathed to Robert MacDonald "the business concern known as Sport Aviation together with all its assets and liabilities".

7. Robert MacDonald commenced a sole proprietorship, Robert MacDonald t/a Sport Aviation, a few days after ESD MacDonald died.

8. The question before me is whether Robert MacDonald t/a Sport Aviation/Sport Helicopters (First Defendant) inherited the delictual liability arising from the said accident or whether that liability still resides in the estate of the late ESD MacDonald.

9. All things being equal, the parties agreed that the delictual liability would reside in the said estate.

10. However, in the present matter, Plaintiffs have pleaded that Robert MacDonald, First Defendant, is liable for the damages arising from the

accident as he "inherited Sport Helicopters, including all its assets and liabilities, from his late father, the former proprietor."

11. During argument Mr Engers accepted that Plaintiffs bore the *onus* to prove that the liability had shifted from the estate to Robert MacDonald.

12. The essence of his argument was that shortly after the death of ESD MacDonald, the executor, Mr van Greunen, gave effect to the bequest in paragraph 5.5 of the Will, referred to in 6 above, and that Robert MacDonald accepted it.

13. To put this issue in context, it is necessary to give some background leading up to the issuing of the summons and beyond that date.

14. On the 23rd May 2007, Deney's Reitz, acting for the insurer of Sport Helicopters, wrote to the British solicitors of four of the Plaintiffs, Stones Solicitors. In this letter they referred to Robert MacDonald as an employee of Sport Helicopters and ESD MacDonald as the "part owner of Sport Helicopters". In this letter they also referred to tickets issued to the Plaintiffs at the time of the flight. The said tickets were attached to the letter. At the foot of each ticket are the words: "ESD MacDonald t/a Sport Helicopters PO Box 271, SEA POINT 8005".

15. On 15 June 2007 Stones Solicitors responded: "When responding, please confirm exactly who the owners of Sport Helicopters are. You refer in your recent correspondence to "Mr Robert MacDonald.... who is part owner of Sport Helicopters". At this stage it must be noted that this is not an accurate reading of the letter from Deney's Reitz to the extent that in that letter Robert MacDonald is described as an employee, and not as a part owner of Sport Helicopters.

16. On 6 August 2007 Deney's Reitz replied as follows: "Our understanding is that the entity was a sole proprietorship belonging to a certain Mr E MacDonald. Mr MacDonald passed away since the accident and our understanding is that his son Mr Robert MacDonald had taken over the running of the business. Should you wish to obtain further information in this regard, our suggestion is that you approach a local correspondent in Cape Town to do the necessary."

17. On the 7th August 2007 Stones Solicitors responded. In this letter the remaining Plaintiffs were included as clients of Stones Solicitors.

18. In a letter from dsc Attorneys, no doubt the South African correspondents of Stones Solicitors, dated 3 November 2008, they asked Deney's Reit Attorneys the following:

"Further to the above matter, we have two citations for your clients.

1. Sport Helicopters

2. ESD MacDonald t/a Sport Helicopters

Kindly confirm which of the above citations is the correct citation in law for your client.

19. Summons was issued on 15 November 2008 before any definitive response was received from Deney's Reit Attorneys.

20. In the citation in the summons there was no reference to ESD MacDonald.

21. On 19 February 2009, Defendants filed their pleas. In it First Defendant at various stages of his plea in effect made it clear that he did not employ Second Defendant at the time of the accident and that he was not a party to the contract upon which the claims were based. At 6.1 of the pleading he specifically pleaded that "ESD MacDonald t/a Sport Aviation and the plaintiffs,, concluded an agreement...." This

pleading was filed some 4 days short of three years after the date of the accident.

22. On 6 May 2009 some 6 months after the issue of the summons and three years and three months after the accident, dsc Attorneys wrote to Deney's Reitz Attorneys as follows:

"Kindly furnish us with the name and contact details of the Executor of the Estate of the late ESD MacDonald".

23. On 18 May 2009 Deney's Reitz Attorneys informed them that Mr Andre van Greunen was the Executor and furnished his address to them.

24. On 30 June 2010 Plaintiffs filed a Notice of Intention to Amend their Particulars of Claim inter alia to incorporate the words "First Defendant inherited Sport Helicopters, including all its assets and liabilities from his later father, the former proprietor". It is this amendment which has given rise to the question in 1(b) above.

25. I now turn to the argument of Mr Engers. In essence he submitted that a reading of the will leaves no doubt that ESD MacDonald intended Robert MacDonald to carry on Sport Helicopters as a going concern. He argued that within days of the death of ESD MacDonald the Executor gave effect to the bequest in paragraph 5.5 of the will.

Furthermore he submitted that Robert MacDonald accepted the legacy from the Executor and that accordingly the liabilities, including the present claims of the plaintiffs, passed to him.

26. Plaintiffs led no witnesses. To support his argument, Mr Engers relied on various documents before the court. These documents were part of "Defendants Court Bundle" which were handed in by First Defendant.

27. First Defendant and the Executor gave evidence on behalf of First Defendant.

28. Mr Engers relied on the following from the documentation before the court:

(a) He submitted that soon after the death of ESD MacDonald payment of R2, 052,175-00 was made by the Executor to Robert MacDonald. This arose from an agreement between ESD MacDonald and a bank linked to the business of Sport Helicopters.

(b) In response to questions contained in a letter from dsc Attorneys dated 21 May 2009, the Executor gave answers in a letter dated 26 May 2009. The essence of this exchange was that the final valuation of the business (Sport Helicopters) bequeathed to First

Defendant had not yet been done, that the business formed part of the estate and that "Robert MacDonald acquired the business by way of inheritance. The assets of the business vested in Robert on the date of ESD MacDonald's death." The latter was in response to the question: "How did Robert MacDonald acquire the business or how did (he) acquire the assets of that business".

Central to the letter of the 21st May 2009 was to address the defence raised in First Defendants' plea that Plaintiffs should have sued "the late ESD McDonald." The germane extract reads as follows:

"One of the defences raised is that Sport Helicopters is not the same entity as the business with which our client contracted, implying that any claim which our clients may have would lie against the late ESD McDonald....
Depending on the facts, therefore, it may be necessary for our clients to institute action against you in your capacity as Executor...."

(c) In a letter dated 7 March 2012 the Executor responded to a number of earlier letters from a Mr Peet Hugo, an attorney acting

for various beneficiaries in the ongoing disputes about the estate. In one of the letters from Hugo, dated 22 February 2012, Hugo had written:

"Graag vernem ons verder van u wanneer Robert MacDonald die bates en laste van Sport Helicopters in terme van die testamentêre bemaking oorgeneem het aangesien dit vir ons voorkom of hy onmiddellik na dood geadieer het."

The Executor responded:

"RG MacDonald het onmiddellik na dood die bates en laste van Sport Helicopters oorgeneem sodat die boedel onthef kan word om die koste van die laste van Sport Helicopters te diens, welke kostes die boedel nie kan betaal nie."

(d) On 2 April 2012, Mr Jan Truter, an attorney representing Robert MacDonald, wrote to Mr Yeowat who was consulted by the Executor as an expert in estates. In a summary of the objections raised by Hugo, Truter, in his summary of events commented as follows to Yeowat:

"The situation was that after the death of Mr ESD MacDonald, the estate had no funds to repay the hire purchase agreements on the helicopters and Mr Van

Greunen and Mr R G MacDonald, the heir of the assets and liabilities of Sports Aviation, agreed that Mr R D MacDonald would take over the assets within days after the death of the late Mr ESD MacDonald and assume responsibility for the liabilities and trade for his personal account."

Mr Engers highlighted that not only was this explanation given by First Defendant's attorney but also that the Executor did not indicate that this was an incorrect exposition of the arrangement.

29. Mr Engers invited me to contrast this exposition with the Executor's response on 28 September 2012 to the following question from Plaintiffs' attorney.

"Kindly advise on what date Robert Graham MacDonald took over the assets and liabilities of Sport Helicopters as per the last will and testament of the late Ernest Stanley MacDonald, as outlined in paragraph 5.5 of same."

The Executor replied:

"Kindly note that the Liquidation and Distribution Account of the Estate Late Mr ESD MacDonald has not yet been finalized as there have been a number of objections lodged against it. I am currently waiting on further correspondence from the Master in that regard. As such, Mr R D Mac Donald is not in a position to receive any inheritance under the will."

Mr Engers submitted that this contrast pointed to the Executor now trying to support the contention that Robert MacDonald did not receive his bequest soon after the death of ESD MacDonald.

Mr Engers also argued that the phrasing of the Liquidation and Distribution (L&D) account is consistent with Robert MacDonald having been given and having accepted the legacy.

30. Before assessing this documentary evidence one has to turn to the evidence of Robert MacDonald and the Executor, Mr Van Greunen.

31. Robert MacDonald testified that prior to his father's death, he had worked for him for some 10 years. His father's management style was autocratic and he micromanaged all the employees and the business.

Soon after his father's death, he established the sole proprietorship R G MacDonald t/a Sport Aviation. To this end *inter alia* he opened a new bank account, registered himself with SARS, entered into employment contracts with employees and negotiated a new lease with the V & A Waterfront for the helicopter business.

His understanding of the law was that he needed to do this to continue the helicopter business as his father's sole proprietorship had come to an end on his death.

There were three helicopters in the business. One in effect was still owned by the bank. He bought it from the bank for his newly established sole proprietorship.

In terms of an oral agreement with the Executor, he assumed control of the remaining two helicopters with a view to using them for his newly established business. The arrangement with the Executor was that he would assume full responsibility for their maintenance and insurance in exchange for being able to use them without paying the Estate for such use. In effect his evidence was that his motive was in the interim to do the necessary to keep the business profitable as at the end of the day he hoped he would be able to accept and take ownership of the legacy when the estate was finally wound up.

In essence, he testified that at no stage did he ever agree to assume responsibility for the claims of the plaintiffs. He stated that in fact he knew nothing of the present claims when he reached the agreement with the Executor. His understanding throughout was that until the estate was finally wound up, he would only assume responsibility for the maintenance, insurance and running of the helicopters. Anything outside of that which he paid for he would have recorded as a claim by him against the estate.

His understanding was confirmed by his father's auditor who explained to him how estates worked. From this advice he gleaned that he could start a clean slate as a sole proprietor.

32. Mr van Greunen testified that he had been ESD MacDonald's attorney since 2003. He confirmed that he was autocratic, demanding and micromanaged.

He stated that when he received his letter of authority to act as the Executor soon after the death of ESD MacDonald, he immediately entered into an oral agreement with Robert MacDonald concerning the helicopters. His rationale for this was that as Executor he did not have the expertise to take care of that aspect of the estate and it would be

most cost effective for the estate if Robert MacDonald assumed responsibility for them. In this regard he also highlighted that the estate immediately had liquidity problems and simply did not have the cash to assume responsibility for maintaining and using the helicopters. Another reason was that from his perspective the helicopters would eventually have to be transferred to Robert MacDonald when the estate was finally wound up.

Accordingly, he entered into an oral agreement with Robert MacDonald in terms of which he would have free use of the helicopters in exchange for Robert MacDonald assuming the responsibility for running the helicopters and everything which went with that. He had discovered that the one helicopter was fully encumbered to the bank. As the estate was not allowed to enter into a debit order agreement with the bank, it had been negotiated that Robert MacDonald purchase that helicopter for his own account from the bank. The other two helicopters remained in the name of the estate.

He felt that the above arrangements would remove a burden from the estate whilst ensuring the preservation of the helicopters until the estate was wound up. As another illustration of this arrangement, he testified that he was allowing another beneficiary to use a house of the estate for no rental provided she take care of the house in the interim.

He testified that there was acrimony between the various beneficiaries, and although over 6 years had passed since the death of ESD MacDonald, and so far there have been 8 Liquidation accounts, there was still no sign of him being able to submit a final Liquidation account acceptable to all.

He stated that one of the key bones of contention between the heirs was the implementation of paragraph 5.5 of the will. One of the issues here was what the assets of the business were which were left to First Defendant and what value should be attached to the business. For example, in a letter from attorneys Hugo, Hugo on behalf of other beneficiaries disputed that all the helicopters are part of the business referred to in paragraph 5.5 of the will.

This was exacerbated by the fact that there was not enough cash in the estate to give effect to the cash bequests to beneficiaries in the will. Another dispute he testified about concerned an account of an auditor which Robert MacDonald had paid. Robert MacDonald subsequently found out that it was for work done for the sole proprietorship ESD MacDonald prior to his death and he now was claiming that this amount should be repaid to him.

In response to the extracts from the documentation relied on by Plaintiffs, the *crux* of Mr van Greunen's response was that at no stage did he ever intend to transfer ownership of the helicopters and the other assets and liabilities of the business to First Defendant. To the extent that these extracts suggested otherwise, they were wrong.

At one point in his evidence he illustrated this by referring to the one Liquidation account where it is recorded that the tax burden of ESD MacDonald and payments to WesBank remained with the estate. (The said auditor's disputed account would fall into the same category.)

In this regard he testified that given the risk to him as Executor, especially in the light of the intense conflict between the beneficiaries and the size of the estate, he would never have made such a rash decision as to assume the risk, within a matter of days of his appointment as Executor, of simply passing ownership of the helicopters to Robert MacDonald. Here it must be noted that there is no evidence before me to suggest that the Executor knew about the intense conflict at the time he said he entered into the oral agreement with First Defendant.

He testified that he saw no need to reduce his agreement with First Defendant to writing.

At one stage, elaborating on his evidence, he testified that the liabilities Robert MacDonald assumed responsibility for included petrol, insurance, maintenance, painting and financing and that this had to be distinguished from the liability which flows from ownership.

33. In effect Robert MacDonald and the Executor confirmed one another's testimony that the said oral agreement was an interim arrangement, pending the finalization of the estate. They both stated that Robert MacDonald would still have to make a choice to accept the bequest before the estate was finally wound up. Accordingly, for example, two of the helicopters had not yet been transferred into Robert MacDonald's name.

34. I now return to Plaintiffs' argument. It will be convenient once again to repeat it. Mr Engers argued that the intention of ESD MacDonald in paragraph 5.5 of his will was that Robert MacDonald take the business over as a going concern. He submitted that within days of the death of ESD MacDonald, if one had regard to the documentation and other conduct of the parties, the Executor gave effect to the bequest in paragraph 5.5 of the will. Furthermore he submitted that Robert

MacDonald accepted the bequest with immediate effect and obtained the subject matter from the Executor. Accordingly, it was argued by Plaintiffs, he assumed responsibility for all the liabilities of Sport Helicopters, including the present claims.

35. I now turn to the documentation relied on by Plaintiffs for this argument as set out in 28(a) - 29 above:

28 (a) In this regard Mr van der Nest pointed out, in my opinion correctly, that the evidence of First Defendant and the Executor was that this money mistakenly was paid to Robert MacDonald by the bank, and not the Executor.

28 (b) In germane respects there is ambiguity and/or a lack of definition in these exchanges. For example, at one stage the Executor writes that the business formed part of the estate but later writes that "the business vested in Robert on the date of ESD MacDonald's death".

In the letter of 26 May 2009, the focus is on the acquisition of the assets of the business, which were bequeathed to Robert MacDonald. No mention is made of liabilities. This is noteworthy given the main motivation of the letter of 21 May 2009 referred to in 28 (a) above. Furthermore in the wider

context of the estate, it is not disputed by Plaintiffs that there were, and still are, serious differences of opinion amongst the beneficiaries as to what the assets of the business are.

It is also important to note that when this letter was sent, the Executor's attention was not focused on the issue at hand. It is only in the letter dated 28 September 2012, referred to in paragraph 29 above, where one can see that the Executor has been mindful of the issue at stake in the present matter in his response. Plaintiffs have argued that I should conclude bad faith from this apparent shift from the first few letters to this last letter. Another explanation is that in the first few letters, the Executor simply did not grasp the nuances of the present issue at stake and thus there was no need to be clearer or tighter on how he expressed himself.

28 (c) The problem with the Executor's response before the court is that once again there is no clear definition of what Van Greunen meant by "laste". Furthermore there is the direct evidence of the Executor who in court explained that he was referring to "lopende laste". In any event that portion of the response of Van Greunen explaining the reason for why Robert MacDonald took over the "bates en laste" also can be

seen to be consistent with the preserving arrangement he said he put in place with First Defendant. It also must be remembered that a focus of the Executor in this letter in effect was to defend his arrangement with Robert MacDonald given the criticism emanating from the other beneficiaries.

28 (d) Once again there is an element of ambiguity and/or lack of definition in this letter from Mr Truter dated 2 April 2012. More particularly there is a lack of clarity as to the liabilities which Robert MacDonald had agreed to take over from the estate.

Furthermore central to interpreting this letter is the belief of the other heirs that they were entitled to "all the income of Sports Aviation from date of death to date." What follows in the letter is an explanation by Truter as to why Robert MacDonald was entitled to this income. At all times the focus of the letter as regards income, is the period between the death of ESD MacDonald and the date of the letter. There is nothing in the letter to suggest that, apropos the liabilities of the business, the time period would be different. In the explanation there also is support for the evidence of First Defendant and the Executor as to the motive for the arrangement.

In addition, as stated elsewhere, when confronted with this letter the First Defendant and the Executor testified in unambiguous terms that to the extent that this letter, or any of the other letters, suggested that their intention was that ownership of all the helicopters and all liabilities without qualification immediately passed to First Defendant a few days after the death of ESD MacDonald, this was a wholly inaccurate suggestion.

36. Central to the argument of Mr Engers is that I must find that both Robert MacDonald and the Executor, not only were poor witnesses, but were deliberately trying to deceive the court.

37. I cannot agree that Robert MacDonald was a poor and deceitful witness. Quite clearly he at times was ill at ease and garrulous. However, it was obvious that he found himself in a foreign and at times, hostile environment and understandably was anxious about the possible consequences of his testimony. To the extent that his demeanor and answers raised questions in my mind as to the veracity of his evidence, the probabilities support his version of events. I now turn to these probabilities.

(a) It is not disputed that the First Defendant knew nothing of the extent of the claims of the Plaintiffs when he is alleged to have

admitted.

If he was an astute businessman, as Mr Engers argued, it would make no sense that he would have accepted responsibility for unspecified liabilities. On the other hand, it would make sense that he would have accepted responsibility for "lopende" liabilities. In this regard, First Defendant's evidence that he wanted to be part of the preservation agreement as in effect he would be maintaining assets which eventually he anticipated would become his, rings true.

(b) Before he was alerted to the nuances of the issues presently before this Court, he rejected liabilities which pre-dated the establishment of his sole proprietorship. These include the fees of the auditor and outstanding tax payments.

(c) Two of the helicopters remained in the name of the estate. It is highly improbable that he would take on board unspecified liabilities but not secure his position as regards the main assets of the business. Furthermore his evidence was that he only had insurance cover for the use of the helicopters for the period

commencing from the establishment of his new sole proprietorship.

(d) It is not disputed that right from the outset the estate had a liquidity problem. This supports the reason for the arrangement the First Defendant testified about.

(e) The probabilities also support First Defendant's version of events given the risk attendant on the Executor of simply divesting the estate of the helicopters within a matter of days of starting as Executor. Even if one accepts that at the time he was not aware of the impending conflict between the beneficiaries, at the outset to simply divest the estate of such significant assets before he had had an opportunity properly to assess the financial situation of the estate, as a whole, simply does not ring true. Furthermore to find for Plaintiffs I would have to find that the intention of the Executor was to divest the estate of the two helicopters even before they were valued.

The probabilities are also against an executor simply transferring "assets and liabilities" without ascertaining what they are and how much they are worth. In any event, even if he intended to transfer them, of what effect could it be if there was a lack of clarity about

what the "assets and liabilities" being transferred were? The probabilities are against an heir simply accepting assets, and particularly liabilities, which are not clearly defined.

38. I also cannot agree with Mr Engers that Van Greunen was a poor witness. It was obvious that at times he was out of his depth as Executor of the estate, especially as the conflict between the beneficiaries deepened. Consequently it is clear that at times he was not as clear and precise as he ought to have been. However, he never wavered from his account that for the sake of the estate he decided to enter into an agreement with First Defendant as set out above. The probabilities referred to above apply equally in an assessment of the evidence of Van Greunen.

39. As already alluded to, Mr Engers in effect has submitted that the First Defendant and Executor have colluded to mislead the court about the true nature of the agreement between them. At best for Plaintiffs there are parts of the documents which raise questions in my mind. However, given the direct evidence before me and that the onus rests with Plaintiffs, I am unpersuaded that Plaintiffs have discharged their onus in this regard.

The fact that the said agreement was not reduced to writing, whilst with hindsight unfortunate, takes the matter no further. If anything, given that the onus is on Plaintiffs to show on a balance of probabilities that First Defendant assumed liability for the claims from the estate, it could be argued that the absence of a written agreement is to the detriment of Plaintiffs.

There is simply nothing before me to convince me that where the documentation relied on by Plaintiffs suggest that First Defendant assumed responsibility inter alia for Plaintiffs claims, I must accept such an interpretation and reject the direct evidence of Robert MacDonald and the Executor in this regard.

40. Mr Engers also sought to rely on the phrasing of the Liquidation and Distribution account. At best for Plaintiffs there is a measure of ambiguity in the account. However, when assessed in the light of the direct evidence of the Executor, Plaintiffs simply can find no succour in the said Account either. Although Mr Engers argued the point that I should make something of the word "awarded" in the Liquidation account, he did not do this with any great conviction, in my opinion correctly so. In this respect the Executor also gave direct evidence about what he meant by using the word.

41. Mr Engers relied heavily on the matter of Thompson v New India

Assurance Co. Ltd 1957(4) 375 (D & CLD). The facts of the present

matter are not comparable to Thompson's facts. In the present matter First Defendant is not the Executor, there is anything but unanimity

between the beneficiaries and there is a dispute about what the assets

of the business are. Furthermore, in Thompson's case there was

evidence that under oath the widow testified that on the death of her

husband she had taken delivery of the business as owner and that the

licences and transportation certificates had remained, for convenience,

in the name of the estate. The accident also had happened after the

death of the deceased when the widow already had possession and

control of the vehicle.

42. Although Mr Engers argued that I should make something of the fact

that First Defendant did not include reference to the agreement in his

plea, he did not make the submission with any real enthusiasm. I am of

the view that this absence of enthusiasm was warranted. Inter alia, First

Defendant denied that he inherited the liabilities of Sport Helicopters. I

am in agreement with Mr van der Nest that had they wanted more

details before trial, it was open to Plaintiffs to make such a request.

43. In respect of the submission that First Defendant's version is an expedient recent fabrication, an assessment of the evidence simply does not support such an argument.

I have already made mention in paragraph 35 above that parts of the documentation before the court are consistent with a preservation arrangement. Furthermore, as far back as 23 May 2007 Plaintiffs' attorneys were alerted to the tickets issued to them on the day of the accident. At the foot of these tickets it was clear that their contract was with ESD MacDonald. Again on 6 August 2007 they were informed that the business was a sole proprietorship and that the sole proprietor had since passed away. On 3 November 2008 they specifically asked which of two citations they should use. Robert MacDonald was not one of these two and ESD MacDonald was one of the options they mentioned. Inexplicably 12 days later summons was issued citing Robert MacDonald. First Defendant filed his plea on 19 February 2009.

In it he denied that he employed Second Defendant and pleaded that it was ESD MacDonald who entered into the contracts with the Plaintiffs and inter alia gave undertakings concerning the safety of the flight provided by ESD MacDonald.

Thus although there was no detail about the alleged agreement about the use of the assets by First Defendant after the death of ESD MacDonald in the plea, throughout in effect it was First Defendant's case that he was not the correct legal entity to institute action against. The probabilities indicate this attitude of First Defendant was premised on his belief that the assets and liabilities had not simply without qualification been transferred to him.

44. On the other hand, it is instructive to consider the following. The amendment of Plaintiffs' claim was filed after they enquired about the name of the Executor. At that stage it was apparent from the record of events that a significant period of time had expired since the date of the accident and that to have withdrawn against Robert MacDonald at that stage to sue the estate ESD MacDonald, might have presented Plaintiffs with an insurmountable problem as far as possible prescription was concerned.

Had Plaintiffs addressed their minds to the Plea when it was filed there was still a small window of opportunity to have addressed this possible insurmountable problem. However, the path chosen was to amend on 30 June 2010, which as already stated, is the reason for the present hearing. Thus, if anything, the amendment could be seen as a belated attempt to remedy a serious oversight by Plaintiffs as regards the

correct party to cite. An oversight which possibly can be traced back to the inaccurate reading of the letter by Stones Solicitors referred to in paragraph 15 above.

45. Although my finding is not dependent on them, I pause to note a number of issues. If I find that First Defendant has assumed responsibility for all the liabilities of Sport Helicopters, without any qualification, the opposite side to that coin would in effect be a declaration for example as to the ownership of the two helicopters without notice to the Master, the other heirs and any creditors of the estate. As Mr van der Nest submitted, in effect it would be a substitution of a debtor without the concurrence of creditors. On the other hand, in effect, First Defendant could find himself held responsible for the claims of Plaintiffs without any certainty about whether or not when the estate is finally wound up he will obtain the benefits of the ownership of the two helicopters. One of the uncertainties of such a declarator also would be whether or not such a transfer of assets and liabilities as envisaged by Plaintiffs would include the transfer of insurance cover to First Defendant. Furthermore, given the possible impact on the insurance company common sense dictates that they would want to have an opportunity to protect their interests before any court order was made.

46. Accordingly, I am of the view that the incorrect party has been sued and that the claim against First Defendant must be dismissed with costs. As previously stated, it was agreed by Messrs Engers and van der Nest that the successful party on this point would automatically be the successful party on the issue referred to in paragraph 1(a) above.

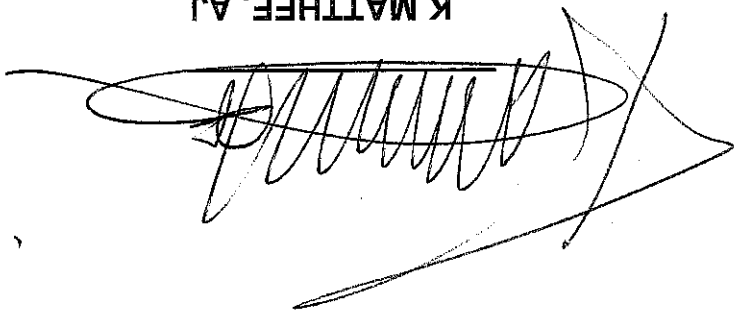
Order:

1. The Plaintiffs' claims against the First Defendant have become prescribed in terms of the Prescription Act, 68 of 1969, dealt with in paragraphs 7 and 20 of the Plaintiffs' particulars of claim (as amended) read with paragraphs 1 to 5 of the First Defendant's amended special plea;

2. The issues raised in paragraph 7 of the Plaintiffs' particulars of claim (as amended) read with paragraph 8 of the First Defendant's plea (as amended) are decided in favour of the First Defendant who has accordingly been incorrectly cited;

3. The Plaintiffs' claims against the First Defendant are dismissed with costs, such costs to include the costs of senior counsel.

K MATTHEW, AJ

A handwritten signature in black ink, appearing to read 'K. Matthew, AJ'. The signature is written in a cursive, stylized font with a large, sweeping initial 'K' and a long, horizontal line extending to the right. The signature is positioned below the printed name 'K MATTHEW, AJ'.