IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO.: 4469/2014

In the matter between:

DANIEL JACOBUS ELLIS	**APPLICANT**
And	
SAGA WINE FARMS (PTY) LTD	**FIRST RESPONDENT**
ALFIRA LARINA FARITOVNA	**SECOND RESPONDENT**
BURKINA FLURA FARITOVNA	**THIRD RESPONDENT**
FREDRICK JAMES COETZEE	**FOURTH RESPONDENT**
ELDRIDGE MULLER	**FIFTH RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**SIXTH RESPONDENT**
THE MASTER OF THE HIGH COURT, CAPE TOWN	**SEVENTH RESPONDENT**
SOUTH AFRICAN REVENUE SERVICES	**EIGHTH RESPONDENT**

JUDGMENT DELIVERED ON FRIDAY, 04 APRIL 2014

DLODLO, J

INTRODUCTION

[1] The Applicant in this matter was appointed as financial manager of the First Respondent in terms of various accounting services agreements. These agreements have never been terminated. The First Respondent is a company duly incorporated in accordance with the Company Laws of

South Africa. The First Respondent had only one shareholder and director by the name of Roza Galimovna Sagazidinov (hereinafter referred to as "Roza"). Roza was a resident in Moscow, Russia and she died on 3 August 2013. Even at the time of Roza's demise, she was still the sole shareholder and director of the First Respondent. At the time of Roza's death, the First Respondent owned an immovable property which operated as a wine estate under the name and style of Lushof Wine Estate. Roza had two children cited as Second and Third Respondents in this application. It does appear though in the Founding papers that the relationship between the Second and third Respondents is estranged and/or that there exist animosity between the two. The Second and Third Respondents are sisters and they are both resident in Moscow, Russia. It seems common cause that Roza died without a Will at least in respect of her shareholding and directorship of the First Respondent. In other words there is no instrument she left that deals with the distribution of her South African assets. For all intents and purposes Roza died intestate in respect of at least her South African assets. According to the Founding papers there is currently nobody acting on behalf of the First Respondent.

[2] It is, however, common cause that the Fifth Respondent is the manager of the farm owned by the company which is involved in the growing of wine grapes and making of wine. An Executor has apparently been appointed to the deceased's Russian estate. However, in South Africa to date the Master has not yet appointed either the Executor to the South African estate of Roza, nor has an Interim Curator been appointed by the Master to such estate as envisaged in terms of Section 12 (1) of the Administration of Estates Act. The Fourth Respondent applied to the Master on nomination of one of the two interstate heirs (the Second and Third Respondents), for his appointment as Executor. The Master

required the Fourth Respondent (if appointed) to put up security in terms of the Administration of Estates Act. The Fourth Respondent failed to put up security. Another objectionable aspect is that the Fourth Respondent is also the attorney of record of the Second Respondent (with whom the Third Respondent is in conflict). An objection was thus lodged with the master against the Fourth Respondent's appointment.

[3] The Third Respondent according to the Answering papers has nominated an independent third party as Interim Curator and who in due course would become the Executor of the deceased's South African estate. I understand that such a request has been submitted to the Master. The proposed appointee is a senior attorney (Mr. Johann Jacobs) who is the director of the established law firm Cliffe Dekker Hofmeyr Inc and he specializes in the administration and winding up of deceased estates. In truth the Administration of Estates Act provides for the manner in which the Master is to proceed in such circumstances. Importantly, any appointment as Executor or Interim Curator is one to be made by the Master in terms of the Act and subject to such person providing security to the satisfaction of the Master. No such appointments are made by Courts of law. The Applicant seeks an order that he be appointed as "Interim Receiver" to the First Respondent. The Third and Fourth Respondents oppose this application and *in limine* they contend that:

(a) The application is misconceived and the relief sought cannot and should not be granted;

(b) The matter lacks urgency and the launch of the application on urgent basis is an abuse of Court process.

THE RELIEF SOUGHT

[4] As highlighted *supra* the Applicant apart from seeking that he be appointed as "Interim Receiver", he also seeks his appointment:

"pending the finalization of the administration of the deceased estate of the late Roza Sagazidinova" and "that such interim receiver be authorized and directed to take control of the business of the company, including but not limited to all assets, sales and finance of the company."

The Applicant further seeks relief that the Receiver (himself) be authorized and directed to:

(a) Preserve all the assets of the company; (b) Receive all income of the company, and to pay all reasonable expenses and disbursements of the company into the company's banking accounts; (c) Bring or defend any action or legal proceedings on behalf of the company; (d) Compromise any debt of the company; (e) continue with agreements, cancel leases, or employment agreements on behalf of the company; (f) Employ bookkeepers, accountants, auditors or any person on behalf of the company; (g) Exercise the power to borrow money required for the business of the company; and (h) Approach the Court for further directions and powers.

DISCUSSION

[5] Mr. Montzinger prefixed his submissions by emphasizing the juristic nature of the First Respondent. For this he relied on the provisions of Section 19 (1) (a) and (b) of the Companies Act, 2008 ("the Companies Act"). Section 19 (1) (a) and (b) reads:

"From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company-

(a) Is a juristic person, which exist continuously until its name is removed from the companies register in accordance with this Act;

(b) Has all the legal powers and capacity of an individual, except to the extent that-

(i) A juristic person is incapable of exercising any such power, or having any such capacity; or

(ii) The company's Memorandum of Incorporation provides otherwise."

Mr. Montzinger also placed reliance on the commentary to the above uoted section by writers in Henochsberg (formerly edited by: The late Hon Mr. Justice PM Meskin, Authors being Professor Piet Delport and Professor Quintus Vorster), namely:

"…It is one of the cardinal principles of company law that "[a] registered company is a legal persona distinct from the members who compose it…This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing…"

I intend dealing with Mr. Montzinger's submission later on in this judgment.

[6] For present purposes it suffices that I mention that the juristic nature of the First Respondent has not been disputed. I may add as well that this is not an issue that plays a role in the determination of the application brought by the Applicant. Substantiating the application it was submitted on behalf of the Applicant that the concept of appointing a receiver is not a strange concept in South Africa; this is evidenced by Section 311 of the Companies Act 61 of 1973. Section 311 of the 1973 Companies Act provide for a compromise or arrangement between a company and its creditors or any class of them or between a company and its members or any class of them. Mr. Montzinger contended that the duties of a receiver can be akin to that of a liquidator. In this regard this Court was referred to

De Villiers v Electronic Media Network (Pty) Ltd 1991 (2) SA 180 (W), a judgment by Kirk-Cohen J where the judge *inter alia* held that, because the receiver does not represent the company, even if he is given "*all such powers as the liquidator would have had"*, he cannot sue on a cheque made in favour of the company and endorsed "not transferable". In the latter event the company (which was in liquidation) as payee was the only one which could sue as holder of the cheque.

In Mr. Montzinger's submission in the instant matter the Administration of Estates Act 66 of 1965 does not provide a solution for the current position the First Respondent finds itself in. I differ with this contention as it would appear *infra*. In Mr. Montzinger's submission even the Articles of Association does not provide a solution. Concluding his submissions Mr. Montzinger insisted that the matter was urgent. I hope to deal with urgency of the matter *infra*.

[A] RELIEF SOUGHT SEEMINGLY CONTRARY TO THE PROVISIONS OF THE COMPANIES ACT, 2008 AND THE ARTICLES OF ASSOCIATION OF THE CONPANY

[7] The corporate governance and business of a company is conducted pursuant to the provisions of the Companies Act, 2008 read together with the Memorandum and Articles of Association of the company. The Memorandum and Articles of Association stipulate how the company is to be governed and matters related thereto. The Companies Act, 2008, makes provision; *inter alia*, for fiduciary duties and obligations of Directors of a company; has provisions protecting against the reckless conduct of the business of a company (which would include borrowing money) and provides for personal liability of directors to creditors in certain circumstances; and further provides for the responsibilities of the accounting officers of the company.

[8] The problem with the relief sought by the Applicant is that it seeks to give him (and he is neither a shareholder nor a Director of the company) the power to conduct the affairs of the company:

(a) Without regard for the provisions of the Companies Act, 2008 or the Articles and Memorandum of Association of the company; (b) In a manner not provided for or envisaged in either the companies Act, 2008 or the Articles and Memorandum of Association of the company; (c) Without the Applicant being a director of the company; (d) Without regard for the rights of the shareholder of the company, which is the deceased estate of the late Roza and in whose deceased estate dominium in respect of the shares of the company vests.

[9] Regard being had to the aforegoing, I agree with Mr. Gess that the relief sought (if granted) would place the control and management of the conduct of the company in the hands of the Applicant. Mr. Gess contends that the relief sought is incompetent. The relief sought would also (if granted) authorize the Applicant to continue as Receiver until the finalization of the administration of the deceased estate of the late Roza despite the fact that the Articles of Association of the company make it clear that the Executor or curator of the deceased estate of the shareholder is entitled to be registered as a member of the company (*nomine officii*), and would then have the power to appoint Directors and exercise all the rights of the shareholder of the company. The Applicant would furthermore usurp the functions and rights of the Executor, and of the deceased estate, in the conduct of the business of the company. Clearly the relief sought would also entitle the Applicant, who is not a director or liquidator of the company, to bring and defend legal proceedings on behalf of the company. The Articles of Association of the company provide in clause 16 to 20 as to what is to happen in the event of

the decease of the sole shareholder of the company. Clause 16 provides as follows:

"20. Any person who submits proof of his appointment as executor, administrator, trustee, curator or guardian in respect of the estate of a deceased member of a company…..shall be entered in the register of members of the company nomine officii, and shall thereafter, for all purposes, be deemed to be a member of the company."

[10] In paragraph 15 of the Founding Affidavit the Applicant suggests that even if the Fourth Respondent were to be appointed as Executor, the First Respondent will still require the Applicant as its "representative" (presumably as "Receiver"). This evidences the failure on the part of the Applicant to appreciate the manner in which the affairs of a company are conducted. Perhaps this is deliberately overlooked for reasons best known to the Applicant. It does appear that the Applicant overlooks the fact that the Executor or Interim Curator (once appointed) will be recognized as the shareholder, and will appoint a director or directors of the company in terms of the Companies Act, 2008 and the Articles and Memorandum of Association of the company. The Legislature made provisions for the control of a company that is wound up, whether that company is a solvent company or an insolvent company. In either event, a liquidator is appointed subject to the supervision of the Master, and the furnishing of appropriate security, and subject to the prescripts of the Insolvency Act and/or the Companies Act. It is of cardinal importance to note that no provision is made for the appointment of a person such as the Applicant in the manner sought in the Notice of Motion.

[11] The Applicant argues that provision is made for appointment by a Court of a Receiver in the case of a scheme of compromise in terms of Section

311 of the Companies Act, 1973 or Section 155 of the Companies Act, 2008. But, I agree with Mr. Gess that such reliance is also misconstrued and does not provide a basis for the Court to appoint the Applicant as Receiver. Importantly, a Receiver appointed in terms of Section 155 of the Companies Act, 2008, is appointed as a consequence of and arising from a contract concluded between the relevant parties and which makes provision for a compromise between the company and its creditors. Such a Receiver has been described as being a *"creature of contract whose powers are those which the compromise confers on him."* The parties may agree to the appointment of a Receiver to administer the compromise subject to the powers stipulated in the agreement, and the Court may sanction such agreement. Such a person, whose function is usually to dealing with creditor's claims and enforcing the compromise, is not vested with all the powers that a liquidator would have under the Companies Act. He does not represent the company. See **Henochsberg on the Companies Act** at 545 to 546**; Blackman, Commentary on the Companies Act** at pages 12-11 to 12-14; ***Imperial Bank Ltd v Barnard and Others NNO*** 2013 (5) SA 612 (SCA) at 618-620; ***South African Fabrics v Millman, NO and Another*** 1972 (4)SAa 592 (a) AT 600; ***De Villiers and Others v Electronic Media Network (Pty) Ltd*** 1991 (2) SA 180 (W) esp. at 184 J to 185 B.

[B] THE ADMINISTRATION OF ESTATES ACT 66 OF 1965 (DOES IT APPLY?)

[12] Yes, the above Act cannot be left out of the equation. In my finding it applies with full force herein. I thus agree that the proposed relief is also incompetent by reason of the provisions of the Administration of Estates Act in that it purports to permit the administration of the estate of a deceased person or a significant part thereof, and indirectly the dealing

with certain assets of a deceased estate outside the provisions of this Act. The following provisions are of cardinal importance and are imperative:

(a) This Act makes it clear that deceased estates are not to be liquidated without letters of Executorship, or otherwise subject to the discretion of the Master of the High Court (Section 13); (b) The Master appoints an executor in terms of this Act, to liquidate and distribute the estate of a deceased person (subject to the provisions of the Act); (c) Even in exceptional circumstances provided for in the Act under discussion, all Executors are required to conduct the administration of a deceased estate: (i) Subject to the supervision and direction of the Master; and (ii) After having given such security to the satisfaction of the Master for the performance of his functions. Importantly, provision is made in the Act for a situation in which no Executor has yet been appointed to the estate of a deceased person, and in those circumstances the Master may appoint a person as an Interim Curator to the estate to deal with the estate of a deceased person until Letters of Executorship have been granted or signed and sealed as provided for in Section 12 of the Act.

[13] The appointment of a person by the Master as Interim Curator in terms of the Act is subject to two important qualifications (both of which clearly the Applicant proposes to avoid). The first is provided for in Section 12 (2) of the Act, in that every person to be appointed shall (before a Certificate of Appointment is issued to him) find security to the satisfaction of the Master in the amount determined by the Master for the proper performance of his functions. The second is that an Interim Curator is required (in terms of Section 12 (6) of the Act) to account for the property in respect of which he has been appointed in such manner as the Master may direct. An Interim Curator remains in office only until such time as an Executor is appointed.

[14] The above shows clearly that the appointment that the Applicant in the instant matter seeks is:

(a) An appointment which is not provided for in the Act; (b) Is one that is not subject to the supervision of the Master and in respect of which the Applicant will not be required to account to the Master; (c) Is one in respect of which the Applicant will not be required to give security to the Master for the performance of his functions; (d) Envisages the administration and dealing with an asset of the deceased estate (shares in the company) in a manner at variance with the way in which estates are dealt with in terms of the Act.

[15] It remains important to note that in those instances in which the Courts have been prepared (on application made) to appoint Interim Curators in respect of assets or the business of a deceased person prior to (or in the absence of) an Executor having been appointed, the courts have consistently required that such appointment be subject to the supervision of the Master and the person so appointed giving security to the satisfaction of the Master for the performance of his functions. See: ***Ex Parte Adkins*** 1937 ECL 188; ***Ex Parte McEwan*** 1930 WLD 325; **Meyerwitz, The Law and Practice of Administration of Deceased Estates** (2010 Edition) page 7-1 to 9-15 especially 7-3 to 7-6.

[16] With regard to the issue of giving security, it deserved to be pointed out that the estate of the late Roza is that of a person who was ordinarily resident and domiciled in Moscow in the Russian Federation and not in South Africa. The only mentioned assets of the deceased are the shares in the company. Ordinarily shares are considered in South African law to be incorporeal movables. There appears to be neither cash nor any

immovable property of any kind in the South African estate of the late Roza. It would appear thus that in the circumstances the Master would be entitled to appoint an appropriate person to liquidate the South African estate in the manner as provided in Section 25 (a) (ii) of the Act, in which event the Master would not be required to insist on security being given.

[17] It appears in the Answering papers that the Third Respondent wishes that an independent person (neither the Fourth Respondent nor the Applicant) be appointed by the Master as Executor to the South African estate of her late mother (Roza) and that such person be appointed in terms of the Administration of Estates Act. In the interim and if there is to be a further delay in the Master appointing an Executor, it would appear to be appropriate that an Interim Curator be appointed by the Master to the estate of the late Roza in terms of Section 12 of the Act. That person so appointed will then be in a position to be recognized as the shareholder of the company, *nomine officii*. The latter person will be appointed by the Master, and shall have obligation to account to the Master and be required to give security to the Master for the performance of his functions. I am told that the Third Respondent has already made such a request to the Master. In the Answering papers the Third and Fifth Respondents dispute that the Applicant is a suitable person to be appointed. I hold that for the reasons advanced *supra* the relief sought must be refused. In other words, this application qualifies to be determined only on this point in *limine*.

[C] URGENCY

[18] Mr. Montzinger contended that on the basis of what the applicant set out in the Founding Affidavit the matter is urgent. On the other hand Mr. Gess submitted that the matter hardly qualifies to be on this Roll in that in his contention it is not at all urgent. It is of importance to note that Roza

died in Moscow on 3 August 2013. According to the Founding papers the Applicant has been involved in discussions with Kresfelder (as proposed Crisis Manager) and with the Fourth Respondent relating to the affairs of the company. These discussions started in November 2013. It is not clear why these discussions could not take place earlier on. The application was lodged with the Master on 14 January 2014 for the appointment of the Fourth Respondent as Executor even though Roza died on 3 August 2013. Accordingly, I would not differ with Mr. Gess that "urgency" is of the Applicant's own making. It is clear that on this aspect also the Applicant has obvious difficulty. Lack of urgency entitles the Court to strike an application off Roll with the necessary costs order to compensate a Respondent who is dragged to Court on short notice. However, this matter having been dealt with as shown above qualifies itself to be dismissed on the point *in limine* correctly raised on behalf of the Respondents fully dealt with earlier on in this judgment.

COSTS

[19] The purpose of costs is to *inter alia* indemnify the successful party for the expenses to which he has been put through having been unjustly compelled to defend litigation. The general rule of our law is that costs follow the event; that is a successful party is awarded costs. An award of costs is always a matter of discretion in all the circumstances of the case dealt with. Mr. Montzinger contended that the costs herein should be paid by the third and Fifth Respondnets in the event the application is successful. In the alternative, contended Mr. Montzinger, should the Court dismiss the application the costs should be borne by the First Respondent in that (in his view) the Applicant acted and is acting in the best interest of the First Respondent. I do not agree with the latter contention.

ORDER

[20] In the circumstances the following order is made:

(a) The application is dismissed with costs.

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DLODLO, J

APPEARANCES:

For the Applicant	:	**ADV. ADRIAN MONTZINGER**
Instructed by	:	Heyns & Partners Inc. (Ref: PF Theron – 021 424 7008)
For Third & Fifth Respondents	:	**ADV. DAVID GESS**
Instructed by	:	Springer-Nel Attorneys (Ref: A. Springer – 021 426 1521)
First, Second, Fourth, Six, Seventh and Eighth Respondents	:	**NO REPRESENTATION**