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

CASE NUMBER 578812021

In the matter between:

JOHANNES MARIUS DE JAGER N.O (In his capacity as the executor of the Estate late RCG Hellinger	Applicant

And

CHRISTIAAN RUDOLF HELLINGER	First Respondent
THE SHERIFF OF THE COURT (PAARL)	Second Respondent
THE SHERIFF OF THE COURT (STELLENBOSCH)	Third Respondent

In re the ex parte application of:

CHRISTIAAN RUDOLF HELLINGER	Applicant

JUDGMENT (LEAVE TO APPEAL)

KUSEVITSKY J

Introduction and Summary

[1] This is an application for leave to appeal against my judgment handed down on 20 January 2022 in which the Applicant in his capacity as executor of the deceased estate ("the Executor") of the late RCG Hellinger, brought an interlocutory application in terms of Uniform Rules 6(14) and Rule 12 to intervene in an ex parte application which was brought by the First Respondent, who is the son of the late Mr Hellinger and also an heir and beneficiary of the deceased estate of his late father.

[2] The ex patte application was brought by the First Respondent in terms of Rule 23(1) seeking an order of attachment to confirm jurisdiction and an application to sue foreign entities in Panama and Mauritius by edictal citation. It is common cause that the First Respondent, his siblings and the deceased's widow, his stepmother, are heirs to the deceased's South African estate and that they are pursuing an action in pursuance of their inheritance interests in the deceased estate. The Executor has also been cited in his representative capacity in that action.

Summary of events

3 It is common cause that the Executor informed the heirs that there was no property to be attached and that he refused to pursue the heirs' claim against the foreign companies which had led them to bring the ex parte application to sue those entities via attachment and edictal citation. They also raised their concerns about the Executor's bias inter alia that:

3.2 The Executor was the personal attorney of the deceased and one of the directors of Cape Chamonix Holdings, a holding company which contained inter alia the local estate assets and according to correspondence, which capacity he refused to divulge information

pertaining to the assets to the heirs. He subsequently resigned having been reminded by the heirs of this conflict of interest;

3.3 Was according to him (the Executor), the sole director of a company whose shares were bequeathed to the foreign entity being the Buffalo Trust (Mauritius) - the very same company which the Executor refused to pursue the inheritance claims against on behalf of the heirs.

[41 It was only upon questioning the Executor of these conflicts that then only did he resign from the directorship. He also failed to deal with the proceeds of estate assets properly, having transferred the proceeds thereof to his firms' trust account despite the request of the heirs to not do so. It is also common cause that the Executor set aside and utilised funds from proceeds of the sale of property belonging to the deceased estate, to fund his opposition to the heirs' ex parte application to pursue their inheritance claims.

[5]It is common cause that the heirs proceeded with the Ex Parte application and obtained an order of attachment on 8 April 2021 and permission to sue via edictal citation was granted by Fortuin J ("the Fortuin Order"). The Executor then proceeded to bring an application to intervene in terms of Uniform Rules 14 and 12 and sought to set aside the orders of attachment, citing that it was the Executor's assets and that it was incompetent for the heirs to have attached the assets belonging to an incola of the court to confirm jurisdiction. The Executor also belatedly amended his notice of motion to include a prayer that the orders of attachment had lapsed since the action contemplated in the order was merely issued and not served on the foreign peregrine within the 15 days stipulated in the Fortuin Order.

[6] The application in the court a quo was framed as an interlocutory intervention application. No mention was made of it being a reconsideration of an order granted specifically in terms of rule 6 (12) (c) as was argued in the leave to appeal and most certainly no case was advanced in reliance of this sub-rule. In the judgment of the

court a quo, the court found that the Executor did not make out a case for intervention and since no evidence was adduced in reliance of Rule 6 (12) (c), the court proceeded on the basis that an application for the setting aside of an order was not competent.

[7] Most of the argument advanced in the interlocutory application and the application for leave to appeal focused on the contention that the heirs could not attach the property belonging to the Executor. However, what the Executor has failed to appreciate is that he is acting in a fiduciary capacity and that in such a capacity, his job is to administer the propOt in terms of the will. Unfortunately, it is clear and the hat that he is wearing in these proceedings is not that of Executor handling the estate to the benefit of the beneficiaries, but rather in his own interest having interests in the foreign entities which is the subject matter of the heirs' action proceedings, in which he is cited in his representative capacity - and which action he is attempting to quash. Essentially he is attempting to block the heirs' actions in seeking to assert their rights to challenge actions perpetrated by entities which would impact on their inheritance. I am unsure if there would be any better indication of bias and conflict.

[8] The court a quo found that the Executor had a conflict of interest and did not make out a case for the intervention. The court also found that the question of whether the summons had lapsed was a point that should be dealt with in the action proceedings.

[9] I am not persuaded that another court will come to a different conclusion. For these reasons the application for leave to appeal must fail. The reasons therefore are stated hereunder.

[10] For purposes of this application, I will refer to the parties as cited before.

Arguments advanced

[11] The Applicant contends that the assets which were attached vests in him in his capacity as executor, are not owned by the Buffalo Trust and that accordingly, it cannot be subject of an attachment order for the purpose of establishing jurisdiction over the Buffalo Trust. The Applicant further contends that the Order was incompetently sought without citation of, or notice to the Applicant as executor, despite the estate's direct and substantial interest in the relief that was sought and granted. The Applicant contends that the Order and the attachments have in any event lapsed, as summons was not served timeously in accordance with the terms of the Order.

[12] I do not propose to list all of the grounds raised in the application for leave to appeal suffice to say that the Applicant contends that the court a quo ought to have:

7 1 Found that the ex parte order was incompetent as the Applicant should have been cited insofar as the deceased estate had an interest in the relief sought;

7.2 As the property attached pursuant to the order was not owned by the foreign peregrine, its attachment could not and did not constitute a basis on which to confirm jurisdiction over them; and

7.3 The attachments had in any event lapsed.

[131 It is trite that in terms of section 17 (l)(a)(i) of the Superior Courts Act, the test for the granting of leave to appeal is more stringent. Section 17 (1) provides as follows:

"Section 17(1)

(1) Leave to appeal may u/Lbe given where thejudge orjudges concerned ate of the opinion that-

(a)(i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be head, including conflicting judgments on the matter under consideration;

(b)the decision sought on appeal does not fall within the ambit of section 16; and (c)wheæ the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the mal issues between the parties. " {My emphasis]

[14] The test which was applied previously in applications of this nature was whether there were reasonable prospects that another court may come to a different conclusion. See Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 8908. What emerges from section 17 (1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out above and is deduced from the words 'only' used in the said section. See The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (I-CC) at para [61, where Bertelsmann J held as follows:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a masonable prospect that another court might come to a different conclusion, see Van
Heerden v Cronwrjght & Others 1985 (2) SA 342 (T) at 343H. The use of the
the word "would" in
court will d iffer from the cowl
whose iudqment is sought to Þe appealed against [My emphasis].

[15] The Applicant contends that it was not competent for the First Respondent to have sought the attachment of the share certificate and the cash and an order attaching them should not have been granted. This is so because the share certificate, the shares and the cash belongs to the Executor - they do not belong to the Butler Trust and in order to confer jurisdiction, the property must belong to the person of whom jurisdiction is sought to be conferred. Thus in order to be able to attach the shares, it is a legal requirement that the share certificate and the cash must belong to the Butler Trust.

[16] There is no dispute concerning the legal principles of attachment ad fundandam. The Applicant has conflated the issue and his arguments presented in this regard are premature. The Executor has a fiduciary duty to deal with the assets of an estate to the benefit of the heirs and not to deal with it as his own assets with the intention of disqualifying the heirs to potential inheritance to their detriment and prejudice and contrary to his fiduciary duty to them.

[17] The Applicant furthermore contends that the court a quo erred in finding that a party affected by an ex parte order is not entitled to intervene in an ex patte application and seek the reconsideration of the order in terms of Rule 12, where rule 6(12) (c) explicitly provides therefore and erred in finding that an affected party can only intervene to challenge an ex patte order on appeal. This however, was not the Applicant's case in the court a quo and it is most certainly not up to a litigant to attempt to refine its relief or argue some other point on appeal.

[18] Rule 6 (12) (c) states the following:

> '(c) A person against whom an oner was granted in his absence in an urgent application may by notice set down the mater for reconsideration of the order. '

[19] First of all, the notice of motion made no reference to a reconsideration of an order in terms of Rule 6 (12) (c), there is only a generic reference to sub-rule 14. Neither did the Applicant seek a reconsideration of the order as the rule requires.

[20] What was in fact vociferously argued, was i) the application for intervention, ii) the nature of the attachment, in other words the incompetence of the attachment as a result of the ownership dispute, iii) the setting aside of the attachments and iv) the lapse of the attachment orders by virtue of the fact that the summons was issued and not served timeously on the foreign peregrine as provided for in the Fortuin Order. What it thus sought was an application to intervene and the setting aside of the orders made. There is no reference to a reconsideration of an order.

[21] In my view, an Applicant seeking reliance on rule 6 (12) (c) has to be precise in his or her notice of motion about the relief sought and the affidavit must contain sufficient allegations and/or evidence must be placed before a court seized with such an application, and to fully provide the reasons for which he seeks such a reconsideration in order to place it in a position to adequately reconsider the order granted. This was not done in casu. This ground of appeal is therefore without merit.

[22] The next ground to be considered is whether it was competent for the First Respondent to have proceeded on an ex parte basis. In the court a quo judgment, I dealt with the reasons advanced by the First Respondent as to the conduct of the Executor which led to them proceeding via Ex parte proceedings!

[231 In ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others 1996 (4) SA 484 WLD, the court had occasion to deal with the sub-rule reflecting that the rule being widely formulated, permitted an aggrieved person against whom an order was granted in an urgent application, to have the order reconsidered, provided that it was granted in his absence and that the underlying pivot to which the exercise is coupled is the absence of the aggrieved party at the time of the grant of the order. It affords an aggrieved person a mechanism designed to redress imbalances in, and injustices and oppression flowing from an order granted as a matter of urgency in his absence.2

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[1] Paragraphs 7 to 20 of the Judgment

ISDN at 486H-J

[241 Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. These will include questions relating to whether an imbalance, oppression or

injustice has resulted and, if so, the nature and extent thereof and whether redress is open to attainment by virtue of the existence of other or alternative remedies.[1]

[25] As I stated in the judgment, the Applicant as executor of the estate was aware of the application. He refused to acquiesce to the requests of the heirs to pursue their claim and they accordingly initiated the Beddingfiled principle in their personal capacities to pursue the claims.[2] 1 also dealt with the reasons for his refusal and his conflict of interest in the matter as evidenced in the correspondence[3][4]. In ISDN, the court refused the rule 6(12) (c) application inter alia because the court was satisfied that the applicant had known that an order would be sought and that the applicant failed to demonstrate oppression, injustice or imbalance in justifying the court to exercise its discretion to overturn the order in its favour.

[26] In the court a quo judgment[e], I referred to the sale by the Executor of the Struisbaai property. In correspondence relating thereto, it is common cause that the Applicant transferred the proceeds of the sale of the Struisbaai property into his trust account, earmarked 'for future legal costs'. The reference of the deposit made reads

as follows "EKSEKUTEUR BOEDEL WYLE RCJ HELL/NGER - VERKRYGWG VAN
OPINIE EN OPPONEER*AANSOEK)"*[7]

[27] In the First Respondents opposing affidavit, he requested an undertaking from the Applicant as executor to not transfer any funds from the proceeds of sale from the Struisbaai property to any other account. The email was sent to the Executor on 15 March 2021 requesting an undertaking by 16 March 2021. The undertaking was not provided by the Executor and in fact on that same day, he instead, contrary to the

[1] ISDN at 487B-C
[2] Paragraphs 21 — 22 of the Judgment
[3] Paragraph 15 of the Judgment
[4] Paragraph 23 of the Judgment

request for an undertaking, transferred the proceeds to his own firm's trust account, despite the request by the heirs to not do so.

[281 He was also told that the heirs would bring an application to attach the property to confirm jurisdiction against the Mauritian Trust. His answer to this was not a denial that the property belonged to the estate, but rather stated the following "l have been advised that [the] Buffalo Trust has no money or any other asset in the estate at this point in time, and as the result that there Is nothing for your cliens [sic] to attach ad fundandamjurisdictionem". The Executor was aware of the application, he did not claim that they could not attach the assets as is his assertion now, and he has not advanced reasons why there would be prejudice or oppression to him as Executor as compared to the heirs. I am therefore satisfied that this ground of appeal must similarly fail.

[29] The next ground of appeal relates to whether the First Respondent failed to institute the action proceedings timeously within the period prescribed for in the

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[7] (EXECUTOR ESTATE LATE RCJ HELLINGER - OBTAIN OPINION AND OPPOSE APPLICATION)
Fortuin order, having the effect of the lapsing of the order and the subsequent attachments.

[301 In an amended notice of motion, the Applicant sought an order declaring that the attachment as contained in the Fortuin order had lapsed by virtue of the fact that it had not been served on the foreign peregrine timeously in terms of the Order. It is common cause that the summons was issued by the Registrar on 30 April 2021. The Applicant argued that the failure to have served the summons by 30 April 2021, i.e. 15 days after the order was issued on 8 April 2021 amounts to a lapsing of the attachments.

[31]In the judgment of the court a quo, the court stated that this issue was best ventilated in the action proceedings. First of all, the cases relied upon by the Applicant all concerning statutory provisions or regulations which requires that an application has to be made within a specified time period.

[32] In Finishing Touch 163 v BHPBi//iton Energy Coal SA 2013 (2) SA 204, the court stated, in an appeal concerned the interpretation of a court order, that the starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the courts intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.[5] The court stated the following:

> "[141 It is necessary to place the Preller J order in proper perspective and to examine its terms and purpose in order to determine the intention of the learned judge when he used the word 'initiate'. In doing so, one has to consider the context in which the order was made..."

[33] In Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies 1972

(1) SA 773 (A), referring to Marine and Trade Insurance Co. Ltd v Reddinger[e] , the court stated as follows:

> "Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him "10 ('My emphasis")

[34] The case law indicates that there is a distinction between the manner in which an action is commenced, to that of an application. If one follows the rationale in Finishing Touches and take into account the surrounding circumstances, which was that the First Respondent sought an order of attachment in order to serve a process via

[5] at para 13; See also Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)

edictal citation, then it is clear that the intention of the Fortuin Order, notwithstanding that it was taken Ex pane, was that action had to be commenced within 15 days. The cases relied upon by the Applicant are distinguishable in casu, since the question of a plaintiff or applicant being supine in its behaviour does not arise since it is he himself having sought such permission to institute the action in the first instance.

[35] A further aspect which bears mentioning is that the Applicant's Notice to amend was filed together with his replying affidavit — and after the First Respondent had filed his opposing affidavit. In the Notice to Amend, the Applicant sought

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[9] 1966 (2) SA407 (A)

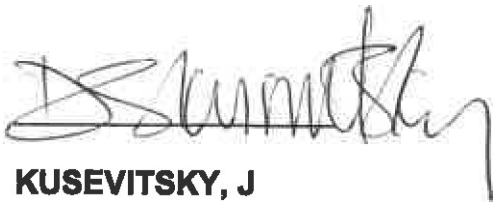
[10] At 780F-G

additional relief that the Fortuin Order had lapsed since the summons had not been served on the foreign peregrine by 30 April 202. The notice further states that this application would be sought at the hearing of the matter. In other words, the First Respondent was not given an opportunity to oppose that relief sought on affidavit and it cannot be said that an applicant can rely as a ground of appeal, that which was not fully ventilated on the papers. In my judgment, I held that the proceedings a quo were not the forum to deal with that challenge and I am not convinced that another court will come to a different conclusion. For these reasons, the ground of appeal in this respect must fail. The Fortuin order was interim in nature and the assets complained of is held by the Applicant by virtue of his fiduciary obligation to the heirs of the deceased estate of which he is the executor.

[36] For all of the reasons above, I am of the view that another court will not come to another conclusion and the application for leave to appeal must fail.

In the circumstances, I make the following order:

1. The Application for leave to appeal is dismissed with costs.



KUSEVITSKY, J