



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D2913/2018

In the matter between:

FNB FIDUCIARY (PTY) LTD N.O.

APPLICANT

and

KUMARAVASAN ANAPPA

FIRST RESPONDENT

DIRENDRA RAJARUTHNAM

SECOND RESPONDENT

SUGHANDHINI RAJARUTHNAM

THIRD RESPONDENT

PONNUSAMY RAJARUTHNAM

FOURTH RESPONDENT

VIOLET PILLAY

FIFTH RESPONDENT

THE MASTER OF THE HIGH COURT, DURBAN

SIXTH RESPONDENT

IAN WYLES AUCTIONEERS

SEVENTH RESPONDENT

ORDER

The following order will issue:

1. The application is dismissed with costs.

JUDGMENT

HENRIQUES J

Introduction

[1] This opposed application concerns the validity of the fifth respondent's appointment as executrix and the disposal by her of the member's interest in MN Pillay Properties Investments CC.

[2] The applicant instituted urgent proceedings on 23 March 2018 in which it sought a rule nisi with interim relief. Such interim relief was for the respondents, excluding the sixth respondent, to be interdicted and restrained from dealing with, alienating or encumbering the said member's interest, alternatively, the assets or properties of MN Pillay Properties Investments CC, being 48 Hunslett Road, Phoenix Industrial Park, and directing all income and rentals receivable in relation to such assets be paid to the applicant's attorneys to be held in trust.

[3] On 23 March 2018, a rule nisi was not issued, and the interim relief foreshadowed in para 3 of the notice of motion was granted by consent. Further orders were issued as follows:

'1. Pending finalisation of this application the 1st to 5th Respondents are interdicted from in any way dealing with, alienating or encumbering the members' interest or the assets and properties belonging to MN Properties Investments CC (being 48 Hunslett Road, Phoenix Industrial Park), and directing that all income and rentals receivable in relation to such assets be paid to the Applicant's attorneys, to be held in trust. Provided that the said attorneys will be entitled to release such amounts for payment of expenses of MN Properties CC, provided all the Respondents aforesaid consent in writing thereto, or with the consent of the Court.'

[4] The Rajaruthnams (the second, third and fourth respondents) were given leave to withdraw their opposition and abide the court's ruling or judgment on the basis that the costs order originally sought in the notice of motion was no longer being pursued. The first and fifth respondents were directed to deliver any answering affidavits and the applicant, any replying affidavit. The application was adjourned sine die and costs reserved.

[5] Essentially the relief foreshadowed in the notice of motion was the following:

'2. That a *rule nisi* do hereby issue calling upon the respondents to show cause, if any, to this court on the day of 2018 why an order in the following terms should not be granted:

2.1 the appointment of the fifth respondent as executrix in the deceased estate of Ganasen Pillay, who died on 26 September 2017, by the sixth respondent be and is hereby declared null and void *ab initio*, alternatively is set aside;

- 2.2 it is declared that the applicant is the only duly appointed executor in the said deceased estate, having been appointed as such by the sixth respondent on the 26th of January 2018;
- 2.3 the purported dispositions of the members' interest in MN Pillay Properties Investments CC by the fifth respondent to the first respondent and thereafter by the first respondent to the second, third and fourth respondents be and are hereby declared null and void, alternatively are set aside;
- 2.4 declaring that the said members' interests are owned by the said deceased estate;
- 2.5 directing the second, third and fourth respondents to do all things necessary, and sign all documents required, to allow registration of the members' interests in MN Pillay Properties Investments CC to be transferred back into the deceased estate of Ganasen Pillay, to be administered by the first applicant¹ in accordance with the deceased's will dated 12 October 2012;
- 2.6 that the costs of this application be paid by the respondents jointly and severally.'

Issues

- [6] The issues for determination in this application are:
- (a) whether the appointment of the fifth respondent by the sixth respondent (the Master) as executrix is void *ab initio* and falls to be set aside; or
 - (b) where there has been an irregularity in the appointment of an executrix and a contract is concluded by her pursuant to such appointment, is such contract void *ab initio*;
 - (c) if not, then despite the irregularity in the appointment can a contract concluded by her be set aside subsequent to performance?.

[7] The issues in the application relate to the disposition of the member's interest by the fifth respondent to the first respondent and the Rajaruthnams, which is the immovable property. If the applicant is correct, then the sale of the member's interest is null and void and will have to be transferred back to the deceased's estate.

¹ This is a reference to the applicant.

Factual matrix

[8] It is common cause that during her lifetime, the fifth respondent was married in community of property to the deceased being Ganasen Pillay (the deceased), who died on 26 September 2017. On 12 October 2012, the deceased executed a will in terms whereof the applicant was appointed by the deceased as the executor of his estate.

[9] Following the deceased's death, the fifth respondent applied to the Master to be appointed as executrix of the deceased's estate. At the time of doing so, the fifth respondent laboured under the impression that the deceased had "cancelled" his will and did not have a will. Consequently, the existence of this will was not disclosed to the Master. Pursuant to the fifth respondent's request, the Master appointed her as executrix of the deceased's intestate estate in terms of letters of executorship issued on 2 October 2017. Such appointment was made in terms of s 18 of the Administration of Estates Act 66 of 1965 (the Act) in circumstances where the deceased died without having executed a will and nominating an executor/executrix.

[10] As a result of such appointment, the fifth respondent became the executrix of a one-half undivided share in the joint community of property estate. In addition, she applied to transfer to herself the deceased's entire member's interest in MN Pillay Properties Investments CC (the CC) and thus acquired the 100 per cent member's interest in the CC which owned nine mini factories in Phoenix Industrial Park at 48 Hunslett Road, Phoenix described as Erf 134, Portion 3, Phoenix Industrial Park.

[11] In her capacity as executrix and surviving spouse, the fifth respondent sold the joint estate's 100 per cent member's interest in the CC to the first respondent in terms of s 35 of the Close Corporations Act 69 of 1984 (Close Corporations Act) for a gross sale price of R7 million.

[12] After ownership of the 100 per cent member's interest had passed to the first respondent, and he had been registered as the sole member of the CC, he in turn sold and transferred ownership of the 100 per cent member's interest in the CC to the Rajaruthnams for a purchase consideration of R8.5 million.

[13] It is common cause that at the time of the fifth respondent's appointment as executrix of the deceased estate and the sale of the 100 per cent member's interest

in the CC, a will which the deceased had executed was in existence, although the fifth respondent indicates she was not aware of the existence thereof.

[14] Subsequently, on learning of the death of the deceased, the applicant through its authorised representative made enquiries in December 2017 with the fifth respondent in relation to the deceased and his estate. The fifth respondent on being made aware of the existence of the will and the applicant's nomination therein as executor, and following legal advice received, surrendered the letters of executorship issued by the Master in her name. The applicant subsequently applied to the Master to be appointed as executor in accordance with the will and was appointed under letters of executorship by the Master on 26 January 2018.

[15] It is common cause that the nine mini factories were and are rented out. An initial valuation of the immovable property conducted by the seventh respondent reflected a value of R13 747 402 on the open market and R9 623 000 in a forced sale. The valuation also referred to rental income from the property in the sum of R174 480.65 per month. However, a subsequent revised income and expenditure statement prepared by the seventh respondent reflected a lower rental income of R149 480.65.

The first respondent

[16] The first respondent, in his answering affidavit, opposes all the relief foreshadowed in the notice of motion. His involvement in the matter is limited to that of an innocent purchaser of the member's interest in the CC from the executrix of the deceased's estate and from the fifth respondent personally, being the surviving spouse of the deceased.

[17] He submits that at the time of her appointment by the Master, the fifth respondent was entitled to deal with her 50 per cent interest in the CC by virtue of her marriage in community of property to the deceased. He further submits that the fifth respondent was entitled to deal with the deceased's 50 per cent share of the joint estate in light of her appointment as executrix. In addition, he submits that the fifth respondent was registered as a member of the CC and consequently in terms of s 54 of the Close Corporations Act, the CC is bound by the acts of the fifth respondent in concluding the purchase and sale agreement with him.

[18] Further, when he contracted with the fifth respondent, he did so at all material times in good faith. The first respondent in addition also attacks the appointment of the applicant as executor of the joint estate and submits that it is defective as there is no basis for the Master to have appointed the applicant as executor of the estate of the surviving spouse, the fifth respondent. The letters of executorship make reference to the executor being authorised to liquidate and distribute the deceased's estate and that of the surviving spouse, the fifth respondent.

[19] Based on the representations of the fifth respondent as well as the Master, he was induced, to his prejudice, into concluding the purchase and sale agreement for the member's interest in the CC and consequently, the applicant is estopped from denying the validity and enforceability of the purchase and sale agreement.

The Rajaruthnams

[20] The Rajaruthnams initially opposed the application but at the hearing on 23 March 2018 withdrew such opposition save for the aspect of costs. Subsequently, their opposition was withdrawn in its entirety, as the issue of costs was resolved. However, it is necessary to consider what they said in answer to the application as their rights are affected by any order this court makes.

[21] In the initial answering affidavit filed by the Rajaruthnams, the following is averred:

- (a) On 18 January 2018, the first respondent sold them his 100 per cent member's interest in the CC for the sum of R8.5 million.
- (b) The first respondent misrepresented that he was entitled to sell such interest. Consequently, pursuant to the agreement of sale, the said respondents made the following payments to the first respondent: on 25 January 2018 the sum of R300 000, on 6 February 2018 the sum of R1.5 million and, on 2 February 2018 the sum of R7 million was paid into the trust account of the seventh respondent at the request of the first respondent. A further payment in the sum of R332 000 was paid in respect of arrear rates for the immovable property.
- (c) The Rajaruthnams became registered members of the CC on 3 January 2018. Subsequently, on 8 February 2018 the applicant's attorneys of record advised them of the situation and requested they contact the applicant's attorneys of record.

- (d) By a letter dated 9 February 2018, it was agreed that a meeting scheduled to take place on 16 February 2018 would attempt to resolve the matter amicably and the Rajaruthnams confirmed that they were bona fide purchasers of the property. However, by email dated 15 February 2018, the applicant's attorneys of record advised that the meeting would not take place as its instructions were to institute an application to court to set aside the sale of the member's interest.
- (e) On receipt of the application papers, the Rajaruthnams took the view that the first respondent was not entitled to sell the member's interest and did not oppose any of the relief sought, with the proviso that no costs orders would be pursued against them.
- (f) In addition, they submitted that the interim relief should go further and direct the seventh respondent to hold in trust the moneys paid to it together with the accumulated interest, as it was their intention to rescind the agreement and proceed against the first respondent for the recovery of all amounts paid to him.

The fifth respondent

[22] Although the fifth respondent filed an answering affidavit, she did not oppose the application at the hearing of the matter and essentially left the matter in the hands of the court. At the hearing of the opposed application, Ms *Dheoduth* made submissions on behalf of the fifth respondent in order to assist the court and filed explanatory heads of argument.

[23] The fifth respondent records in her answering affidavit that in the event of the court being disposed to granting any orders, she does not oppose the granting of the relief in paras 2.3, 2.4, 2.5 and 3 of the notice of motion; however, she does oppose the granting of the relief in paras 2.1 and 2.2 of the notice of motion.

[24] In her answering affidavit, the fifth respondent indicated that she did not know of the existence of the deceased's will and that same only surfaced and was communicated to her on 28 December 2017 and to her attorney in writing on 15 January 2018.

[25] Furthermore, she was appointed as executrix by the Master in terms of the laws of intestate succession on 2 October 2017. She indicated that the applicant was

aware of the will in December 2017 and about the sale of the member's interest in the CC on 9 February 2018, yet it did nothing prior to the institution of the application, despite knowing full well what the factual position was.

[26] She submits that the letters of executorship which appointed her as executrix by the Master authorised her to deal with her husband's estate as well as her half share to such estate. As a consequence of dissention between herself and the children of the deceased, after his death she sought legal advice in relation to the administration of her husband's estate. When her attorney enquired whether the deceased had a will, she indicated that she was not in possession of a will and her knowledge of any previous will was limited to what the deceased had informed her, namely, that he had "cancelled" his will.

[27] In that there was no will, her attorney assisted her in completing the documents to report her husband's estate to the Master, which she did. She did not make any misrepresentations to the Master. In the process of winding up the deceased's estate and reporting it, her attorney had two meetings with attorney Rishen Maharaj who represented the deceased's children. At the meeting Melaine,² the deceased's daughter, informed her attorney that she was aware that her father had died intestate and was willing to work with the fifth respondent's attorney to wind-up the estate. The deceased's daughter had also placed an advert in the local newspapers calling for anyone to come forward if they had her late father's will or had any information pertaining thereto.

[28] In addition, the fifth respondent's attorney of record contacted attorney Raj Badal who had attended to legal matters on the deceased's behalf and he confirmed that her late husband had not made a will with him. Badal however, informed her attorney that it would not surprise him if a will was subsequently found. She records that as a consequence she was of the 'correct and unmistakable view that [her] late husband had died intestate at the time'.

[29] She further submits that as a consequence of her marriage in community of property to the deceased, the deceased's will only deals with his portion of the joint estate. The will was not a joint or a massed will and even if it was, the applicant then ought to have sought her consent to adiate or repudiate the massing. The applicant

² The transcript of the telephone conversation records the spelling of the name as Marlene.

did not do so as the will of the deceased only deals with her husband's undivided half share in and to the joint estate by virtue of their marriage in community of property.

[30] Having regard to annexure "A" (the deceased's will), the deceased records his bequests to her and the other heirs and as a consequence is dealing with his estate, being the 50 per cent of the joint estate and not their entire estate. Consequently, when she dealt with the member's interest in and to the CC by virtue of her marriage in community of property and on the dissolution of her marriage by death, the fifth respondent became entitled to 50 per cent of the value of the member's interest and a further 33 per cent of her late husband's 50 per cent share in terms of his will.

[31] The fifth respondent submits that the will restricts the applicant to the administration of the deceased's estate and not hers. She confirmed that she was aware that in 2014/2015 her husband had cancelled all previous wills and was to draft a new will. Had she been aware of the existence of the will she would not have sought the assistance of an attorney but would have approached the applicant. She pertinently denies misleading the Master or making any fraudulent misrepresentations in this regard.

Submissions by the applicant

[32] The applicant submits that in relation to the first respondent, he has no legal as opposed to a financial interest in the appointment of the fifth respondent as executrix and has no interest in any of the relief being sought.

[33] The applicant further submits that the application falls to be decided on a question of law, namely, either the Master had the power to appoint the fifth respondent as an executrix but mistakenly exercised that power, or was purporting to exercise the power which he did not have at all. If he had the power to appoint the fifth respondent and mistakenly exercised that power, then the appointment would be valid until withdrawn and the fifth respondent would have the right to deal with the immovable property until her appointment was withdrawn. If he exercised a power he did not have at all, then his power to appoint the fifth respondent was lacking and rendered the fifth respondent's appointment void *ab initio*. In support of this

submission, Mr *Stokes SC*, who appeared for the applicant, relied on the decision in *Mvusi v Mvusi NO & others*.³

[34] It is common cause that the Master appointed the fifth respondent in the absence of a contrary nomination in a will in terms of s 18 of the Act. The applicant however submits that as there was a valid will in which it was appointed as executor, the Master could only act in accordance with s 14 of the Act and consequently, the Master exercised a power he did not have. It is for this reason that the appointment of the fifth respondent is rendered void *ab initio*.

[35] Following on the appointment of the fifth respondent being void *ab initio*, then her dealing with the assets in the deceased's estate is of no force or effect. The fifth respondent was therefore not entitled to pass ownership to the first respondent and consequently, the first respondent was not entitled to then pass ownership to the Rajaruthnams. It is under these circumstances that the applicant submits that the member's interest purportedly disposed of by the fifth respondent must be returned to the deceased estate. In addition, the applicant relies on the decision in *Mngadi NO v Ntuli & others*.⁴

[36] In relation to the passing of dominium, the applicant submits that our law does not concern itself with the validity of the underlying causa as South African law follows the abstract theory approach. Consequently, for a valid transfer of ownership the following requirements must be met:

- (a) the parties to the transfer must be in a position to pass and acquire ownership. In the instance of a deceased's estate, the transferor must be the executor or a representative or a person authorised by such executor;
- (b) the parties must be legally competent to give and receive transfer of ownership; and
- (c) the parties must intend passing ownership.

[37] It is for these reasons the applicant submits that as the fifth respondent's appointment by the Master was void *ab initio*, she had no authority to deal with the assets in the deceased's estate and consequently could not pass ownership to the first respondent.

³ *Mvusi v Mvusi NO & others* 1995 (4) SA 994 (Tks) at 1000.

⁴ *Mngadi NO v Ntuli & others* 1981 (3) SA 478 (D) at 484D-E.

[38] Mr *Stokes SC* submitted that the Master was only entitled to appoint the fifth respondent in the absence of a contrary nomination in the deceased's will. His power to appoint the fifth respondent derived from s 18 of the Act, which had no application as the deceased left a will. Consequently, as there was a will, the Master could only appoint the applicant in accordance with s 14 of the Act.

[39] Among the submissions made by the applicant is that the fifth respondent obtained appointment as executrix through fraud, alternatively, misrepresentation, the submission being that she was aware of the existence of the will when she applied to the Master for appointment as executrix. In support of this, the applicant relies on the contents of a letter received from the fifth respondent's attorney of record, K Maharaj, on 9 February 2018. In such letter, she surrendered her letters of executorship to the Master and 'conceded she was never entitled to be appointed as executrix'. The applicant also relies on a transcript of the telephonic discussion held between a representative of the applicant and the fifth respondent in December 2017 annexed to the papers as exhibit "F".

[40] In addition, the applicant alleges that the fifth respondent has been receiving income from the rental income of the properties, which is being distributed to herself and some of the heirs. In addition, it alleges she disposed of the immovable property at a fraction of its value, as there were two earlier offers, which substantially exceeded the sale price of the property to the first respondent, and she did so with the full knowledge of her attorney of record.

[41] According to the applicant, what is further suspicious in relation to the disposal of the immovable property, is the fact that the sale occurred on 20 November 2017 and the registration of the member's interest in the first respondent's name took place relatively soon thereafter on 7 December 2017, a period of approximately 17 days. In addition, the onward sale to the Rajaruthnams was also concluded fairly swiftly as they were appointed members of the CC on 3 January 2018.

Submissions by the first respondent

[42] Mr *Harcourt SC* who appeared for the first respondent, submitted in his heads of argument that the issues for determination in this application are the following, namely:

- (a) Where there has been an irregularity in the appointment of the executrix by the Master, is the contract concluded by the executrix void *ab initio*?
- (b) If not, then where there has been an irregularity in the appointment of the executrix, can a contract concluded by such executrix be set aside after there has been performance?

[43] He submits that the appointment of executors, be it testate or intestate, are made by the Master pursuant to, inter alia, ss 14 to 18 of the Act. A testator nominates a proposed executor/executrix of his/her estate and the Master has a discretion to either appoint the nominated executor or to appoint another executor in terms of s 22 read with s 54 of the Act.

[44] Relying on the decision in *Jacobs & others v Baumann NO & others*,⁵ the submission is that the appointment of an executrix constitutes an administrative act which even if irregular, remains valid until set aside in terms of the *Oudekraal* principle.⁶

[45] Even in circumstances where the appointment of an executrix was irregular, any contract in terms of which performance has occurred and in particular, where ownership of immovable property has passed, cannot be set aside. For this submission, he relies on the decision in *Legator McKenna Inc & another v Shea & others*.⁷

[46] He submits that the relief sought by the applicant fails to recognise that the member's interest in the CC is not owned solely by the deceased's estate but in equal, undivided shares by the joint estate of the widow (the fifth respondent) and the deceased.

Analysis

Preliminary legal question to be determined - locus standi in iudicio of the first respondent

[47] The preliminary legal question to be determined is the issue raised by the applicant relating to the locus standi of the first respondent to oppose the relief sought. The applicant submits that as the property had been onward transferred to

⁵ *Jacobs & others v Baumann NO & others* 2009 (5) SA 432 (SCA).

⁶ This principle was confirmed in the decision of *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC).

⁷ *Legator McKenna Inc & another v Shea & others* 2010 (1) SA 35 (SCA).

the Rajaruthnams, the first respondent does not have a direct and substantial interest in the application entitling him to oppose it. The submission being that he has no legal interest as opposed to a financial interest in respect of the validity of the appointment of the fifth respondent, nor can he oppose the orders seeking the transfer back to the deceased's estate of the member's interest from the Rajaruthnams.

[48] Locus standi in iudicio refers to the legal standing and capacity of a party to litigate and it is often said that this involves determining whether a party has a 'direct and substantial interest' in the right forming the subject matter of the litigation and in the outcome of the litigation.⁸ Whether a litigant has standing in a matter is determined by having regard to the particular facts and law applicable. In *JDJ Properties CC & another v Umngeni Local Municipality & another*,⁹ the court held the following:

'Whether a litigant's interest is sufficient to clothe him or her with standing involves a consideration of the facts, the statutory scheme involved (in public-law disputes, a statutory power is almost inevitably involved) and its purpose: the issue must, in other words, be determined in the light of the factual and legal context.' (Footnote omitted.)

[49] Such a determination requires a court to assume that the allegations made by the first respondent in the affidavits are true and correct.¹⁰ In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others*, the Constitutional Court held the following:

'And in determining Giant's standing, we must assume that its complaints about the lawfulness of the transaction are correct. This is because in determining a litigant's standing, a court must, as a matter of logic, assume that the challenge the litigant seeks to bring is justified. As Hoexter explains:

"The issue of standing is divorced from the substance of the case. It is therefore a question to be determined *in limine* [at the outset], before the merits are considered."¹¹ (Footnotes omitted.)

[50] The applicant submits that the only interest, which the first respondent has in the application, is a financial as opposed to a legal interest. The submission of Mr

⁸ *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (A) at 534A-E; *Wishart & others v Blieden NO & others* [2013] 1 All SA 485 (KZP) para 41.

⁹ *JDJ Properties CC & another v Umngeni Local Municipality & another* 2013 (2) SA 395 (SCA) para 27.

¹⁰ *Zulu & others v eThekweni Municipality & others* 2014 (4) SA 590 (CC) para 21; *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* 2013 (3) BCLR 251 (CC) para 32.

¹¹ *Giant Concerts* *ibid* para 32.

Stokes SC in this regard is that in seeking the transfer back to the deceased's estate of the member's interests from the Rajaruthnams, the first and fifth respondents have no interest, as they do not oppose such relief. The first respondent only has a financial interest in the validity of the appointment of the fifth respondent as executrix. What must be borne in mind is the fact that the applicant indicates that as the deceased at the time of his death had executed a will and appointed the applicant as executor, the Master only had the power to appoint the applicant and not the fifth respondent. The Master had to make such appointment and act in terms of the provisions of s 14 of the Act.

[51] If one considers the authorities on the issue of locus standi, the courts have held that a person has locus standi if they have a direct and substantial interest in the outcome of litigation or any orders, which may affect their rights. Part of the relief, which the applicant seeks, is for the fifth respondent to pay over the purchase price paid for the immovable property. It is common cause between the parties that such moneys have been paid into the applicant's attorneys trust account.

[52] It must be borne in mind that certain of the relief, specifically paras 2.3 and 2.4 of the orders in the notice of motion affect the first respondent. In my view, given the nature of the relief which the applicant is pursuing in the notice of motion, the first respondent has a direct and substantial interest in the proceedings.

[53] Consequently, it cannot be said that he does not have locus standi to oppose the relief, specifically that part of the relief sought in paras 2.3 and 2.4 of the notice of motion. If the transfer of the member's interest to the fifth respondent is set aside, the first respondent would be faced with an action from the Rajaruthnams. In any event, the applicant would not have cited him as a party in these proceedings if he did not have a direct and substantial interest in the proceedings.

The appointment of the fifth respondent as executrix

[54] In order to deal with the parties' submissions, it is useful to consider the relevant provisions of the Act. Section 14 of the Act reads as follows:

'14 Letters of the executorship to executors testamentary

(1) The Master shall, subject to subsection (2) and sections 16 and 22, on the written application of any person who –

- (a) has been nominated as executor by any deceased person by a will which has been registered and accepted in the office of the Master; and

(b) is not incapacitated from being an executor of the estate of the deceased and has complied with the provisions of this Act, grant letters of executorship to such person.’

[55] Section 18 reads as follows:

‘18 Proceedings on failure of nomination of executors or on death, incapacity or refusal to act, etc

- (1) The Master shall, subject to the provisions of subsections (3), (5) and (6)-
 (a) if any person has died without having by will nominated any person to be his executor; or. . .

appoint and grant letters of executorship to such person or persons whom he may deem fit and proper to be executor or executors of the estate of the deceased, or, if he deems it necessary or expedient, by notice published in the *Gazette* and in such other manner as in his opinion is best calculated to bring it to the attention of the persons concerned, call upon the surviving spouse (if any), the heirs of the deceased and all persons having claims against the estate, to attend before him or, if more expedient, before any other Master or any magistrate at a time and place specified in the notice, for the purpose of recommending to the Master for appointment as executor or executors, a person or a specified number of persons.’

[56] It is common cause on the papers that the Master appointed the fifth respondent in terms of s 18 of the Act at a time when it was believed that the deceased died intestate. Although there was a suggestion in the papers that the fifth respondent misrepresented the true position, was mala fide and acted in a fraudulent manner, Mr *Stokes* did not strenuously pursue this line of argument.

[57] In the course of making submissions, Mr *Stokes* relied on the decision in *Mvusi*.¹² In this decision, Davies AJ considered the case of *Mngadi*.¹³ In such matter, the deceased had been married twice and had executed a will in which his first wife had been appointed as the executrix of his estate. He entered into a second marriage at the time of which the will had not been revoked. After his death, the will was accepted and registered by the Master. However, his second wife had been appointed by an additional Bantu Affairs Commission as representative of the deceased’s estate in terms of reg 4(1) of the Regulations for the administration and distribution of the estates of deceased Bantu, GN R34, RG 1331, 7 January 1966.

¹² *Mvusi v Mvusi NO & others* 1995 (4) SA 994 (Tks) at 1000.

¹³ *Mngadi NO v Ntuli & others* 1981 (3) SA 478 (D).

Both the Bantu Affairs Commissioner and the second wife were unaware of the existence of the will. The second wife had sold and transferred certain immovable property in the estate to the second defendant who in turn sold and transferred it to the third defendant.

[58] Page J declined to follow the reasoning underlying the decision in *Brand, NO v Volkskas Bpk & another*.¹⁴ He was of the view that the decision in such case was distinguishable and held that the appointment of the first defendant being the second wife was void *ab initio* and that she had no power to transfer the ownership of the immovable properties to the second defendant. The ownership of the properties remained vested in the estate of the deceased of which the first wife was a duly appointed representative.¹⁵

[59] In *Mvusi*, the Transkei High Court took the view that when the magistrate appointed Jotham (J), he was “mistakenly exercising a power which he had” and was not “purporting to exercise a power which he did not have at all”. The appointment of J was valid until such time as the appointment was withdrawn and J had the right to deal with the immovable property.¹⁶

[60] In my view, the facts of *Mvusi* are distinguishable from the present matter. In *Mvusi*’s matter, J who had been appointed as the representative of the deceased’s estate had represented that he was the sole beneficiary of the deceased’s estate, transferred the property onto his name and then on-sold it to a third party. Such third party was aware of the defect in J’s title. There was no innocent third party purchaser and in any event, J had misrepresented to the magistrate when he obtained his appointment that he was the sole heir to the estate of the deceased. The court took the view that J acted in fraud of the true heirs when he transferred the immovable property to a third party. Unlike in the present matter, there is nothing to show that the first respondent and the Rajaruthnams were aware of any defect in the fifth respondent’s title to transfer the membership interest and sell the immovable property.

[61] The decision in *Mngadi* is also distinguishable as different statutes were applicable. The court in *Mngadi*’s case was of the view that the regulations only

¹⁴ *Brand, NO v Volkskas Bpk & another* 1959 (1) SA 494 (T).

¹⁵ See fn 13 above at 484E-G.

¹⁶ See fn 12 above at 1000F-G.

empowered a commissioner to appoint an executor where a deceased person had died leaving no valid will. In the current matter, the Master is empowered by statute to appoint an executor with or without a valid will. Consequently, the Master when appointing the fifth respondent, exercised a power which he had in terms of the Administration of Estates Act, without knowledge of the existence of a will, and consequently such exercise of power cannot be void *ab initio*.

[62] In my view, one must accept that as the fifth respondent was unaware of the existence of the deceased's will at the time she applied for appointment as executrix, her application to the Master was not fraudulent nor did she misrepresent the factual position. She genuinely believed in my view that the deceased had "cancelled" his old will. Steps were taken and enquiries were made to ascertain whether or not the deceased left a will.

[63] This is borne out by the advertisement that was placed in the local newspapers by the deceased's daughter as well as the enquiries made by the deceased's attorney and even with the applicant. Furthermore, the telephonic exchange with the applicant's representative does not indicate any knowledge on the fifth respondent's part of the existence of a will; in fact, she relied on the deceased's say so that he had cancelled the will. There is nothing to indicate that the fifth respondent's and the deceased's family's efforts to either locate and/or establish whether the deceased had left a will are unreasonable. I am satisfied that the fifth respondent did not act mala fide and at all times acted in a bona fide and reasonable belief that the deceased died intestate.

[64] The recording of the telephonic conversation between the fifth respondent and the applicant's representative was made without any disclosure to the fifth respondent that it was being recorded. A reading of the exchange in my view reveals that the fifth respondent assumed, after having being told by her late husband, that he had in fact 'cancelled his old will', that there was no will in existence. On a number of occasions during the telephonic conversation the fifth respondent indicates that she is not aware of a later will and is only aware of the old one, which the deceased informed her was cancelled.

[65] She also during such telephonic exchange indicates that she would request her attorney of record to get in touch with the applicant to deal with any queries they

had in respect of a will. What is also evident from the papers is that the applicant had been informed by the fifth respondent's attorney of the deceased's death. At the end of the conversation, she indicates that there was no will.

[66] There is a material dispute of fact as to whether the fifth respondent knew of the existence of the will, which is incapable of being resolved on the papers, and consequently Ms *Dheoduth* is correct that the court must follow the principles set out in the decision of *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*.¹⁷ There has been no request for the matter to be referred for the hearing of oral evidence.

[67] The application papers contain correspondence exchanged by the fifth respondent's attorneys of record, K Maharaj Incorporated to First National Bank as well as the seventh respondent. The correspondence was sent to First National Bank with a view to ascertaining the accounts held by the deceased with their institution and to further inform them that they were assisting the fifth respondent in attending to winding up the estate of the deceased. There appears to have been no response in relation to such request and consequently the version of the fifth respondent in this regard must be accepted. Such correspondence was submitted to the applicant in December 2017.

[68] What is not clear is why the applicant did not immediately inform the Master and the fifth respondent of the existence of the will. Consequently, at the time the Master made the appointment in terms of s 18 of the Act, such appointment was 'mistakenly exercised'.

[69] Once the fifth respondent and her attorney became aware of the existence of the will, she surrendered the letters of executorship. The first respondent's conduct in this regard strengthens my view that the fifth respondent did not act mala fide or that she was aware of the existence of the will and fraudulently misrepresented this fact to the Master when she applied to be appointed as executrix.

[70] In fact, when viewed holistically, the probabilities are in my view overwhelmingly in the fifth respondent's favour that she did not know that the will had *not been cancelled*. Her interaction with the applicant's representative during the

¹⁷ *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163.

telephonic exchange is inconsistent with the conduct of someone acting mala fide and intent on misrepresenting the true position.

[71] It is trite that the Master is a functionary and any act performed by him pursuant to the Administration of Estates Act constitutes administrative action. It is now trite that unless the act is set aside by a court in proceedings for judicial review, such act exists in fact and has legal consequences which cannot be overlooked. Even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.¹⁸

[72] The Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town*, per Howie P and Nugent JA, in dealing with the apparent anomaly, relied on an analysis by Christopher Forsyth. Forsyth expatiated that:

‘. . . while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words

“ . . . an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal assistance of the first act is not a precondition for the second.”¹⁹ (Footnote omitted.)

[73] In addition, in deciding whether or not to set aside the administrative act, one often has to do so considering the consequences such act produced. In *Oudekraal*, the court said the following:

‘It will be apparent from that analysis that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced – the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others – and for that reason it will generally be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.’²⁰

¹⁸ See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 26.

¹⁹ See fn 18 para 29.

²⁰ See fn 18 para 38.

[74] The *Oudekraal* principle received endorsement from the Constitutional Court in the decision of *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*.²¹

[75] In addition, although the applicant raised concerns in relation to the purchase consideration paid by the first respondent for the property, in correspondence exchanged between K Maharaj Incorporated and the seventh respondent, the following becomes evident and these suspicions in my view appear unfounded:

- (a) The seventh respondent indicates that they reviewed their initial valuations of the property dated 7 November 2017 as the value was arrived at utilising the investment method. In arriving at a market related appraisal, the rentals generated, which were provided by Melaine Pillay, were used to make the calculations. After submission of the initial appraisal, they were made aware that the rental amounts provided were incorrect and the true rental generated only amounted to the sum of R149 480.65 rather than the amount of R174 480.65 as previously advised.
- (b) This discrepancy emerged when their offices undertook rental collections and revealed that the family members who occupied sections 19 and 20 of the immovable property did not pay rent and that one of the heirs, Mark Pillay, was paid the sum of R12 500 per month from the rentals. In addition, the initial appraisal was revised as it was subsequently brought to their attention that unauthorised structures (for which there were no approved building plans) had been erected, certain improvements had to be reinstated, and the entire storm water and sewerage system had to be replaced. This would result in substantial amounts having to be expended on the immovable property.
- (c) In relation to the two offers that were made to purchase the member's interest, which were not accepted, the seventh respondent indicated that in respect of the first offer, no deposit had been paid and no resolutions had been submitted by members of the CC confirming such offer. In addition, there was a request for additional information. In respect of the second offer made, no deposit was submitted in compliance with clause 1.1 of the conditions of sale.

²¹ *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC).

- (d) Although rentals were collected for a period of three months, expenses being rates, water, electricity and security as well as other miscellaneous expenses incurred for the property, reduced the income significantly.
- (e) The applicant entertained suspicions of an existing relationship between the seventh respondent and the first respondent. The nature of the relationship was clarified in that the seventh respondent confirmed that first respondent had been a client of the company for a period in excess of 15 years. He is a property speculator/entrepreneur and was included on their database of clients who are notified of properties that they are instructed to sell. The first respondent had also purchased a number of properties on auction and regularly attended auctions conducted by the seventh respondent.
- (f) Although there was a suggestion that the fifth respondent received payment of certain moneys, it is clear that this was in relation to her monthly maintenance. She did not receive payment of the purchase price as these moneys less commission was held by the seventh respondent, which was subsequently paid to the applicant's attorneys of record to be held in trust.

[76] Ms *Dheoduth* in her submissions indicates that it is only if the fifth respondent is shown to have acted mala fide, and was aware of the existence of the will and thereafter fraudulently misrepresented this fact to the Master, that her appointment can be considered void *ab initio*. However, in that regard there is a material dispute of fact, which is incapable of being resolved on the papers, and consequently the court must follow the principles set out in the decision of *Room Hire*.²²

[77] In the absence of fraud it would mean that when the fifth respondent applied to the Master for her appointment as executrix, she acted bona fide and this would have the consequence of not nullifying her appointment and any transactions made pursuant to her appointment as executrix. In addition, the first respondent is the party to whom the fifth respondent sold her member's interest in the CC and the deceased's interest and is consequently a bona fide third party. As a consequence thereof, the deceased estate is bound by the purchase and sale agreement.

[78] Having concluded that the Master and all persons concerned laboured under the mistake that the deceased did not leave a will, the result thereof is that the fifth respondent's appointment and all acts done pursuant thereto would be valid. This

²² See fn 17 above.

would be until she returned the letters of executorship to the Master and the applicant was appointed as executor in terms of the will. Consequently, the effect of the fifth respondent's appointment is valid until she handed in the letters of executorship.

[79] The fifth respondent derived her power as executrix from her appointment as executor by the Master and not from the will. Consequently, the Master as appointing her executrix, absent knowledge of a will, conferred authority on her, which he was by virtue of the provisions of the Administration of Estates Act entitled to confer. In *Brand, NO v Volkskas Bpk* the full court of the Transvaal division as it then was held the following:

'The revocation of the first executor's appointment did not, in my view, have the effect of rendering what he had done null and void. What he had done was under the authority of the Master given in accordance with the statute and it was clearly not illegal, even though it may turn out after investigation that the will under which the estate was being administered was invalid through revocation. To hold that everything done in the first administration was null and void, would lead to most absurd results which it seems unnecessary to particularise.'²³

What is the legal effect of a marriage in community of property?

[80] A marriage in community of property results in all assets, including the right of occupation of premises by one spouse, and liabilities, whether subsisting at the time of the marriage or acquired or incurred during the course of the marriage, being pooled to form a single joint estate.

[81] The author H R Hahlo, in *The South African Law of Husband and Wife*, explains the nature of a marriage in community of property as follows:

'The joint estate consists of all the property and rights of the spouses which belonged to either of them at the time of the marriage or which were acquired by either of them during the marriage. . .As regards acquisitions stante matrimonio, whatever either spouse acquires during the marriage falls automatically into the joint estate, no matter whether it is acquired by onerous or gratuitous title; by a contract or succession; in pursuance of a condictio or of a delictual claim; as the result of legal or illegal activities. . .Nor does it make any difference whether the acquisition is made in the name of the husband, of the wife or both spouses jointly.'²⁴ (Footnotes omitted.)

²³ *Brand, NO v Volkskas Bpk & another* 1959 (1) SA 494 (T) at 498E-H.

²⁴ H R Hahlo *The South African Law of Husband and Wife* 5ed (1985) at 161-163.

[82] The joint estate is held by both spouses in co-ownership, in equal undivided shares. This includes all assets and all liabilities of both spouses subject to certain exceptions, one such exception being property donated or bequeathed by a third party containing a proviso that it shall not fall into the joint estate and shall be the spouse's separate property. Spouses married in community of property can also own separate properties, which are excluded from the joint estate.

The disposal of an interest of a deceased member in terms of s 35 of the Close Corporations Act

[83] Section 35 of the Close Corporations Act reads as follows:

'Subject to any other arrangement in an association agreement, an executor of the estate of a member of a corporation who is deceased shall, in the performance of his or her duties –

- (a) cause the deceased member's interest in the corporation to be transferred to a person who qualifies for membership of a corporation in terms of section 29 and is entitled thereto as legatee or heir or under a redistribution agreement, if the remaining member or members of the corporation (if any) consent to the transfer of the member's interest to such person; or
- (b) if any consent referred to in paragraph (a) is not given within 28 days after it was requested by the executor, sell the deceased member's interest –
 - (i) to the corporation, if there is any other member or members than the deceased member;
 - (ii) to any other member or members of the corporation in proportion to the interests of those members in the corporation or as they may otherwise agree upon; or
 - (iii) to any other person who qualifies for membership of a corporation in terms of section 29, in which case the provisions of subsection (2) of section 34 shall *mutatis mutandis* apply in respect of any such sale.'

[84] The provisions of s 29(2)(c) and 29(3)(c)-(e) must be kept in mind when applying the provisions of s 35 of the Close Corporations Act. Section 29(2)(c) reads as follows:

'a natural or juristic person, *nomine officii*, who, in the case of a member who is insolvent, deceased, mentally disordered or otherwise incapable or incompetent to manage his or her affairs, is a trustee of his or her insolvent estate or an administrator, executor or curator in respect of such member or is otherwise a person who is his or her duly appointed or authorized legal representative.'

[85] The provisions of s 29(3)(c)-(e) read as follows:

‘(c) A trustee of an insolvent estate, administrator, executor or curator, or other legal representative, referred to in subsection (2) (c), in respect of any member of a corporation, who is not obliged or who does not intend to transfer the interest of the member in the corporation in accordance with the provisions of this Act within 28 days of his or her assuming office to any other person, shall within that period, or any extended period allowed by the Registrar on application by him or her, request the existing member or members of the corporation to lodge with the Registrar in accordance with section 15 (1) an amended founding statement designating him or her, *nomine officii*, as representative of the member of the corporation in question.

(d) Where the corporation has no other member, any such representative himself or herself shall, in the circumstances contemplated in paragraph (c), act on behalf of the corporation in accordance with the provisions of section 15 (1), read with the said paragraph (c).

(e) The provisions of paragraphs (c) and (d) shall not affect the power of such representative, as from the date of his or her assuming office, and whether or not any such amended founding statement has been lodged, to represent the member concerned in all matters in which he or she himself or herself as a member could have acted, until the interest of that member in the corporation has in accordance with the provisions of this Act been transferred to any other qualified person.’

[86] The executor becomes the member *nomine officii* and is empowered to act on behalf of the close corporation in terms of these provisions even before the registration of the amended founding statement. Where a close corporation is the registered owner of immovable property as defined in s 102 of the Deeds Registries Act 47 of 1937, the close corporation can sell its immovable property, it being represented by the executor acting in terms of the authorities cited above.

[87] From the facts of the matter we know that at the time the fifth respondent dealt with and sold the immovable property to the first respondent, she did so at a time when the deceased member’s interest was transferred to herself. She as executrix became the member *nomine officii* and was empowered to act on behalf of the CC. As the CC was the registered owner of the immovable property, she would in her capacity as executrix be entitled dispose of the property. In addition, the Master’s consent would not be necessary for her to sell the immovable property, as the deceased was the sole member of the CC.

[88] In the case of a sole member, the executor would also be entitled to cause the close corporation to do any act which the deceased could have done had the deceased been alive and that would include the power to cause the close corporation to sell its immovable property.

[89] In *Boerboonfontein BK v La Grange NO en 'n ander*,²⁵ the court held that for purposes of s 29(3)(e) of the Close Corporations Act, an executor of an estate of a deceased member is 'a representative'. The executor can act in respect of all the affairs of the corporation as if he/she is a registered member of the corporation notwithstanding that an amended founding statement has not been registered.

How does one then interpret the provisions of s 35 of the Close Corporations Act?

[90] In *Livanos NO & others v Oates & others*,²⁶ the court concluded that in terms of s 35(a), an executor must first transfer a deceased member's interest to a legatee or heir if the remaining members of the corporation consent to the transfer. If they do not do so, then the executor is entitled to sell the deceased member's interest in terms of the provisions of s 35(b). In para 10 of the judgment the court held the following:

'The section does not oblige the executor to sell the member's interest to the corporation or the remaining members. The intention of the legislature is clearly that in the event of s 35(a) not being applicable, the executors can dispose of the members' interest in one of the three manners provided for in s 35(b).'

[91] In addition, one must also be mindful of the provisions of s 54(2) of the Close Corporations Act, which provides that a corporation is bound by the act of a member 'whether or not such act is performed for the carrying on of the business of the corporation'.²⁷

[92] Section 54 of the Close Corporations Act provides as follows:

'(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.

(2) Any act of a member shall bind a corporation, whether or not such act is performed for the carrying on of the business of the corporation unless the member so acting has in fact

²⁵ *Boerboonfontein BK v La Grange NO en 'n Ander* 2011 (1) SA 58 (WCC).

²⁶ *Livanos NO & others v Oates & others* 2013 (5) SA 165 (GSJ).

²⁷ *Axal Properties 2 CC v Kotze* 2013 (JDR) 2086 (SCA).

no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.’

[93] Lewis JA stated the following in *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC & another*²⁸ para 17 insofar as authority of a member of a close corporation is concerned:

‘Section 54(2) does no more than express the usual rules relating to ostensible authority. And s 54(1) simply confers on a member authority to act for a close corporation, as the common law confers on a partner the power to bind the partnership. The section does not regulate the question of written authority for the purpose of s 2(1) of the Alienation of Land Act, as it is assumed s 69 of the Companies Act does. It is clear, however, that, on the reasoning in *Potchefstroom Dairies*, a member, who by law can represent a close corporation, need not have written authority. But why should that be true of an agent of the close corporation who is not a member, as is the case with Christelis?’

[94] The purpose of s 2(1) of the Alienation of Land Act 68 of 1981 ensures certainty in respect of contracts for the sale of land. Such object or purpose is not defeated if a functionary of a company or a close corporation signs such contract as there can be no uncertainty about the functionary’s authority as it derives from law. If however, authority arises from the expression of will, for example an expressed authorisation, it must be in writing as if it is not, the uncertainty of the authority defeats the object or purpose of s 2.²⁹

[95] In interpreting the provisions of s 54, our courts have held that a member of a close corporation is an agent even if no authority, express or implied, has been conferred on him or her. The corporation is bound by the acts of such member unless a third party knew or ought reasonably to have known that there was the absence of authority.³⁰

[96] In this matter, the fifth respondent was, once appointed as executrix of the deceased’s estate, entitled to transfer his member’s interest. Not only would she have been entitled by virtue of her appointment to deal with her fifty per cent interest

²⁸ *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC & another* 2010 (3) SA 630 (SCA).

²⁹ *Northview Shopping Centre* ibid para 26; *Divine Heights 5 CC v Greg & Sons Enterprises CC* 2011 JDR 1691 (FB).

³⁰ *J & K Timbers (Pty) Ltd t/a TEGS Timbers v G L & S Furniture Enterprises CC* 2005 (3) SA 223 (N) at 227F-H; *Klaas v Summers & others* 2008 (4) SA 187 (C) para 18.

in the estate by virtue of her marriage in community of property, but she would as executrix be entitled to deal with his fifty per cent interest in the joint estate and his member's interest.

Was the sale of the member's interest to the first respondent valid?

[97] Until such time as the fifth respondent returned the letters of executorship to the Master, she was entitled to effect the sale of such member's interest. Essentially, the applicant, as I understand the submissions, submits that ownership could not have passed to the first respondent and subsequently to the Rajaruthnams, as there was a defect in the fifth respondent's right to transfer ownership to the first respondent.

[98] The submission being that as her appointment was void *ab initio*, she could not have transferred the deceased member's interest to herself, nor could she have acted *nomine officii* in terms of s 35 of the Close Corporations Act nor in terms of the letters of executorship and sell the immovable property to the first respondent. For this submission, the applicant relies on the decision of *Mngadi*.³¹ I have for reasons already alluded to earlier on in the judgment dealt with the effect of the decision in *Mngadi* and why same is distinguishable.

What then of the sale of the immovable property and its transfer to the first respondent?

[99] It is clear that the abstract theory of transfer applies to both the transfer of movable and immovable property. This was confirmed by Brand JA in the Supreme Court of Appeal in the decision of *Legator McKenna Inc v Shea* where he said '[a]ccording to the abstract theory the validity of the transfer of ownership is not dependent upon the validity of the underlying transaction such as, in this case, the contract of sale'.³² The abstract theory of transfer in respect of the passing of ownership in the case of immovable property is effected by the registration of transfer in the deeds office coupled with the so-called real agreement. The essentials of a real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property.

³¹ *Mngadi NO v Ntuli & others* 1981 (3) SA 478 (D).

³² *Legator McKenna Inc & another v Shea & others* 2010 (1) SA 35 (SCA) para 21.

[100] In terms of the abstract theory of transfer, the validity of transfer of ownership is not dependant on the validity of the underlying transaction, notwithstanding, that the causa which gave rise to such transfer is defective, a valid transfer of ownership can occur.

[101] In respect of the abstract theory of transfer, there are two requirements for the passing of ownership, namely:

- ‘(a) delivery, in the case of movable property and in respect of immovable property registration of transfer in the deeds office;
- (b) coupled with the so-called real agreement, the essential elements are the intention on the part of the transferor to transfer ownership and intention on the part of the transferee to become the owner of the property.’³³

[102] The Supreme Court of Appeal has authoritatively held that the abstract theory of transfer applies in our law to the sale of both movable and immovable property.³⁴ It therefore follows in the absence of fraud, notwithstanding the existence of the will which none of the parties were aware of at the time of the sale of the member’s interest and the immovable property, the transfer is in accordance with the abstract theory of transfer and must stand.

The Rajaruthnams as bona fide purchasers

[103] The Rajaruthnams are bona fide purchasers who cannot be dispossessed of ownership of the property. As explained by Brand JA in *Bowring NO v Vrededorp Properties CC & another*³⁵ relating to double sale of property and the doctrine of notice:

‘The legal basis advanced by Vrededorp for its claim to the blue portion is again derived from the doctrine of notice. This time it relies on the application of the doctrine in the sphere of successive sales. The usual operation of the doctrine in this instance, as explained in our case law, is essentially as follows: if a seller, A, sells a thing – be it movable or immovable – to B and subsequently sells the same thing to C, ownership is acquired, not by the earlier purchaser, but the purchaser who first obtains transfer of the thing sold. If the first purchaser, B, is also the first transferee, his or her right is unassailable. If the second purchaser, C, is the first transferee, his or her right of ownership is equally unassailable if he or she had

³³ *Legator McKenna Inc & another v Shea & others* 2010 (1) SA 35 (SCA) para 22.

³⁴ *Kriel v Terblanche NO en andere* 2002 (6) SA 132 at 134B-F; *Prophitius & another v Campbell & others* 2008 (3) SA 552 (D) at 558G; *Legator McKenna v Shea* ibid para 21; *Du Plessis v Prophitius & another* 2010 (1) SA 49 (SCA) para 10.

³⁵ *Bowring NO v Vrededorp Properties CC & another* 2007 (5) SA 391 (SCA).

purchased without knowledge of the prior sale to B. But, if C had purchased with such prior knowledge, B is entitled to claim that the transfer to C be set aside so that ownership of the thing sold can be transferred to B. (See eg *Cohen v Shires, McHattie and King* (1882) 1 SAR 41 at 46; *McGregor v Jordaan and Another* 1921 CPD 301 at 308; *Tiger-Eye Investments (Pty) Ltd and Another v Riverview Diamond Fields (Pty) Ltd* 1971 (1) SA 351 (C) at 358F - G; *Kazazis v Georghiades en Andere* 1979 (3) SA 886 (T) at 894B - D; *Cussons en Andere v Kroon* 2001 (4) SA 833 (SCA) ([2002] 1 All SA 361) at 839C - E (SA); Badenhorst, Pienaar & Mostert *op cit* 89; Gerhard Lubbe 'A doctrine in search of a theory: reflections on the so-called doctrine of notice in South African Law' 1997 *Acta Juridica* 246 *et seq.* Again it is unnecessary to enter into the unresolved debate referred to earlier, ie whether knowledge acquired by C between purchase and transfer would make any difference.)'³⁶

[104] At the time the Rajaruthnams purchased and took transfer of the property they were unaware of the existence of the will and accordingly the doctrine of notice cannot apply to them.³⁷ They are therefore bona fide purchasers who acquired the property without any knowledge of any defect in title and therefore cannot be dispossessed of ownership of the property. The sale and transfer of the property to them is accordingly valid and cannot be set aside.

[105] Having reached the following conclusion that:

- (a) the fifth respondent's appointment although "irregular" was valid until she returned the letters of executorship;
- (b) the transfer of the deceased's member's interest in MN Properties CC to the fifth respondent was valid;
- (c) the first respondent and the Rajaruthnams were bona fide purchasers of the member's interest; and
- (d) bearing in mind that the applicant was appointed as executor with effect from 26 January 2018,

there is no basis to grant the relief which the applicant seeks and consequently the application falls to be dismissed with costs.

Costs

[106] As the applicant has been unsuccessful, there is no reason to depart from the usual rule in relation to costs.

³⁶ Ibid para 11.

³⁷ *Harley v Upward Spiral 1196 CC & others* 2006 (4) SA 597 (D) at 603-605.

Order

[107] In the result, the following order will issue:

1. The application is dismissed with costs.

HENRIQUES J

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Date of Hearing : 18 February 2019

Date of Judgment : 10 September 2019