

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

Case No: 6094/2007

In the matter between:

JICAMA 194 (PTY) LTD

Plaintiff

and

KAREN LOTTER N.O.

First Defendant

SIEGFRIED HEIRISS

Second Defendant

AND

Case No: 6095/2007

In the matter between:

KEVIN RAYMOND ALLAN N.O.

First Plaintiff

BARBARA CONSTANCE ALLAN N.O.

Second Plaintiff

MARC KEVIN ALLAN N.O.

Third Plaintiff

BRETT RAY ALLAN N.O.

Fourth Plaintiff

and

KAREN LOTTER N.O.

First Defendant

SIEGFRIED HEIRISS

Second Defendant

JUDGMENT

Delivered on: 6 December 2011

VAHED J:

- 1] GERHARD WILHELM HILSE ("the deceased") took ill during June 2003 and, on 27 June 2003, at the age of 78, died a lonely death in hospital. At the time of his death he had been living alone in Pinetown on one of two adjacent immovable properties owned by him. His closest living relative was a sister, Mrs Gade, who at the time was living in Hamburg in Germany.
- 2] The first defendant is the representative of the executor testamentary in the deceased's estate. Prior to her appointment as executor testamentary it was thought that the deceased had died intestate and at that stage the second defendant had been appointed as executor dative. They are both sued for failing to honour agreements in terms of which the deceased's immovable properties ("the properties") were sold to the respective plaintiffs in these matters. The one property was sold to a company, the plaintiff in case number 6094/2007 and the other was sold to a Trust represented by the plaintiffs in case number 6095/2007. In fairly loose terms the *alter ego* of both the company and the Trust is Mr Kevin Raymond Allan who, at the time of the deceased's death, was his neighbour. In terms of an Order made on 17 August 2010 both actions were consolidated.
- 3] The brief facts giving rise to both actions are as follows. When the deceased suddenly took ill Mr Allan arranged for his admission to hospital, and thereafter, upon his death arranged for his funeral and cremation. He also paid the hospital bill and the costs relating to his

funeral and cremation. He arranged for contact to be made with an associate in Germany in an effort to trace the deceased's sister. As a result of that he was put in contact with a German attorney, Ms Ursula Schuebel ("Schuebel"), who was based in Munich and who traced and made contact with Mrs Gade in Hamburg.

- 4] At the time the second defendant was an attorney practising as such in Pinetown. Mr Allan secured his services and ultimately, on 19 December 2003, he was appointed executor dative to the estate of the deceased.
- 5] Prior thereto both Mr Allan and the second defendant had been in contact with Schuebel and with Mrs Gade. Mr Allan's contact with Mrs Gade concerned amongst others his interest in acquiring the deceased's 2 properties. The second defendant's contact with Ursula related to his appointment as executor and securing Mrs Gade's support in that regard. He also explained in some detail the process of winding up a deceased estate in South African law.
- 6] After the second defendant's appointment Mr Allan took his interest in the properties further. He made an initial offer, which was thereafter increased. At some point in time it was explained to him by the second defendant that the properties had to be valued by a sworn appraiser or valuator so that a price and process acceptable to the Master of the High Court could be achieved.

7] In the interim the second defendant and Mr Allan were in the process of sifting through the deceased's substantial (although eventually largely irrelevant) collection of documents in order to properly establish the state and extent of his estate and to establish the whereabouts of his assets, particularly the title deeds relating to the two properties. While that was unfolding and on 21 January 2004 the second defendant received a telephone call from a representative of Syfrets who indicated that they were in possession of a document purporting to be the deceased's Will. The second defendant waited for further communication in that regard. When he testified the second defendant said that he "put the matter on hold" until very nearly the end of that year. He did not want to incur further costs only to discover that he was going to be replaced as executor.

8] During December 2004 sworn appraisals of the two properties were obtained. Shortly thereafter Mr Allan began negotiating directly with Schuebel regarding his acquisition of the properties. At the same time he was dealing with the second respondent with regard to the incorporation of a close corporation, intending that to be the vehicle by which one of the properties was going to be acquired. He later changed his mind, indicating that a company was preferable and this led to the acquisition by him of a "shelf-company" which turned out to be the plaintiff in case number 6094/2007. At the same time he informed the second defendant that he was going through the process of forming a

family trust, intending that to be the vehicle for the acquisition of the other property.

9] While all of this was unfolding, a competing interest in the properties was expressed by another potential purchaser. When it appeared that Mrs Gade and Schuebel were not forthcoming with a decision the second defendant wrote to them in Germany explaining his position as executor and advising that the offer that had by then been made by Mr Allan was to be preferred.

10] During June 2005 the second defendant prepared separate written agreements for the sale of the one property to the company, the plaintiff in case number 6094/2007 and the sale of the other property to the trust, the plaintiffs in case number 6095/2007. These agreements were both signed on 29 June 2005 or shortly thereafter. The properties were sold for a total purchase price of R520 000,00.

11] Both agreements contain, as clause 22 in each of them, the following provision:

"This agreement shall be subject to the Master the High Court of South Africa, Pietermaritzburg, and the sole heiress, Alice Maria Gade, consenting to the sale. Should such consent not to be obtained, this agreement shall lapse and be of no further force or effect."

12] I pause to mention that shortly before the agreements were concluded

and signed, and after he had pressed for further instructions, the second defendant received an e-mail communication from Mrs Gade's daughter to the effect that her "... mother [had] reached a decision. Mr Kevin A. must receive the buying right (*sic*)."

Prior thereto it appeared from other interactions amongst the relevant role players, that Mrs Gade was willing to consent to the estate's properties being sold to Mr Allan.

13] Shortly after the agreements were signed the second defendant was incapacitated firstly as a result of a surgical procedure that he had to undergo and thereafter as a result of illness. However, according to him, although the pace with which he attended to matters slowed somewhat, with assistance the estate file continued to receive attention. He did not immediately prepare the envisaged consent for signature by Mrs Gade because, according to him, he wanted all the other preliminary steps to be completed before forwarding the documents of consent to Germany. His explanation was that, given his experience of dealing with Schuebel and Mrs Gade, he would be faced with a series of questions as to the future conduct of the matter had he sent up the documents of consent at an earlier time. He wanted to be in a position to say that everything possible had been done, that the loan agreements and mortgage bond documents of the two plaintiffs had been done, prepared and signed and that the only outstanding issue was the question of lodgement and the subsequent processes in the Deeds Office. Given that view that he took of the matter, the

documents of consent, which had been prepared earlier, presumably at the time the transfer documents had been prepared, were only sent to Germany under cover of a letter from the second defendant dated 12 November 2005.

14] On or shortly before 16th of December 2005 the second defendant was removed from office by the Master of the High Court, the Master indicating in his letter of removal that the reason therefor was the second defendant's failure to lodge the estate's liquidation and distribution accounts with him.

15] It seems however that in the interim, or coinciding with that removal, the deceased's Will had been lodged with the Master of the High Court by BoE Trust KZN, that process culminating in the appointment of the first defendant's principal as executor of the estate on 15 March 2006.

16] It appears that the first defendant is BoE Trust KZN's nominated official representing it as the executor of the estate. They, in turn, appointed Sentinel International Trust Company ("Sentinel"), as agent, to attend to the winding up of the deceased's estate. Mr Dirk van Ryneveld ("van Ryneveld"), Sentinel's regional director based in Durban, dealt with the matter.

17] After finding his bearings, which included preliminary communications with the second defendant, Mr Allan and Ursula, van Ryneveld wrote to

Schuebel via email enquiring whether the consents had been signed. That was on 10 May 2006. When she responded in the negative, and after consulting the second defendant, van Ryneveld took the view that the sales to the plaintiffs had either lapsed or that the envisaged consents would no longer be forthcoming and put the properties up for auction. On 17 August 2006 the properties were sold on auction to a third party for R2,725 million.

18] Against that background the plaintiffs in both actions sued the first defendant in contract for damages resulting from the executor's breach of the agreements in failing to obtain the consents in a form acceptable to the Master of the High Court. In the alternative they sued the second defendant in delict for negligently failing to obtain the consents.

19] When the trial commenced I was informed that the matter would be proceeding on the issue of liability only and I assumed that an Order to that effect had already been made. I was not asked to make an Order in terms of Rule 33(4) of the Uniform Rules of Court. After judgment had been reserved and on going through the Court files I ascertained that no such Order had been previously sought or made. I note from the minutes of the conference held in terms of Rule 37 on 24 August 2010 that the parties were agreed that the issues be so separated and assume that the failure to secure such an Order from me when the matter commenced was an oversight. I record my intention to grant such Order.

20] Mr *Schumann*, who appeared for the plaintiffs in both actions, outlined the issues on liability in his opening address. These were crisply stated by him to be as follows:

On the contractual issue:

- a. Whether the second defendant, in his capacity as executor, timeously failed to obtain the written consent of the heir;
- b. Whether, if such consent had been sought, it would have been forthcoming;
- c. Whether the Master of the High Court would have consented to the sales.

On the delictual issue:

- d. Whether the second defendant was negligent in failing to obtain the consents;
- e. Whether the second defendant owed the plaintiffs in both actions a duty of care.

And on a further issue added by Mr *Crofts* who appeared for the

first defendant:

- f. Whether the first plaintiff in case number 6095/2007 had authority to represent the other trustees when he signed the sale agreement.

21] In what follows it must be remembered that from the end of June 2005 until 17 August 2006, a period just short of 14 months, the properties increased in value from R520 000,00 to R2,725 million, an increase of the order of 400%.

22] On the contractual question the crucial issue is Mrs Gade's written consent. Absent that there can be no question of the Master of the High Court's consent. That much was common cause. It was also common cause that had Mrs Gade's written consent been obtained, the Master of the High Court's consent would, all else being equal, have been a formality. Issue "c" therefore falls away.

23] It seems to me that the contractual issue and the delictual issue are the face and reverse of the same coin. Insofar as the second defendant is concerned, it is the same conduct that is examined to establish or reject either proposition. Insofar as the delictual issue is concerned it was common cause that the spotlight of negligence must be focussed on the period August to November 2005, conduct outside that period being irrelevant. Although there was some initial sparring to the effect

that for the contractual issue that period ought to commence sometime earlier than August 2005, I am of the view that for both issues the relevant period is identical.

24] It is common cause that there had been no direct communication, written or otherwise, from Mrs Gade to the second defendant indicating her consent to the sale of the estate's properties to the plaintiffs. On that score, the closest that the plaintiffs could reach that goal was a letter written by Mrs Gade to Mr Allan personally on 09 August 2003 in which she said (loosely translated from the original German):

"I am sorry to say that I cannot guarantee you the first option on the land as I do not have the necessary rights to this at present. If after having found other possible heirs and they being agreed, I am willing to support your case so that you get first option at best offer for this land."

25] The authorities are clear that if, after all the valid heirs' consents have been obtained, a subsequent higher offer is not sufficient to upset a sale. See **Meyerowitz: On Administration of Estates and Estate Duty** (2004 Ed) paragraph 13.8. But what is the position, such like we have here, where in anticipation of written consent from the heirs the executor sells property in the estate and thereafter, because property has increased in value, the heir declines written consent to that sale? Logic dictates that there ought to be nothing wrong with that stance. A purchaser in those circumstances was always at risk until the consent document was in fact signed by the heirs.

26] So then the crucial question is: Did the second defendant commit an actionable breach (by negligently not obtaining Mrs Gade's signature timeously) during the crucial period? Put differently: Did the second defendant breach the agreements when he waited until November to send the documents of consent to Ursula for signature by Mrs Gade?

27] Mr *Thatcher*, who appeared for the second defendant, attacked the plaintiff's case against the second defendant on two levels.

28] Firstly, he argued, that the law imposed no special obligation or duty on the second defendant *vis-à-vis* the plaintiffs. That argument unfolded as follows:

29] The duties of an executor are summarised in **Meyerowitz** (*supra*). At para 12.24, relying upon the authority of *Lockhat's Estate v North British & Mercantile Insurance* 1959 (3) SA 295 (AD) at 302 E-G, the following appears:

"[T]he executor's duty [is] ... to obtain possession of the assets of the deceased ..., to realise such of them as may be necessary for payment of the debts of the deceased, taxes and the costs of administration and winding-up, to make the payments and to distribute the assets and money that remain after debts and expenses have been paid among the legatees under the will or among the intestate heirs on intestacy."

30] In *Ex Parte Misselbrook, N.O.: In Re Estate Misselbrook* 1961 (4) SA 382 (D) CANEY J held at 384 A-B that:

“[a]s a matter of general principle, executors have not the right and are not under the duty (unless the will directs them to do so) of realising more of the assets of the estate than is necessary to pay debts, administration expenses, death duties, cash legacies and other outgoings. That is the ordinary rule.”

31] Dealing with the executor's duty to heirs, and relying on the authority of *Clarkson NO v Gelb & Ors* 1981 (1) SA 288 (W), Mr *Thatcher* submitted that that duty trumped any contractual duty that the executor may have in respect of a third party such as the plaintiffs. The imposition of a legal duty *vis-à-vis* the plaintiffs, so the argument went, would result in a breach of the executor's fiduciary duty to the heirs. This, Mr *Thatcher* argued, flowed from the finding in *Clarkson* at 295 C-E that:

“...in our common law an action exists against an executor at the suit of the heirs to recover the loss which they have suffered as a result of his maladministration of the estate. This is not the Aquilian action but is an incident of the special fiduciary position which the executor holds, having “taken charge of the affairs of others”. These “others” are the heirs in whom the right to obtain ownership of their inheritances vested at the time of the deceased's death. This type of action is one for the rendering of accounts, debatement thereof, payment of balances found to be due and payment of damages for maladministration. In view of the statutory provisions which relate to the administration of a deceased's estate, it is probably now limited in modern times to simply an action for damages.”

32] Thus, it was argued, the second defendant owed no legal duty to the plaintiffs as this position was a logical and natural consequence of the principles established in *Lockhat's Estate, Misselbrook and Clarkson*

reconciled with the principles of liability discussed in *Broderick Properties (Pty) Ltd v Rood* 1964 (2) SA 310 (T) at 314 H – 315 B and *Jowell v Bramwell-Jones & Ors* 1998 (1) SA 836 (W).

33] Secondly, and dealing with the delay, Mr *Thatcher* contended that the period under review, ie. August until 9 December 2005 revealed nothing remarkable about the second defendant's conduct such that it warrants a finding that he was negligent. In addition to the facts I have set out earlier in this judgment Mr *Thatcher* also argues as being relevant the fact that during his frequent interaction with the second defendant (which included frequent email exchanges) during this period not once did Mr Allan seek to complain about delay. There was certainly nothing in writing that was introduced or referred to in evidence.

34] Mr *Schumann* contended that the second defendant did indeed owe the plaintiffs a duty of care and that the duty was breached by him when he failed to obtain the necessary consents from Mrs Gade. In this regard he contended that the facts spoke for themselves and, in support of those facts, relied on paragraph 13.9 in **Meyerowitz** (*supra*):

“When selling property the executor should take care to see that the sale is made subject to the issue of the Master's certificate... . But whether this is done or not, transfer to the purchaser pursuant to the sale is subject to the issue of the Master's certificate and if such certificate is not obtained, whether through nonfeasance or misfeasance of the executor, the purchaser will have no claim for specific performance or damages

against the estate, even should he have been notified by the executor that the sale could be regarded as final and conclusive. If the executor acted *mala fide* or recklessly in advising the purchaser that the sale was final, or in not obtaining the Master's certificate, an action for damages will probably lie against him in his personal capacity."

35] Although that passage speaks only of the consent of the Master, the consent of the heir is a necessary preliminary step and so that passage applies equally to the facts of cases under consideration.

36] No allegations of *mala fides* on the part of the second defendant have been made and accordingly nothing need be said in that regard.

37] I am not persuaded that the second defendant was negligent during his tenure as executor and more particularly during the focussed period between July and December 2005.

38] In my view, his actions during that period were perfectly reasonable and it cannot be said that during that period that time was of the essence such that it compelled him to act with more speed. In addition there was no harm that he could reasonably anticipate befalling the plaintiffs.

39] The simple fact of the matter is that Mrs Gade had not signed the required documents of consent and there was nothing anyone could do to compel her to do so. Her apparent willingness to do so at some point is irrelevant.

40] What is relevant however is this. The properties had, during the crucial period, clearly increased significantly in value. In the exercise of his fiduciary duty to the heir the second defendant would, to my mind, have been acting perfectly lawfully if, before demanding signature by Mrs Gade, he investigated the position and advised her of that increase in value so that when she came to finally consider signing the documents of consent she was making an informed decision in that regard. It is true that the discovery of an increase in value after the consents had been signed would not vitiate the consent, everything else being equal; but there is nothing in law to suggest that such an enquiry before the documents of consent are signed is improper. In my view, given the lapse of time between the determining of the purchase price of the properties and the date signature to the documents of consent was being sought, the second defendant's fiduciary duty to the heir demanded of him that he conduct such investigation and put Mrs Gade in the position where she would have been making an informed decision.

41] It is obvious that had Schuebel or Mrs Gade made those enquiries and independently declined to sign the documents of consent the plaintiffs would have been in the same position. They would have had no remedy.

42] Given what I say in paragraph 40 it follows that the first defendant

acted appropriately in the discharge of the executor's fiduciary duty to Mrs Gade.

43] Arriving at those conclusions it becomes unnecessary to decide the question as to authority, although I would have been inclined to decide that issue in the first defendant's favour. The point is a simple one. The agreement involving the Trust is signed by Mr Allan alone and his signature is unqualified. In evidence Mr Allan said that he was certain that he had been authorised in writing to represent the other trustees but, when challenged, he could not produce the relevant minute. In the result there was insufficient before me for the Trust to discharge the onus it bore to establish that Mr Allan was duly authorised to conclude the agreement. See *Thorpe & Ors v Trittenwein & Ano* 2007 (2) SA 172 (SCA) at 178. In the absence of that authorisation there was nothing to suggest that the plaintiffs in Case No 6095/2007, as trustees, had acted jointly, as they were in law required to act, in concluding the agreement. In my view the challenge in this regard had been raised sufficiently on the pleadings notwithstanding Mr *Schumann's* submissions to the contrary.

44] Mr *Crots* submitted that, whatever happened with the outcome of this matter, I ought to award the first defendant the trial costs of 1 September 2010. On that date the matter had been set down for trial but proceed before GORVEN J on a limited basis, dealing only with an opposed application by the second defendant to amend his plea.

Ultimately GORVEN J dismissed that application, ordering the second defendant to pay the plaintiffs' costs. No mention was made of the first defendant's costs.

45] It seems to me that the first defendant was fortunate in not being made to share those costs with the second defendant. At a pre-trial conference held on 24 August 2010 the first defendant indicated that she supported the second defendant's proposed application for an amendment to her plea. At the hearing before GORVEN J it is not clear whether Mr Crots made any submissions in furtherance of such support and GORVEN J's written judgment is silent on that aspect. It therefore seems fair, now, that I make no Order as to those costs.

46] In the result I make the following Orders in both matters:

- a. To the extent necessary, and in terms of Rule 33(4), the issues shall be separated with the question of the defendants' liability being determined first before all others.
- b. The separated issue is resolved in the defendants' favour.
- c. The action is accordingly dismissed with costs.

DATE OF HEARING:	25 October 2011
DATE OF JUDGMENT:	6 December 2011
FOR THE PLAINTIFFS:	P Schumann
INSTRUCTED BY:	Stirling Attorneys
FOR THE FIRST DEFENDANT:	E Crots
INSTRUCTED BY:	Tomlinson Mnguni James
FOR THE SECOND DEFENDANT:	G R Thatcher

INSTRUCTED BY:

Norton Rose