

IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE PROVINCIAL DIVISION)

Case No. : 1246/06

In the matter between:-

J J LAZENBY t/a LAZENBY TRANSPORT

Plaintiff

versus

M SAAYMAN N.O.

Defendant

CORAM:

H.M. MUSI, JP

HEARD ON:

20 JANUARY 2009

DELIVERED ON:

29 JANUARY 2009

JUDGMENT

H.M. MUSI, JP

- [1] The plaintiff has instituted action against the defendant for damages arising out of a collision that took place between the plaintiff's motor vehicle and a motor vehicle driven by the defendant's deceased husband. The defendant is being sued in her capacity as executrix of the estate of her late husband (the deceased).

- [2] In addition to her plea on the merits, the defendant filed a special plea. When the matter came up for hearing, the parties reverted to an agreement they had earlier reached during the course of the pre-trial conference held in this matter and which is set out in paragraph 7.2 of the pre-trial minutes as follows:

“The parties have agreed that the matter will only proceed on the 20th January 2009 on the issue of the special plea to be decided. The balance of the issues between the parties will be postponed, with the consent of the Honourable Court to a later date for determination if necessary. The parties will also consider whether this is an appropriate matter for a stated case to be referred to the Court on the special plea, alternatively whether a list of admissions will be submitted to the presiding Judge. The parties will revert to one another in this regard.”

- [3] No stated case was put before the court nor were any formal admissions submitted. What was submitted was an affidavit by Mr. Willem Francois Bouwer, the attorney who administered the deceased estate on behalf of the executrix. A letter written by the plaintiff's attorneys was also submitted which briefly stated that the plaintiff will admit contents of

Bouwer's affidavit save that plaintiff denies that he did not lodge a claim with the estate and indicating that attempts were unsuccessfully made to obtain information from the executrix (apparently relating to the administration of the estate).

[4] The parties requested that I should adjudicate the validity of the special plea on the basis of the common cause facts set out in the pleadings together with Bouwer's affidavits, without hearing evidence. Counsel for the plaintiff indicated that he would accept the correctness of Bouwer's affidavit for present purposes.

[5] There are two legs to the special plea. The essence of the first leg is that the plaintiff has failed to lodge his claim with the executrix of the estate, nor does his Particulars of Claim contain an averment to the effect that he lodged his claim with the executrix. It is contended that the defendant administered the estate by complying fully with the requirements of the Administration of Estate Act, 66 of 1965, (the Act), prepared a proper liquidation and distribution account and caused same to be published and to lie for

inspection as required by the Act. There having been no objection filed with the executrix, the defendant proceeded to distribute the assets to the heirs (the defendant was the only heiress) in accordance with the account and that there are no further assets in the estate. It is contended that, in the premises, the plaintiff is not entitled to sue the defendant. In argument, it was disclosed that the defendant relies on the defence of *plene administravit* in this regard.

In the second instance, the defendant contends that the particulars of claim do not contain an averment to the effect that the heirs had been unduly enriched at the expense of the plaintiff, the absence of which averment means that the particulars of claim do not disclose a cause of action.

- [6] Based on Bouwer's affidavit, it can be accepted that the deceased's estate was fully and duly administered in terms of the provisions of the Act and the assets duly distributed and transferred to the heirs. It can further be accepted that the plaintiff did not lodge his claim with the executrix as required by the Act or at all. The question of his claim being considered and rejected does not therefore arise nor does

the question of the Master having made any decision in regard thereto. As a matter of fact, by his own admission, the plaintiff first became aware of the identity of the person charged with the administration of the estate, Bouwer, when a notice of intention to defend was served.

[7] It can also be accepted on the basis of Bouwer's affidavit that there are no further assets in the estate. And it is common cause that though the executrix has complied fully with the requirements of the Act and completely finalised the estate, she has not been discharged in terms of section 56(1) of the Act.

[8] The question to be decided in relation to the first part of the special plea is whether the plaintiff is debarred by virtue of the expression *plene administravit* from suing the executrix in the circumstances outlined above. Mr. Woodrow, for the defendant, relied entirely on the matter of **FAURE v BRITZ NO** 1981 (4) SA 346 (OPD), especially the passage at p. 351G – H where Malherbe AJ (as he then was) implied that such defence could operate if the estate has not only been finalised and that there are no further assets, but also that

the administration thereof was fully and duly executed. Mr. Woodrow submitted that the facts of this case meet all such requirements and that the defence should therefore apply. Mr. Woodrow was fully aware of more recent judgments that clearly disagreed with the view expressed in **FAURE v BRITZ**. He nonetheless submitted that I am not bound by those decisions and that I should follow **FAURE v BRITZ**, being a judgment of this Division.

- [9] In the matter of **VISSER v SCHMIDT NO** 2001 (3) SA 810 (T), a full bench judgment, the court rejected the view that a creditor of an estate is precluded from suing the executor of the estate where the estate has been completely finalised and he has not lodged his claim. The court remarked as follows at p. 820H – I:

“With the qualifications presently to be noted, the *Stanford* judgment has consistently been followed regarding the availability of a common-law action against the executor despite not having complied with formalities relating to the lodging of a claim and disputing the rejection thereof. See, *inter alia*, *Davids v Estate Hall* 1956 (1) SA 774 (C); *Kamatchee v Kunniamma* 1961 (3) SA 100 (D); *MacDonald, Forman & Co Ltd v Van*

Aswegen en 'n Ander 1963 (3) SA 173 (O) and *Grobler en 'n Ander v Jacobs NO* 1965 (4) SA 724 (O)."

About the so-called defence of *plene administravit* the court had this to say:

"The term *plene administravit*, as a matter of linguistics, may be an adequate description of a factual situation where an executor has fully and duly administered an estate. The preceding overview, however, leads us to differ respectfully from the Court a quo. As a substantive defence available to an executor, it is not well established in our law and it is certainly not well defined. Reference to the phrase seems to be an echo of what is known in the English law but, if so, it is an imperfect and imprecise echo."

- [10] Mr. Reinders, for the plaintiff, cited other judgments of this Division that fully accord with the views expressed in **VISSER v SCHMIDT**, *supra*. See **McDONALD, FORMAN AND CO. LTD v VAN ASWEGEN** 1963 (3) SA 173 (O); **BENADE v BOEDEL ALEXANDER** 1967 (1) SA 648 (O); **ELS NO v JACOBS** 1989 (4) SA 622 (SWA). Compare also **TOLSTRUP NO v KWAPA NO** 2002 (5) SA 73 (W).

[11] It should be noted, as was pointed out in **VISSER v SCHMIDT**, *supra*, that the remarks in **FAURE v BRITZ**, *supra*, about the applicability of the defence of *plene administrativ* do not constitute the *ratio decidendi* of the judgment and, being *obiter*, are not binding. In my view, as long as long as the executor in an estate has not been discharged in terms of the provisions of section 56 of the Act, a creditor whose claim was not dealt with in the administration of the estate in terms of the Act, is not precluded from instituting action against the executor as representative of the estate. Nor can the fact that there are no further assets in the finalised estate be an obstacle. In the latter regard, it was pointed out in **VISSER v SCHMIDT**, *supra*, that when a judgment is sought against an individual the question whether he has assets with which to satisfy the judgment is irrelevant.

[12] The second part of the special plea can readily be disposed of. As Mr. Reinders correctly submitted, the plaintiff did not seek to recover damages from the heirs. His claim was not based on the *condictio indebiti* and there was therefore no need to make any averments regarding enrichment in the

particulars of claim. This part of the special plea simply has no merit. Moreover, it is the type of objection that should have been raised by way of an exception.

[13] Mr. Woodrow submitted that if I should dismiss the special plea, I should make an order similar to the one made in **VISSER v SCHMIDT**, *supra*. I see no point in making such an order. It is settled that a creditor in the position of the plaintiff cannot lay claim to the assets that have been duly distributed in terms of the liquidation and distribution account of the estate. If there are no reasonable prospects of uncovering further assets belonging to the estate, it will be up to the plaintiff to consider the advisability of proceeding further with his action.

[14] The special plea is dismissed costs. The case is postponed *sine die*.

H.M. MUSI, JP

On behalf of plaintiff:

Adv. S.J. Reinders
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of defendant:

Adv. C. Woodrow
Instructed by:
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