

**Not reportable**  
**Delivered 20 June 2007**

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(TRANSVAAL PROVISIONAL DIVISION)**

Case number: 8521/2006

Date: 20 June 2006

In the matter between:

**LARA-ANNE SIDWELL**

1 st Applicant

**CORAL SIDWELL**

2nd Applicant

**MARY SIDWELL**

3rd Applicant

and

**EMMA SIDWELL**

1 st  
Respondent

**THE MASTER OF THE HIGH COURT**

2nd Respondent

**JUDGMENT**

PRETORIUS J.

This application deals with the will of the late Dean Hylton Sidwell ("the deceased"). The applicants seek the following declarator to interpret the will: "1.

*It is declared that:*

- 1.1 *The last will and testament of the late Dean Hylton Sidwell is to be interpreted as if the underlined words as indicated below had been inserted:*

"The house 230 Wilson Street No 3 Fair Oak (which is jointly owned by Emma and me) must be sold for as much possible - Emma will get half (representing her half share of the property, and not as a legacy or inheritance) and my mom Mary Sidwell 40 Wilson Street Fairland will get the other half (being a legacy of my half interest in the house and being all that I can bequeath).

There is £200 000 (pounds in Switzerland Barclays Bank (which is jointly owned by Emma and me). That amount must be split as well £100 000 for Emma (representing her half of the money, and not as a legacy or inheritance) and £100 000 for my mom Mary Sidwell for safekeeping for Laraanne and Coral **(being a legacy of my half of the money and being all that I can bequeath).**"

- 1.2 *The first respondent has already received all that she was entitled to, whether in terms of the will or in terms of her*

*joint ownership rights in respect of the house and the funds as referred to in the will;*

1.3 *The first respondent shall not be recognised as a legatee under the will;*

1.4 *The third respondent, as legatee, is entitled to be awarded one half of the proceeds of the fixed property referred to in the will;*

1.5 *The third respondent, as legatee in trust for the benefit of the first and second applicants, is entitled to be awarded the full amount standing to the credit of the bank account referred to in the will at the death of the deceased. "*

The application is brought by the minor daughters of the deceased assisted by his first wife Sallieanne Spangenberg and the mother of the deceased.

The first respondent opposes this application and raises two points *in limine*. The first is that the first respondent is not cited in her capacity as executrix in the deceased's estate.

The second is that the applicants adopted the incorrect procedure by launching this application prematurely.

The first respondent was the wife of the deceased and the executrix in his deceased estate.

The first applicant argues that the first respondent is not cited in her capacity

as executrix of the deceased estate. The applicant does not deal with this at any stage and chooses not to join the first respondent as executrix.

Where an executrix is sued it must be alleged that she is being sued in her personal capacity as well as in her capacity as executrix of the deceased estate.

The first respondent is cited in the founding affidavit as follows:

*"5. The first respondent is Emma Sidwell, an adult women residing at 32 El Shaddai, Cornelius Street, Weltevreden Park. The first respondent (hereafter referred to as "Emma") was the wife of the deceased and is the executor in his deceased estate. "*

It is quite clear that she is not cited as executrix as mr Kruger, for the applicants, argued. He maintains that she is described in her official capacity - that is patently not so.

In **Ohlsson's Cape Breweries v Hamburg 1908 TS 134** on p 140 Solomon J found:

*"But it must now be taken to be well established under our law and practise that the executor alone is the legal representative of the deceased, and that no action can be brought claiming a declaration against an estate or claiming damages out of the assets of an estate without making the executor of the estate a party to the action."*

In **JT and W Fitzgerald v Green 1910 EDL 299** Kotze JP found at p 306:

*"Without going into all the authorities, it may be laid down that no legal proceedings can be instituted against an estate, or for the recovery of or laying claim to any assets belonging to an estate, without joining the executor of such an estate as a party to the suit. "*

The executrix had to be joined as a party in this application. This preliminary issue must be upheld.

The second point *in limine* is that the applicants have adopted the incorrect procedure.

It is common cause that the liquidation and distribution account has not been lodged at the offices of the second respondent as yet. Section 35(7) of the Administration of Estates Act, 66 of 1965 provides for the applicants to object to the liquidation and distribution account when it lies open for inspection at the office of the second respondent. The second respondent will thereafter adjudicate upon such objection. In the event of the second respondent finding in favour of the applicants, the second respondent can furnish directions to the executrix to amend the account. In the event of a dispute arising between the second respondent and the executrix, the dispute can be resolved in terms of section 96(3) of the Act, by a Judge in chambers. Should any interested person (such as the applicants) be aggrieved by the second respondent's finding, such person can apply to Court to set aside or review such decision [section 35(10)]. Accordingly, there is no dispute to be determined until such time as the second respondent has adjudicated upon any objection in terms of section 35 of the Act.

Mr Kruger argues that this provision in the Act cannot preclude parties to launch an application before the liquidation and distribution account had been drawn by the executrix and her agent. In this instance the second respondent has had no opportunity to consider the will and the liquidation and distribution account, therefore there is no Master's report.

Section 35(10) of the Act provides:

*"(10) Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the Court within thirty days after the date of such direction or refusal or within such further period as the Court may allow, for an order to set aside the Master's decision and the Court may make such order as it may think fit. "*

Mr South, for the first respondent, argues that the applicants want the court to interpret the will as set out in the notice of motion and that would entail rectification for which there is no foundation or request from the applicants.

In **Clarkson NO v Gelb and Others 1981(1) SA 288 (WLD)** Coetzee J found at p293 D-E:

*"Heirs and legaltees can claim whatever is due to them only after confirmation of the liquidation and distribution account (in terms of s 35 (12) of the Act) according to its tenor."*

And at 297 D - E:

*"When, in addition, one bears in mind that the inheritance could legally*

Case number 10705/2006  
 Heard on 15 June 2007  
 For the Applicant / Applicant Adv AN Kruger  
 Instructed by Thys Cronje inc  
 For the Respondent / Respondent: f the Adv AG South  
 I nstructed by Routledge Modise Inc  
 Date of Judgment 20 June 2007  
 confirmation of the liquidation and distribution account.

I have to agree with Mr South for the first respondent that the letter from the second respondent abiding with the court's decision takes the matter no further.

Both points *in limine* are upheld and as a result I do not deal with the further merits of the application, as the second respondent still has to deal with the liquidation and distribution account.

I therefore make the following order:

The application is dismissed with costs, jointly and severally the one to pay the other to be absolved.

C Pretorius

Judge of the High Court