IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 20/11/2007
CASE NO: 27302/2006

REPORTABLE

CM LANNGENVELDT — APPLICANT

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And

S HORN (N.O.) — 1ST REPONDENT

(In his capacity as the executor of the estates

Of JS HORN and HCSI HORN)

THE REGISTRAR OF DEEDS — 2ND RESPONDENT

THE MASTER OF THE HIGH COURT — 3RD RESPONDENT

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JUDGMENT

MAVUNDLA, J.,

[1] The applicant seeks an order in terms of which the first respondent is ordered to within 21 days of the granting of the order, to take all necessary steps, and to sign all necessary documents in order to have the property known as Erf 339, Vanderbijlpark, Central West 3, Township, Registration Division I.Q., Gauteng Province (also known as no.27 Armstrong Street, Central West 3 Vanderbijlpark) transferred into the names of the applicant, and that upon failure to do so the Sheriff be authorised to do and that the first respondent pay the costs of this application on attorney and client scale.

[2] The application is consequential to the first respondent having reneged from proceeding with the transfer of the aforesaid property into the names of the applicant, pursuant to a sale agreement he had entered into, in his capacity as the executor of the estates of his deceased parents, with the applicant, claiming that, whereas he had believed that he had been appointed the executor in the estate of his father and also in the estate of his mother, it transpired that he was in fact only appointed as such in the estate of his father and not of his mother as well.

[3] The first respondent contends that the sale transaction was therefore invalid as it was not in accordance with the provisions of section 13(1) of the Administration of Estates Act of 1965 since he had no *locus standi* to

transact in respect of his mother's estate. In support of this contention reliance is made of the matters of Du Toit v Vermeulen 1972 (3) SA 848 (A) and Clarkson NO v Gelb 1981 (1) SA 288 (W). It needs mention that there are also other reasons advanced by the first respondent for not wanting to proceed with the transaction.

[4] Mr. Potgieter, in his heads of argument further makes the point that the first respondent cannot be estopped from raising the defence that he had no authority to bind the estate of his mother because "Estoppel cannot be used to make legal what otherwise would be illegal.", and further that the applicant cannot satisfy all the requirements of estoppel. In this regard he has referred to Amler's 5th edition of *Precedents* of *Pleadings* and the cases therein cited, namely:

(a) Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A);

(b) Strydom v Die Land en Landboubank van SA 1972 (1) SA 801 (A) and

(c) Levy v Zalrut Investments (Pty) Ltd 1986 (4) SA 457 (W).

I may as well mention that in the 6th edition Amler refers to inter alia Philmatt (Pty) Ltd v Mosselbank Developments CC [1996] 1 ALL SA 296 (A); 1996 (2) SA 15 (SCA) and Provincial Government of Eastern Cape and Others v Contractprops 25 (Pty) Ltd [2001] 4 ALL SA 273 (A), 2001 (4) SA 142 (SCA).

He further submits that section 13(1) proscribes against the liquidation or distribution of a deceased estate except under the letters of executorship and that therefore the first respondent did not have authority to deal with his mother's estate and that therefore he cannot be estopped, vide Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd 2001 (4) SA 142 at 148 F-G where the said that:.

[5] On the other hand Mr. RT Bruyns for the applicant has submitted that the contract of purchase and sale concluded between the applicant and the first respondent is enforceable in law because there is no question of *error in negotio* between the parties when they concluded the agreement. He further states that the contract is enforceable against the first respondent in his capacity as the executor alternatively against the first respondent as the heir to the estate of his mother. He has also referred me to the following cases: Brits v Van Heerden 2001 (3) SA 257 at 284; Milnere Street Properties (Pty) Ltd v Ecksteen Properties (Pty) Ltd 2001 (4) SA 1315 at 1328 and Pswarayi v Pwsarayi 1960 (4) SA 925(SR); and Trust Bank van Afrika v Eksteen 1964 (3) SA 402 (A).

BACKGROUND FACTS

[6] It is common cause that Johannes Stephanus Horn, who died on 02 January 2000, and Hermina Christina Sofaya Issabella Horn, who died on 4 November 2001, were the parents of the first respondent. In their

lifetime, the parents of the respondent got divorced on 27 June 1997. They entered into a divorce settlement agreement which was made an order of Court. In terms of the said settlement agreement, Hermina Christina Sofaya Horn shall keep as her exclusive property Erf 339 CW Vanderbijlpark Township, Gauteng and the Stephanus Horn, (the defendant in those proceedings) agrees to have his half share to the said property transferred to the plaintiff (Hermina Christina Sofaya Issabella Horn).

[7] It is common cause that Johannes Stephanus Horn, the father of SHorn died intestate on 2 January 2000. It is also common cause that Hermina Christina Sofaya Horn, the mother of S. Horn died on 4 November 2001, having left a will. In terms of the said will she left everything she possessed, including Erf 339 CW Vanderbijlpark Township, Gauteng to Stephen Horn subject to the condition that in the event he does not inherit, then everything would devolve to her other son Johannes Meyer, who is the step brother to Stephen. It is also common cause that According to the Letters of Executorship, Stephan Horn was appointed as the executor of the Estate of Johannes Stephanus Horn.

[8] The memorandum of agreement of sale refers to Stephanus Horn to be acting in his capacity as the son and executor of the estates of Johannes Stephanus Horn and Hermina Christina Sofaya Horn. Factually it is

incorrect that he was the executor in the estate of his mother as well because he was never appointed as such, and this is common cause.

[9] In the matter of Trust Bank Van Afrika Bpk v Eksteen 1964 (3) SA 402 (AA) at 415 in dealing with estoppel, the Court pointed out that:

> "The doctrine of estoppel is an equitable one, developed in the public interest, and it seems... that whenever a representor relies on a statutory illegality it is the duty of the Court to determine whether it is in the public interest that the representee should be allowed to plead estoppel. The Court will have regard to the mischief of the statute on the one hand and the conduct of the parties and their relationship on the other hand."

[10] In Amler's Precedents of Pleading, 6th edition at p166 it is stated that:

> "General:The essence of the doctrine of estoppel by representation is that a person is precluded or estopped from denying the truth of representation previously made by her or him to another person if the latter, believing in the truth of the representation, acted thereon to her detriment.

*Aris Enterprises (Finance (Pty) Ltd v Ptotea Assurance* Co *Ltd* 1981 (3) SA 274 (A) at 291

**Onus:** If a party wishes to rely on estoppel, that party must plead it and prove its essential.

*Blackie Swart Argitekte v Van Heerden* 1986 (1) SA 249(A) at 260

*ABSA BANK Ltd* v *IW Blumber* & *Wilkinson* [1997]2 ALL SA 307 (A); 1997 (3) SA 669 (SCA)

**Estoppel raised by a plaintiff:** Estoppel is not a cause of action. A plaintiff can, therefore not rely on it in the claim nor can a defendant rely thereon in counterclaim.

*Rosen* v *Barclays National Bank Ltd* 1984 (3) SA 974 (W) at 983

*Sodo* V *Chairman, African National Congress, Umtata Region* [1998] 1ALL SA 45 (TK)

If the plaintiff wishes to rely on estoppel, it must be pleaded in replication in reply to the defendant's plea where reliance is placed upon the true facts.

*Mann* v *Sydney Hunt Motors (Pty) Ltd* 1958 (2) *SA 102* {G)."

[11] The applicant in his replying affidavit has stated that he was never advised by first respondent nor his attorney that he does not as yet have the necessary capacity and or authority to enter into a valid agreement in respect of the estate of his late mother. He further avers that the first respondent and or his legal representative through their misrepresentation have brought him under an erroneous belief, be it intentional or negligently, that he is authorised to sell the said property, much against his prejudice.

[12] In his answering affidavit the first respondent stated inter alia that he had initially believed that his mother had died intestate. He at a later stage discovered that she had left a will. He further says that his former attorney,

Mr Bekker had been under the belief that the first respondent had been appointed as the executor in the estates of both his parents. His aforesaid attorney had also advertised for both the estates of his father and his mother in terms of section 29 of Act 66 of 1965. It is only after the memorandum of agreement of sale had been concluded and when his then attorney Bekker appeared before the disciplinary committee of the Law Society on 6 June 2006 that he was informed that he had not been appointed as the executor in the estate of his late mother that he became aware that he did not have authority to act as the representative on behalf of his mother's estate.

[13] Section 13 of the Administration of Estates Act No 66 of 1965, provides as follows:

"(1) No person shall liquidate or distribute the estate of any deceased person, except under the letters of executorship granted or signed and sealed under letters of executorship under this Act, or under an endorsement made under section *fifteen,* or in pursuance of a direction by a Master."

[14] In the matter of De Faria v Sheriff, High Court, Witbank 2005 (3) SA 372 para [25] -[29] the Court said that:

"[25] In Schierhout v Minister of Justice 1926 AD 99 at 109, Innes CJ stated that:

'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. . . . So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act. . . . And the disregard of peremptory provisions in a statute is fatal to the validity of the proceeding affected.'

[26] This is, however, only a general rule. If the Legislature intended a different result, effect must be given to such intention. See Messenger of the Magistrate's Court, Durban v Pillay 1952 (3) SA 678 (A) at 682.

[27] In Swart v Smuts 1971 (1) SA 819 (A) at 829E - 830C, Corbett AJA summarised the applicable principles as follows:

'Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. In die algemeen word 'n handeling wat in stryd met In statute re bepaling verrig is, as 'n nietigheid beskou, maar hierdie is nie 'n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat

die Wetgewer geen nietigheidsbedoeling gehad het nie. Daar is in hierdie verband verskeie indiciae en interpretasiereëls wat van diens is om die bedoeling van die Wetgewer vas te stel. Dit is bv beslis, na aanleiding van die bewoording van die wetsvoorskrif self, dat die gebruik van die woord "moet" (Engels "shall"), of enige ander woord van 'n gebiedende aard, 'n aanduiding is van 'n nietigheidsbedoeling; en dat 'n soortgelyke uitleg van toepassing is in gevalle waar die wetsbepaling negatief ingeklee is, dws in die vorm van 'n verbod. Selfs in sodanige gevalle kan daar ander oorwegings wees wat desondanks tot 'n geldigheidsbedoeling lei. As 'n strafbepaling of soortgelyke sanksie ten opsigte van 'n oortreding van die statutêre bepaling bygevoeg word, dan ontstaan natuurlik die vraag of die Wetgewer dalk volstaan het met die oplegging van die straf of sanksie dan wel daarbenewens bedoel het dat die handeling self as nietig beskou moet word. Soos Bowen LJ, die saak in 'n Engelse gewysde, Mellias and Another v The Shirley and Feemantle Local Board of Health (1885) 16 QBD 446 te 454, gestel het

". . . in the end we have to find out, upon the construction of the Act, whether it was intended by the Legislature to prohibit the doing of an act altogether, or whether it was only intended to say that, if the act was done, certain penalties should follow as a consequence".

In hierdie verband moet die doel van die wetgewing, en veral die kwaad wat die Wetgewer wou bestry, in oorweging geneem word.

Aandag moet ook gewy word aan die volgende vraag: verg die verwesenliking van die Wetgewer se doel die vernietiging van die strydige handeling, of sal die oplegging van die straf of sanksie daardie doel volkome verwesenlik? Die volgende uitlating van Hoofregter Fagan in Pottie v Kotze (supra) [1954 (3) SA 719 (A)] te 726H, is hier tersake:

"The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."

Nog 'n belangrike oorweging wat hier ter sprake kern is die feit dat nietigheid soms groter ongerief en meer onwenslike gevolge ("greater inconveniences and impropriety" - soos die gewysdes dit stel) kan veroorsaak as die verbode handeling self.'

See also Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd 1978 (2) SA 872 (A) at 885E - G, Neugarten and Others v Standard Bank of South Africa Ltd 1989 (1) SA 797 (A) at 8080 - 809E and Simplex (Pty) Ltd v Van der Merwe and Others NNO 1996 (1) SA 111 (W) at 1120 113E.

[28] In Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd (supra) at 885E the Court found that a prohibition couched in negative terms ('no

erf . . . shall be sold, transferred or built upon. . .') is 'generally a factor strongly indicative of an intention that anything done in breach of the prohibition will be invalid'.

[29] In Sutter v Scheepers 1932 AD 165 at 173 - 4, Wessels JA referred to certain guiding principles which have evolved in England to determine when a provision in an Act is directory and when it is peremptory. He described the following tests as useful guides in this context:

1. The word 'shall' when used in the statute is rather to be construed as peremptory than directory unless there are other circumstances which negative this construction.
2. If a provision is couched in a negative form it is to be regarded as a peremptory rather than as a directory mandate.
3. If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.
4. If, when we consider the scope and object of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and if there is no explicit statement that the act is to be void if the conditions are not complied

with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

5. The history of the legislation will also afford a clue in some cases. See also Sayers v Khan 2002 (5) SA 688 (C) at 690F- 692H.

[30] It is also suggested that when a contract is not expressly prohibited but it is penalised, ie the entering into it is made a criminal offence, then it is impliedly prohibited and so rendered void. See Christie The Law of Contract 4th ed at 393 and Henry v Branfield 1996 (1) SA 244 (D) at 250C - D."

[15] From the very fact that the word "shall" is employed in section 13(1) of Act 66 of 1965, it is clear that such subsection is peremptory. Any disposition of the assets belonging to the deceased estate in contravention of s 13( 1) is therefore a nullity. The first respondent was not appointed as the executor in the estate of his deceased mother and therefore he did not have any authority to act on its behalf.

[16] On the other hand the first respondent was granted letters of executorship in respect of his father's estate. He had authority to act on behalf of the estate of his deceased father. In regard to the estate of his deceased father his authority entitled him only to transfer the 50% interest his father had over the relevant immovable property, into the estate of his deceased

mother. Once the relevant property has been transferred into his mother's estate, the executor who would have been appointed by the Master of the High Court would then have authority to deal with the estate of the first respondent's mother's estate in accordance with the will. The first respondent who has been appointed the heir in his mother's estate can only deal with the relevant immovable property once it resorts in him, which was not the case when he entered into the contract of sale with the applicant herein. In the result the conclusion to be reached is that when the applicant entered into the sale agreement with the applicant in respect of the relevant immovable property, he did not have authority to do so and consequently the relevant agreement of sale is void ab initio.

[17] The first respondent has stated that he bona fide believed that he had such authority. On the basis of the Plascon Evans principle, I must accept the version of the first respondent that he acted bona fide, when he entered into the relevant sale agreement, since he believed that he had been appointed as executor. The applicant cannot refute that the misrepresentation was genuinely made. The applicant relied on the advice of his then legal representative that he had been appointed as executor in both estate of his deceased parents. Put differently, the applicant has not acquitted himself of the onus resting upon him to prove the essentials of estoppel. But besides, the agreement of sale I find as a fact that it is void

N .M. MAVUNDLA

HEARD ON THE: 13/11/07

DATE OF JUDGEMENT: 20 /11 /2007

APPLICANT'S ATT: MR C J VAN EEDEN

APPLICANT'S ADV: MR R T. BRUYNS

2nd RESPONDENTS' ATT: MR KRYNAUW

2nd RESPONDETS' ADV: MR JJ POTGIETER

ab initio. Vide in Eastern Cape Provincial Government v Contractprops 2001 (4) SA 142 (SCA) at 148 E-G the Supreme Court of Appeal said that:

> "It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel. (See Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A) at 411 H - 412B."

Vide also Strydom v Die Land-en Landboubank van SA 1972 (1) SA 801 (AD) at 815B-G.

[18] I deem it not necessary to deal with the rest of the issues that have been raised in the papers, for instance the delay by the second respondent in finalising the winding of the estate of his deceased father where he has been appointed as the executor, as well as the remedies available to the applicant in respect of the damages he may have suffered as the result of having entered into the above sale of agreement.

[19] In the premises the application is dismissed with costs.

**JUDGE OF THE HIGH COURT**