IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No. 13043/2012

In the matter between:-

SHARON KISTEN	First Applicant
CHANTAL NAIDOO	Second Applicant
And	
SUGENDREE MOODLEY (NEE PILLAY)	First Respondent
HIMAL TUGH NO	Second Respondent

ORDERS

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1. The main application and the counter application are dismissed.

2. There will be no order as to costs in either the main application or the counter application.

JUDGMENT

HENRIQUES J

Introduction

[1] This is an application in which the applicants seek both interim and final relief in respect of the immovable property described as Portion 3… of Erf 8…, Chatsworth, physically situated at 5… C…. C…., B…., C….. (The immovable property).

[2] The applicants seek interim relief in terms of which inter alia:

[2.1] the respondents are interdicted from alienating, mortgaging, encumbering and further allowing the immovable property to fall into a state of disrepair;

[2.2] the first respondent be directed to co-operate with the applicants in restoring and upgrading the immovable property to a habitable state and to that end, to obtain the services of a building maintenance contractor to attend to the repair and restoration of the immovable property so that a fair market value can be obtained when it is sold;

[2.3] they gain access to the immovable property;

[2.4] the expenses incurred in respect of restoring and repairing the immovable property be borne by the beneficiaries of the estate late Subramoney Naidoo, jointly and severally, alternatively be paid from the proceeds of the sale of the immovable property.

[3] In respect of final relief the applicants seek orders that inter alia:

[3.1] on completion of the repairs, valuations be obtained from two independent estate agents;

[3.2] on receipt of such valuations, the applicants and the first respondent be entitled to make offers to purchase the immovable property, such sale being subject to the approval and consent of the beneficiaries;

[3.3] failing the sale of the immovable property to either of the applicants or the first respondent, the immovable property be sold by public auction.

[4] The first and second respondents have filed a counter application in which they seek to join the Master of the High Court, KwaZulu Natal, Pietermaritzburg and Durban and the Registrar of Deeds for the Province of KwaZulu Natal as the third, fourth and fifth respondents respectively, and, seek an order that the property be sold by way of

public auction in terms of s 47 of the Administration of Estates Act,[1] together with ancillary relief.

[5] In the main application and counter application the parties seek a punitive cost order against the other on account of the alleged conduct of the other.

Background Facts

[6] The following facts arise from the affidavits and annexures filed in the main and counter application.

[6.1] The immovable property is an asset in the estate of the late Subramoney Naidoo, ("Subramoney") reported at the Master's office, Pietermaritzburg, under Estate No. 7…../Pmb.

[6.2] The second respondent is the executor of the estate of the late Subramoney.[2]

[6.3] Clause 4 of Subramoney's Will nominated Edwin Deveraj Subramoney Naidoo (Edwin Naidoo), as well as the first applicant and the first respondent as beneficiaries of his estate.

[1] Act 66 of 1965.
[2] An application to the Master to have the second respondent replaced as executor by the first respondent was submitted – the date is not reflected on the letter. The applicants indicate that this was in 2010. The first respondent was not substituted as executor. It is apparent from the annexures filed, that the second respondent is familiar with the family members who are parties to this dispute and has acted as a legal representative for some of them in some instances.

[6.4] Edwin Naidoo died on 19 December 2009 and the second applicant was appointed to attend to administer and wind up his estate. In effect the second applicant, being a beneficiary in Edwin Naidoo's estate, and her siblings, would be entitled to inherit from the estate of Subramoney.

[6.5] On 9 January 2008, the second respondent signed the liquidation and distribution account in the estate of Subramoney. Subsequent to queries being attended to, the liquidation and distribution account was accepted and approved by the Master in June 2008.

[6.6] The liquidation and distribution account indicates the heirs were required to meet the cash shortfall in the estate, failing which, the immovable property would be sold at a public auction to meet the cash shortfall.

[6.7] The first applicant and first respondent have both made offers to purchase the immovable property. Such offers appear to have lapsed.

[6.8] The immovable property has yet to be transferred into the names of the beneficiaries of Subramoney's estate and such transfer can only be effected on the issue of a rates clearance certificate by the Ethekwini Municipality.

[6.9] The immovable property was occupied by Edwin Naidoo until his death on 19 December 2009. Since then the property has been vacant and is in a poor condition. It has been vandalized, is uninhabitable and losing value.[3]

[3] This is common cause.

[6.10] The applicants allege they have attempted to maintain the immovable property so that it does not lose further value, but have been met with objections and resistance from the first respondent.

[6.11] The applicants have attempted to resolve the matter with the first respondent and have sent numerous letters to the second respondent,[4] in his capacity as executor, for him to intercede and resolve the matter between the beneficiaries.

[6.12] The first and second respondents do not deny these attempts.

[6.13] The applicants fear the longer the immovable property stands vacant and is not sold, it will devalue to the extent that there will be no equity in the immovable property. There is also a real fear that the municipality will sell the immovable property for a negligible amount in satisfaction of outstanding rates and municipal charges.

[6.14] The second respondent made attempts to transfer the immovable property in 2008, but the first applicant failed to sign the relevant documents in 2008 when they were forwarded to her. The first applicant indicates that this was due to a dispute with Marsha Pillay,[5] which dispute the first and second respondents are well aware of. The first applicant and first respondent have paid various amounts due in respect of municipal charges and fees due to the second respondent. The

[4] Correspondence annexed to the papers spans a two year period. The first and second respondents do not deal with the correspondence in their affidavits nor does the second respondent indicate if he ever responded to the applicants' attorneys and if so what the response was.

[5] Marsha Pillay is the first respondent's mother and the daughter of Subramoney Naidoo.

delay in winding up the estate it is alleged has largely been due to the second respondent's conduct.

[7] The first respondent and the second respondent oppose the relief sought by the applicants. In addition, they raise *in limine* defences to the application, namely that the applicants have not joined the Master of the High Court, Durban and Pietermaritzburg and the Registrar of Deeds. The second respondent has not been cited in his representative capacity as the executor of Subramoney's estate and further, there is no basis in law and in fact for the relief sought in the applicant's notice of motion. The crux of the first and second respondents' opposition is that the applicants do not have *locus standi* to bring this application.

Issues for determination

[8] The issues to be decided in these applications therefore is the *in limine* defences, whether or not the applicants had the necessary *locus standi* to institute the application. Further, whether the applicants and the first and second respondents are entitled to the relief sought.

[9] It would appear that the parties are *ad idem* that the immovable property should be sold and the proceeds distributed to the beneficiaries. It is the manner of sale which is at issue if one has regard to the affidavits and annexures filed.

The Merits of the Application

[10] I propose to deal firstly with the issue of non-joinder. It is practice for litigants to cite the Master, Pietermaritzburg in the application in light of the fact that he is an affected party and oversees the winding up of estates, specifically the estate late Subramoney. However, as the applicants seek no direct relief against either Master, service of the application papers sufficed for the relief in the main application. No direct and substantial relief was sought.

[11] The papers were served on the Registrar of Deeds on 20 February 2013 and no report or any objection to the application or counter application has been filed. Here to no direct and substantial relief was sought and on the facts of this matter, service was sufficient.

[12] The respondents, however in the counter application, seek direct relief against the Master, Pietermaritzburg. Both the application papers together with the counter application have been served on the respective Masters and reports have been filed.[6] In essence, the Master in the Subramoney estate indicates that the estate was reported on 16 October 2006 and the filing slip issued on 18 August 2008, that the immovable property was to be transferred to the heirs but such transfer was still outstanding. The Master, Durban has filed a report in respect of the estate late Edwin Deveraj Subramoney Naidoo confirming the reporting of the estate and that the only asset in the

[6] The Master, Pietermaritzburg's report is at 120 of the Indexed papers.

estate of Edwin Naidoo is his one third share in respect of the immovable property in estate late Subramoney. Both Masters abide by the decision of the court.

[13] In light of the order sought in paragraph 3 of the counter application, it would have been necessary for the respondents to join the Master, Pietermaritzburg as an order is sought directing the Master to approve the sale.

[14] Given the conclusion, I reach, it is not necessary to deal with this *point in limine* further and issue orders for the formal joinder of such parties.

[15] I now turn to the issue of *locus standi*. Mr Naidoo, counsel for the first and second respondents argued that the applicants did not have *locus standi* to institute the application and that the application was fatally defective. He did not however, cite any case authority for this proposition. He argued that in terms of the Administration of Estates Act, any application or action in relation to any assets of the estate had to be instituted by the executor, being the second respondent. He submitted that if the applicants or any of the beneficiaries took issue with the manner in which the second respondent was handling the estate, their recourse was an application to the Master for the removal of the executor.

[16] The counter application has been brought by both the first and second respondents who have deposed to affidavits in support of the relief. The second

respondent joins the first respondent in respect of the order sought in the counter application. The fallacy in this submission is clear. What is 'good for the goose must be good for the gander' and in submitting that the applicants did not have *locus standi* to bring the application, on what basis can it possibly be argued that the first respondent has *locus standi* to bring the counter application, if one were to accept the submission of Mr Naidoo?

[17] The issue of *locus standi* of beneficiaries has not been definitively decided. The case of *Angath v Mothari, NO & Others*[7] concerned an exception in which the defendants, one of whom was an executor, sought to have an action stayed until the other intestate heirs in an estate had been joined. The action had been instituted by the plaintiff as one of the heirs in the estate of his father for the delivery of immovable assets and ancillary relief. The defendants, including the executor of the estate raised a plea *in limine* that the plaintiff had to join the other beneficiaries to the action as they had a direct and substantial interest insofar as the assets in the estate were concerned. Caney AJ found that 'each heir has a separate and independent right to have assets belonging to the estate brought into it; the heirs have as yet no direct interest in the assets themselves, but will, each of them, be entitled, not to a joint interest, but to have his or her share upon the distribution of the estate by the second defendant if the action goes against the first defendants.'[8]

[7] 1954 (4) SA 285 (N).
[8] At 289 C-D.

[18] Caney AJ was of the view that even though an executor represents the estate and not individual beneficiaries, it was, given the facts of the matter, prudent to join the beneficiaries in the action and upheld the exception.

[19] *Fakroodeen v Fakroodeen & Others NNO*[9] concerned an application by an heiress who applied for an order against the executor of her late father's estate to liquidate the estate assets and to sell immovable properties in the estate and distribute the assets in terms of the Will. The respondents took a point *in limine* that the other heirs and beneficiaries ought to have been joined in the action. The court directed that the heirs had a direct and substantial interest in the proceedings and ought to have been joined. It would appear having regard to the *Fakroodeen* decision that a beneficiary was entitled to bring such application and had *locus standi* given the circumstances. Leon J was of the view that the dispute was 'between rival beneficiaries'[10] who were the real parties to the dispute and had to be joined. By analogy then, it must follow that the applicants are 'rival beneficiaries' and have *locus standi* to bring the application.

[20] In *Du Toit v Vermeulen*[11] the question was once again discussed but not resolved. It would appear that the facts of this matter are similar to that in *Fakroodeen*, a decision of this division. Here the applicants were seeking to compel the executor and the first respondent to comply with and enforce the terms of the Will and consequently

[9] 1971 (3) SA 395 (D).
[10] At 398.
[11] 1972 (3) SA 848 (A).

had *locus standi.* To hold otherwise would also be to find that the first respondent could not institute the counter application.

[21] As a consequence of the order in paragraph 3 of the counter application, and the fact that the Master, Pietermaritzburg elected to file a notice to abide and the affidavits did not contain any facts dealing with s 47, correspondence was addressed to the respective Master's offices and the parties' legal representatives.[12]

[22] The applicants' legal representative submitted in supplementary heads of argument, that an order in terms of s 47 was appropriate, given that the second respondent has not acted in the best interests of the beneficiaries. The respondents adopt the view that the relief in terms of paragraph 3 is competent given the dispute between the parties and refers to a number of authorities.

[23] In response to the requestfor a report to deal with the factual position in this matter and the interpretation of s 47 given those facts, the Master, Pietermaritzburg has indicated that it does not file heads of argument but rather a report. As it does not oppose the application, no papers have been filed. Insofar as the request to address the issue of the interpretation of s 47 is concerned, the response is to refer the court to the author Meyorowitz and his commentary thereon insofar as the procedure is concerned.

[12] The letter refers to heads of argument being filed by the parties' representatives and for the Master to address the issue by way of a report. There was a considerable delay in obtaining a response from the Master, Pietermaritzburg.

No attempt has been made to place the facts before the court as to whether an approach in terms of s 47 has been made by the second respondent.

[24] The approach adopted by the Master is unhelpful to say the least. Whilst I accept that the role of the Master is not to become embroiled in family disputes, the section requires the Master to exercise a discretion and not to simply adopt a supine approach. I propose to deal with this issue further.

[25] Before doing so however, it is necessary to comment on the second respondent's conduct. As executor, he is required in exercising his fiduciary duty, to act in the best interests of the estate and the beneficiaries. He is obliged to take control of the assets, preserve them and administer and wind up the estate as speedily as possible. In the event of conflict between the beneficiaries, he can act in terms of s 47 of the Administration of Estates Act and must seek direction and approval from the Master in the event of the beneficiaries not being in agreement.

[26] The second respondent aligns himself with the content of the affidavit of the first respondent. Yet annexure "KS11" indicates that he was advised of the death of Edwin Naidoo and the appointment of the executor. One would have expected that he would have known of this as he would have been liasing with all beneficiaries in winding up the estate late Subramoney. Apart from sending documents to be signed by the first respondent in 2008, he has not indicated what steps he had taken when he received no

response, and why he did not get direction from the Master or compel the first respondent to sign.

[27] In addition, there is no indication why the offers to purchase were allowed to lapse and why he has allowed the immovable property to deteriorate to such an extent that it has decreased in value. He also does not appear to have taken any steps to have the immovable property sold to a third party or by public auction once the offers had lapsed and it is only this application which has resulted in the counter application. There is nothing placed before this court to determine what the second respondent did to attempt to sell the immovable property between 2008 and the date of the application some 5 years later.

[28] To date the transfer of the property has not taken place and the beneficiaries have been prejudiced in the amount that they will obtain from the estate. The second respondent has not provided any explanation as to why he ignored correspondence from the applicants and does not disclose why he himself failed to approach the Master for directions or approval.

[29] In essence, the executor is authorized subject to the consent of the heirs/beneficiaries to sell the immovable property. Section 47(b) provides for the executor to sell the property subject to conditions as the Master may approve if the heirs are unable to agree on the manner and the conditions of sale. On what is contained in the affidavits, and in the absence of the Master and the parties' legal representatives'

advice to the contrary, no such approach to the Master for approval for the sale of the immovable property by way of public auction has been made.

[30] One does not know what the attitude of the Master is to such a sale nor is one advised whether such a sale will realize an amount to the benefit of the beneficiaries. One is not informed as to whether the Master approves of such sale or not. The second respondent can only sell the immovable property subject to the consent of all the heirs and subject to the approval of the Master. The requirements of the section are pre-emptory.[13]

[31] *Davis & another v Firman NO & others*[14] concerned the correct interpretation of s 47. I align myself with the views expressed in such judgment and the reasons. The parties had placed before the Master the information in respect of the differing views for the sale before an approach was made for the approval of the sale of shares and loan accounts in this instance.

[32] The court considered the interpretation of the section in the context of the role of an executor in the winding up of an estate. Levinsohn J quotes from the decision of Innes CJ in the decision of *Ex parte Eckard*[15] where the court reiterated that executors are responsible to realize assets, such is not an unfettered discretion and that he acts under supervision of the Master.

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[13] *Scholfield & others v Bontekoning & another* [2011] JOL 27906 (GSJ) para 5.
[14] [2010] JOL 24849 (N).
[15] 1902 TS 169.

[33] In *Davis*, the court was of the view that assets must be sold for the best possible price and a sale by public auction is not the norm. Where as in this instance, the heirs do not agree with the each other or the executor regarding the manner of realization of the assets, then the executor can only sell the property 'in such manner and subject to such conditions as the Master may approve'.[16]

[34] The Master performs the function of considering the options placed by the non-consenting heirs as to the best manner to realize the property, and approves thereof. This is clear having regard to pages 15 and 16 of the *Davis* judgment where the court held

> '. . . and it is only in the event of these heirs being unable to agree *inter se* that the Master's jurisdiction to consider whether to approve the sale would arise.'

[35] The Master in my view not only performs a supervisory role but a specialized role. The court should defer to the Master's view unless same is clearly wrong or it can be shown on review that it was an improper exercise of such discretion. I agree with the sentiments expressed that courts should not 'interfere with the exercise of discretion by a specialised official'[17] and should be hesitant to substitute its own ruling for that of the Master.[18]

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[16] At 3.
[17] *Foil Laminators CC & others v Master of the High Court & another* [2013] JOL 30787 (FB) para 33.
[18] *Van Zyl NO v The Master* 2000 (3) SA 602 (C) para 20.

[36] On the facts of this matter, the approach to court for orders in the counter application, specifically paragraphs 2, 2[19] and 3 is made without the differing views of the heirs being placed before the Master, and the executor's views of the manner of realization of the property, ie by private treaty, public auction or by the heirs themselves. In addition, in the absence of the executor approaching the Master for him/her to exercise a discretion and make a decision to approve or otherwise the manner of realization proposed, this Court cannot make a decision for the Master and cannot usurp the role or function of the Master in s 47.

[37] Prior to approaching the court the second respondent ought to have approached the Master in terms of s 47 for a decision. Absent such approach, this Court cannot make a decision for the Master. It can only deal with a decision once made, on review.

[38] I now turn to the relief sought in the main application. In essence, the first and second applicants appear to have instituted the application out of sheer desperation. The manner in which the papers were drafted and the relief sought in the notice of motion can be described as clumsy, overreaching and lacking foundation. The crux of their complaint relates to the manner in which the second respondent is winding up the estate. An approach ought to have been made to the Master for the removal of the second respondent in terms of s 54 of the Act.[20]

[19] There were two paragraphs 2 in the notice of motion in the counter application.
[20] *Reichman v Reichman & others* 2012 (4) SA 432 (GSJ).

[39] As part of his duties in preserving the assets of the estate one would have expected the second respondent to have taken the necessary steps to maintain the property and ensure that the highest possible price is obtained for it when sold. In the absence of more being said in the founding affidavits and why an approach to have him removed was not pursued, this Court cannot issue the orders sought. I accept that a number of attempts were made to resolve the issues and the disputes which came to naught but, nowhere in the affidavits is an approach to the Master dealt with. Whilst it may be cold comfort that the beneficiaries may have a claim against the second respondent should it be found he was negligent or remiss in preserving the assets to ensure the property was sold for the best possible price, this Court cannot issue the orders absent a request to the Master.

Costs

[40] I now turn to the question of costs. It would appear that neither party is completely innocent in their conduct. The applicants were forced to resort to this application to force the second respondent to dispose of the immovable property in the estate to enable them to obtain their inheritance.

[41] It is only after the applicants instituted this application that the second respondent now joins the first respondent in bringing a counter application for the immovable property to be sold by public auction. The adage no good turn goes unpunished comes to mind.

[42] I am inclined to believe that both sets of parties are to blame for the mess that has resulted and an equitable course would be for the costs of the application and counter application to be paid by each party.

[43] Having said that, however, the second respondent ought not to be rewarded for his inactiveness and his failure to take satisfactory steps to wind up the estate and seek approval of the Master in terms of s 47. To hold otherwise would be to reward him for unsatisfactory conduct.

[44] The remuneration of executors and interim curators is dealt with in terms of s 51 of the Administration of Estates Act. In terms of sub-sec 3 the Master may:'(a) if there are in any particular case special reason for doing so, reduce or increase any such remuneration; **due to an executor**

> (b) disallow any such remuneration, either wholly or in part, if the executor or interim curator has failed to discharge his duties or has discharged them in a unsatisfactory manner;. . . .'(My emphasis)

[45] Given the information placed before the court, I am not in a position to determine whether or not the remuneration of the second respondent ought to be disallowed in total, or in part. The Master is best placed to deal with this in light of the fact that the Master has been overseeing the conduct of the second respondent. I believe that so as not to unduly burden the estate and further reduce any amount which the beneficiaries will receive from the sale of the immovable property, it would be prudent to direct the

Master to enquire into the remuneration due to the second respondent and act in terms of the provisions of s 51(3) if the Master deems fit.

Conclusion

[46] For reasons mentioned, it will not be necessary to issue orders for joinder of the parties requested by the respondents. Absent any approach to the Master, this Court cannot issue orders either in the main application or the counter application.

[47] Consequently the orders I grant are the following:

[47.1] the main application and the counter application are dismissed.

[47.2] there is no order as to costs.

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HENRIQUES J

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