REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 75130/2009

DATE:06/06/2012

In the matter between:

MENDELOW, RONALD N.O.	FIRST APPLICANT
LEDWABA, LAZARUS N.O.	SECOND APPLICANT

And

THE MASTER OF THE HIGH COURT PRETORIA	FIRST RESPONDENT
THE MASTER OF THE HIGH COURT JOHANNESBURG	SECOND RESPONDENT
THE REGISTRAR OF DEEDS PRETORIA	THIRD RESPONDENT
VAN DEN HEEVER, THEODORE WILHELM N.O	FOURT RESPONDENT

KEEVEY KAREN N.O.	FIFTH RESPONDENT
IMPERIAL BANK LIMITED	SIXTH RESPONDENT
CRONIN, PATRICK HENRY	SEVENTH RESPONDENT
VALENTE, RICCARDO ROSSER	EIGHTH RESPONDENT

JUDGMENT

BAQWA A.J

The Application

[1] This is an application in which the applicants seek an order in the following terms:

1.1 The first respondent's certificate issued on 30 August 2001, in terms of section 42(2) of the Administration of Estates Act 66 of 1965 as amended, by which the first respondent endorsed a power of attorney dated 24 July 2001, signed by the seventh and eighth respondents in their then capacities as the joint executors of the estate of the late Emily May Valente authorising the transfer of the immovable property described as Portion 104 (a portion of Portion 65) of the Farm Rietfontein 2 registration division I.R. Province of Gauteng measuring 1,2111 (one comma two one one one) hectares held under Deed of Transfer No. T120046/2001 dated 25 October 2001 (herein referred to as "the property") from the estate of the late Emily May Valente to U Valente Africa (Pty) Limited, (now in liquidation) is hereby set aside;

1.2.The transfer of the property by the former executors in the estate of the late Emily May

Valente to U Valente Africa (Pty) Limited (now in liquidation) under deed of transfer No. T120046/2001 be and is hereby set aside;

1.3. The said property is hereby ordered to revert to the estate of the late Emily May Valente held under Deed of Transfer No. T71702/1991 for due administration by the first and second applicants in accordance with the provisions of the Administration of Estates Act No. 66 of 1965 as amended;

1.4. The third respondent be and is hereby ordered and directed:-

1.4.1.to cancel the Deed of Transfer No. T120046/2001;

1.4.2. to transfer the property into the estate of the late Emily May Valente, estate number 6348/2001.

1.5. The fourth and fifth respondents, and in so far as the sixth respondent may have possession of the current Title Deed, the sixth respondent, be and are hereby ordered to surrender the Deed of Transfer No. T120046/2001 dated 25 October 2001 to the applicants' attorney, alternatively directly to the third respondent for due cancellation;

1.6. In the event of the fourth and fifth and/or the sixth respondent not surrending the said Deed of Transfer No. T120046/2001, the third respondent be and is hereby ordered and directed to cancel the said Deed and Transfer the property as stipulated in paragraphs! 4.1 and 1.4.2 of this order;

1.7.The third respondent to cancel the first mortgage bond registered against the title deeds of the property in favour of the sixth respondent;

1.8. The eighth respondent be ordered to pay the costs of these proceedings on the scale as between an attorney and his own client;

1.9. The sixth respondent to pay the costs of these proceedings jointly and severally with the eighth respondent, which liability shall be limited to the amount of the taxed party and party costs pertaining to these proceedings;

HO.The applicants are hereby authorised to procure payment of the costs payable by the eighth respondent by appropriating the amount of such costs from the cash resources of the estate of the late Emily May Valente and allocating such appropriation to that portion of the estate of the late Emily May Valente which, but for the provisions of paragrapgh 6 of the Last Will and Testament of the late Emily May Valente signed on 23 March 1994, would have vested in and become payable to the eighth respondent;

1.11.To the extent necessary any non compliance with the period of 180 days set out in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 in terms of section 7(2) of such Act is hereby considered.

Parties

[2] The applicants are attorneys practising as such in Johannesburg and Pretoria, respectively who bring this application in their representative capacities as joint executors of the deceased estate of the late Emily May Valente estate number 6348/01.

[3] The first and second respondents are the Masters of the High Court Pretoria and Johannesburg.

[4] The third respondent is the Registrar of Deeds, Pretoria.

[5] The fourth and fifth respondents are insolvency practitioners who are cited in their capacities as joint liquidators of U Valente Africa (Pty) Limited (in liquidation) ("the company").

[6] The sixth respondent is Imperial Bank Limited("Imperial").

[7] The seventh respondent is a practicing attorney, a former executor in the estate currently administered by the applicants herein.

[8] The eighth respondent is Ricardo Rosser Valente who is also a former executor in the estate.

[9] The applicants seek no order for costs against the first six respondents nor is a costs order sought against the seventh respondent save in the event that an of those respondents oppose these proceedings in which event the applicants seek an order for costs occasioned by such opposition.

Background

[10] The background of this matter can be summarised as follows:

10.1.The applicants are the executors in the estate of the late Emily May Valente, appointed as such on 24 November 2009.

10.2. Emily May Valente ("the deceased') died on 30 January 2001 having a codicil bequeathing a legacy of R15 000.00 to each of seven grand children and a will in terms of which she bequeathed the residue of her estate, in shares to her two sons, Ricardo Rosser Valente ("the eight respondent") and Evan Rosser Valente ("Evan")

10.3. In terms of her will the deceased nominated the seventh respondent ("Cronin") the eight respondent and Evan as the executors in her estate. Evan declined the appointment.
10.4. The eighth respondent and Cronin were appointed as executors on 10July 2001.
10.5. During their term as executors eighth respondent engaged in a series of acts of dishonesty pertaining to the administration of the estate. This led to the resignation of Cronin on 28 May 2007 due to the compromising position in which he found himself.

10.6. A further consequence was the removal of the eighth respondent as the remaining executor by the first respondent ("the Master").

[11] The relief sought by the applicants falls into three broad categories:
11.1. The applicants seek the review and setting aside of the certificate issued by the Mater in terms of Section 42(2) of the Administration of Estate Act which made possible the transfer of the property to the company. They also seek the setting aside of the transfer which is a relief sought at administrative law.
11.2. Further, the applicants seek the return of property to the estate by means of a transfer back. This relief is sought both at administrative law and also by way of condictio but the applicants have abandoned the latter during the cause of these proceedings.
11.3. Lastly, the applicants seek to have the first mortgage bond registered over the property, in favour of the sixth respondent cancelled.

[12] Only the sixth respondent filed an answering affidavit in opposition to this application.

[13] Initially, the sixth respondent raised four grounds as a basis for its opposition:

13.1. Its contention was that the applicants have chosen "the wrong victim" and that any claim they have should be more properly pursued against the eighth respondent.

13.2. The sixth respondent also contended that Evan had waived his claim to acquire real rights in the property.

13.3. The third contention was that the claims vesting in Evan and in the estate had been extinguished by prescription.

13.4. Fourthly, the sixth respondent raised estoppel based upon representations made by Evan, relied upon by the sixth respondent.

[14] During the cause of the proceedings counsel for the sixth respondent, Mr Wasserman S.C indicated that sixth respondent would no longer be relying on waiver and prescription as grounds on which sixth respondent bases its opposition.

[15] The applicant's claim is premised on the exercise by the master of his powers in terms of Section 42(2) of the Act based on a material misrepresentation which can be summarised as follows:

15.1. Eighth respondent forged his late mother's signature approximately seven days prior to her passing away on an agreement of sale in terms of which the property was disposed of to the company.

15.2. He forged the signature of his brother and co-heir, Evan on a document entitled "consent to sale" and presented the consent to sale to the first respondent ("the master") with the intention of inducing the master to endorse the power of attorney to transfer in terms of

section 42(2) of the Act.

[16] Applicants contend that the transfer in question was procured pursuant to a fraudulent scheme by the eighth respondent with the objective of misappropriating the property from the deceased estate for his own benefit and profit.

[17] It is applicants' further contention that had it not been for the alleged fraud, the property would have remained an asset in the deceased estate and would have been distributed, alternatively realised and the proceeds thereof distributed in accordance with the will of the deceased.

[18] The sixth respondent does not contest the contention advanced on behalf of the applicants (and supported by Evan) to the effect that the signature on the "consent to sale" is a forgery.

[19] The application is therefore premised on a review in terms of Section 6 and 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)

Section 7 provides as follows:

"7 Procedure for judicial review.

(1) Any proceedings for judicial review in terms of Section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-fa) Subject to subsection 2(c), on which any proceedings instituted in terms of internal remedies as contemplated in

subsection(2)(a) have been concluded; or

(b)Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or ought reasonably have been expected to have become aware of the action and the reasons."

[20] The thrust of sixth respondent's submission is premised on the view that this application has been instigated and in all probability funded by Evan. It suggests that this is therefore not a genuine application and that Evan is the real applicant. This submission is a rather unusual one to say the least because it pre-supposes that the court could weigh considerations pertaining a party nor cited in the proceedings, ignore the applicants and virtually treat them as non-participants in these proceedings.

Even though Evan has filed a detailed affidavit in support of the applicant's action, I am not persuaded that elevating him to an applicant in the rather unorthodox manner suggested would be the proper thing to do both in fact and in law.

It is common cause that Evan is a beneficiary in the estate which the applicants have been appointed to administer and it would be accordingly inappropriate to treat him otherwise in these proceedings.

[21] It is common cause that Evan became suspicious regarding eighth respondent's dishonesty in his actions regarding the estate in 2005. He did not take any action as he would have been entitled to do in terms of PAJA.

The sixth respondent's submission would therefore have the effect of impugning the present

action, if Evan was the applicant, as being non-compliant with the provisions of section 7 (supra) in that it would be seen as being unreasonable or outside the 180 day period prescribed in that section. If that reasoning is accepted, the further submission is that such non compliance should not be condoned.

[22] On the other hand, the applicants were appointed on 24 November 2009 and about two weeks later, during December 2009, they brought this application.

22.1. Applicants submit that time was of the essence because despite advice from the applicant's attorney to the fourth respondent of an intention to bring these review proceedings to procure the cancellation of the transfer of the property to the company, the fourth respondent persisted in his intention to offer the property for sale by public auction as soon as possible, which he advised applicants' attorney was the sixth respondent's instruction to him.
22.2. Applicants further submit that their actions were not driven by Evan as the relief they seek is not just focused on the property but on the estate. It is common cause that there are seven other beneficiaries in the estate, namely the grandchildren and the applicants submit that if there are no other liquid assets in the estate they would have to sell the property in order to ensure that what was bequeathed to the other beneficiaries is properly distributed.
22.3.Applicants submit that in 2005 Evan had a suspicion about his brother Ricardo (eighth respondent) dishonesty but no proof. They submit that it was only in march 2007 after reviewing the Liquidation and Distribution Accounts presented by eighth respondent that he realised that the sale of the property to the company was effected in a fraudulent manner. He then instituted winding up proceedings of the company.
22.4. Shortly after the institution of the winding up proceedings on 22 May of 2007 Evan's attorney had received a letter from seventh respondent indicating beyond any doubt that the

consent purportedly signed by Evan had been forged. First respondent had exercised his powers in terms of Section 42(2) of Act relying on a forged consent which constituted a material fraudulent misrepresentation.

22.5. According to the applicants therefore, Evan took action by way of winding up action when he received proof of dishonesty. The estate could nor have taken action prior to the applicants' appointment in November 2009 because the eighth respondent who was both the fraudster and executor was only removed as executor on 27 August 2009.

22.6. Applicants submit that there was nothing inappropriate in Evan trying to negotiate joint control of the company prior to receiving proof of dishonesty and that had he achieved joint control he would probably have prevented subsequent actions by eighth respondent where he further fraudulently obtained loans using the property as security. [23] Having considered the facts stated above, I am not persuaded that Evan ought to be elevated to the status of applicant in this matter. I am of the view that the applicants are properly before court and that they have taken the only appropriate action available to them. I am also of the further view that their action was taken timeously and in reasonable time and in compliance with section 7 of PAJA. I find that it is not necessary to impute whatever knowledge Evan had to them because Evan is a beneficiary and not an executor in the estate. Any delay in launching these proceedings therefore ought to be condoned.

Estoppel

[24] The sixth respondent has also raised the defence of estoppel against the applicants' claim. In doing saw sixth respondent states that the estate was always duly represented and that the replacement of the executors should not be allowed to enure to the benefit of the estate at the expense of an innocent third party. Sixth respondent further submits that the

estate facilitated the transfer of the property to the company and that it was therefore entitled to assume that the company was the owner of the property which was duly authorised to apply for finance and to cause a bond to be registered over its property. Sixth respondent therefore submits that the estate ought to be estopped from pursuing these proceedings which seek to recover the property and thereby prejudicing an innocent third party.

[25] The question is whether the estate was indeed duly represented at all material times. In my view, it cannot be said to have been duly represented prior to the advent of the applicants. It is common cause that eighth respondent was the fraudster and executor at the same time. He seemed to be hell bent to perpetrate a concatenation of fraudulent acts from the moment he was appointed as executor. The question is whether the defence of estoppel be utilised to legitimise a series of fraudulent acts. Eighth respondent failed to disclose that there was an application to wind-up the company even at the time when he was being granted a loan and causing a bond to be registered over it's property.

[26] It is instructive to examine this legal principle through the eyes of his lordship Ponnan JA in the case of

City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008(3) SA 1 (SCA)

When he stated the law as follows:

"When deciding whether the doctrine of astoppel may be raised against a statutory body, a distinction must be drawn between (a) acts beyond or in excess of the legal powers of a public authority; and (b) the irregular or informal exercise of power granted. The failure by a

statutory body to comply with the provisions which the legislature has prescribed for the validity of a specified transaction falls within category (a) and cannot be remedied by estoppel because that would give rise to a transaction which is unlawful and therefore ultra vires. This is to be distinguished from the failure by a statutory body to comply with all the relevant internal arrangements and formalities which falls within category (b) and in respect of which estoppel may be successfully invoked (paragraphs [11]-[13] at (5F-6A)"

[27] It is quite clear from the facts of this case that we are dealing with a series of unlawful acts which were perpetrated by the eighth respondent. He unlawfully caused first respondent to facilitate the transfer of the property to the company in terms of section 42(2) of the Act. He thereafter used the same property to secure loans for his own personal use and not for the benefit of the company. It does not seem proper to me to invoke estoppel to remedy these illegalities.

[28] It is also significant that counsel for the sixth respondent Mr Wasserman S.C, conceded that in his view applicants should have been allowed to succeed with a similar claim had it been brought in the year 2001. By making that concession he was seeking to underline his attack on what he categorises as an unreasonable delay in bringing this action at this time. That matter has already addressed earlier in this judgment. The point is, if the action should have succeeded at an earlier time and the delay in bringing the action in terms of PAJA is condoned, then logically the claim should succeed.

[29] Another point to be considered as submitted by counsel for the applicants, Mr Cook S.C, is that no representation was made by the applicants- nor could any have been made - prior to the sixth respondent advancing funds to the company. The estoppel defence can therefore

not be upheld against them.

Cancellation of the bond

[30] Applicants seek cancellation of the bond over the property presently registered in the name of the company. The events preceding the registration happened as follows:
30.1. On 16 May 2007 Evan applied for the winding up of the company based on eighth respondent's malfeasance.
30.2. A provisional winding-up order was granted on 9 December 2008 and the company was finally wound-up on 30 April 2009. Thus in accordance with section 348 of the old Companies Act, the winding -up commenced on 16 May 2007.
30.3. The first mortgage bond registered over the property in favour of the sixth respondent was registered during October 2008.
30.4. The registration of the bond was a disposition within the meaning of section 341 of the old Companies Act. "Disposition" has the meaning assigned to it by section 2 of the Insolvency Act, 24 of 1936 (See Henochsburg on the Companies Act, 5th Ed. Vol. 1 p679) The definition in section 2 includes a reference to mortgage.

[31] In terms of section 341(2): "Every disposition of its property (including rights of action) by any company being wound up and unable to pay its debts made after the commencement of the winding up, shall be void unless the court otherwise order".

[32] It is quite clear that the registration of a bond was a disposition contemplated in section 341(2) and as such is void and liable to be set aside. The purpose of section 341(2) is to ensure that the property of a company threatened with winding-up is not improperly dissipated

prior to the commencement of the winding-up and is available for the satisfaction of the claims of its creditors on a footing of equality of treatment subject only to any security or preference which any of them may enjoy under the Insolvency Act.

See Lane No v Olivier Transport 1997 (1) SA 383 C at 385 Henochsberg on the Companies Act (supra) at p676

Eighth respondent was clearly dissipating the property in question to benefit himself.

[33] In considering this matter if is instructive to make reference to the judgment of her ladyship, the Honourable Justice Mayat during the winding-up proceedings at the South Gauteng High Court in the matter of
Evan Rosser Valente v Valente Africa (Pty) Ltd and 2 Others Case No 115/07 (an unreported decision delivered on 30 April 2009).
In that case the company was the first respondent whilst the eighth respondent was the second respondent. Justice Mayat stated as follows: respectfully agree with Acting Justice Epstein that a prima facie case has been made out in the initial proceedings for a provisional winding-up of the first respondent As noted by the learned Judge it was not disputed that the registration of the BOE bond constituted non-compliance with certain sections of the Companies Act including section 234 read with section 235, as well as section 236 of the Companies Act Furthermore, the second respondent did not obtain a resolution of the directors of the first respondent in terms of section 236 of the Companies Act. In addition it was not disputed that the second respondent utilised the proceeds of the loan procured with the security of BOE bond to purchase another property which was then sold at a profit by his company Erf 332 Chloorkop (Pty) Limited. Thus in breach of the second respondent's

fiduciary duties in terms of the Companies Act the BOE bond was effectively procured by the second respondent at the expense of the first respondent entirely for the benefit of Erf 332 Chloorkop (Pty) Limited without any compensation to the first respondent and indeed without also the knowledge of the first respondent initially.

Thereafter it became apparent in those proceedings, whilst the second respondent had already procured the cancellation of the BOE bond prior to the hearing of the initial proceedings, he had simply repeated and indeed exacerbated his fraudulent conduct by procuring the Imperial Bond for three times the amount of the BOE bond. The second respondent's submission in these proceedings that only a small portion of the R6 million secured by the Imperial bond did not mitigate his conduct, particularly as it was not in dispute in the initial proceedings that the registration of the BOE bond was a contravention of the Companies Act. In the same way it can now hardly be disputed that the circumstances relating to the registration of the Imperial bond, which was ascertained by the applicant's attorneys after the initial proceedings, and which was similar to the circumstances pertaining to the registration of the BOE bond also constitute a contravention of the Companies Act. Furthermore, as already indicated, the second respondent's failure to disclose the registration of the Imperial bond to the applicant and to the court in the initial proceedings is in my view fraudulent."

Quite evidently the registration of a bond with sixth respondent was not only unlawful in contravention of section 341(2) of the Companies Act but also a perpetuation of a fraudulent spree that the eighth respondent had embarked on.

Conclusion

In summary therefore I find that:

35.1. The applicants have the necessary locus standi to bring this application.

35.2. The application for review is properly premised on PAJA and it falls properly within the ambit of the provisions of PAJA. To the extent that it may not comply with those provisions, such non compliance is condoned.

35.3. The first respondent was improperly and unlawfully induced to facilitate the transfer of the property by the fraudulent actions of the eighth respondent.

35.4. But for the fraudulent actions of the eighth respondent the transfer of the property from the estate to the company would not have taken place.

35.5. The registration of the bond in favour of the sixth respondent at the instance of the eighth respondent was both fraudulent and in contravention of inter alia section 341(2) of the Companies Act and as such has to be set aside.

ORDER

[36] In the result the following order is made:

I. The first respondent's certificate issued on 30 August 2001, in terms of section 42(2) of the Administration of Estates Act 66 of 1965 as amended, by which the first respondent endorsed a power of attorney dated 24 July 2001, signed by the seventh and eighth respondents in their then capacities as the joint executors of the estate of the late Emily May Valente authorising the transfer of the immovable property described as Portion 104 (a portion of Portion 65) of the Farm Rietfontein 2 registration division I.R. Province of Gauteng measuring

1,2111 (one comma two one one one) hectares held under Deed of Transfer No. T120046/2001 dated 25 October 2001 (herein referred to as "the property") from the estate of the late Emily May Valente to U Valente Africa (Pty) Limited, (now in liquidation) is hereby set aside;

2.The transfer of the property by the former executors in the estate of the late Emily May Valente to U Valente Africa (Pty) Limited (now in liquidation) under deed of transfer No. T120046/2001 be and is hereby set aside;

3.The said property is hereby ordered to revert to the estate of the late Emily May Valente held under Deed of Transfer No. T71702/1991 for due administration by the first and second applicants in accordance with the provisions of the Administration of Estates Act No. 66 of 1965 as amended;

4. The third respondent be and is hereby ordered and directed:-
4.1. to cancel the Deed of Transfer No. T120046/2001;
4.2. to transfer the property into the estate of the late Emily May Valente, estate number 6348/2001.

5.The fourth and fifth respondents, and in so far as the sixth respondent may have possession of the current Title Deed, the sixth respondent, be and are hereby ordered to surrender the Deed of Transfer No. T120046/2001 dated 25 October 2001 to the applicants' attorney, alternatively directly to the third respondent for due cancellation;

6. In the event of the fourth and fifth and/or the sixth respondent not surrending the said Deed

of Transfer No. T120046/2001, the third respondent be and is hereby ordered and directed to cancel the said Deed and Transfer the property as stipulated in paragraphs 4.4.1 and 4.4.2 of this order;

7.The third respondent to cancel the first mortgage bond registered against the title deeds of the property in favour of the sixth respondent;

8.The eighth respondent be ordered to pay the costs of these proceedings on the scale as between an attorney and his own client;

9.The sixth respondent to pay the costs of these proceedings jointly and severally with the eighth respondent, which liability shall be limited to the amount of the taxed party and party costs pertaining to these proceedings;

10.The applicants are hereby authorised to procure payment of the costs payable by the eighth respondent by appropriating the amount of such costs from the cash resources of the estate of the late Emily May Valente and allocating such appropriation to that portion of the estate of the late Emily May Valente which, but for the provisions of paragrapgh 6 of the Last Will and Testament of the late Emily May Valente signed on 23 March 1994, would have vested in and become payable to the eighth respondent;

11.To the extent necessary any non compliance with the period of 180 days set out in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 in terms of section 7(2) of such Act is hereby condoned.

IT IS SO ORDERED.

S.A. M. Baqwa

Judge of the Northern Gauteng High Court

Counsel for the plaintiff: Adv. Cook S.C

Attorneys for the plaintiff: G.B. Liebmann Behrmann &Co

Counsel for the defendant: Adv. Wasserman S.C

Attorneys for the defendant: Victor & Partners