NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

Case No: AR232/08

In the matter between:

EXECUTOR ESTATE LATE LEBANON JACOB SOROUR Appellant

and

G W T SCOWBY Respondent

JUDGMENT

SISHI, J :

[1] This is an appeal against the judgment of the Magistrate of Port Shepstone granting an order in terms of section 72 of the Magistrates' Court Act 32 of 1944 ("The Act") against the Appellant. The Magistrate made an order in the following terms:

> *"Whereas it has been made to appear to the above Honourable Court that a debt is at present or in future owing or accruing to the Judgment Debtor by or from the Garnishee;*
>
> *It is ordered:*
>
> 1. *That the said proceeds in respect of the benefit accruing to the First Respondent, being a beneficiary in the Estate Late Lebanon Jacob Sorour, Estate No. 789/2005 PMB be attached for the amount required as specified in paragraph 2 hereof.*

2. *That the Garnishee pay the Judgment Debtor's Attorneys so much of the debt as may be sufficient to satisfy a judgment obtained against the Defendant, by the Judgment Creditor in the Port Shepstone Magistrate's Court at Port Shepstone on the 28 January 2004 for the sum of R49,442.87 and judgment costs which were taxed in the sum of R18,249.18 as also for payment of the further costs and interest incurred in the sum of R19,930.52 i.e. total outstanding at date hereof R87,622.57, plus further interest @ 15,5% per annum from 8th June 2007 to date of final payment, plus sheriff's fees and further costs which may be incurred.*

If the Garnishee fails to pay the Judgment Debtor's Attorneys as aforesaid, he shall appear before the court on 29 January 2008 at 9h00, Civil Court Port Shepstone to show course why they should not pay same".

The reference in the order to First Respondent is a reference to one P.J. Sorour. The reference to "the Garnishee" is a reference to the present Appellant. The reference to the "Judgment Creditor" is a reference to the present Respondent.

[2] The background facts leading to the institution of this appeal are as follows :

The Respondent had been granted judgment in his favour against P.J. Sorour for the amount of R49,442.87 together with interest and costs.

The Applicant alleged that P.J. Sorour would be inheriting an amount of R2,320,887.90 from his late father's estate and that the Respondent

was the nominee of the executor of that deceased estate, and in that capacity was holding certain funds on behalf of P.J. Sorour.

[3] Mr Blomkamp who appeared for the Appellant submitted that although the application was opposed, the Magistrate granted the application. In finding that she should grant the application, the Magistrate accepted as a fact that "the First Respondent " i.e. P.J. Sorour" will be inheriting an amount of R2,320,887.90 from the State Late Lebanon Jacob Sorour (hereinafter referred as to "the Garnishee") and that "funds were being held on behalf of the First Respondent in Trust by attorneys B.W. Dwyer of Matatiele who were the duly authorised nominee of the executor/s"

[4] Mr Blomkamp submitted that the question that arises in this case is whether an expectation of an inheritance such as the case herein, falls within the ambit of Section 72 of the Magistrate's Court Act, whether it is any debt that is in future owing or accruing to a Judgment Debtor by or from any other person, where the potential heir is the debtor and the other person is the executor of the deceased estate. It is common cause that the definition of debt in section 61 of the Magistrate's Court Act is not helpful either.

[5] Section 72 of the Magistrate's Court Act 32 of 1944 reads as follows:

> *"72 Attachment of debts*
>
> (1) *The court may, on ex parte application by the judgment debtor … order the attachment of any debt at present or in future owing or*

> *accruing to a judgment debtor by or from any other person (excluding the State), residing, carrying on business or employed in the district, to an amount sufficient to satisfy the judgment and the costs of the proceedings for attachment, whether such judgment has been obtained in such court or in any other magistrate's court, and make an order (hereinafter called a "garnishee order") against such person (hereinafter called the "garnishee") to pay to the judgment creditor or his attorney at the address of the judgment creditor or his attorney, so much of the debt as may be sufficient to satisfy the judgment and costs, and may enforce such garnishee order as if it were a judgment of the court".*

Mr Blomkamp submitted that the question posed above has to be answered in the negative because an accruing debt, for a start, section 72 in the way it is worded, in the way it is framed, postulates four situations, being a debt owing at present or a debt owing in the future or a debt accruing in the future but that is not what the legislature could have meant, because a debt accruing at the present does not really make sense. What was intended was that that expression is to be read as: any debt at present or in future, respectively owing or accruing to a judgment debt. The words "in the future" were intended to be relative to "accruing" and the words "at present" were intended to be relative to the words "owing".

[6] The question then is whether the hope of receiving an inheritance once the executor has wound up the Estate, and the final account has lain for inspection and then confirmed by the Master, the hope or expectation of receiving an inheritance at that stage falls in the ambit, can be described as a debt accruing in the future.

[7] Mr Blomkamp submitted, correctly in my view, that if one were to inherit property as opposed to money that could not be the subject of a "garnishee order". In terms of section 72 the Act a debt for the purposes of section 72 of the Act must be understood as a debt sounding in money and Mr Blomkamp submits that, that is the only way the section can work.

[8] In the present matter if one looks at how the prospective inheritances of R2,320,887.99 are made up, it appears to be made up, of the bulk of the estate that give rise to the inheritance seems to be shares or undivided shares in a great variety of immovable properties, mostly one-fifth shares. From the ***aliunde*** account, it is not clear whether those properties were all going to be sold and the money forming the inheritance passed on, or whether they would simply be valued and the proportionate share of the immovable property would be passed to the heirs at a valuation making up of R2,32,887.99. Either of the two could happen in this case.

[9] If one looks at the ***aliunde*** account under the immovable property, the deceased had a one-fifth share in various properties. The deceased was himself one of the 5 children and he received a one-fifth undivided share in a number of properties. Those would in turn be passed on to his heir or each of those shares would have to be sold and turned into money. The other possibility is that for the purposes of the ***aliunde*** account, a value is attached to the piece of property or that sub-division that is passed on, or share that is passed on. In the end what the heirs gets is property valued at R2,320,887,99.

[10] It is clear from the record that everybody at the garnishee proceedings thought in terms of inheritance in the form of cash money accruing to the Respondent. Yet, that might not be a situation.

[11] Mr Blomkamp submits that even in the situation where all the assets in the estate will have to be reduced to money and what will be transferred to heirs, will be amounts of money, even in that situation the expectation of being made a money payment by an Executor cannot fall within the ambit of a debt accruing in the future, as contemplated by Section 72 of the Act. Mr Blomkamp submitted that an accruing debt as pointed out in the case of **Honey & Blanckenberg v Law** 1966 (2) SA 43 (R) is a debt which is not yet actually payable but which is represented by an existing obligation. It is not yet due. The Executor's obligation to the heir or legatee is merely to deliver or transfer to the heir or legatee his legacy "if such remains" or his share of the residue of the estate that

may remain once all the debts of the estate have been settled. If nothing remains after paying the debts, there will be no claim that can be enforced against the Executor. If something does remain after paying the debts, an obligation will then come into being requiring the Executor to pay the heir or the legatee. This obligation can only be enforced once the liquidation and distribution account has been confirmed, that is, once the estate has become distributable under Section 35 (12) of the Administration Act 66 of 1965 when the account has lain for inspection (and been advertised as so lying) and no objection has been lodged or one has been lodged and has fallen away.

[12] Mr Blomkamp submitted that the position is set out in the judgment of **Centlivres CJ and Greenberg & Others v Estate Greenberg** 1955(3) SA 361 (A) at 364:

> *"The position under modern system of administering deceased estates is that when a testator bequeaths property to a legatee, the latter does not acquire the dominium in the property immediately on the death of the testator but what he does acquire is a vested right to claim from the testator's executors at some future date delivery of the legacy, i.e. after confirmation of the liquidation and distribution account in the estate of the testator. If, for instance, immovable property is bequeathed to a legatee, he acquires a vested right as at the death of the testator but he does not acquire the dominium in that property until it is transferred to him by the executor. If that property has to be sold in order to pay the debts of the estate, the legatee may never acquire the dominium in that property"*

His right is not attachable and is not enforceable until such time as the account has lain for inspection and has been confirmed by the Master. It only becomes enforceable at that stage. It is still a use ***ad aquirendi***. It is nothing more than a ***spes*** and the general principle is that a ***spes*** is not attachable and the authority for that are the cases of **McPhee v McPhee** 1989(2) SA 765 (N); **Mears v Pretoria Estate and Market Co Ltd** 1906 TS 661; **Soja (Pty) Ltd v Tuckers Land Development Corporation (Pty) Ltd and Another** 1981(2) SA 407 (W).

[13] In **Mears v Pretoria Estate and Market Co, *supra*,** INNES CJ stated as follows at 668:

> *"It is not necessary, it seems to me, to attempt to define exactly what interests and claims can be attached, nor to attempt to indicate the extent to which, possibly, the machinery of interdict or garnishee order might be available to applicants in cases where they cannot attach so-called rights. All we have to decide is whether a mere expectation or **spes** can be attached, in my opinion it cannot"*

[14] Mr Dutton for the Respondent submitted that on the death of the deceased the heirs acquire a right to their inheritance insofar as that inheritance eventually is found to have some value. He submits that it is not accurate to refer to that right as ***spes***. The heirs have a right which is vested in them and they are entitled to enforce that right. Mr Dutton seems to concede that it is essential for the garnishee order that

what is attached must sound in money. Mr. Dutton submitted that if one looks at the garnishee order itself, it seems to support the notion that the inheritance in this case will have to sound in money, in other words, the claim would have to sound in money because the order made by the court ***a quo*** reads as follows: "whereas it has made to appear to the abovementioned Honourable Court that a debt at present or in future owing or accruing to the Judgment Debtor from the garnishee, that the said process in respect of benefit be attached for the amount required as specified in paragraph 2 and that the garnishee pay the Judgment Creditor's Attorneys so much of the debt as maybe sufficient to the judgment". He conceded that the order purports to attach an amount of money. He submitted that that situation will only be capable of being established once the accounts are laid for inspection. In the present case one does not know at this point whether there is going to be a debt sounding in money or simply property or both.

[15] The assets forming the basis of the inheritance in the ***aliunde*** account to the three heirs, there is a whole series of undivided one-fifth shares in a great number of immovable properties. There is no indication in that ***aliunde*** account how they were going to be turned into money, whether they were all going to be sold. There is reference to the movable property and the household having been sold on auction and produced about R13,195,00. The movables have been sold and they have been turned into money but there is no indication on that, that the immovable property which constituted the bulk of the value of the estate had been

auctioned or otherwise turned into money. They were simply valued and that value was divided into three, after deduction of expenses. Those are the properties forming part of the inventory. But, when they are all individually valued and put together to form the estate of the deceased in this case, Sorour, after deduction of expenses the balance is divided into three and one arrives at the figure of R2,320,887.90 each. But, there is no indication that it is cash because there is no recapitulation statement attached to that. What the Respondent here is going to receive from his father's estate is then one-third of one-fifth of each of the individual properties which on the value attributed to each would give him R2,320,887.90 but he wont have that in cash.

Mr Dutton conceded that it was unknown at that point what was going to happen ultimately. It might happen that he receives property.

[16] When it was put to Mr Dutton that the order made by the Magistrate on 11 December 2007, ordered the executor to pay forthwith, Mr Dutton disagreed and submitted that what the order is postulating is that the Magistrate has been satisfied that there is a judgment debt pressing and owing or in future owing or accruing. When it was further put to him that in terms of this order if the garnishee fails to pay the judgment debt as aforesaid, he should appear before this court on 29 January 2008 to show cause why he should not pay the same, Mr Dutton agreed and however stated that if he were to appear on that day he would say that the debt is not yet payable, the accounts are still lying for inspection.

But if one looks at the Magistrates reasons, the Magistrate has rejected that because part of her reasons is that the Executor is holding in trust funds for the debtor for the Respondent. Mr Dutton submits that this is not a situation where the Executor is now being ordered to pay the debt which was found to be due. All that has happened in terms of the garnishee order is that the Magistrate has said: "I am satisfied that there is a debt in the now or in future is payable". But again this overlooks the fact that the Executor is called upon to show cause a month later why he has not paid. Mr Dutton submits that if the Executor comes to court and says that he has not paid because accounts have not lain for inspection and therefore the debt is not yet due, that is a perfect defence. Again, the Executor mentioned this in the affidavit in Court but the Magistrate in her reasons rejected the submission by the Executor.

[17] The following proposition was put to Mr Dutton by the Court:

"The Executor says:

There is nothing due to the Respondent at this stage, because, I am in the middle of proceeding with the Estate, I have done a draft L and D account, it has gone to the Master, the Master has got queries. Until those queries have been sorted out, it is unclear what the Respondent is going to get out of this Estate. Yes, he is an heir, there is a vested right, but the amount that is going to accrue to him, and they don't deal with this discretion of property versus cash that is going to accrue, but is inherent in what he says. I don't know what is going to accrue to him, there is nothing due to him at the moment. The Magistrate rejects all that. She says I know you are holding money for the Respondent. In other words, you are in a debtor-creditor situation. Pay and if you have

not paid after this order, come and appear in court on 29 January 2008, to come and show cause why you should not pay. Now he has already shown cause presumably he will be up for contempt if he arrives and he gives the same argument. The Magistrate says, but I have heard all that".

[18] In this regard Mr Dutton submits that it is not necessarily so because the effect of the Magistrate's decision is that it is common cause that the account has not lain for inspection and therefore the Executor is under no obligation at that point to pay. It follows, legally, it is not set out in her judgment, but the legal consequences of that, is that he is under no obligation to make payment in fact he is under obligation not to make payment. According to Mr Dutton, the effect of the order is simply that when it comes to the point that the Executor needs to make payment, he must do so. According to him it can't mean something else. Mr Dutton's submission in this regard overlooks the fact that this was all debated before the Magistrate, before the order was made.

[19] It seems that the Magistrate was under an impression that it does not matter whether the account has lain for inspection or not. This is clear from the Magistrate's reasons, where she states that the court chooses not to enter the arena as to whether the inheritance is vested or not, save to say that the beneficiary has a personal right to claim from the Executor "when it falls due". The argument as to when the First Respondent's request became due is certainly one that must be

traversed. But she does not traverse it. This is clearly a misdirection on the part of the Magistrate.

[20] Mr Dutton submitted that what the garnishee order meant is that there is a debt which is accruing in the sense that it will be payable in the future. It is an obligation which arises at present, payable at some future date. Once the accounts have lain for inspection, it would then be payable. Mr Dutton's submission in this regard cannot be correct in that the order of the Magistrate does not say pay in future, it says pay when the Executor says at that stage of opposing the garnishee order, there is nothing owing because the estate is not finalised, the Magistrate says that he is just delaying. It is blatantly obvious that the delaying tactics do not lie with the Master. In fact, the Magistrate said the following in her reasons for judgment:

> *"The Master's queries promptly followed in October 2007. It is blatantly obvious that the dilatory tactics do not lie with the Master but with the executors and or possibly with the legal representative. This is a further factor that has sowed seeds of doubt in the mind of the court as regards to bona fides of the above mentioned. To add insult to injury some of the queries raised by the Master are issues that any Attorney qualified to wind up the deceased's estates should all too well be aware of."*

[21] Mr Dutton submitted that if the Magistrate's order is to be read in the manner suggested, that the Executors immediately applies to make payment of that full amount, then clearly that order is just improperly

worded. It simply cannot stand up to legal scrutiny. He submits that, that cannot be the meaning of that order. It may well be that the order needs to be revisited. But it still begs the question as to whether an obligation is attachable. The obligation which the Executor has towards the heir, is the right which the heir has towards his inheritance. He submits that he has that right and that right is in fact attachable. He submits that once that right is attachable in the general sense then there is no reason whatsoever why a garnishee order should not be granted in respect of that right.

[22] Mr Dutton referred to the case of **Vrede Ko-Operatiewe Landboumaatskappy v Lourens** 1962(3) SA 952 (OFS) wherein an attachment was allowed of an heir's right where it had to vested but there was still uncertainty as to the amount. He referred to the footnote which reads as follows:

> *"The court granted the application of a judgment creditor, where he applied for an order authorising him to attach the judgment debtor's interest in a certain inheritance and where it appeared that the judgment debtor has a vested right in certain property … although the amount of the sum was still uncertain".*

[23] But one does not have to quantify the value of a right for the purposes of an attachment in Sale In Execution. The right that is attached and sold in execution does need to be a debt whereas the Garnishee order in terms of section 72 of the Act seems to deal with a debt. One permits

execution against the right that is not a debt as such and does not have a said value. It might not have any value or have any value. Whereas the garnishee rights that you attach must sound in money.

[24] Mr Dutton then referred to the case of **Seegers v Retreat Motors** 1953(4) SA at 422C. Mr. Dutton dealt with the facts of this case and submitted that what the Court was dealing with therein is a question of a contingent right and whether there was a contingent right or not. In the context that the Judge made a remark about not dealing with the word owing. But where it is of assistance is that in that case the Industrial Council had held monies on behalf of employees, just as the Executor holds monies on behalf of the heir and deals with them under certain obligations. That case can clearly be distinguished from the present case in that the executor does not hold monies on behalf of the heir. He holds the monies because both the assets and liabilities in the estate vest in the executor. In this case there is no creditor. The executor is not a debtor of the heir until liquidation and distribution account has been approved and there becomes an obligation upon him in terms of that to discharge whatever money is due to the heir.

[25] What is clear is that the heir cannot institute an action against an executor for delivery of his inheritance until the Liquidation and Distribution account has been approved. Only at that stage the heir acquires a personal right against the executor for delivery. The other difference between **Seeger'**s case and the present case is that in

Seeger's case the Court found that there is a debt within the ambit of section 72 of the Act because the Pension Fund Unemployment Commissioner actually held money paid over by the employer. In the present case, as Mr. Blomkamp submitted, there is no debtor/creditor relationship and it is uncertain that an amount is going to become due for payment in future but certainly does not arrive until the Liquidation and Distribution account has been approved. Unlike any attachment in execution in terms of section 72 of the Act the right to attach is limited to a debt.

[26] In the final analysis I find that Mr. Blomkamp's submission that the Magistrate's order is capable of no other reading than that she ordered that the executor must pay that amount which she spelt out in the order together with interest and costs forthwith or by certain date in January 2008, is correct.

[27] The Magistrate was also under an erroneous impression that the executor was holding funds on behalf of the respondent, P.J. Sorour. The Magistrate was completely wrong and she misdirected herself in this regard. In the present matter the Executor is not a debtor to the heir, until the Liquidation and Distribution account has been approved and there becomes an obligation upon him then to discharge whatever monies are due to the heir.

[28] The Magistrate ought to have found at the very best that until the laying open of inspection without objection of the Liquidation and Distribution Accounts for the prescribed periods there was no debt at present or future owing or accruing to the First Respondent by the Appellant, and that the application in terms of section 72 of the Act was premature.

[29] The Magistrate ought to have postponed the granting of a final order pending the finalisation of the estate or dismiss the application. She therefore erred in this regard.

CESSION

[30] Mr Blomkamp submitted that there was no basis for ignoring cession, this being a case that had to be decided on the papers. He submitted that the fact that the inheritance had been ceded was not rebutted by the Applicant in the Court ***a quo.*** The Magistrate should have referred the matter to oral evidence. She ought not to have made a finding as to whether or not there was a cession simply on the basis of the papers and disputed allegations on the papers. She should either have sustained it or if she was doubtful about it should have referred the matter for oral evidence and if she was not going to refer it for oral evidence the approach laid down in the **Plascon-Evans Paints Ltd v Van Riebeek Paints Ltd** 1984(3) SA 623 (A) at 634 F – H case should have been applied. There was therefore no basis for the finding she made with regard to cession.

[31] Mr Dutton submitted that one does not know whether the cession is valid or not at this point, that is something to be determined in future, and the executor will look into it. The account will lie for inspection, and ultimately, the decision will be taken at that time. He then submits that if the cession is not valid then it seems that in all probability there will be money ultimately owing to the heir.

[32] As Mr Blomkamp has pointed out correctly in my view that the fact that the inheritance had been ceded was not rebutted by the Applicant in the Court ***a quo*****.** The matter should have been referred to oral evidence and if not she should have followed the approach laid down in **Plascon-Evans** case ***supra*** and sustained it. There was entirely no basis for the finding that the inheritance had not been ceded. The Magistrate misdirected herself in this regard.

[33] Having considered all the material placed before Court, I am satisfied that the appeal should succeed in this matter.

[34] Mr Blomkamp submitted that the appeal should be upheld and an order by the Magistrate be set aside and the appellant should be awarded the costs of the appeal and his costs in the Court ***a quo.*** On the other hand Mr. Dutton submitted that the appeal should be dismissed with costs.

In the result I make the following order :

1. The appeal is upheld.

2. The order made by the Magistrate is set aside and there is substituted therefore by an order, as follows;

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"*The application is dismissed, with costs.*"

3. The Respondent (judgment creditor) is ordered to pay the costs of the appeal.

SISHI, J.

VAN ZÿL, J. :

1. I have had the opportunity of reading the judgement of my brother Sishi, J. and I agree with the conclusions reached, as well as the order proposed. I would, however, like to add thereto a few remarks of my own in regard to the matters in dispute in this appeal.

2. At issue is whether the debtor stands to inherit from the estate of his late father, herein represented by the appellant as

executor thereof. If so, then the further issue arising is whether the subject matter of the inheritance or legacy is in law capable of being attached under garnishee order in terms of section 72 of the Magistrates Courts Act 32 of 1944 ("the Act"). I propose to consider these issues briefly below.

3. Section 61 of the Act defines 'debts' as including any income, from whatever source, other than emoluments and section 72(1) provides for the attachment, under garnishee order, of "*any debt at present or in future owing or accruing to the judgment debtor by or from any other person*".

4. In the present matter it appears to be common cause that the judgment debtor was one of the named beneficiaries in the estate of the deceased and that, for whatever reason, the liquidation and distribution account in the estate has not yet lain for inspection. It follows that section 35 of the Administration of Estates Act 66 of 1965 has not been complied with. Until compliance is achieved and the estate has become distributable within the meaning of section 35(13) of the Administration of Estates Act, any vested rights which the beneficiaries may have acquired against the executors of the estate (here the garnishee), are not enforceable (see ***: Estate Smith v Estate Follett 1942 AD 364 at 383)***. Indeed, section 50 of the Administration of Estates Act provides that any executor making a distribution

otherwise than in accordance with section 35 risks personal liability to make good any resultant shortfall. ***In DuRand N.O. v Pienaar N.O. and Others 2000 (4) SA 869 (C), Comrie J at 873 I-J*** described the position, as follows;

> "*An inheritance or legacy vests in the heir or legatee on the death of the testator. It is not the dominium which vests, but a personal right to claim the testamentary benefit from the executor in due course.*"

5. In ***Honey & Blanckenburg v Law 1966 (2) SA 43 (SR)*** it was held that rental payable for the unexpired portion of a lease is money "*accruing*" and thus capable of attachment by way of garnishee order. It was there held at page 48A that -

> "*An accruing debt is therefore a debt not yet actually payable, but a debt which is represented by an existing obligation.*" ;

and in ***Seegers v Retreat Motors 1953 (4) SA 422 (C), Herbstein J at 425H*** referred to the -

> "*attachment of an existing debt which is at present owing to a judgment debtor, or which may in the future be owing to that judgment debtor in the sense that payment thereof is to be made in the future.*"

6. In my respectful view, what is required is an existing obligation, the payment in terms of which is not yet due, but which will become due at some future date. A mere contingent interest under a will is not capable of attachment ***(Vrede Kooperatiewe andboumaatskappy Bpk v Lourens 1962 (3) SA 952 (O) at 953 D-F)***, nor is a *spes* (***Mears v Pretoria Estate & Market Co***

Ltd 1906 TS 661). Under the common law an attachment cannot be made of wages not yet due (***Gouws v Theologo & Ano 980 (2) SA 304 (W) at 306 B; Van der Merwe v Uys 1957 (4) SA 574 (T)).***

7. In ***Vrede Kooperatiewe Landboumaatskappy Bpk v Lourens (supra),*** the benefit sum had been paid over to be held in the Guardian's Fund pending determination of the identities of the members of the class of beneficiaries (i.e., the children of the testator's five sons), of which the judgment debtor was one. Accordingly the court held at 953 F-G that -

> " *ons hier nie te doen het met 'n voorwaardelike reg, wat 'n onsekerheid mag skep of die reg ooit in die begunstigde sal vestig nie. In die onderhawige geval is die respondent se reg tot die bedrag seker en die enigste onsekerheid bestaan ten opsigte van die omvang van die bedrag.*"

8. In the present matter, whilst the judgment debtor's inheritance vested in him upon the death of his late father, he acquired no *dominium* therein but at best a personal right to claim the benefit from the executor in due course, once provision has been made to settle the claims of creditors of the estate and the requirements of section 35 of the Administration of Estates Act have been complied with. Assuming there will be an eventual benefit, then even its form is uncertain. It may take the form of transfer of undivided shares in fixed property and the heirs may even be required to contribute to make up the envisaged cash

shortfall in the estate, so that heirs do not receive any payment at all.

9. In my view it has not been shown that the judgment debtor had in law acquired a right to payment against the estate whilst the actual payment thereof is not yet due, but which will become due at some future date. In my judgment no more than a mere contingent interest in the estate has been established, and that is not capable of attachment under garnishee order.

10. But even if I were wrong in my view, as expressed above and the right acquired by the judgment debtor is sufficiently clear and certain to be capable of attachment, then a further difficulty arises. The garnishee, in opposing the imposition of the garnishee order before the Magistrate, in addition claimed that the rights of the judgment debtor to his inheritance from the estate had been ceded as far back as during April 2006, shortly after the death of the deceased. It was asserted that such cession was for value, in that the sum of R240 000-00 was paid to the judgment debtor as consideration for the cession. The Magistrate in her reasons for judgment in terms of Rule 51(1) refers to the cession as "*the supposed cession*". The Magistrate further proceeds to doubt the existence of this cession and even goes so far as to doubt, in the circumstances, the *bona fides* of both the executors in the estate, as well as that of their

attorneys. All this based upon the affidavits before the Magistrate in circumstances where the applicant for relief (the judgment creditor) had not even delivered a replying affidavit.

11. Assuming, in the absence of a replying affidavit placing the existence of the alleged cession formally in dispute, that the cession was disputed before the Magistrate then, in my view, the Magistrate erred in summarily deciding this factual conflict in favour of the judgment creditor on the papers before the court. The proper approach to resolving factual conflicts on affidavit is to take the 1facts as stated by the respondent, together with the facts alleged by the applicant and which are admitted, or at least not disputed by the respondent. These facts, thus taken together, then form the factual basis for deciding the application. ***(Die Dros (Pty) Ltd and Ano v Telefon Beverages CC and Ors 2003 (4) SA 207 (C), Van Reenen J at 214B-E (paragraph 18).*** On this approach the Magistrate should have upheld the existence of the alleged cession.

12. The Magistrate also criticised the garnishee because, so it was said, it could be concluded in the circumstances that the omission of reference to the cession in the draft liquidation and distribution account submitted to the Master was indicative of questionable or ulterior motives on his part. However, in ***Byron***

v Duke Inc 2002 (5) SA 483 (SCA), Zulman JA at 492B (in paragraph 8) held that -

> " ***...*** *where a judgment creditor has ceded his rights it is not absolutely necessary for the cessionary to obtain his substitution on the record before he may sue out a writ in the name of the cedent.*"

13. In my view there is nothing in the rules relevant to the attachment of a debt by a garnishee which affects any prior cession, preference or right of retention, claimed by any third person in respect of the debt concerned***. (Van Winsen et al – Civil Practice of the Supreme Court of SA at 787, note 256).*** If, therefore, the inheritance rights of the judgment debtor were capable of attachment they would, by parity of reasoning, also have been capable of cession. Whether they were actually and effectively ceded before the garnishee proceedings were initiated, appears to me to be a factual dispute which is not capable of resolution on the papers and should have been referred for decision after the hearing of oral evidence. The Magistrate does not appear to have appreciated this difficulty and in my view misdirected herself also in this regard.

14. In my view the order made by the Magistrate cannot stand and needs to be set aside. In the absence of any request for the referral of the matter to oral evidence, the Magistrate ought to have dismissed the application. There is no reason why costs should not follow the result, both in this court as well as in the

court below. In the circumstances and as indicated above, I agree with the order set out at the conclusion of the judgment by Sishi, J.

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VAN ZYL, J.

Date of hearing	:	08 September 2008
Date of Judgment	:	04 September 2009
Appellant's Attorneys	:	DWYER INC c/o Mason Inc 3rd Floor Fedsure House Church Street PIETERMARITZBURG
Appellant's Counsel	:	Mr. P.J. Blomkamp
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