THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Case number: 126/08

In the matter between:

TABEA JACOBS	**First Appellant**
CLIFFORD JACOBS	**Second Appellant**
TABIA INVESTMENT HOLDINGS CC	**Third Appellant**

and

HERRN SEBASTIEN BAUMANN NO	**First Respondent**
SAMUEL SPYCHER	**Second Respondent**
JOHANNES SPYCHER	**Third Respondent**
RAHEL SPYCHER	**Fourth Respondent**
THERESE SPYCHER	**Fifth Respondent**
DAVID SPYCHER	**Sixth Respondent**

Neutral citation: *Jacobs v Baumann NO* (126/08) [2009] ZASCA 43 (8 May 2009)

CORAM: MPATI P, LEWIS, VAN HEERDEN, JAFTA et MAYA JJA

HEARD: 5 March 2009

DELIVERED: 8 May 2009

Summary: Whether summons issued in an action, launched by an executor of a deceased estate subsequently found to have been unlawfully appointed, a nullity – whether substitution of executor having effect of adding a new party to the action and prejudicing to the appellants.

ORDER

On appeal from: Cape Provincial Division (Bozalek J sitting as court of first instance)

The appeal is dismissed with costs including those occasioned by the employment of two counsel.

JUDGMENT

MAYA JA (MPATI P, LEWIS, VAN HEERDEN, JAFTA JJA concurring):

[1] This appeal is against a judgment of the Cape High Court (Bozalek J) which upheld the respondents' application for the substitution of the first respondent, Mr Sebastien Baumann NO (Baumann), as 'representative of the heirs' of a deceased estate and for the joinder of the sixth respondent, one of such heirs, in action proceedings instituted by the second to fifth respondents (the respondents) against the appellants. The appeal is with the leave of the court below.

[2] The essential facts may be briefly stated. The respondents are Swiss nationals. The second to fourth and the sixth respondents are the children of Mr Hans Rudolph Spycher (the deceased), also a Swiss national until his death in Switzerland on 3 February 2004. The fifth respondent is his widow and the first appellant is his daughter. All are heirs to his estate in terms of a will dated 8 November 1995. The first and second appellants are married to each other and reside in South Africa. They were members of the third appellant, a close corporation, at the material time.

[3] The real bone of contention between the parties is a loan of CHF 600 000 (six hundred thousand Swiss francs) which the deceased granted the third appellant nearly 21 years ago, on 2 December 1988. The first appellant represented the third appellant in the transaction. The loan was to be repaid with interest over a ten-year period from the time of its grant, but on the deceased's death 15 years later, more than the capital sum originally advanced remained owing. The deceased had recorded the indebtedness in a codicil to his will executed on 30 March 2001.[1]

[1] The facts relating to the loan are alleged in the respondents' particulars of claim to which the appellants are yet to plead, but it does not appear from the papers filed in the interlocutory proceedings under challenge that they are disputed.

[4] It appears that the non-payment of the loan became a very sore point for the respondents as it adversely impacted on the administration of immovable property in the deceased estate, to the extent that there was a looming threat of a sale in execution. As a result, relations between the first appellant and the respondents soured. The respondents consequently had a Mr Wirz appointed as 'representative of the heirs', apparently a Swiss equivalent of an executor of a deceased estate, by a Swiss district court on 5 December 2004. On 29 December 2004 they obtained another order (headed 'Correction of the appointment dated 15 December 2004') from the same court, changing Wirz's initial appointment to that of 'administrator of the estate'. Both orders were obtained without notice to their co-heir, the first appellant, apparently in breach of the relevant Swiss law.

[5] On 1 February 2005, the respondents instituted an action against the appellants in the Cape High Court for the repayment of the loan and ancillary relief. Wirz was also cited (reluctantly so it seems, but nonetheless cited) as the first plaintiff in these proceedings in his nominal capacity as 'trustee' of the deceased estate. In response to the action, the appellants entered appearance to defend and fired their first salvo by successfully appealing Wirz's appointment in Switzerland. They obtained an order from a

Swiss Canton Court on 25 April 2005 setting the appointment aside, having earlier obtained an interim order, on 28 February 2005, effectively interdicting Wirz from acting either as ‘representative of the heirs’ or ‘administrator of the estate’. The view of the Canton Court was that the magistrate’s failure to grant the first appellant a hearing or arrange negotiations between the parties had seriously infringed her procedural rights. The matter was accordingly remitted to the district court for reconsideration.

[6] Thereafter, on 21 September 2005, Baumann, a Swiss attorney specializing in inheritance law, was appointed as the ‘representative of the heirs’. The appellants sought to challenge this appointment too, but failed. After certain preliminary processes, including communication with the appellants, Baumann approved the pending action. The respondents then attempted to substitute him for Wirz in the action and to join the sixth respondent, who had been erroneously omitted, as a plaintiff. It is the appellants’ opposition to these proceedings that has brought the parties this far.

[7] In the court below, as here, the appellants contended in the main that a substitution of the executor was impermissible because (a) the summons in the action was a nullity as there was no duly appointed executor when it was issued and Wirz lacked authorisation to litigate on behalf of the deceased estate; and (b) the running of prescription in respect of the repayment of the loan had thus not been interrupted by the issue of summons and, as Baumann would become plaintiff *nunc pro tunc*, allowing the substitution would prejudicially deprive them of the opportunity of raising prescription as a defence.

[8] The court below found, *inter alia*, that the issue of prescription was not relevant as it had not been sufficiently pleaded or dealt with in the papers and that the key considerations were whether the summons was a nullity and whether the appellants would suffer any prejudice if the substitution – the sixth respondent's joinder was pegged on the success or otherwise of the substitution – was allowed. The court then held that the summons was not a nullity and that substitution would not change the essential nature of the action because the heirs always intended to cite, as a party to the action, the administrator or trustee of the deceased estate, which Wirz was when the

action was instituted, and that it remained open to the appellants to raise any defence they wished in the progression of the action.

[9] In argument before us, the respondents challenged the appealability of the judgment of the court below arguing that leave to amend a pleading, such as was granted, is interlocutory and does not have the effect of disposing of at least a substantial portion of the relief claimed in the action. I do not agree. It is trite that, generally speaking, a judgment or order is susceptible to appeal if it is (a) final in effect, ie unalterable by the court which made it; (b) definitive of the rights of the parties in that it grants definitive and distinct relief; and (c) dispositive of at least a substantial portion of the relief claimed in the main proceedings.[2] Therefore, a court determining whether or not an order is final considers not only its form but also, and predominantly, its effect.[3] An order may not possess all three attributes, but will nonetheless be appealable if it has final jurisdictional effect[4] or is 'such as to "dispose of any issue or any portion of the issue in

[2] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A).
[3] *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H; *Zweni* at 532H-I.
[4] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10E-11B; *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) paras 18 and 19; *Metlika Trading Ltd v Commissioner for SARS* [2004] 4 All SA 410 (SCA) para 24.

the main action or suit" or … "irreparably anticipates or precludes some of the relief which would or might be given at the hearing" '.[5]

[10] In this case, if the appeal succeeds, the validity of the summons, which is crucial for determining whether or not the amendment of the particulars of claim is to be allowed and would obviously impact on the defence of prescription if raised, will not be reconsidered at the trial. And if it is, it will not be on the same facts. This, in my view, renders the judgment of the court below final and susceptible to appeal, inasmuch as the effect of substituting an executor of a deceased estate for the deceased in proceedings is final regarding whether the summons issued in the deceased's name is valid even though issued in the name of a non-existent party.[6]

[11] Turning to the merits of the appeal, the issues remain those argued in the court below as indicated in paragraph 7 above. In weighing up the parties' submissions, the first question to be considered, as correctly observed by the court below, is the role of a 'representative of heirs' or, as the respondents termed it in their particulars of claim, a 'trustee' of a deceased estate in the context of Swiss law. Questions of foreign law are

[5] *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870; *Cronshaw v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) at 690E-F.
[6] *Van Heerden v Du Plessis* 1969 (3) SA 298 (O) at 303B-F.

questions of fact in our courts and, although judicial notice of the law of a foreign state may be taken under s 1(1) of the Law of Evidence Amendment Act 45 of 1988, this may only be done in so far as such law can be ascertained readily and with sufficient certainty.[7]

[12] The difficulty here is that no evidence was led in this regard and the only relevant material available on record are the two judgments of the Swiss Canton Court, translated from Swiss German to English, in the proceedings challenging Wirz's and Baumann's appointments as 'representative of the heirs'. Regrettably, even though these documents allude to some relevant aspects of Swiss statutory law, little can be gleaned from them because of the poor quality of the translation. The language used is far from clear and, on various occasions, the translator recorded her difficulty stating that she 'presumed' the meaning of some of the words from the general context of the documents as she could not trace them in any dictionaries. This renders the translated documents unreliable.

[7] *Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396G; *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) at 954B-E; *MV Heavy Metal Belfry Marine Ltd v Palm Base Maritime* SDN BHD 1999 (3) SA 1083 (SCA) para 65; *MV Alam Tenggiri Golden Seabird Maritime Inc v Alam Tenggiri SDN BHD* 2001 (4) SA 1329 (SCA) para 21;

[13] In that case, it must be presumed that Swiss law is the same as South African law on this aspect.[8] The rule in our law is that the only proper person to litigate on behalf of a deceased estate, in the vindication of its assets, is its executor even to the exclusion of the beneficiaries in the estate.[9] This means that a Swiss equivalent of an executor of the deceased estate was required to initiate and conduct the action instituted on 1 February 2005. It must then be considered whether Wirz's appointment as administrator of the estate and involvement in the action meets this requirement.

[14] As already indicated, the thrust of the appellants' case was that the summons instituting the action in February 2005 was invalid, and the substitution requested consequently impermissible, as there was no legally appointed executor with authority to litigate on the estate's behalf until Baumann's appointment in September 2005. To fortify this contention, they sought to draw a distinction between two forms of action – that taken by an executor whose appointment is lawful but is subsequently revoked, and that of an executor whose appointment is unlawful. They then argued that the former type of action is valid until the appointment is set aside, but that the

[8] *Schapiro v Schapiro* 1904 TS 673 at 677; *Rogaly v General Imports (Pty) Ltd* 1948 (1) SA 1216 (C) at 1227-1230; *The MV Sea Joy Owners of the Cargo Lately Laden On Board; The MV Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C) at 493D.
[9] *Boland Bank Ltd v Roup, Wacks, Kaminer & Kriger* 1989 (3) SA 912 (C) at 914G-H; *Asmal v Asmal* 1991 (4) SA 262 (N) at 264G-265D; *Gross v Pentz* 1996 (4) SA 617 (A).

latter is void *ab initio* and that Wirz's appointment and institution of the action fell into the latter category.

[15] This seems to me a proper distinction to make. The crisp question it raises is whether Wirz's appointment was lawful. If it was, then the institution of the action on 1 February 2005 was proper as his appointment was set aside after this date. If it was unlawful, then the summons is a nullity which cannot be amended.

[16] In support of their argument the appellants referred us, inter alia, to the decisions of *Brand NO v Volkskas Bpk & another*[10] and *Mngadi NO v Ntuli & others*.[11] In the *Brand* case a document purporting to be the last will and testament of the deceased was lodged with the Master, who duly appointed an executor in terms thereof. In accordance with his powers, the executor completed the administration of the estate, filed the relevant accounts and handed the residue of the estate to an administrator appointed in terms of the will to administer it in trust. Thereafter, another purported will executed after the first document and revoking any other will was found. It was lodged with the Master who accepted it as valid and recalled

[10] 1959 (1) SA 494 (T).
[11] 1981 (3) SA 478 (D).

the letters of administration he had previously issued in terms of the earlier document. The new executor brought proceedings for an order directing the first executor to hand over the assets of the estate and render to him an account of its dealings therewith. The court refused to hold that the revocation of the first executor's appointment rendered the administration of the estate conducted under the first will a nullity and reasoned that those actions were legally performed under the authority of the Master given in accordance with the law.

[17] *Mngadi*, on the other hand, lies on the different side of the divide. There, a deceased black man who had been twice married executed a will in which his first wife, the plaintiff, was appointed executrix of his estate. He did not revoke the will on his second marriage and, after his death, the Master accepted and registered it in that form. Thereafter however, the second wife, the first defendant, was appointed by an additional Bantu Affairs Commissioner as representative of the deceased estate in terms of regulation 4(1) of the Regulations for the Administration and Distribution of Estates of Deceased Bantu. Both were unaware of the existence of the will. The second wife then sold and transferred certain immovable property in the estate to the second defendant who, in turn, sold and transferred it to the

third defendant. The first wife brought a vindicatory action against the defendants and the Registrar of Deeds.

[18] The court held that since the power of appointment conferred upon the Commissioner by the Regulations existed only in relation to cases where the deceased had died intestate, if the Commissioner purported to exercise that power in respect of a deceased who had left a valid will, as in the present case, he would not be mistakenly exercising a power he possessed, but would be purportedly exercising a power he did not have at all in terms of the relevant statute. The appointment of the second wife was thus found to be void *ab initio* and the subsequent sale transactions invalid as the ownership of the properties remained vested in the estate of which the plaintiff was the duly appointed representative.

[19] Both judgments are, in my respectful view, sound. Whither then falls the present case? I am unable to see the similarity between Wirz's appointment by a competent court of law and the *Mngadi* facts pressed upon us in argument on the appellants' behalf. To my mind, the absence of the very jurisdictional fact in *Mngadi* giving rise to the exercise of the

Commissioner's power to appoint a representative of a deceased's estate – the non-existence of a valid will – must surely distinguish the two cases.

[20] The only flaw found by the appeal court in Wirz's appointment was merely procedural. That cannot detract from the court's power to adjudicate the application for his appointment and grant an order. Such order would obviously stand until such time as it were properly set aside. In the words of Lord Radcliffe in *Smith v East Elloe Rural District Council*:[12]

'An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'[13]

Quite clearly, any steps taken by Wirz on the authority of the court order appointing him as administrator of the estate before his appointment was restricted by the interdict of 28 February 2005 and finally withdrawn on 25 April 2005 are not unlawful.[14] The summons issued in his name on behalf of the deceased estate is, therefore, not a nullity.

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[12] [1956] 1 All ER 855 at 871G-H.
[13] See also *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) paras 27-31.
[14] *Brand NO v Volkskas Bpk* 1959 (1) SA 494 (T) at 498F-G; *Mvusi v Mvusi NO* 1995 (4) SA 994 (TkS) at 1000F-G.

[21] I see no further bar to the amendment application. Wirz purported to sue on the estate's behalf and the involvement of the respondents in the suit does not change its representative nature. The effect of the substitution is not to introduce a new party,[15] but merely to replace an irregularly appointed executor with the proper one. The possibility that the appellants may suffer prejudice by being deprived of the opportunity to plead prescription simply does not arise.[16] This, in my view, is the end of the matter.

[22] It was asked on the appellants' behalf that, if the appeal fails, the costs order made by the court below should be altered, as the respondents sought an indulgence by seeking to amend their particulars of claim and were thus not entitled to costs. It was also submitted that the appellants' opposition to the application was not unreasonable in view of the uncertainty relating to Swiss law. However, I am not persuaded that there is any good reason to interfere with the discretion of the court below in the circumstances of this case. I am thus not amenable to accede to this request.

[23] The appeal is dismissed with costs including those occasioned by the employment of two counsel.

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[15] *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15H-16C.
[16] *Boland Bank Ltd v Roup, Wacks, Kaminer & Kriger* 1989 (3) SA 912 (C) at 914H-I.

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MML MAYA
JUDGE OF APPEAL

APPEARANCES:

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