

SOUTH AFRICA / JUDGMENT

Jones v Pretorius NO (281/2019) [2020] ZASCA 113; 2022 (1) SA 132 (SCA) (29 September 2020) [2020] ZASCA 113

COURT

Supreme Court of Appeal

BEFORE

Saldulker, Van der Merwe, Dlodlo, Goosen,
Mabindla-Boqwana

CASE / FILE NUMBER

281/2019

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 281/2019

In the matter between:

BAREND PETRUS JONES APPELLANT

and

CHRISTINA HELENA PRETORIUS NO RESPONDENT

Neutral citation: Jones v Pretorius NO (281/2019)

[2020] ZASCA 113 (29 September 2020)

Coram: SALDULKER, VAN DER MERWE and DLODLO JJA and GOOSEN and MABINDLA-BOQWANA AJJA

Heard: Matter disposed of without oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 29 September 2020.

Summary: Deceased estate – agent appointed to administer estate on behalf of executor – agency terminated upon death of executor - subsequent payments by agent from estate funds to himself – not recoverable under s 50(b) of Administration of Estates Act 66 of 1965 – remedy under s 50(b) not limited to *condictio indebiti* – payments constituted unlawful appropriations of estate funds – recoverable by new executor by reason of powers and duties attached to office of executor.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mdalana-Mayisela AJ sitting as court of first instance):

1 The applications for condonation are granted. The applicant in each application is directed to pay the costs thereof.

2 The appeal is dismissed with costs.

Van der Merwe JA (Saldulker and Dlodlo JJA and Goosen and Mabindla-Boqwana AJJA concurring)

- [1] The respondent, Ms Christina Helena Pretorius NO, is the duly appointed executor of the deceased estate of Mr Wilhelm Petrus Meyer (the estate). In that official capacity she launched an application in the Gauteng Division of the High Court, Pretoria against the appellant, Mr Barend Petrus Jones, for payment of the amount of R1 148 828.13. The court *a quo* (Mdalana-Mayisela AJ) granted the application with costs but gave leave to the appellant to appeal to this Court. The central issue in the appeal is whether the respondent's claim had a legal basis. The parties agreed that the matter be disposed of without an oral hearing, in terms of s 19(a) of the Superior Courts Act 10 of 2013.
- [2] The material facts are not in dispute. The late Mr Meyer was the father of the respondent. He passed away on 29 December 2012. He was survived by his spouse, Mrs Cornelia Wilhelmina Gertruida Meyer, the mother of the respondent. In their joint will, the survivor was nominated to be the executor of the estate, on condition that the appellant, who practised as a chartered accountant under the name of Jones & Co, was to act as the agent of the executor.
- [3] As a result, and in anticipation of her appointment as the executor of the estate, Mrs Meyer mandated the appellant to administer the estate on her behalf. She did so by written power of attorney dated 25 January 2013. In terms thereof, the appellant would be entitled to the executor's fee in respect of the administration of the estate (presumably in terms of the tariff provided for in reg 8 of the regulations promulgated under s 103 of the Administration of Estates Act 66 of 1965 (the Act)).
- [4] On 30 April 2013 the Master of the High Court, North Gauteng Division (the Master) duly appointed Mrs Meyer as the executor of the estate. On 25 September 2013, however, Mrs Meyer also passed away. The appellant nevertheless continued to administer the estate. Crucially, he caused the estate to pay the total amount of R1 148 828.13 to himself, as follows:

- ‘(a) R150,000.00 on 26 March 2014;
- (b) R78,000.00 on 27 March 2014;
- (c) R150,000.00 on 28 May 2014;
- (d) R78,000.00 on 29 May 2014;
- (e) R150,000.00 on 9 December 2014;
- (f) R250,000.00 and R142 828.13 on 27 December 2014;
- (g) R150,000.00 on 6 May 2015.’

[5] The amounts in (a) to (f) above purported to be payments of executor’s fees in respect of the estate. The appellant said

that the last payment (g) represented fees for services that he had rendered to the Willie Meyer (Swaziland) Trust. He did not provide any basis for the liability of the estate for these fees, but even if such liability is accepted, it matters not, as I shall demonstrate. I should add that I make no imputation of dishonesty on the part of the appellant. I accept that in making these payments he acted in the bona fide belief that he was entitled to do so.

[6] A new executor was only appointed on 21 April 2016, when the Master issued letters of executorship to the respondent. By that date, the Master had approved an amended first and final liquidation and distribution account that the appellant had drawn. The appellant had not, however, given proper notice in terms of s 35(5) of the Act that the account would lie for inspection. It follows that no distribution of the estate as provided for in s 35(12) of the Act, that is, in terms of an account which had laid for inspection without any or successful objection thereto, had by then taken place. The Master also did not approve the payment of any remuneration to the appellant. After the respondent had taken possession of the estate files, she demanded repayment of the said amount from the appellant and his failure to do so led to the present litigation.

[7] As I have indicated, the appellant paid estate funds to himself after the death of Mrs Meyer. As a general rule, a contract of agency is terminated by the death of either the principal or the agent. See Sir J W Wessels *The Law of Contract of South Africa* 2 ed (1951) Vol I para 1675 and *Ward v Barrett NO and Another* [1962] 4 All SA 557 (N); 1962 (4) SA 732 (N) at 737D. The appellant correctly accepted that the general rule is applicable to this matter. It follows that after the death of Mrs Meyer, the appellant had no authority to act for the estate or to deal with its property. He particularly could not lawfully make any payment from estate funds. Executor’s remuneration was in any event not payable at the time, because of the provisions of s 51(4) of the Act. They provide that an executor shall not be entitled to receive any remuneration before the estate has been distributed as provided for in s 35(12), unless the payment of such remuneration has been approved in writing by the Master.

- [8] In written argument presented to this Court, the appellant correctly conceded that these payments to the appellant constituted unlawful appropriations of estate funds. Surprisingly, however, he maintained that the respondent's claim nevertheless had to fail on the ground that her application did not disclose a cause of action.
- [9] In response hereto, the respondent relied on the provisions of s 50(b) of the Act, as she did in the court a quo. It appears that the court a quo at least implicitly accepted that s 50(b) provided the respondent with a remedy against the appellant.
- [10] It is necessary to reproduce s 50 in its entirety:

'50. Executor making wrong distribution

Any executor who makes a distribution otherwise than in accordance with the provisions of section thirty-four or thirty-five, as the case may be, shall-

- (a) be personally liable to make good to any heir and to any claimant whose claim was lodged within the period specified in the notice referred to in section twenty-nine, any loss sustained by such heir in respect of the benefit to which he is entitled or by such claimant in respect of his claim, as a result of his failure to make a distribution in accordance with the said provisions; and
- (b) be entitled to recover from any person any amount paid or any property delivered or transferred to him in the course of the distribution

which would not have been paid, delivered or transferred to him if a distribution in accordance with the said provisions had been made: Provided that no costs incurred under this paragraph shall be paid out of the estate.'

- [11] Both the language and the context of s 50 indicate that it has limited application. It deals with the position of an executor who made a distribution otherwise than in accordance with the provisions of s 34 (in respect of an insolvent deceased estate) or s 35 of the Act. It firstly saddles an executor who made a wrong distribution with personal liability for any resultant loss sustained by an heir or claimant. Secondly it affords such an executor the right to recover what was wrongly paid, delivered or transferred.
- [12] In *Els NO v Jacobs* 1989
- (4) SA 622 (SWA) at 629-630, the court held that the application of s 50(b) is limited to circumstances in which the *condictio indebiti* would be available. On behalf of the respondent it was contended that this case had been wrongly decided on this point. I agree. There is no indication of such a limitation in the text or context of s 50. On the contrary, if that was intended, there would be no need for the provision. In my opinion s 50(b) provides a self-standing statutory remedy and the decision to the contrary in *Els NO v Jacobs* should not be followed.

- [13] Thus, s 50(b) permits recovery of what an executor wrongly distributed. The Act defines an executor as a person ‘who is authorized to act under letters of executorship granted or signed and sealed by a Master, or under an endorsement made under section fifteen.’ (Section 15 of the Act is not applicable to the matter.) This recovery may no doubt be made by the legal successor of such executor. An executor may also, of course, act through an agent. The acts of a duly authorised agent are in law those of the executor. But a payment from estate funds by a person who is neither an executor as defined nor his or her duly authorised agent, falls outside the scope of s 50. And an unlawful appropriation of estate funds by a person who has no authority whatsoever to deal with the estate, can hardly be said to be a distribution within the meaning thereof in s 50.
- [14] It follows that the respondent’s claim did not fall within the ambit of s 50(b). Does this mean that even though the appellant admitted that these payments constituted unlawful appropriations of estate funds to him, the estate was remediless? Certainly not. As I shall show, the answer lies in the powers and duties attached to the office of an executor.
- [15] A deceased estate is an aggregate of assets and liabilities. Rights of action that vest in an estate, naturally form part of the assets thereof. See *Lockhat’s Estate v North British & Mercantile Insurance Co. Ltd* 1959 (3) SA 295 at 302F-G. Upon his or her appointment, only the executor has powers and duties to deal with the estate. His or her rights and obligations are derived from the common law and statutory provisions. One of the main obligations of an executor is to recover what is due to the estate. And only the executor may institute legal proceedings to do so. The position is summarised in D Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* 2010 ed at 12-23 – 12-24, para 12.26:
- ‘Upon his appointment the executor becomes entitled to deal with all the assets of the estate and it is his duty to recover all assets, in whatever form they may be, whether immovable, movable, corporeal or incorporeal, which belong to the estate but which are in the hands of, or may be owed by, third parties. It is for him to decide whether the estate has any claim against a third party and the advisability of instituting action to recover.’
- [16] In the result the respondent was not only entitled but obliged to recover the estate funds that had unlawfully been appropriated by the appellant. That the office of executor of the estate entitled the respondent to recover the unlawful appropriations from the appellant, was adequately raised in the founding affidavit. It follows that the appeal must fail.
- [17] The appellant applied for condonation of the late filing of his notice of appeal and the respondent, in turn, applied for condonation
- of the late filing of heads of argument. The respective applications were not opposed and should be granted. Each applicant for
- condonation should bear the costs of the application.
- [18] The following order is issued:

C H G VAN DER MERWE

JUDGE OF APPEAL

APPEARANCES

For appellant: J Truter

Instructed by: Surita Marais Attorneys, Pretoria

E C Cooper Majiedt Incorporated, Bloemfontein

For respondent: P J Vermeulen SC

Instructed by: W F Bouwer Attorneys, Pretoria

Wessels & Smith Attorneys, Bloemfontein.

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