IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 2906/2013
DATE HEARD: 17/04/2014
DATE DELIVERED: 6/05/14
REPORTABLE

In the matter between:

LEON KEYTER N.O.	**APPLICANT**
and	
MARIAN ELAINE VAN DER MEULEN N.O.	**FIRST RESPONDENT**
FREDERICK JOHANNES POTGIETER N.O.	**SECOND RESPONDENT**

Application to compel executor of deceased estate A to deliver flock of sheep to executor of deceased estate B, executor of deceased estate C having ceded right to delivery to executor of deceased estate B – application brought after executor of deceased estate A tendered 'furnishing' sheep – action pending in respect of delivery of sheep – *lis alibi pendens* – requirements met but justice and equity and balance of convenience favouring application being determined – validity of cession – held that executor of deceased estate may cede rights – application succeeded with costs.

JUDGMENT

PLASKET J

[1] This case concerns the fate of a flock of sheep. The dispute concerning the flock has raged for so long now that both the parties and the sheep have changed: the parties, as well as another person who plays a part in this matter, are executors of deceased estates, two of the original protagonists having died; and the flock in issue is made up of different sheep, old age, sale and slaughter having taken their inevitable toll.

[2] The applicant (Keyter) is the executor of the estate of the late EWD K. One Paterson, who is not a party to these proceedings, is the executor of the estate of the late HA K. The second respondent (Potgieter) is the executor of the estate of the late JWDD K.

[3] In terms of the will of EWD K., a usufruct was granted to his wife, HA K., in respect of, inter alia, the flock of sheep that is the subject matter of this application. After she had taken possession of the sheep following the death of her husband, she entered into an agreement with NW K. in terms of which the sheep were leased to him. The agreement provided for the lease to terminate on her death and imposed an obligation on him to 're-deliver to the Administrators in Estate Late EWD K. livestock of equal number and value as received at the commencement of this Lease . . .'

[4] HA K died on [……]. JMDD K took possession of the sheep in, it would appear, his capacity as executor of her estate. He died on […….] and Potgieter and Ms Marian van der Meulen (cited as the first respondent in this matter) were appointed executors of his estate. Van der Meulen has subsequently resigned as an executor and plays no part in this matter. On the death of JMDD K., Paterson was appointed as executor to the estate of HA K..

[5] On 4 May 2011, Potgieter, through his attorney, tendered to 'furnish' the sheep to Paterson. He did so in answer to a letter from Paterson in which he had asked for confirmation that the sheep could be collected. Potgieter's attorney's letter states, after referring to a dispute concerning the sheep:

'Those small stock as disclosed must be made available to Estate HA K. as once the litigation has been finalised or settled, you will have to deal with them in a final account.
Whenever you require the small stock as listed please call upon us, representing Estate JMDD K., to furnish such stock to you giving that Estate a reasonable opportunity to produce the listed small stock'.

[6] Although there were subsequent discussions between Potgieter and Paterson concerning the value of the sheep being paid instead of them being handed over to Paterson, it is apparent that the tender of the return of the sheep had been accepted and the further discussions were unsuccessful attempts to vary its terms.

[7] On 24 January 2013, Paterson ceded to Keyter 'the right, title and interest the above-named estate has in and to' the sheep. On 6 February 2013, Keyter wrote to Potgieter's attorneys. He said:
'Mr Meyer has, on behalf of the Executor, Mr Potgieter, tendered delivery of the sheep referred to in the Particulars of Claim. This tender was repeated by your Counsel during argument of the joinder of the Estate.
Mr Meyer has however indicated that the tender was made to the Executor of the Estate Late H.A. K, Mr Paterson, and not to the writer in his capacity as Executor in the Estate Late EWD K..
Mr Meyer indicated however that the sheep would be delivered on receipt of a cession by Mr Paterson N.O. in favour of the writer.
The cession is attached.
We require the sheep as listed in the cession to be available for inspection within ten days from date of receipt of this letter.
. . .
We require transport to be available to deliver the sheep to Keeviston immediately after the inspection. Transport costs to be for your client's account.'

[8] The reference in the letter to particulars of claim is a reference to an action that Keyter instituted against NW K and JMDD K. (in his capacity as executor of the estate of HA K.). Paterson was substituted as second defendant and Van der Meulen and Potgieter were joined, in their capacity as executors of the estate of JMDD K., as third defendant. That action was for the delivery of the sheep, alternatively the payment of R400 000.00, the rendering of an account in respect of

the progeny, and debatement of that account, payment of any amount established to be due, and costs.

[9] Three issues have been raised by Potgieter in opposition to the application. They are: that the application, in the light of the action, is *lis pendens*; that the claim against Potgieter is, in any event, ill-founded in fact and in law; and that the cession upon which Keyter sues is invalid and he consequently lacks standing. I proceed to deal with these issues.

Lis alibi pendens

[10] The defence of *lis alibi pendens* arises when four requirements are met. They are that: (a) there is litigation pending (b) between the same parties (c) based on the same cause of action and (d) in respect of the same subject matter.[1] *Lis alibi pendens* does not, if successfully invoked, put an end to the plaintiff's or applicant's case. Rather, it allows for the staying of the later matter pending the final determination of the earlier matter.[2] Once the earlier proceedings have been finalised, however, the later proceedings will be struck by, and terminated by, the defence of *res judicata*. In *Nestlé (South Africa) (Pty) Ltd v Mars Inc*[3] Nugent JA said the following:

'The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.'

[1] LTC Harms *Amler's Precedents of Pleadings* (6 ed) at 227-228; Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed) (Vol 1) at 311.
[2] Harms (note 1) at 228.
[3] *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 16.

[11] The court is vested with a discretion as to whether to stay proceedings or to hear the matter despite the earlier pending proceedings. In *Loader v Dursot Bros (Pty) Ltd*[4] Roper J dealt with this aspect when he said:

'It is clear on the authorities that a plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject-matter. The Court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist . . .'

The exercise of this discretion is determined with reference to what is just and equitable as well as the balance of convenience.[5]

[12] As far as the onus is concerned, Harms states that as the later proceedings are presumed to be vexatious, the party who instituted those proceedings bears the onus of establishing that they are not, in fact, vexatious. He or she does so by satisfying the court that despite all of the elements of *lis alibi pendens* being present, justice and equity and the balance of convenience are in favour of those proceedings being dealt with.[6]

[13] In this matter, the action is still pending. It is essentially between the same parties. (NW K. and Paterson are also defendants in the action but not party to these proceedings.) It is based on precisely the same cause of action and relates to the same subject matter. The only difference is that the relief claimed in the action extends somewhat further than the relief claimed in this matter. The common feature, however, is that in both, an order is sought for the delivery of the sheep to Keyter.

[14] It was argued by Mr Dugmore, who appeared for Keyter, that I should, in the exercise of my discretion, determine the matter and that to do so will be a practical and effective way of resolving the central dispute between the parties. It will, in other

---

[4] *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) at 138.

[5] *Loader v Dursot Bros (Pty) Ltd* (note 4) at 139; *Geldenhuys v Kotzé* 1964 (2) SA 167 (O) at 168F-H; *Van As v Appollus & andere* 1993 (1) SA 606 (C) at 610D-F; *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 (1) SA 184 (Tk) at 192A-E.

[6] Harms (note 1) at 228.

words, be both just and equitable and convenient for this application to be dealt with rather than be stayed pending the finalisation of the action.

[15] In order to decide whether to determine these proceedings or stay them, it is necessary to say something about the action and the reasons for this application being brought.

[18] The action was instituted in 2006 and the plea was also filed in that year. At that stage JMDD K. was still alive and had been cited as the executor of the estate of HA K.. In his plea, he admitted being in possession of the sheep. After his death, he was substituted as the second defendant by Paterson. In May 2011, the tender was made by Potgieter, through his attorney, to Paterson and in 2012, an application was brought by Keyter to join the estate of JMDD K., represented by Potgieter and Van der Meulen, as the third defendant. In this application, the tender was apparently repeated by their counsel. Potgieter, in his affidavit, confirmed that the sheep were 'upon farming property which forms part of the estate of the late John K. in respect of which my co-Executor and I took possession and control' and admitted having made the tender to Pateron. Shortly thereafter, in January 2013, the cession was effected. At that stage, therefore, as far as Keyter was concerned the issue of the delivery of the sheep had been brought to a head. On 6 February 2013, he sent a copy of the cession to Potgieter's attorney and demanded delivery of the sheep, believing, it would appear, that the final hurdle had been cleared.

[17] When further hurdles were then erected by Potgieter, Keyter launched these proceedings to enforce the tender. In his replying affidavit, in response to the defence of *lis alibi pendens* being raised, he said the following:

'The delivery of the sheep, which forms the subject matter of the main action under case no 1658/2006, has been tendered by the Second Respondent. The tender is with respect an admission of liability.

The purpose of the present application is therefore not to adjudicate the merits of that claim, but to enforce the tender for the delivery thereof.

The remaining and unresolved claims are not the subject of this application.'

[18] The tender is not one that is contemplated by rule 34(2), read with rule 34(5), of the uniform rules in that while it is in writing, it was not 'given to all parties to the action' and it does not state whether it 'is unconditional or without prejudice as an offer of settlement'. (It also says nothing of costs.) It was described by Mr Dugmore as a common law tender. Keyter is correct that the tender amounted to an admission of liability. If it had been a tender in terms of the uniform rules and had not been honoured, Keyter would have had a purpose-built procedure available to him to enforce the tender: rule 34(7) makes provision for an application on five days notice to enforce a tender.

[19] The present proceedings are analogous to the situation envisaged by rule 34(7). They are both meant to bring to finality an aspect of a case that has, in effect, been settled. The procedure adopted by Keyter strikes me as being a cost-effective way of finalising an important issue that has dragged on for years and looks likely to continue to drag on in the absence of resolution through this application. In the circumstances of this case, the considerations raised by Navsa JA in *Socratous v Grindstone Investments*,[7] namely the clogging of already congested court rolls with an 'unwarranted proliferation of litigation', does not arise precisely because the application will have the impact of 'killing' a major issue in the trial that is planned to be run at some stage in the future. This application seeks to achieve precisely the type of beneficial result that rule 34 aims for.[8]

[20] In my view, therefore, considerations of both justice and equity and of the balance of convenience favour the determination of the merits of this matter despite the pending action. Consequently, the *lis alibi pendens* defence fails.

Is Keyter's claim bad in fact and law?

[21] Two arguments under this head were raised by Mr De La Harpe, who appeared for Potgieter. The first is that the tender was 'inchoate'. I have said something of this in paragraph 6 above. I shall now deal with the point in more detail.

---

[7] *Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA) para 16.
[8] As to the aim and purpose of rule 34 generally, see *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) para 13.

[22] The argument is that the tender is inchoate because, after it was made, Potgieter and Paterson negotiated further about Paterson settling for the value of the sheep rather than the sheep themselves, and those negotiations were never concluded. In my view, this categorisation of the effect of what happened is incorrect and led to an incorrect conclusion. The tender was made and accepted. Then, negotiations commenced with a view to varying the terms of the performance promised. That came to nothing. The result was that the tender was not varied and the original tender – to give Paterson possession of the sheep – stood.

[23] Indeed, this much appears to be conceded in Potgieter's answering affidavit. He stated that '[i]t is so that Mr PATERSON wrote to me enquiring as to where he could collect the sheep' but later told Potgieter that he would prefer the cash value of the sheep. This was followed by 'debate and correspondence regarding the value of the livestock' which was never resolved.

[24] That this attempt to vary the nature of the performance had no impact on the tender appears from the following passage of Potgieter's answering affidavit:

'51.3 I have repeatedly tendered to Mr PATERSON the livestock and/or their value reasonably agreed.

51.4 That tender does not, however, vest the Applicant with an entitlement to claim the livestock from me.'

From this it is clear that Potgieter admits the tender to Paterson but denies that he is obliged to return the sheep to Keyter. That rases the validity of the cession which I shall deal with in due course.

[25] The second argument raised under this head is that Potgieter has no duty to return the sheep because his duties as executor of the estate of JMDD K. extend only to the liquidation and distribution of the deceased's personal estate. His powers and duties do not extend to property that the deceased took control of in his capacity as executor of the estate of HA K.

[26] The short answer to this argument is that by his own admission Potgieter is in possession of and in control of the sheep, which are on the property of the estate of

JMDD K., and he has tendered to return them. Furthermore, there is no one apart from Potgieter who can return the sheep and, if there is, he has not suggested who that may be.

[27] I am consequently of the view that, if the cession is valid, Potgieter is under an obligation to return the sheep to Keyter. I turn now that that central issue.

The validity of the cession

[28] Clause 1 of the cession effected by Paterson in favour of Keyter states:

'I, Andrew Stuart Paterson, the duly appointed executor in the estate of the late Hazel Agnes K. . . . hereby cede, assign and make over all the right, title and interest the above-named estate has in and to the livestock including the progeny referred to in paragraph 7 and Prayers A, B and C of the Particulars of Claim in case number 1658/2006 in the High Court of South Africa (Eastern Cape, Grahamstown) to the executor in the estate of the late Eric William Danckwerts K..'

[29] The argument advanced by Mr De La Harpe is that as an executor acts in an official capacity – and Paterson was clearly acting in his official capacity when he purported to effect the cession – he or she may not cede rights in a deceased estate. I need only address that 'big picture' issue and not whether there may be some other defect that invalidates this particular cession.

[30] Mr De La Harpe has not been able to refer me to a case that holds that the executor of a deceased estate may not cede rights of the estate. He relies, however, on *South African Board of Executors and Trust Co Ltd (in liquidation) v Gluckman*,[9] in which the court was concerned with whether a trustee of an insolvent company could cede to a third party a right to sue for the setting aside of a disposition of property without value.

[31] Before answering that question, the court set out the legislative scheme within which the trustee functioned. Three points were made. First, when a trustee sues, he or she requires authorisation to do so in the form of a resolution of creditors.

[9] *South African Board of Executors and Trust Co Ltd v Gluckman* 1967 (1) SA 534 (A).

Secondly, he or she is granted standing to sue to set aside a disposition without value but, if he or she does not do so, a creditor may sue for that relief in the name of the trustee and upon indemnifying him or her against an adverse costs order. Thirdly, when the disposition without value is set aside, the court declares the trustee entitled to recover any property alienated under it.[10]

[32] Having set out this legislative scheme, Beyers JA turned to whether a trustee's right of action may be ceded. He held:[11]

'Counsel for the appellant submitted that under the general powers of administration a liquidator may sell the assets of the company, that a right of action is an asset, and that if it can be sold it can be ceded. The argument, it seems to me, loses sight of the fact that the right which a liquidator has in terms of sec. 130(2) of the Companies Act, read with sec. 32 of the Insolvency Act, is a right which can only be exercised *nomine officii*. Its exercise is an administrative act or duty which can only be exercised by a particular official in the name of the company. The sections clearly do not contemplate its exercise by a third party, entitling him to obtain a judgment thereon in his own name. It is a right to sue in a representative capacity, and that capacity cannot by cession be bestowed upon another. If the liquidator were allowed to cede the company's claim to a third party, the right conferred by the section on a creditor to bring the action in his own name would be stultified; or the situation may arise where both the creditor and the cessionary might institute action.'

[33] It is clear from this passage that Beyers JA was not prescribing a general rule that trustees may never cede rights that vest in an insolvent company. He was dealing with the specific issue of whether a trustee could cede a right of action to sue for the setting aside and recovery of a disposition without value. And his finding was that a trustee could not do this because it was inconsistent with and would undermine specific provisions of the Companies Act then in force and of the Insolvency Act 24 of 1936. In other words, a cession of this particular right of action was not legally permissible because it would fly in the face of the scheme that the legislature had put in place. This decision goes no further than to hold that the legislature intended only the trustee, and a creditor in defined circumstances, to be able to sue for the setting aside of a disposition without value. It is not authority for

[10] At 541C-F.
[11] At 541F-H.

the more general proposition that a trustee can never cede rights of an insolvent company.

[34] There is, however, direct authority for the proposition that an executor of a deceased estate may cede rights vested in the estate. In *Elizabeth Nursing Home (Pty) Ltd v Cohen & another*,[12] the excipient, so it was alleged, was a debtor of the deceased. Instead of recovering the debt himself, the executor had ceded the right of action to recover the debt to an heir as part of his inheritance. The heir had then instituted an action for the payment of the debt. One of the exceptions taken was that the particulars of claim disclosed no valid cause of action because an executor may not validly cede a right of action to another person. The issue that Caney J was required to determine was thus essentially the same issue as in this case. It had been argued by counsel for the excipient that executors could not validly cede a right of action because it was their duty to take possession of all of the deceased estate's assets, including claims, and only the executor could sue to recover claims.[13]

[35] During the course of his judgment, Caney J referred to the judgment of Ramsbottom JA in *Lockhat's Estate v North British & Mercantile Insurance Co Ltd*[14] in which the learned judge of appeal particularised the duties of an executor as follows:[15]

'The duty of an executor who has been appointed to administer the estate of a deceased person is to obtain possession of the assets of that person, including rights of action, to realise such of the assets as may be necessary for the payment of the debts of the deceased, taxes, and the costs of administering and winding up the estate, to make those payments, and to distribute the assets and money that remain after the debts and expenses have been paid among the legatees under the will or among the intestate heirs on an intestacy.'

[36] While this passage does not deal specifically with the question I have to answer, it is clear from it that an executor has a great deal of freedom as to the mechanics of how he or she liquidates and distributes an estate. Caney J, in

[12] *Elizabeth Nursing Home (Pty) Ltd v Cohen & another* 1966 (4) SA 506 (D).
[13] At 510E-F.
[14] *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 (3) SA 295 (A).
[15] At 302E-G.

Elizabeth Nursing Home, held that an executor is first required to reduce assets, including rights of action, into his or her possession. Having acquired possession of an asset, it is for the executor 'to decide whether to call it in, if it is a debt, or to realize it, or to distribute it, so to speak *in specie* amongst the beneficiaries'.[16] He then said:[17]

'If Mr. *Noren* were correct in his contention, then the executors could never resort to a sale of book debts. They would be obliged to call in the debts, collect them, and handle the cash, whereas it is common experience that executors do sell book debts. Nor could executors cede book debts along with delivering to a beneficiary a business left to him as a going concern, as surely they can.'

[37] The *Elizabeth Nursing Home* matter is the clearest of authority that an executor may cede a right that is vested in an estate. Meyerowitz, with reference to that case, states that an executor 'may in the course of his duty in liquidating the estate cede the estate's right to any assets or claims which are capable of cession to the beneficiaries or third parties' and that a cessionary 'will then be able to enforce such rights in place of the executor'.[18]

[38] I am in respectful agreement with Caney J: whatever the position may be in respect of trustees of insolvent companies, it is clear that an executor of a deceased estate may cede a right to an heir. If he or she can do that, I can see no reason in principle why he or she cannot cede a right to a third party, as happened in this case. It follows that I consider Meyerowitz's statement of the legal position, with respect, to be correct.

[39] In the result, I find that the attack on the validity of the cession fails.

Conclusion and order

---

[16] *Elizabeth Nursing Home* (note 12) at 512E-F.
[17] At 512F-G.
[18] D Meyerowitz *The Law and Practice of Administration of Estates and their Taxation* (2010 edition) para 12.26.

[40] Having found no merit in any of the defences raised by Potgieter, I must decide whether he is obliged to deliver the sheep to Keyter, at his cost, or whether Keyter is obliged to collect the sheep, at his cost.

[41] The undertaking does not assist in determining whether Potgieter is required to deliver the sheep or Keyter is required to collect them: in it, Potgieter merely undertakes to 'furnish' the sheep on request. This may mean no more than that he made them available. In my view, however, Potgieter, being in possession of the sheep and not being entitled to be in possession of them, is obliged to deliver them to Keyter.[19] I see no reason why Keyter should not be allowed to inspect the sheep before delivery.

[42] Keyter having succeeded in this application, there is no reason why costs should not follow the result, and that those costs should not be borne by the estate that Potgieter represents.

[43] I make the following order.

(a) The second respondent, in his capacity as executor in the estate of the late John Martin Dennis Danckwerts K., is directed to deliver, within 30 days of the date of this order, to the applicant, in his capacity as executor of the estate of the late EWD K., the following sheep: 221 Dorper ewes with lambs, five Dorper rams, 46 maiden Dorper ewes, 52 Merino ewes, two Merino rams and 32 weaned lambs.

(b) The applicant or his representative shall have the right to inspect the sheep referred to above on the day of delivery on the property where they are currently kept.

(c) The sheep shall be delivered to the applicant at Keeviston farm.

(d) The estate of the late John Martin Dennis Danckwerts K. is directed to pay the applicant's costs of this application.

---

[19] See the analogous case of *Lourensford Estates (Edms) Bpk v Grobbelaar* 1996 (3) SA 350 (O) at 353H-354D.

C Plasket
Judge of the High Court

APPEARANCES
Applicant: G Dugmore, instructed by Neville Borman and Botha
Second respondent: D De La Harpe, instructed by Netteltons