evdw/ (Case no: 384/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

DONALD JOHN LOW, N.O First Appellant

ELSIE EDITH LOW, N.O. Second Appellant

MARA ODETTE WARREN, N.O. Third Appellant

and

CONSORTIUM CONSOLIDATED CORPORATION (PTY) LIMITED Respondent

Coram : Hefer, Vivier, F H Grosskopf, Plewman JJA et Farlam AJA

Date of hearing : 27 August 1998

Date of delivery : 29 September 1998

JUDGMENT

FARLAM AJA

The appellants in this matter, who are the executors in the estate of the late William Andrew Low (to whom 1 shall refer in what follows as "the deceased"), sued the respondent in the Witwatersrand Local Division, inter alia for an order directing it (i) to deliver to them certain gold coins, which had at one stage belonged to the deceased, or (ii) should it fail to deliver the coins to them within fourteen days from date of judgment, to pay to them the sum of R732 500,00 with interest thereon at the rate of 10% per annum compounded, calculated from 21 February 1994 to date of final payment.

Roux J in the trial court having dismissed their claim with costs, they now appeal, with leave of the court a quo, to this court.

It was common cause in the court below that on 21 February 1994 and at Johannesburg the deceased and the respondent, represented by its sole shareholder and executive director, Mark Andersen, concluded an agreement, partly in writing

and partly orally, which was referred to in evidence as "the Swop Deal".

Although there was some dispute on the pleadings and at the trial as to some of the terms of the agreement it was common cause that the agreement contained the following terms:

(a) the deceased undertook to deliver to the respondent and did deliver certain coins, (in what follows I shall refer to these coins as "the deceased's coins");

(2) the agreed value of the deceased's coins was R732 500,00;

(3) the respondent agreed to procure certain other coins (to which I shall refer in what follows as "the exchange coins") and to deliver them after they had been procured to the deceased.

It was also common cause that the deceased's coins were delivered to the respondent on or about 21 February 1994.

The appellants alleged that, in breach of the agreement, the respondent

failed to purchase and deliver any coins to the deceased, "notwithstanding the lapse of more than a reasonable time from date of the conclusion of the agreement", that they had demanded from the respondent that it deliver the exchange coins to them and that it had failed to do so. They then purported to cancel the agreement (such cancellation being effected by the service of the summons) and demanded delivery of the deceased's coins or the sum of R732 500,00, with accrued interest thereon.

In its plea the respondent averred that it did procure the exchange coins and that it did deliver them to the deceased. It denied that the appellants were entitled to cancel the contract and prayed that the appellants' claim against it be dismissed with costs.

The only witness who testified on the appellants' behalf was the first appellant, who was the deceased's son.

His evidence was that the deceased had a stroke on 15 July 1994 and died

five weeks later. To the best of his knowledge the deceased, who was interested in coins, kept all his coins in a safety deposit box in the vaults of the Eloff Street branch of Trust Bank. After his death the exchange coins were not in this deposit box nor could they be found elsewhere.

It was common cause that the deceased had dealings, involving three transactions, with the respondent, inter alia, with a view to collecting nine portfolios of what were described as "USRCs" (United States Rare Coins) and which were also called St Gaudens.

One transaction, which took place late in 1993, involved the purchase of three portfolios of USRCs, known as portfolios 1, 2 and 3. It is common cause that the coins making up these portfolios were kept by the respondent on the deceased's behalf in its vaults and were handed over to the executors after his death. .

Another transaction, which according to the evidence probably took place

on 8 March 1994, involved the purchase of coins making up what were described as portfolios A, B and C. These coins, which were on order from the United States at the time of the deceased's death, were, to the extent that the deceased had paid for them, handed over to the executors on their receipt in South Africa.

The third transaction, the so-called "Swop Deal", which is the subject matter of the present case, related to the acquisition by the deceased of the exchange coins, which made up what were called portfolios 4, 5 and 6.

The first appellant conceded that all he knew about the exchange coins was that he could not find them. He did not know if the deceased had sold them or hidden them in his garden or a cellar or anywhere else. He also conceded that he could not say whether or not the deceased sent them overseas or whether he opened another bank account secretively and left them in a safety deposit box other than his deposit box at the Trust Bank.

Andersen gave evidence regarding details of his dealings with the deceased,

whom he described as a very secretive and eccentric gentleman and who told him that he had buried Kruger rand coins in his garden. He stated, however, that apart from being eccentric the deceased was very astute with what the witness described as a "tremendous mind".

He said that the coins making up portfolios 4, 5 and 6, after they arrived from the United States of America, were delivered to the deceased, who carefully checked them and placed them in supermarket shopping bags and took them out of the respondent's offices. Before doing so, said the witness, he signed the invoices relating to the exchange transaction to show that he had received the coins in full. He was unable to pinpoint the exact date when delivery took place but said it was definitely between 21 April 1994, when the last consignment of coins arrived from the United States, and 11 May 1994, the last date on which the respondent gave the deceased what he called a read-out of his portfolio.

He said that the deceased was very fastidious about the accuracy of the

documents handed to him relating to his transactions with the respondent.

He also stated that the deceased liked to upgrade, as he put it, his coins, by asking for better examples of the coins, which would be given to him by the respondent as and when they came to hand.

A number of instances were put to him of coins identified by serial numbers which had been listed as having been delivered to the deceased which were subsequently sold by the respondent to other customers. He said that these must have been instances where coins originally delivered to the deceased were subsequently upgraded. He conceded, however, that he had no recollection of any of the coins making up portfolios 4, 5 and 6 having been upgraded in the way he described but said that this was a possibility. He also conceded that to the extent that upgraded coins were not listed in the schedules there were obvious errors in the documents.

In his judgment the learned judge held that the onus rested on the appellants

to prove all the elements of their case. This meant that they had to prove that the respondent did not deliver the exchange coins to the deceased. He added, however, that, had he come to the conclusion that the onus to prove delivery to the deceased was on the respondent, his ultimate finding on the facts would not have been different.

The learned judge referred to the rule of practice that a trier of fact must "scan with suspicion the evidence of a party resisting a claim by a deceased estate in raising a defence to which he alone can speak" (Da Mata v Otto NO, 1972(3) SA 858 (A) 868 F).

After carefully considering the evidence the learned judge said:

> "I have weighed all the criticisms levelled at Andersen and, viewing his evidence with suspicion as our practice dictates, I find him to be both truthful and reliable. I hold that he delivered the "saints" to the defendant. He did not steal them which is the alternative finding."

On appeal it was contended on the appellants' behalf that the trial judge

should have held that the onus to prove delivery of the exchange coins to the

deceased rested on the respondent and that it failed to discharge this onus.

Counsel for the appellants referred to the rule of practice to be applied when a party resisting a claim by a deceased estate raises a defence to which he alone can speak and submitted that the trial judge, although he mentioned it in his judgment, did not in fact apply this rule of practice to the evidence presented on behalf of the respondent satisfactorily or at all.

In his argument in support of the contention that the appeal should be dismissed, counsel for the respondent, in addition to arguing that the trial judge's findings were correct, also contended that the appeal should fail because the appellants had not proved that the contract contained a term obliging the respondent to return the deceased's coins or their agreed value if the exchange coins were not procured within a reasonable time and because, time not being of the essence and not having been made of the essence, the appellants had no right

to cancel the contract and claim return of the deceased's coins or their agreed value.

On the view I take of this case it is not necessary to consider whether this contention is correct. It is also unnecessary to decide whether the judge in the court below correctly held that the onus was on the appellants to prove nondelivery of the deceased's coins. I say this because I am satisfied for the reasons that follow that the respondent did deliver the exchange coins to the deceased on or before 11 May 1994.

It is clear that this is a case where the court must apply the rule of practice relating to the cautious approach to be adopted when evidence is given of a defence raised against a deceased estate of which the estate can have no knowledge. This rule of practice was discussed by Fagan JA (with whom Centlivres CJ and Schreiner JA concurred) in Borcherds v Estate Naidoo, 1955(3) SA 78(A) at 79 A-F as follows:

"If the facts in issue are particularly within the knowledge of only one of the parties to a suit, that is a circumstance which the Court must take into consideration in weighing the probative effect of the evidence adduced. Here the one party to the alleged transaction of repayment is dead. The Court must therefore scrutinise with caution the evidence given by, and led on behalf of, the surviving party. This attitude has been adopted by the Courts in a number of cases in which a claim was preferred against a deceased estate, or a defence was set up to a claim by the estate. I may refer, inter alia, to Estate Lynch v Stewart, 1913 CPD 451 at p 454; Estate Schickerling v Schickerling, 1936 CPD 269 at p 272; Estate van der Walt v Crooks, 1941 CPD 244 at pp 247-249 and decisions reviewed there; to the remarks of Davis AJA, on the last-mentioned case in Moyce v Estate Taylor, 1948(3) SA 822 at p 827; and to Wood v Estate Thompson and Another, 1949(1) SA 607 (N), where Selke J enunciated the principle, as deduced by him from the cases to which counsel had referred him, in the following words:

> 'I am not aware of any rule of our law or of any practice of our Courts which requires that, merely because a claim is one made against a deceased's estate, it must on that account be proved with a special degree of cogency, and I do not believe that any such rule exists. If it did, it would no doubt work for the protection of the estates of deceased persons against fraudulent claims, but, on the other hand, it might work considerable injustice on honest claimants against such estates. It seems to me that such a principle, if it

existed, would obviously cut both ways, and, on the whole, I do not think the cases are really authority for more than the principle that the Court must examine with a very cautious eye uncorroborated evidence given in such cases; but I do not appreciate that the Court should do more in that respect than it is wont to do in all cases where interested evidence is given ex parte against someone who is not in a position to answer it.'

I have no fault to find with the statement of the principle by Selke J, except that I should prefer to omit the word 'uncorroborated', unless it means 'uncorroborated by evidence which is itself cogent enough to overcome the caution'. The mere fact that, as in the case before us, three witnesses corroborate each other by giving similar evidence on the one side cannot make the three or any one of them escape the cautious scrutiny which should be applied to evidence which the other party to the suit is not in a position to answer."

In my view the main question to be considered in this case is whether, applying the approach enjoined on triers of fact in cases such as this in the judgement of this court in Borcherds v Estate Naidoo, supra, one can accept that Andersen's evidence that he delivered the exchange coins to the deceased was truthful. In this regard there were two items of evidence of great importance.

The first was the evidence about the character and personal traits of the deceased. The first appellant conceded that his father was secretive about his financial dealings, including those relating to gold coins, that he did store Kruger rand coins in specially fabricated steel casings in a back corner of his cellar and that he was highly intelligent and very careful in his business dealings.

The second was the evidence that from about 11 May 1994 the deceased was in possession of documentation emanating from the respondent from which it must have been apparent to him that the exchange coins had all arrived in South Africa but that they were not being held on his behalf by the respondent in its vaults, although it was holding the coins in portfolios 1, 2 and 3 for him. Despite this he continued to have dealings with the respondent and entrusted large sums of money to it, inter alia, with a view to acquiring the coins making up portfolios A, B and C. Such conduct in a man of the astuteness and intelligence of the deceased is in my opinion very strong corroboration of Andersen's evidence that

5 he delivered the coins to the deceased. It is evidence which is, to use the phrase employed in the judgment in Borchards v Estate Naidoo, supra, "itself cogent enough to overcome the caution" required in cases of this kind. The fact that the coins were not in the deceased's safety deposit box at the Trust Bank and could not be found by his executors can be explained on the basis of what is known about his secretiveness and eccentricity.

In all circumstances I am of the view that the appeal should be dismissed with costs and it is so ordered.

FARLAM AJA

Concur

Hefer JA Vivier JA F
H Grosskopf JA
Plewman JA