



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021/14513

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
<u>3/03/2023</u>	
DATE	<u>Malindi</u>
	SIGNATURE

MARINDA RETIEF

Applicant

and

WILLEM JOHANNES STEYN N.O.

First Respondent

ALMINDA SOPHIA KRUGER N.O.

Second Respondent

JOHANNES ANTONIO ROETS N.O.

Third Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 3 March 2023.

JUDGMENT

MALINDI J:

Introduction

[1] The applicant, the duly appointed executor of the estate of the late Willemina Janetta Harmina Vermeulen, seeks an order in terms of which the Belvedere Trust (hereinafter referred to as "the Trust"), an *inter vivos* trust represented by its trustees, being the first, second and third respondents, is ordered to repay a loan amount of R451 000.00.

[2] It is common cause that:

- 2.1 On 8 April 2003, the Vermeulens and the Belvedere Trust entered into an agreement to provide the Vermeulens with an exclusive right to occupy a unit in the Sterlig Retirement Village.
- 2.2 The Vermeulens complied with their obligations in terms of the agreement by amongst others making payment to the Belvedere Trust of the full loan amount of R451 000.00.
- 2.3 Mr Vermeulen passed away on 6 June 2015.
- 2.4 Ms Vermeulen passed away on 19 August 2019.
- 2.5 The applicant, an employee of Citadel Fiduciary (Pty) Ltd, was appointed as the executor of the deceased estate on 8 October 2020, succeeding one Mr Daniel Schutte, who was appointed on 19 September 2019.
- 2.6 The loan amount was not repaid to the estate after Ms Vermeulen passed away on 19 August 2019.

[3] The respondents oppose the application and raise the following points *in limine*:

3.1 The applicant has no *locus standi* to institute these proceedings on behalf of Ms Vermeulen who passed away on 19 August 2019 ("the deceased"), for the reason that the applicant does not have the power to act on behalf of the deceased.

3.2 The applicant's claim has prescribed.

3.3 This Court is not vested with the necessary jurisdiction to entertain these proceedings.

[4] The replying affidavit was filed four (4) days out of time. The respondents do not oppose the condonation application in respect thereof. Condonation is granted.

Background

[5] The joint practice note sets out a chronology of events as follows:

5.1 On 8 April 2003, the Vermeulens entered into an agreement with the Belvedere Trust for a "life right" in Unit 74 in Sterlig.

5.2 On 7 August 2003 a loan amount was paid to the Trust.

5.3 On 6 June 2015 Mr Vermeulen passed away.

5.4 On 19 August 2019 Ms Vermeulen passed away.

- 5.5 On 19 September 2019, Mr Schutte was appointed as the executor of the deceased estate of Ms Vermeulen.
- 5.6 On 8 October 2019, the Applicant was appointed as executrix.
- 5.7 On 10 October 2019 Mr Arrie Vermeulen advised the applicant in respect of levy payments.
- 5.8 In October 2019, Unit 74 was vacated at Sterlig Retirement Village.
- 5.9 On 5 December 2019 payment was made in respect of levies.
- 5.10 On 8 January 2020 payment was made in respect of levies.
- 5.11 On 27 January 2020 payment was made in respect of levies.
- 5.12 On 11 March 2020 payment was made in respect of levies.
- 5.13 On 26 May 2020, a refund was made in respect of the deposit amount.
- 5.14 On 11 August 2020, a representative of the Trust advised that the unit had been sold.
- 5.15 On 22 September 2020, a representative of the Trust addressed an email to the applicant requesting all of the estate's documents.
- 5.16 On 8 October 2020 the applicant was appointed as executrix of the deceased estate.

5.17 On 5 November 2020 an email was addressed to the Trust demanding payment of the loan amount.

5.18 On 6 May 2021 the application was issued.

[6] The above arises from the following salient facts pleaded by the applicant. On 8 April 2003 at Roodepoort, Gerhardus Frederik Vermeulen acting personally and Willemina Janetta Harmina Vermeulen acting personally and the Belvedere Trust, duly represented by its authorised trustee *alternatively* authorised agent entered into a written occupation right agreement.

[7] The Vermeulens acquired the exclusive right of occupation of Unit 74 in the Sterlig Retirement Village. The Belvedere Trust is the registered owner of Portion 26 of the farm Breau, also known as Wilropark Extension 27, 29, 30 and 31 on which the retirement village is located.

[8] Some of the crucial terms of the agreement are:

8.1 Upon the death of the last survivor, the contract would terminate and the Belvedere Trust would obtain occupation of the unit as soon as possible so as to ensure that marketing of the unit could commence without delay;

8.2 After a period of 30 days have lapsed, the Belvedere Trust would make payment to the estate of the deceased of the full loan amount subject to deductions of any payments relating to loans, arrears or accumulated expenses as calculated by the governing body.

[9] Now that the Vermeulens have passed away the executrix seeks payment to the estate of the last deceased Vermeulen of the R451 000.00 consideration for the exclusive right of occupation.

[10] Save for the points *in limine*, the respondents oppose the application on the merits on the following ground:

"The future loan amount was indeed less than the current agreement and therefore the Trust deducted commission in the amount of R33 825.00 and the outstanding levies of R11 552.36 from the loan amount of R451 000.00. The balance was, therefore, R405 622.64 and not the amount of R451 000.00 claimed by the applicant."

[11] The obligation to repay the loan amount, minus any amounts owed, are not denied.

[12] The applicant has filed a replying affidavit and succinctly deals with the respondents' allegations that the application is vexatious, constitutes an abuse of process and further should not have proceeded by way of motion because of existing disputes of fact.

[13] I agree with the applicant that on the face of the common cause facts the only dispute is in relation to the calculations of deductions that ought to be made, if any, on the sum claimed. This arithmetical dispute does not constitute a genuine dispute of fact as envisaged in *Room Hire Co (Pty) Ltd v Jeppe Streets Mansion (Pty) Ltd*.¹ Furthermore, the allegation of vexatious litigation, aimed at defaming the Trustees is misplaced. The demand to make payment was made on 5 November 2020 and the respondents have opposed the claim. That payment of the loan amount (minus what the Trust may justifiably deduct) is set out clearly in the agreement.

¹ *Room Hire Co (Pty) Ltd v Jeppe Streets Mansion (Pty) Ltd* 1949 (3) SA 1155 (T).

[14] The applicant denies that R11 552.36 in respect of levies is outstanding and due to the Retirement Village. She concedes that an amount of R33 825.00 in commission for the sale of the property is deductible.

Points in limine

[15] During the argument the respondents abandoned all points *in limine*, save for lack of standing in litigation by the executrix, the applicant.

[16] The respondents contend that section 16 of the Deceased Estates Act applies regarding the appointment of an executor by a corporation. It is contended that such an appointee should either be an officer or director of the company that has been nominated as executors. It is contended that the applicant describes herself as an employee of Citadel without stating whether she is an officer or director as defined in the Companies Act, 71 of 2008.

[17] The applicant contends that executors can be appointed from all walks of life and that attorneys equally qualify for such appointment. She states in her founding and replying affidavits that she is an attorney by qualification who is now employed by Citadel, the company nominated as executors. She replaced the initially appointed executor, Mr Schutte, who was an officer of Citadel.

[18] The applicant submits further that the fact that the Master of the High Court issued the letter of executorship to her is *prima facie* proof that the Master was satisfied that she qualifies. The letter cannot be challenged in these proceedings without the Master having been joined to such a challenge.

[19] I hold that Ms Retief's appointment is valid and that she has legal standing to have brought these proceedings. The Master was satisfied of her appointment by resolution of Citadel, the duly nominated company as executors. I do not agree with Ms Vergano, for the respondents, that a case for Ms Retief's appointment is not made out in the papers.

Merits

[20] The respondents' case finally boiled down to the contention that the commission amount and outstanding levies stand to be deducted from the claimed amount. Mr Van Schalkwyk, for the applicant, conceded that these amounts should be deducted if due and payable. He contested, however, that any levies were outstanding. He referred to various payments made on behalf of Unit 74 and contended that the respondents cannot have a double payment of levies for the period that it claims them. On the other hand the respondents contended that the payments referred to are not described in the bank statements and can therefore not be ascribed to payments for levies.

[21] As the issue of levies remains disputed, I am inclined to find in favour of the respondents in this regard because of the concession that outstanding levies are deducted and that the payments made in the name of Unit 74 are not described as payments for levies.

[22] When the commission amount of R33 825.00 and R11 552.36 in outstanding levies are deducted, the amount of R405 622.64 remains payable to the applicant.

Interest

[23] Interest is due for the period from the sale of the life right in Unit 74. It is common cause that the payment of the claimed amount became due and payable from this date. There is no reason for the respondents to have benefited from the interest in the money that it ought to have paid immediately to the deceased estate upon sale of Unit 74 to new purchasers of the life right therein.

Costs

[24] The award of costs follows the results. The applicant is awarded costs. The applicant seeks a punitive costs order on the attorney and client scale. I award costs on this scale for the following reasons:

24.1 The respondents contrived opposition to the application on technical grounds that easily proved indefensible during the hearing save the point on *locus standi*. It was not reasonable to pursue those grounds up to the date of hearing itself.

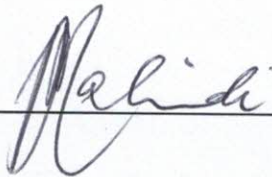
24.2 In November 2020 the applicant made demand for the payment in her capacity as Partner: Estate Administration. Despite numerous undertakings to make payment over two years no payment was made. Not even a tender with deductions for the commission and levies.

[25] The respondents' conduct was unnecessarily obstructive and the applicant should not be out of pocket as a result of their conduct.

Conclusion

[26] In the circumstances the following order is made:

1. The respondents are ordered to pay the amount of R405 622.64 to the applicant forthwith;
2. The respondents are ordered to pay interest on the amount of R405 622.64 from the date of sale of the life right in unit 74 in 2020 to the date of full and final settlement;
3. The respondents are ordered to pay the cost of this application on the attorney and client scale.



G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

COUNSEL FOR APPLICANT:

Rousseau van Schalkwyk

INSTRUCTED BY:

Alant, Gell & Martin Inc

COUNSEL FOR RESPONDENTS:

Vivian Vergano

INSTRUCTED BY:

Casper le Roux Inc

DATE OF THE HEARING:

1 August 2022

DATE OF JUDGMENT:

3 March 2023