

## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

CASE NO: 985/202

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED

DATE: 25/10/2022 SIGNATURE: [REDACTED]

In the matter between:

**M AND H LOWVELD (PTY) LTD****T/A PUMBAA WILDLIFE PARK****APPLICANT**

And

**EVENTIERIA WILDLIFE PARK (PTY) LTD****FIRST RESPONDENT****JACOBUS MARTHINUS BROOKDRYK****(In his capacity as executor of estate late Erich Venter)****SECOND RESPONDENT**


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**JUDGEMENT**


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**KGANYAGO J**

- [1] The applicant has brought an application against the respondents seeking orders that it be declared the owner of the snow–white tiger and all other species of animals and birds that it has specified in the founding affidavit; that the respondents be interdicted and restrained from interfering with or obstructing the hand over process of the snow–white tiger and other animals and birds from their current location to a designated location by the applicant; alternatively that the sheriff or deputy sheriff Modimolle/Vaalwater be authorised to, with the assistance of Mr Maritz to enter the premises of the respondents to identify and immediately collect and transport the animals and birds specified to the premises of the applicant; that for the purposes of this order, the applicant be exempted from the requirement of a permit for purposes of collecting and transporting all the animals and birds; and that the applicant pay the respondents the remaining credit balance of R156 000.00 within a period of four months, with the first payment being payable on 10<sup>th</sup> day of the first month after the judgment and order granted by this court, and the remaining three payments on the 10<sup>th</sup> day of each of the succeeding three months. The respondents are opposing the applicant's application.
- [2] According to the applicant on 23<sup>rd</sup> October 2020, Hendrik Maritz who is the owner and/or director of the applicant, entered into discussion with Eric Venter (deceased) for the purchase of the snow–white tiger and other species of animals and birds. That their discussion became serious, and on 8<sup>th</sup> December 2020 the applicant paid the deceased R65 000.00 partly in cash and partly in bank deposit for a snow–white tiger, and a further R175 000 deposit for the other species of animals and birds. The applicant alleges that after that it started

the process of obtaining the relevant permit for the transportation of the snow-white tiger which permit was granted on 17<sup>th</sup> December 2020, and was to expire on 17<sup>th</sup> January 2021. That the deceased passed away on 9<sup>th</sup> December 2020 before the transportation plans could begin as planned.

- [3] The applicant avers that on 6<sup>th</sup> January 2021 represented by Mr Maritz, it started the process of collecting the snow-white tiger and was referred to Marius Broodryk (second respondent) who is the appointed executor in the estate of the deceased. The second respondent referred the applicant to Annelie Botha from Cornel Botha attorneys who confirmed their appointment as attorneys of record for the estate of the deceased. Annelie informed the applicant that it will not collect the tiger as planned as it was not the owner, and further that it did not effect payment for the deposit of the other species of animals and birds. The applicant was further told that its version of events was not credible, and that it should proof its claims against the estate.
- [4] According to the applicant, this was not the first sale that it had concluded with the deceased. That in the past it had purchased cats from the deceased and paid him by cash. That the deceased preferred to be paid by cash to a designated account or in person. That in the current matter it had paid the deceased by cash for other animals and that this transaction too was no different as the deceased preferred to be paid by cash. It is the applicant's contention that the snow-white tiger did not form part of the deceased estate, but that it was owned by the first respondent, and that the assets of the first respondent did not form part of the estate of the deceased. That the deceased personal estate including the value of the shareholding in the business may be



subject to administration by the relevant administrators. That the agreement which the applicant had with the deceased was partly oral and written.

- [5] The answering affidavit of the first respondent, has been deposed by Franses Human who alleges that she is the sole remaining director and 80% shareholder of the first respondent, with the other director being the deceased who had 20% shareholding in the first respondent. That prior to the death of the deceased, the Eventieria was jointly managed and run by the first respondent which owns and runs restaurant on the property, and the deceased who was trading as Grootfontein Boerdery who owned and ran the zoo (Wild Life Park) on the property. That the animals in the zoo belonged to the deceased in his personal capacity.
- [6] The first respondent denies owning any wildlife, and that all the wildlife belonged to the estate of the deceased which is under the control of the second respondent. The first respondent denies that itself or any member of its board acting on behalf of the first respondent had entered into an agreement with the applicant or anyone else for the sale of animals and birds. The first respondent further denies that itself or the member of its board acting on its behalf has received payment from the applicant.
- [7] The second respondent in his answering affidavit has conceded that he is the appointed executor in the estate of the deceased. That the first respondent and the deceased were his clients from 2015. That he was well acquainted with their respective business operations and their financial affairs as he was their auditor. That the first respondent does not own or possess any animals and also does not trade in animals. According to the second respondent, the first respondent derives its income from conducting the business of a restaurant.

That the farm from which the first respondent is conducting its business is owned by Dakota Trust, and that the deceased had rented the premises from the trust in his personal capacity.

- [8] According to the second respondent the deceased derived his income from various business activities. The deceased was the sole proprietor of Grootfontein Boerdery which conducted the business of the zoo – like park on the property where the first respondent is operating the restaurant. It is the second respondent's contention that all the animals that can be found on the premises belonged to the deceased, and that they therefore form part of the assets of the deceased estate. The second respondent submit that for that reason those animals are legally in his possession and/or under his control, pending the finalisation of the administration of the deceased's estate.
- [9] The second respondent alleges that he was having a close relationship with the deceased and was therefore privy to all professional transactions entered into by the deceased. That he was notified during the beginning of December 2020 by the deceased that Maritz was desirous of purchasing five animals which were two white lions, one tabby tiger and two wolves. The second respondent alleges that on the 7<sup>th</sup> December 2020 Dr Pretorius the veterinarian came to the farm and sedated the five animals which Maritz took delivery of them. Doctor Pretorius had deposed a confirmatory affidavit corroborating the second respondent's version in as far as it relates to him.
- [10] The second respondent denies that the deceased had ever entered into negotiations for the sale of the snow-white tiger and other species of animals and birds with the applicant. It is the second respondent's contention that the transaction that was in limbo at the time of the deceased death related to two

white lions, one tabby tiger and two wolves only, which the applicant had collected. That the applicant should have lodged his claim with the executor of the deceased estate. The second respondent submitted further that there is a factual dispute which is evidenced by the founding affidavit, which renders the applicant's application an exercise in futility.

- [11] In reply to the second respondent's answering affidavit, the applicant had stated that a valid contract of sale was concluded between the applicant represented by Maritz as the owner and/or director of the applicant, and the first respondent represented by the deceased in both his personal capacity and his capacity as the shareholder and director of the first respondent.
- [12] The second respondent had submitted that there is a factual dispute of fact which the applicant was aware of when it launched its application. The applicant in its founding affidavit has stated that on 14<sup>th</sup> January 2021 it was informed by Annelie Botha an attorney appointed for the deceased estate that it will not be a position to collect the tiger as it was not the owner, and also that there was no proof that it had paid a deposit for the other species of animals and birds. Further the applicant is relying on a partial written and oral agreement. Even with the alleged written agreement, the applicant has failed to attach a document signed by both Maritz and the deceased clearly spelling out the terms of the agreement. From the beginning since the respondents were disputing the existence of the alleged sale, and the applicant did not have all the documentary proof, it was clear to the applicant that it will need some form of oral evidence to proof its claim.
- [13] The applicant had attached a certain document to its founding affidavit which it regards as an agreement for the sale of the animals and birds. However, that



document looks like a letter/invoice allegedly signed by the deceased only. What is strange with that document is that it is signed by the deceased and addressed to the deceased. The applicant had failed to explain this anomaly in its papers. The bank deposit slips which the applicant has attached as proof of payment, does not show who the payee was, oral evidence will be needed to supplement that.

[14] In *National Director of Public Prosecutions v Zuma*<sup>1</sup> Harms DP said:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on papers.”

[15] The applicant has launched its application with the full knowledge that its claim was been disputed by the respondents, and was also relying on a partly written and oral agreement which was also disputed by the respondent. For it to prove its claim it will have to present oral evidence. It is trite that an applicant who elects to proceed by way of motion proceedings despite being aware that a serious dispute of fact was bound to develop, runs the risk that the application may be dismissed with costs. It is not proper that an applicant should commence proceedings by way of motion procedure with the full knowledge

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<sup>1</sup> 2009 (2) SA 277 (SCA) at 290D-F

that the disputes of fact might arise. ( See *Room Hire Co (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd*<sup>2</sup>). On this point alone the applicant's application stands to be dismissed.

[16] The other issue to be determined is whether the applicant should have resorted to legal action before it lodged its claim against the estate of the deceased which is being wound up by the second respondent. Section 26 of the *Administration of Estates Act*<sup>3</sup> (Act) provides that immediately after the letters of executorship have been granted to him, and executor shall take into his custody or under his control all property, books and documents in the estate and not in possession of any person who claims to be entitled to retain it under contract, right of retention or attachment. The second respondent had been duly appointed as the executor of the deceased estate and issued with the letters of executorship. Thereafter he took control of all the property, books and documents of the deceased. That included the animals and birds that are the subject of the applicant's claim.

[17] Section 29 of the Act provides that the claims against an estate of a deceased person be lodged with the executor of the estate. Section 32 of the Act provides a procedure to be followed by the executor if he/she disputes a claim lodged against the estate. Section 33 of the Act provides that if any executor rejects any claim against the estate, he shall forthwith notify the claimant in writing by registered post and shall state in the notice his reasons for rejecting the claim. From the wording of section 33 it is clear that the executor must first reject and

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<sup>2</sup> 1949 (3) SA 1155 (T)

<sup>3</sup> 66 of 1965



give reasons for the rejection before the claimant can exercise any of his/her right in enforcing his/her claim against the estate.

- [18] The applicant wanted to circumvent that procedure of lodging its claim against the estate by rushing to court prematurely. The applicant had not even lodged its claim with the executor of the deceased estate, but only had a discussion with the attorney of the deceased estate. For a claim to be properly rejected, it must also be formally lodged. When the applicant institute an action against the estate of the deceased, it must be having reasons for rejection. In my view, the applicant's application is premature, and on this point, it also stands to be dismissed.

- [19] In the result I make the following order:

19.1 The applicant's application is dismissed with costs on party and party scale, which costs will include the costs of two counsel for the first respondent.

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KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH  
AFRICA, LIMPOPO DIVISION,  
POLOKWANE

**APPEARANCES:**

**Counsel for the applicant**

**: Adv V G Shakoane SC**

**Adv Maisela**

<b>Instructed by</b>	<b>: Macbeth Attorneys Inc</b>
<b>Counsel for the first respondent</b>	<b>: Adv BP Geach SC</b> <b>Adv JRF Ernst</b>
<b>Instructed by</b>	<b>: Cornel Botha Attorneys</b>
<b>Counsel for the second respondent</b>	<b>: Adv De Wet Keet</b>
<b>Instructed by</b>	<b>: DVDm Inc Attorneys</b>
<b>Date heard</b>	<b>: 10<sup>th</sup> October 2022</b>
<b>Electronically circulated on</b>	<b>: 25<sup>th</sup> October 2022</b>