



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: 2483/2023

In the matter between:

**WERNER VAN DER MERWE
ELEANOR VAN DER MERWE
DOROTHEA ANNA VAN DER MERWE
JACO VAN DER MERWE
ANDREA GREYLING
APPLICANT**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH**

and

**ILZE DALENE NEL N.O.
MAGDA CHRISTINE PELSER
ANITA JACOLINE GREEFF
VIVIAN STEPHEN VAN DER MERWE
THE MASTER OF THE HIGH COURT,
MAKHANDA
ANDRIES KEUN
RESPONDENT
THE REGISTRAR OF DEEDS,**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH**

JUDGMENT ON URGENCY

Rugunanan J

[1] This matter, the papers of which run to some 650 pages including annexures (mostly unnecessarily duplicated), came before me for urgent hearing on 4 August 2023.

The relief claimed and the procedural context for the determination of the matter

[2] In Part A of the notice of motion, applicants claim against the respondents and/or their legal advisors is that they be ‘interdicted and restrained’ from taking further steps to advance the transfer of farms Winterhoek and Leeuwkop (or Leuwe Kop) pending compliance with predetermined steps for marketing the properties and pending finalisation of further relief in Part B of the notice of motion.

[3] The properties were owned by the late Vivian Stephanie Van Der Merwe whose estate lies under the jurisdiction of the fifth respondent (the Master) and its assets vested in the first respondent as testamentary executrix authorised by letters of executorship issued in accordance with the Administration of Deceased Estates Act 66 of 1965 (the Act).

[4] Following negotiations between the first and sixth respondents, offers of R10,7 million and R9,3 million respectively for purchasing Winterhoek

and Leeuwkop were put forward. The negotiations culminated in sale agreements concluded with the sixth respondent during August 2019, the offers being market related at the time. During May 2023 an increased offer of R13 million for Winterhoek resulted in the conclusion of a revised sale agreement with the sixth respondent on approval by the estate heirs (second, third and fourth respondents).

[5] Sixth respondent's combined interest in the properties amounts to some R23 million.

[6] Directed at the Master, and posited on section 95 of the Act, is the relief in Part B which seeks to review and set aside:

6.1 '[T]he fifth respondent's decision to reject the applicants' objection to the sale of the Winterhoek farms, which decision was conveyed to the applicants' attorney on the 30th of June 2023... ; and

6.2 [T]he fifth respondent's decision to endorse the power of attorney for the sale of the farm Leeuwkop...'

[7] In summary, the advancement of the property transfers is sought to be interdicted in Part A pending the review in Part B.

In excursus

[8] Applicant's contemplations on review are incoherent.

[9] In the notice of motion the review contemplated in Part B is brought in terms of the procedural prescripts in uniform rule 53. The deponent to the founding affidavit avers that:

‘Applicants have a right to administrative action that is procedurally fair in accordance with section 33 of the Constitution’.

[10] Elsewhere it is stated that:

‘Applicants have not had the advantage of section 3 or section 5 of the Promotion of Administrative Justice Act’ (the PAJA)¹

[11] Applicants’ papers do not offer clarity on whether the general normative grounds in section 33 are resorted to or whether they seek reliance on the PAJA.

[12] The PAJA is regarded as the primary or default pathway to review.

[13] Its legitimacy stems from the mandate in section 33(3) of the Constitution.

[14] Direct constitutional review under section 33 itself is available only infrequently. Considering that the PAJA provides the most immediate justification for judicial review and that specific grounds are concretised in section 6, PAJA must be applied or resorted to in legal disputes before the general norm is invoked.²

A further excursus

[15] Applicants previously instituted urgent proceedings in this Court against the first respondent on 3 March 2023 under Case No. 663/2023 (the March 2023 application).

¹ Section 3 deals with 'Procedurally fair administrative action affecting any person' and section 5 deals with 'Reasons for administrative action'.

² Hoexter, *Administrative Law in South Africa*, 2007, 114-115.

- [16] The relief sought in effect being a duplication of Part A herein without claiming review relief against the Master.
- [17] The matter served before Laing J.
- [18] Holding that there was insufficient urgency for its enrolment on a day not normally reserved for the hearing of motion court matters the learned judge, on 22 March 2023, ordered the matter be removed from the roll with the applicants to pay costs.
- [19] Applicants are incorrect in their contention that the matter was struck off the roll.
- [20] To date, it is common cause that applicants have taken no further steps towards finality – the matter has not been withdrawn and remains extant.
- [21] Indubitably, a significant portion of the relief now sought in Part A is already before this Court in the preceding matter.

Urgency

- [22] Adverting to Part A of the notice of motion, the urgent relief pleaded is ‘to interdict the progression of the transfers pending the review of the decision (sic) of the fifth respondent prior to finalisation of the liquidation and distribution account in the deceased’s estate.
- [23] An element underscoring urgency, applicants argue, is the potentially significant increase to a probable R32,9 million representing the current combined market value of the properties factoring construction of wind energy pylons and allocation of energy contracts.

- [24] Applicants assert that the sale of the properties to the sixth respondent was undervalued and affects their benefit arising from a settlement agreement concluded during November 2022 between themselves and the estate heirs. In terms of the settlement applicants would receive from the deceased's nominated heirs 25% of the nett proceeds of the estate less R2,3 million.
- [25] While applicants themselves are not testamentary heirs, they maintain that they cannot wait until the estate has been finalised for the reason that the estate should not be quantified on the basis of historically outdated offers out of kilter with 2023 values that visualise the prospect of gain for everyone (except of course for the sixth respondent).
- [26] Avoiding prolixity, much of the background to the above is sketched in the founding papers and dealt with in the judgment by Laing J.
- [27] At the commencement of the proceedings it was considered convenient to direct counsel to turn to the question of urgency as a preliminary issue and deal with same before anything else.
- [28] After hearing argument I made the following order:
- 28.1 The matter is struck off the roll.
- 28.2 The first and second applicants, jointly and severally, the one paying the other to be absolved, shall pay the costs of the first and sixth respondents on a scale as between attorney and client.
- [29] This judgment constitutes the reasons for my order.

Principles

- [30] Pertinent to questions of urgency, it is trite that a party is not entitled to rely on urgency that is self-created when seeking a deviation from the rules of court. The rationale is that the more immediate the reaction by the litigant to remedy the situation by way of instituting proceedings the better it is for establishing urgency.³
- [31] The consideration of urgency requires a court to be placed in a position where it must appreciate that if it does not grant immediate relief, something unlawful is likely to happen at a particular point in time.
- [32] Urgency is diminished where the litigant takes longer to act from the date of the event giving rise to the proceedings. In short, a party seeking relief must come to court immediately or risk failing on urgency. The latitude extended to dispense with the rules of court in circumstances of urgency is not available to a party who is dilatory to the point where its very own inactivity is the cause of the harm on which it relies to seek relief.⁴
- [33] Unreservedly, I agree with these principles, and applying them to the facts of this matter, I have little hesitation in concluding that the present application is a prime example of self-created urgency.

Timeline

- [34] On 4 November 2019 in the course of first respondent's administration two things happened: (a) the Master, acting in accordance with section

³ See *University of the Western Cape Academic Staff Union and Others v University of the Western Cape* (1999) 20 ILJ 1300 (LC) para 15..

⁴ *National Police Services Union and Others v National Negotiating Forum and Others* (1999) 20 ILJ 1081 (LC) quoted with approval in *Masete v Transnet Bargaining Council and Others* [2021] ZALCJHB 153 para 23.

42 of the Act endorsed the sale of Leeuwkop; and (b) in respect of Winterhoek, he directed her to lodge further documentary information.

[35] Dissatisfied with the course of matters in the estate, applicants launched action proceedings to challenge the deceased's Will. For the present, the merits of that challenge are irrelevant save to state that it was alleged that the deceased was unduly influenced when she executed her Will in May 2015.

[36] The proceedings were instituted on or about 18 November 2019 and eventually culminated in the settlement of November 2022.

[37] In the course of the proceedings first respondent was requested to disclose for inspection her files relating to the administration of the deceased's estate. She did so on 13 May 2021 in electronic format whereafter the files were dispatched to applicants' attorneys for physical examination.

[38] Indications are that the further documentation requested by the Master on 4 November 2019 in respect of Winterhoek had yet not been forthcoming and on 16 May 2023 a letter by the Master to applicants stated *inter alia*:

'I confirm that no endorsement in terms of section 42(2) of the Administration of Estates Act authorising transfer of Winterhoek Farm has been granted by my office due to certain outstanding requirements. My office will not grant such pending finalisation of Case No 663/2023.'

[39] During June 2023 the first respondent and the estate heirs made representations to the Master for the sale of Winterhoek.

[40] Applicants were afforded opportunity and objected.

[41] The Master communicated his decision to all concerned. His letter of 30 June 2023 states:

‘[A]fter having considered all the reasons, representations, relevant documents and information submitted to me, your clients objection to the sale of Winterhoek Farm has been rejected due to the following reasons:

1. The Will directs that all fixed properties be sold.
2. The heirs mentioned in clause 4 of the Will have all consented.
3. It is recognised that the settlement agreement... awards your clients 25% of the proceeds of the deceased estate.
4. However such does not vary the Will or make your clients heirs which will give them the right to consent or object.

Should any party feel aggrieved by my decision, I wish to refer you to the provisions of section 95 of the Administration of Estates Act ... You must take any steps you deem necessary in terms of this section.’

[42] On 7 July 2023 applicants requested the Master to:

‘[K]indly confirm that you are honouring your undertaking that consent to transfer will not be given pending finalisation of Case No 663/2023’.

[43] In response the Master, on 12 July 2023, informed applicants that:

‘[I]t will be unreasonable for my office to wait for the enrolment of the matter which we don’t know when will that take place. As stated in my letter of the 30th of June 2023 your client has the right to bring a fresh application and take my decision on review’.

[44] On account of the undertaking given by the Master, applicants' counsel urged in his certificate that no urgency existed in launching the review until 12 July 2023 when the Master withdrew his undertaking.

[45] Emerging from the sketched events is a distinctive timeline for each of the properties.

Leeuwkop

[46] Applicants do not deny that the first respondent's files were made available as aforementioned. Maintaining that the files were gone through with a view of finding matters and communications relevant to prove undue influence, applicants explain that:

'[T]he relevance of the endorsed deed of sale in respect of Leeuwkop, nor the yet to be endorsed deed of sale in respect of Winterhoek, were not appreciated at the time'.

[47] In argument sixth respondent correctly contended that the explanation 'does not wash'.

[48] So too does applicants' contention that urgency was triggered on 12 July 2023 by the Master's withdrawal of his undertaking.

[49] The conclusion that the PAJA is applicable throws the spotlight on section 7(1).

[50] The section provides that any proceedings for judicial review under PAJA must be instituted 'without unreasonable delay' and not later than 180 days after the date upon which a party became aware of the

administrative action or might reasonably have been expected to have become aware of such action.⁵

[51] As regards the 180 day period, of importance is that the proverbial clock does not start ticking once a party seeking the review engenders an appreciation of the administrative action or becomes aware of the fact that it is tainted by irregularity. To the contrary, the clock starts to run with reference to the date on which the affected person became aware of the action and/or the reasons for it or the date on which he might reasonably have been expected to have become aware of the action and reasons.⁶

[52] Section 9 of PAJA renders it competent to condone non-compliance with section 7 by providing that a court may extend the 180 day⁷ period where the interests of justice so require.

[53] Prior to the lapse of the 180 days it would in essence be for a respondent to raise and convince a court that the delay was unreasonable. Any delay subsequent to the 180 day period, will be regarded as unreasonable per se and an applicant would have to seek an extension of the period (essentially similar to condonation) in accordance with section 9 of PAJA which will only be granted should a court be of the view that it is in the interests of justice.⁸

⁵ Compare *Sibiya v Director-General: Home Affairs and Others and 55 related cases* 2009 (5) SA 145 (KZP) para 16.

⁶ Compare *Cape Town City v Aurecon SA (Pty) Limited* 2017 (4) SA 223 (CC) at 231E-F and 238G-239B.

⁷ Or the 90 days for requesting reasons under section 5.

⁸ In *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] 4 All SA 639 (SCA) para 26, the court held: 'At common law application of the undue delay rule requires a two-stage enquiry. First, whether there was an unreasonable delay and, second if so, whether the delay should in all the circumstances be condoned ... Up to a point, I think, S 7(1) of PAJA requires the same two-stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the Court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters.'

- [54] The obvious characteristic of applicants' conduct (or perhaps their legal representatives – as it may seem), is inertia. Nothing in the papers before me indicates that section 9 was resorted to or that section 5 had been invoked.
- [55] The point of course must also be made that nothing turns on the Master's withdrawal of his undertaking.
- [56] The proverbial horse had long bolted by then.
- [57] Irrefutably, the prescribed time frame for instituting review proceedings or requesting reasons had already come to pass when the notice of motion had been issued in the present matter.

Winterhoek

- [58] Relevant, is the Master's decision of 30 June 2023.
- [59] His decision communicated to applicants' attorneys makes it clear:

‘... your clients' objection to the sale of Winterhoek Farm has been rejected...’
- [60] That is the decision identified in the notice of motion for review and setting aside.
- [61] This notwithstanding, in heads of argument the claim is that:

‘The applicants wish to review the Master's decision taken on the 30th of June 2023 in respect of the sale of Winterhoek to the sixth respondent.’

The decision has been “validated” by the delay... That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not.’

[62] That is effectively what was argued and it founders simply on the basis that there is a disconnect with the relief in the notice of motion and applicants' founding affidavit where it is asserted:

'[T]he relief sought in this application relates to the review of the fifth respondent's decision to consent to the sale of Winterhoek ...'

[63] What remains essential of the Master's conduct and/or reason for his endorsement of the sale of Winterhoek by the first respondent is that:

'The Will directs that all fixed properties be sold.'⁹

[64] Without question, the endorsement for the sale of fixed property serves as confirmation by the Master, under whose supervision an estate is administered, that powers conferred upon an executor have been properly exercised.¹⁰

[65] Winterhoek was endorsed on 30 June 2023 – this in accordance with the deceased's wishes.

[66] The notice of motion issued on 21 July 2023.

[67] On 4 July 2023 applicants, through their attorneys, demanded an undertaking from first respondent to refrain from proceeding with the transfer of the properties for seven days while papers were being finalised for a fresh application.

[68] The demand elicited the following riposte on 7 July 2023:

⁹ *Gray v The Master* 1984 (2) SA 271 (T) at 274H-275A.

¹⁰ *Smith v Smith's Estate* 1927 EDL 1 at 17.

‘Your clients’ urgent application challenging the sales of the two farms was struck from the roll on 22 March 2023. The application was not withdrawn by your clients and not re-enrolled.

You have indicated on 3 April 2023 that you intend to bring a new application.’

[69] A period of three months and almost three weeks passed between 3 April 2023 and 21 July 2023. Where the relief in Part A of the notice of motion is a duplication of the March 2023 application it is inexplicable that applicants procrastinated. The sheer volume of papers and accumulation of correspondence evidences nothing constructive to bring finality to the latter proceedings within this period.

[70] Applicants allowed the March 2023 application to lie in abeyance despite the convenience and accessibility of case management. It provides a competent alternative process to alleviate congestion on the court rolls and for addressing problems which may cause delays in the finalisation of cases.

[71] The case management system makes provision for opposed motions.¹¹

[72] If the applicants were merely being tardy or perhaps employing a tactic for delaying the first respondent’s finalisation of the estate this would have been readily exposed through judicial intervention for which the process allows.

[73] When the endorsement of Winterhoek occurred on 30 June 2023 the timeline in the above period indicates that applicants were left with three weeks until 21 July 2023 to finalise papers for the present application.

¹¹ *Bobotyana and Others v Dyantyi and Others* [2020] ZAECGHC 89 paras 19-25.

- [74] The application was served on the first and sixth respondents and the Master on 21 July 2023 – and as for the remaining respondents, service was effected on 24 July 2023.
- [75] The timetable in the notice of motion afforded the respondents until 28 July 2023 – a mere five court days within which to answer the comprehensive allegations in the founding affidavit with further allowance of two days for applicants’ replying papers to be filed no later than 1 August 2023.
- [76] A completed set of indexed and paginated papers was filed with the registrar on 2 August 2023 in anticipation of the matter being heard at 09h30 on 4 August 2023.
- [77] The timetable imposed on the respondents was unreasonable and oppressive.
- [78] It had scant regard for the administration of justice relevant to the interests of other litigants and the convenience of the Court in so far as other matters upon which the Court was expected to deal with as a matter of urgency.
- [79] Courts are a public resource under severe pressure.¹²
- [80] The foregoing puts into perspective the events shaping the timeline that applicants appropriated for themselves and which they have not succeeded in justifying.

Conclusion

¹² *Savvas Socratous v Grindstone Investments 134 (Pty) Ltd* [2011] ZASCA 8 para 16.

- [81] The circumstances applicants find themselves in are self-created and does not qualify as falling in the class of recognised urgency that justifies a litigant obtaining a preference on the court roll at the expense of others.
- [82] In appropriate circumstances the papers may be such, and the circumstances such, as to justify the dismissal of a matter as set out in *Vena v Vena and others*¹³ but on technical grounds being lack of urgency.
- [83] In this matter applicants' papers and the circumstances, however, are not such as to justify a dismissal order.
- [84] The usual striking off order was considered appropriate.
- [85] On the question of costs – this is a matter of judicial discretion. I have taken cognisance of the circumstances set out hereinabove. In addition, the application is supported only by the first and second applicants with powers of attorney granted in favour of their legal representative/s. Powers of attorney from the remaining applicants have not been filed – they having indicated that they do not wish to proceed due to exposure to legal costs.
- [86] It bears noting moreover, that the first applicant is the main deponent to the founding affidavit (and so too in the March 2023 application). No confirmatory affidavits from third, fourth and fifth applicants are attached (as was also the case in the March 2023 application).
- [87] The manner in which applicants have initiated these proceedings is indubitably reprehensible. I have no more than a sense that first

¹³ 2010 (2) SA 248 (ECP) para 6-8.

respondent's efforts in finalising her administration of the estate are being frustrated.¹⁴

[88] Based on all the above reasons I made the order that I did on 4 August 2023.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances

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¹⁴ See for example the general remarks in *Mzontsundu Trading (Pty) Ltd and Another v Lavelikhwezi Investments (Pty) Ltd and Another* [2021] ZAECMHC 44 paras 36-40.

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Date heard:

04 August 2023

Reasons:

11 August 2023 by email at 09h30