IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case No:4133/2022

In the matter between:

DANĖ STEYN	Applicant
and	
ZWELIBANZI WILLIAM NGQUQU N.O. (In his capacity as the executor of the deceased estate of the late Petru Steyn, Estate Number 360/2003)	1st Respondent
MASTER OF THE HIGH COURT BLOEMFONTEIN	2nd Respondent
THE REGISTRAR OF DEED BLOEMFONTEIN	3rd Respondent
WATERLAAGTE VOERKRAAL (PTY) LTD	4th Respondent
MARIETA STEYN	5th Respondent

HEARD ON: 17 NOVEMBER 2022

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for the hand-down are deemed to be 12h30 on 23 January 2023.

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[1] The applicant filed an application on 30 August 2022 for an interim interdict to restrain the first respondent from passing the transfer of the farms to the fourth respondent pending:

1.1 An application for declaratory relief to the effect that the agreement of sale was concluded in conflict with section 47 of the Administration of Estate Act, 66 of 1965; and

1.2 An application to review and set aside the decision of the second respondent in terms of which the second respondent was to issue the certificate in terms of section 42 (2) of the Act.

[2] The application was opposed only by the first respondent, who filed and served his notice to oppose on the same day.

[3] An order was granted by the court on 2 September 2022 by agreement between the applicant and the first respondent in the following terms:

"1 The application was postponed to the opposed roll of 17 November 2022;

2 The First Respondent is interdicted and restrained pendente lite from transferring the farms set out in paragraphs 2.1 and 2.2 hereunder ("the farms") to the Fourth Respondent, pending the finalisation of this application:

2.1 The remainder of the farm Salpeterspan number 601, district Brandfort, in extent 956, 9572 hectors;

2.2 The remainder of the farm Salpeterspan number 334, district Brandfort, in extent 663,4012 hectors; and

3. The first respondent shall file his answering affidavit (if any) within 15 days from date of this order;

4. The applicant shall file her replying affidavit within 10 days from the date on which the First Respondent's answering affidavit is filed (if any);

5. The parties shall file heads of argument as per the practice directives of the Free State Division of the High Court;

6. Costs to be costs in the application."

[4] Despite the parties being *ad idem* that the relief sought has become moot (though on different grounds), they insisted that the matter should proceed. The applicant was of the view that the merits of the application were only relevant in so far as the costs were concerned. The first respondent insisted that the merits of the matter should be adjudicated in their entirety.

[5] In his opposition, the first respondent raised three preliminary points. He contended furthermore that he acted lawfully and that the applicant was not entitled to the relief sought as a material dispute existed on the papers.

[6] The matter has, for all intents and purposes, become moot. I shall therefore confine myself only refer to those portions that are relevant to the decision that I arrived at.

[7] It is common cause that the fifth respondent and the applicant are sisters who were bequeathed the two farms that are the subject matter of this application. The bequest was subject to their grandmother's usufruct.

[8] The executor of the deceased estate, the first respondent, could not transfer the farm to both the fifth respondent and the applicant jointly as natural persons may not hold an undivided share in agricultural land in terms of section 3 of Act 70 of 1970.[1] The farm was subsequently sold to the fourth respondent at a public auction on 4 May 2022. Pursuant to the sale, the master issued a certificate in terms of section 42 (2) of the Act on 22 August 2022 confirming that no objection was raised to the sale of the farms.

<u>First point *in limine*: non-compliance with the provisions of regulation 3 (1) promulgated under the Justice of the peace and Commissioner of Oaths Act.</u>

[9] In support of its submission that the application has become moot, the first respondent stated that the applicant averred in the first paragraph of the founding affidavit that she was a female person whereas the attestation clause identified the applicant as a male person. The founding affidavit was therefore neither properly attested to nor properly commissioned. It was therefore fatally defective and failed to comply with the requirements of regulations 3 (1) and 4

[1] Paragraph 21 of the Founding Affidavit.

(1) of the Act. The court could not give effect to the presumption of regularity that the oath was sworn to and signed in the presence of a commissioner of oaths. The variance in the gender reference called for the conclusion that the oath was conducted in the absence of the deponent.[2]

[10] The first respondent then referred to *Parys-aan-Vaal Woonstelle (Pty) Ltd and another vs. Plexiphon 115 CC*[3], *Absa Bank vs. Botha N.O. and others*[4] and *Southey vs. Vorster and others*[5] These authorities are distinguishable from the present matter and do not assist the first respondent's argument.

[11] In the *Parys-aan-Vaal Woonstelle* case, the objection was premised on non-compliance with regulation 4(1) which governs the administration of oaths or affirmations. The commissioner of oaths certified the affidavit and omitted to delete the applicable gender and was identified as a *"he/she".* In holding that the affidavit was not properly commissioned and that there was no substantial compliance with the requirement of Rule 4 (1), the court stated that the affidavit fell short of the requirements contemplated in Rule 6 (5) (d) (ii) and the fact that the gender of the deponent did not appear anywhere in the affidavits, supported the inference that he did not appear in person before the commissioner of oaths.[6]

[12] In *Southey*[7]*,* certain factors influenced the court to conclude that the attestation by the commissioner of oaths was not done in the presence of the deponent. These were:

a) The place where the affidavit appeared to have been attested and the implied *"unlikelihood, that both*[8] *must have travelled a distance in excess of 150 km to the place of attestation whilst they resided less than 40 km (distance from Xhariep Dam to Venterstad) from each other;"*

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[2] Paragraph 9 of the First Respondent's Heads of Argument.
[3] Case No:3498/2021 High Court Free State, 14 October 2021.
[4] 2013 (5) SA 563 (NGHCP).
[5] Case No: 1432/2021 High Court Free State, 21 May 2021.
[6] Paragraphs 18 and 19 of the Judgment.
[7] Supra.
[8] The Commissioner of oats and the deponent. Para 26 of the judgment.

b) What made matters worse was that the second respondent raised the attestation as a point in *limine* in his answering affidavit but the applicant elected to do nothing to correct it. Another irregular conduct was when the applicant's counsel attempted to hand up from the bar a statement obtained from the commissioner on the day of the hearing.[9]

[13] In the *Absa bank case*[10]*,* the applicant approached the court on an *ex parte* basis for summary judgment. The respondent objected to the application as the affidavit was not properly attested to and could thus not serve as a verified affidavit for summary judgment purposes. A verifying affidavit is a sine qua non to the summary judgment procedure. It was obligatory for the applicant to ensure that his founding affidavit was compliant with the law.[11]

[14] In her reply, the applicant (unlike in the *Southey* matter) corrected the position. She stated that the reference to *"he"* instead of *"she"* in the attestation clause at the end of her founding affidavit, was merely a typographical error. She attached an affidavit by the commissioner of oaths in confirmation.

[15] In these circumstances, it is clear to me that form is elevated above substance. Unlike the situation in the summary judgment application in *Absa Bank,* no prejudice will arise if the matter is proceeded with. I agree with the argument that this point in *limine* is purely technical. The omission to indicate the correct pro-noun *"she"* should not lead to an inference that the founding affidavit was not properly commissioned. An explanation was provided. This point in *limine* should therefore fail.

Mootness

[16] In support of its submission that the application has become moot, the first respondent stated the following:

"Second point in limine

[9] Paragraph 27 of the Judgment.
[10] Supra.
[11] Paragraph 25 Southey *supra.* Engineering Requisites (Pty) Ltd v Adam 1977 (2) SA 175 (O).

3.1 The relief sought by the Applicant has become moot. It became moot even prior to the institution of the present proceedings and both the applicant and her legal representative was very well aware of this.

3.2 The Fourth Respondent lost all interest in acquiring the properties and the retracted all offers to acquire the properties prior to institution of the present application. This was done particularly due to the background of the matter and the Applicant constant dissatisfaction with the administration of the estate which will be addressed in more detail below.

3.3 Upon receipt of the application my attorney of record contacted the applicant's attorney of record and exchanged several correspondence indicating that the present application is nothing more than an abuse of process and constituted incessant and unnecessary litigation as no risk exist that the properties will be sold to the fourth respondent.

3.4 It was suggested by my attorney of record that the applicant withdraws the application and tender my costs at the time, which costs was limited at the time. Applicant was however not amenable to agree to such proposal and elected to proceed with the application.

3.5 I respectfully submit that the application has become moot and that the honourable court ought not to be burdened with adjudication of applications of this nature."[12]

[17] What is strange is that Daniel Verster, the only director of the fourth respondent, filed an affidavit on 7 October 2022[13] and confirmed that he informed the first respondent (the executor) in July 2022 that the fourth respondent was no longer interested in purchasing the properties. The first respondent was instructed by him to ensure that the deposit paid by the fourth respondent in respect of the purchase price of the farms, as well as the commission paid to the auctioneer, were paid back to the fourth respondent.[14] This was confirmed by Mr Verster on 26 September 2022.[15]

[18] It is important to mention that on 1 September 2022 The first respondent's attorneys addressed an email to the applicant's attorneys wherein they stated the following:

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[12] Paragraph 3.1 to 3.5 of the First Respondent's Answering Affidavit.
[13] Page 311 of the Indexed Papers.
[14] Paragraph 32 and 33 of the Replying Affidavit.
[15] See page 318 of the Indexed Papers.

"We note from your urgent notice of motion, and more specifically in prayer two thereof, that your client's aim is to interdict and restrain my client, the first respondent, in transferring the said properties to the fourth respondent.

You have been made aware by the fourth respondent and by our offices that the deposit and auctioneering fees have already been paid back to the fourth respondent. The transaction has entirely been cancelled.

In an attempt to save legal costs, it is my advice that your client, the applicant, must consider the following:

1. *To withdraw the urgent application;*
2. *That the first respondent would agree not to transfer the farms mentioned in the notice of motion in prayers 2.1 and 2.2 to the fourth respondent;*
3. *That the applicant pays to the first respondent legal costs up until the removal of the matter on attorney and own client scale.*

The client's urgent response would be highly appreciated."

[19] Whilst on this point, it behoves to mention that on 24 August 2022, the applicant's attorneys addressed a letter to the first respondent that they were instructed to take the Master on review for having granted the endorsement of the section 42(2) application. They also requested his written undertaking and confirmation that the transfer of the properties in the name of the purchaser, would not be proceeded with until such time that the court had made a decision on the anticipated review application.

[20] The first respondent responded as follows on 24 August 2022:

"1. Your letter dated 24 August 2022 refers.

2. The content of the letter referred above is noted, however I will not be able to accede to your request to stop the transfer of Farm Salterpan 601, District Brandfort and Remainder of the farm Williesdam 334, District Brandfort because the auction was conducted above board and we are waited for you for over a month to present to me the offers you claimed to have at the meeting with Mr Mokhobo at Master on 13th July 2022. I will not entertain any delay from your side or your client.

3. To be clear as an executor and the conveyancer I will only stop the processes once when I 'm served with a court order/interdict and will not on the basis of a mere application.

We trust you find the above in order"

[21] It is evident that the first respondent was fully aware in July or early August already, that the transaction was cancelled and both the executor and the auctioneer had returned the fourth respondent's money as he was informed by the fourth respondent or its director that the sale was not proceeding. It is crystal clear that as of 24 August 2022, the first respondent was fully aware that the said transaction was off the table and, as a natural consequence, no transfer of the immovable properties would take place. It is incomprehensible that the first respondent, being fully aware that the transaction had been off the table for a considerable period before this application was launched, vigorously opposed the it. Despite his attorneys' correspondence of 1 September 2022, he continued to file opposing papers and presented argument in court.

Urgency

[22] The first respondent lamented the extremely shortened timelines proposed by the applicant[16] and *"the aforesaid cause of action adopted by the applicant resulted in a situation where I, despite taking all possible action to ensure that I oppose the application, was unable to do so prior to the hearing of the matter on 2 September 2022."*[17]

[23] It is mind boggling that as at 30 August 2022, the first respondent, despite having full knowledge that the sale transaction was not being proceeded with, communicated incorrect and inaccurate information to the applicant's attorney which created the impression that the transfer of the properties would proceed unless steps were taken to halt the process. The first respondent created the urgent circumstances in which the applicant found himself. It is strange that, having realised that the fourth respondent was no longer pursuing the sale transaction, the first respondent sent the email dated 24 August 2022, as he did. The applicant was justified in these circumstances in following the steps that he did.

[24] The first respondent alleged that the applicant resorted to an extreme remedy by launching this application. This step was not justified as the applicant knew

[16] Paragraph 4.1 of the Answering Affidavit.
[17] Paragraph 4.3 of the Answering Affidavit.

that the sale would not proceed.[18] Nowhere in the papers is it suggested that the first respondent notified the applicant of the suspension or termination of the sale immediately before the application was filed. Neither was the Master informed of such termination as the latter forwarded an email on 23 August 2022 to the appellant's attorneys advising them of her inability to reconsider or cancel her endorsement[19] as her decision had already been communicated to the executor.

[25] Section 42(2) of the Act provides that an executor who desires to effect the transfer of any property in pursuance of a sale, shall lodge with the registration officer, in addition to any such other deed or document, a certificate by the Master that no objection to such transfer exists. Section 47 provides that an executor shall sell property in the manner and subject to the conditions which the heirs who have an interest therein, approve in writing. If the said heirs are unable to agree on the manner and conditions of sale, the executor shall sell the property in such manner and subject to such conditions as the Master may approve.

[26] An initial offer of R8 300 000.00 for the properties was rejected by the applicant and the fifth respondent. This led to the first public auction which was held on 17 March 2022. Dissatisfaction with the purchase price at the auction led to the second auction on 4 May 2022. The applicant was dissatisfied with the purchase price realised at this auction. A meeting followed between the executor, the second respondent and the applicant's attorneys. The second respondent forwarded the email dated 15 July 2022 to the parties stating, inter alia, the following:

"*Since the administration of the estate and more especially the sale of the farms cannot be hold hanging indefinitely you were afforded an opportunity until the 15th of August 2022 to find a potential buyer of the said farms which you will duly inform the executor once that is successful even not. It was also agreed that should this fail the current sale the current will proceed as is with endorsement of the application already lodged*."

[27] The applicant's attorneys responded as follows on 21 July 2022:

[18] Paragraph 48.2 of the Answering affidavit.
[19] In terms of section 42(2) of the Administration of Estates Act.

"I confirm the contents of your letter but do not agree that I at any stage on behalf of the client confirmed that the sale may proceed on the endorsement currently in front of you for approval. I made it very clear in the meeting that our instructions are not to accept the fact that *the executor did not act in accordance with section 47 and same will be dealt with should the sale with regards to the auction that was held proceed.*

I have not received any emails from the executor in this regard as was discussed."

[28] The first respondent stated that he received the second respondent's endorsement approving the manner and sale of the property.[20] The application for endorsement was dated 30 May 2022. It was granted and bore the Master's date stamp of 25 August 2022. Clause 8 of the endorsement recorded that the written consent by major heirs and/or tutors of minors to the manner and conditions of sale was attached. A consideration of the exchange of correspondence between the parties above, and the history of the outcome of the public auctions, make such an averment to be inaccurate and false. Furthermore, despite the maintenance that an agreement was reached on 13 July 2022 as per the second respondent's communication of 15 July 2022, the first respondent submitted that a factual dispute existed between the parties as evidenced by their correspondence of the 15th and the 21st July 2022.

[29] It is evident that when the endorsement was granted on 25 August 2022, the sale was not proceeding and the Master was none the wiser. The first respondent was therefore in no position to say "*I am left with no alternative but to proceed with the sale, and for this reason I have indicated to the applicant on 24 August 2022, that I am not in a position to stop the transfer of the properties. I respectfully submit that I am not mandated to do so in the circumstances.*"[21] The statement is false and devoid of all truth. The applicant is entitled to a finding in her favour. The first respondent's defences are dismissed as being without substances.

[30] I have already found that the relief sought is now moot. I agree with the applicant that the merits of this application are only relevant in the determination of the costs. The applicant, as the successful party, is entitled to

[20] Paragraphs 10.1 and 10.2 of the Answering Affidavit.
[21] Paragraph 10.4 of the Answering Affidavit.

the costs. The unprofessional manner in which the first respondent handled this matter, justifies that he be visited with a costs order on a punitive scale.

[31] I make the following order:

Order:

1. The first respondent is ordered to pay the applicant's costs on an attorney and client scale.

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MHLAMBI, J

On behalf of the plaintiff: Adv. R van der Merwe
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