

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

CASE NO: 15794/2022

TARYN-LEIGH HARPER

Applicant

and

ABSA TRUST LIMITED N.O.

1st Respondent

duly appointed as Executor in the estate of the late Andreas Jacobus

Frederick Christoffel Bester ito sections 13 and 14 of the

Administration of Estates Act 66 of 1965

MASTER OF THE HIGH COURT, CAPE TOWN

2nd Respondent

CHRISTINA PETRONELLA MARAIS

3rd Respondent

REGISTRAR OF DEEDS, CAPE TOWN

4th Respondent

ROBERT PETER GREEN

5th Respondent

JUDGEMENT ELECTRONICALLY DELIVERED ON 14 SEPTEMBER 2023

ALLIE, J:

1. The applicant seeks the following relief, namely, to:
 - 1.1. declare the written agreement of sale entered into between herself and the fifth respondent allegedly acting in his capacity as *curator bonis* of the patient at the time, on Andreas Jacobus Frederick Christoffel Bester, now deceased (“ the deceased”) for the purchase of the immovable property

situate at 4 Louw Street, Elim, Kuilsriver, Western Cape (“ the immovable property”) valid and enforceable; and

- 1.2. order that ABSA Trust Limited in its capacity as executor of the deceased estate of Bester, pass registration of transfer of the said immovable property into the name of the Applicant, subject to payment of all transfer and registration fees by the Applicant.

2. Third Respondent, who is a legatee to who the immovable property was bequeathed, in terms of the Last Will dated 16 October 2009 of the deceased, opposes the application.

3. The remaining Respondents abide the decision of this Court.

4. Henceforth, a reference to Respondent is a reference to Third Respondent who is the only Respondent that opposes this application.

5. It is regrettably necessary to record that the Applicant’s Counsel filed a Practice Note with the Acting Judge President of this Division that does not comply with the Practice Directions in this Division. More specifically, Practice Direction no. 43 which specifies how matters, where the papers exceed 200 pages, should be dealt with in a Practice Note so that the matter can become an early allocation.

6. The purpose of an early allocation is to grant the judge seized with the matter sufficient time to read and consider the papers where they exceed 200 pages.

7. In this case, the indexed and paginated papers are 391.

8. Practice Direction 43 reads as follows:

“43. Early Allocation of opposed matters and filing of heads of argument in all Fourth Division matters

(1) If any matter on the continuous roll requires early allocation, the legal representatives for the plaintiff, excipient or applicant (as the case may be), shall after compliance with the provisions of Rule 62 (4), deliver to the secretary of the Judge President, **not less than seven (7) days** before the date of hearing, the relevant court file, together with a practice note to that effect, setting out the case number, the names of the parties and their legal representatives, and the date of hearing. Practitioners are reminded that “days” means court days.

(2) The practice note together with the heads of argument must be filed in the court file prior to the file being presented to the Judge President for allocation.

(3) Parties must indicate which pages should not be read.

(4) Matters will be deemed to require early allocation, as contemplated above: -

(a) Where the papers (including annexures) in the matter **exceed 200 pages**; or

(b) Where the issues are such that the Judge allocated to hear the matter would, in order to prepare for the hearing, reasonably need to receive the papers earlier than he or she would normally do so (that is, the day before the hearing).

(5) Matters will not be allocated if the requirements are not met.

(6) Where heads of argument have been filed electronically and acknowledgement of receipt via e-mail is not received within two (2) days, the duty remains on the person filing the heads of argument to ensure that such documents were in fact received.” (emphasis added)

9. The Practice Note filed on behalf of the Applicant is dated 28 August 2023 and stamped by the Registrar on 29 August 2023.

10. The matter was set down for hearing on 4 September 2023, therefore 7 court days before 4 September 2023, would be 24 August 2023.
11. Applicant's attorney and counsel failed to ensure that the Practice Note was filed on 24 August 2023 in compliance with Practice Directions no. 43.
12. Applicant's counsel failed to mention in the Practice Note that the pages exceed 200 and instead stated that the pages exceed 100, thereby creating the impression that the file ought not to be an early allocation.
13. I am of the view that since the indexed and paginated papers are contained in one arch lever file, it ought to have been strikingly obvious that the pages exceeded 200 and no reason has been advanced as to why Applicant's counsel failed to mention that it exceeds 200 pages.
14. I fail to appreciate the purpose of the Practice Directions, if they are not being followed by the legal representatives nor are compliance with those directions being enforced by the office of the Acting Judge President.
15. The conduct described above concerning non-compliance with Practice Directions, undermines the efficient administration of justice in this Division.

Common cause facts

16. It is not in dispute that the Applicant went to live with the deceased who cared for her when she was approximately 12 years old and that she completed her studies in 2009 while living with the deceased at the immovable property.
17. It is common cause that the deceased operated a business at that time and he closed the business in 2011.
18. The deceased's two adult children relocated to New Zealand many years ago.
19. The deceased and his former wife, Maria Elizabeth Bester were divorced before the applicant went to live with the deceased.
20. After closing his business, the deceased was diagnosed with dementia.
21. On 4 September 2015, the fifth respondent was appointed by the court as *curator bonis* of the deceased subject to the fifth respondent holding a valid Fidelity Fund certificate.
22. The Fifth Respondent failed to apply to the Master of the High Court in terms of section 72 of the Administration of Estates Act for the issuing of Letters of Curatorship to him.

23. According to the Fifth Respondent, a practising attorney, he did not know that he had to apply for Letters of Executorship and upon realising that, he sought to do so after the deceased had passed away.
24. The deceased passed away on 3 June 2021.
25. A different immovable property is bequeathed to the applicant in terms of the Will.
26. In the Will, the deceased bequeathed R1000 000 to each of his two children, R1000 000 to his former wife, R15000 000 to the third respondent and R750 000 to his brother.

Applicant's allegations

27. According to applicant since 2009, she took it upon herself to care for the deceased by doing all the shopping, purchasing his medication and preparing meals in the evenings.
28. During 2012, the deceased allegedly became forgetful, therefore Applicant took him to a doctor who diagnosed him with dementia.
29. During 2013, the deceased's condition deteriorated to the point where he could no longer be left alone and required full time care.

30. In April 2013, the applicant allegedly took the deceased to a mental health care specialist who provided the necessary note and later affidavit in support of an application for the appointment of a *curator bonis*.
31. In June 2013, the applicant employed a full time live-in nurse at a cost of R5000 per month, for which applicant allegedly paid.
32. Thereafter the deceased didn't want anyone in his personal space, so the Applicant employed her mother, who had previously been in a romantic relationship with the deceased, to take care of the deceased. Applicant allegedly paid her mother R3000 per month to do so.
33. On 4 December 2014, the specialist again diagnosed the deceased with dementia and recommended that a *curator bonis* be appointed for the deceased.
34. During February 2015, the general practitioner doctor that the deceased usually saw, said that the deceased's dementia had deteriorated over the last 6 months and recommended that the deceased receive 24 hour care in a specialised environment.
35. The deceased was moved to various care facilities such as Klaradyn retirement village between 2014 and 2021 and later to Huis Marie Louw in 2021.
36. The applicant alleges that she paid for all the care facilities that the deceased was admitted to.

37. On 31 May 2016, the Applicant concluded a written agreement of purchase and sale with the Fifth Respondent, in terms of which she sought to purchase the immovable property owned by the deceased.
38. The purchase price for the immovable property is stated in the agreement as being R1361 000,00 less a purported value of a usufruct in favour of the deceased of R726 223,61, leaving a cash portion of R634 776,39 of which Applicant is alleged to have paid R150 000 already as at the date of execution of the agreement, leaving a balance of R484 776, 39.
39. The Fifth Respondent signed a letter on 16 October 2021, stating that the Applicant had paid the full purchase price of R634 776,39.
40. Applicant alleges that she paid the full purchase price over a period of years stretching from 2009 until 2021 when the deceased passed away by paying certain expenses for the deceased.
41. That allegation amounts to a period of 12 years in which the Applicant allegedly paid all the deceased's expenses.
42. As proof of those payments, applicant annexes her own summary of amounts paid without primary source vouchers and without her bank statements reflecting that she had paid expenses to the value of R634 776, 39.
43. The agreement of sale contains the following suspensive conditions:

"3 SUSPENSIVE CONDITION

This Agreement is subject to the suspensive condition that the Master of the High Court approve the purchase of the immovable property by the Purchaser on these terms and conditions:

3.1 Should such approval of the Master of the High Court be granted within 30 (thirty) days of signature hereof by the last signatory, or within such further period as allowed by the SELLER in his exclusive discretion, the SELLER shall be entitled, but not obliged, by means of written notice addressed to the PURCHASER to declare this sale as cancelled.

3.2. In the event of either party giving notice to the other party as provided for

above for cancellation of the Agreement, the Parties shall be placed in the same position as they were prior to this agreement and shall have no claim the one against the other, except that the PURCHASER shall be liable for the costs of this Agreement of Sale and to ... (indistinct) ... as provided for in this Agreement, for the period ...(indistinct) ... occupation of

The Property, and for any damage caused by through the Purchaser to The Property.

3.3 The PURCHASER shall sign forthwith all documents and take all steps necessary in respect of such application for the aforementioned loan immediately after signature of this AGREEMENT. Should the PURCHASER fail to do so, such default shall amount to a breach of this AGREEMENT, and in such event the SELLER is, in addition to her remedies in terms of this AGREEMENT, irrevocably and in rem suam authorized to complete and sign all documents and applications to any financial institution as the case may be in respect of an application for a loan on behalf of the PURCHASER on conditions no less favourable than the terms and conditions on which loans for similar purposes are being granted currently by financial institutions. Should such a loan be granted, the SELLER is authorized to accept the terms and conditions of any such loan on behalf of the PURCHASER.

3.4 In the event of this Agreement being cancelled as provided for in Clause

above, the Purchaser shall not be entitled to any compensation for any improvements made by her to The Property while in occupation thereof in terms of this AGREEMENT.

3.5 This suspensive condition shall be deemed to have been fulfilled as soon as the Seller has received confirmation from the Master of the High Court that this purchase in terms of a contract envisaged in Section 1 of the Alienation of Land Act, Act 68 of 1981, as amended.

3.6 The suspensive conditions contained in Clauses 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 and 3.7 are of the benefit of the PURCHASER who may at any time before the time and the date stipulated for fulfilment thereof, waive same.

3.7 Unless the suspensive conditions have been fulfilled, or waived within their respective periods, the provisions of this agreement will fall away and be of no further force or effect, and neither party shall have any claim against the other in terms hereof or arising from the failure of the suspensive conditions.”

44. The applicant alleges that because paragraph 3.6. of the Suspensive Conditions in the Agreement states that they are in favour of the purchaser, she is entitled to waive compliance with the suspensive conditions and she alleges that she did so tacitly.
45. Applicant alleges further that the written agreement remains valid and enforceable as there is no need to comply with the suspensive conditions.
46. Applicant didn't transfer the property into her name as she did not deem it necessary.
47. Applicant also alleges that the deceased gave her a General Power of Attorney on 17 May 2013.

Applicable Law

48. Section 71(1) of the Administration of Estates Act 66 of 1965 expressly provides that:

“(1) No person who has been nominated, appointed or assumed as provided in section seventy-two shall take care of or administer any property belonging to the minor or other person concerned, or carry on any business or undertaking of the minor or other person, unless he is authorized to do so under letters of tutorship or curatorship, as the case may be, granted or signed and sealed under this Act, or under an endorsement made under the said section.”

49. Section 72(1) (d) provides that:

“(1) The Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act, 1953 (Act 37 of 1953), or any order of court made under any such provision or any provision of the Divorce Act, 1979, on the written application of any person-

...

(d) who has been appointed by the Court or a judge to administer the property of any minor or other person as tutor or curator and to take care of his person or, as the case may be, to perform any act in respect of such property or to take care thereof or to administer it; and... grant letters of tutorship or curatorship, as the case may be, to such person”

50. Section 80 (1) of the Act provides as follows:

“ 80 (1) No natural guardian shall alienate or mortgage any immovable property belonging to his minor child, and no tutor or curator shall alienate or mortgage any immovable property which he has been appointed to administer, unless he is authorized thereto by the Court or by the Master under this section or, in the case of a tutor or curator, by any will or written instrument by which he has been nominated.”

51. The approach to interpretation was significantly altered since **Natal Joint Municipal Pension Fund v Endumeni Municipality**¹ where it was held as follows:

*“In the interpretation of statutes, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the **context** in which the provision appears; the apparent **purpose** to which it is directed; and the material known to those responsible for its production. When more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A **sensible meaning** is to be preferred to one which leads to insensible or **un-businesslike results or undermines the apparent purpose of the provision**. The approach requires that 'from the outset one considers the **context and the language** together, with neither predominating over the other ”* (emphasis added)

52. In **Bouwer NO v Saambou Bank Bpk**,² Hartzenberg J, in discussing the purpose of section 71 (1), found that the legislature was mindful of the fact that a curator who administers the estate of another, could be subjected to the temptation to misappropriate the assets of the patient, therefore the legislature intended in section 71(1), to protect the patient or *de cuius* as well as the curator. The court then goes on to find that purpose of the section is not to protect innocent third parties who have no knowledge of the true position of the curator who has not been issued with Letters of Curatorship, but to protect the interests of the *de cuius*.

53. On behalf of Applicant, it was argued that Bouwer’s case is not binding authority because it is the decision of a single judge in another Division of the Court. It was also argued on behalf of applicant that Bouwer is distinguishable because the

¹ 2012 (4) SA 593 (SCA)

² 1993 (4) SA 492 (T) at

court order appointing the curator in that case included a condition that the curator provide security and section 77 of the Act found application.

54. What the Applicant's counsel however fails to appreciate is that the finding concerning the purpose of section 71(1) stands totally separate from the finding concerning section 77 and therefore the issue of provision of security is irrelevant and unrelated to the dictum concerning section 71(1).
55. The full bench in **De Wet NO v Barkhuizen and Others**³ the court applied the dictum concerning interpretation as set out in **Endumeni** and relied on the purpose of section 71(1) as concluded in **Bouwer**. The Court held that purpose of section 71 (1) is to ensure that no person, even a duly appointed curator bonis, may perform any act which would place at risk the property or interests of the *de cuius*. The court went on to support the finding in **Bouwer** that any act performed contrary to the provisions of section 71(1) of the Act was a nullity.
56. While Bouwer and De Wet are indeed not binding authority for this Court, but have persuasive value, the interpretation of the purpose of section 71 (1) set out in them, accords with provisions of the Act that apply to curators.
57. Section 85 of the Act makes certain sections that apply to executors of deceased estates applicable to curators. Those sections are 24, 26, 28 and 36, subsection (2) of section 42, sections 46 and 48, subsection (2) of section 49 and sections 52, 53, 54 and 56.

³ 2022 (4) SA 197 (ECG) at [9] to [10]

58. Section 81 emphasizes the intention of the legislature to protect the property of the *de cuius* and keep all alienation of property at arms' length or subject to oversight by the Court or the Master, by declaring a purchase by a curator, of property administered by a curator void unless the Court or the Master has consented thereto.
59. Section 80 also subjects the alienation of property belonging to the *de cuius* subject to the master or the Court's oversight.
60. Section 78(1) creates an obligation on a curator to lodge within 30 days of his appointment, an inventory setting out all the property to be taken care of or administered by him.
61. Section 77 (5) provides that where there is any default by any curator in the proper performance of his functions, the Master may enforce the security and recover from such curator or his sureties, the loss to the person under curatorship.
62. Section 78(2) prohibits the alienation of property by a curator if that property has not been included in the inventory.
63. Section 26 that specifically refers to executors but also applies to curators by virtue of section 85 mentioned above, provides that a curator also "*shall take into his custody or under his control all the property, books and documents in the*

estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment ”

64. The sections of the Act applicable to curators makes clear that the purpose, role and function of a curator bonis, *inter alia*, is to protect the interests of the *de cuius* and that he must do so with utmost good faith and act in the interests of the *de cuius* only.
65. In so applying, the clear meaning and the contextual and purposive approach of interpretation, section 71 (1) has one purpose only, namely to protect the interests of the *de cuius*.
66. It is also apparent from the manner in which the Fifth Respondent dealt with the immovable property, his subsequent letter declaring the full purchase price to have been paid without any reasons or evidence provided in support therefor, his failure to open a separate bank account and to take control of the property of the *de cuius* and his willingness to act in accordance with the interests of the Applicant as opposed to the interests of the deceased, that he did not fulfil his statutory obligations in terms of the Act nor can the Applicant be considered to be an innocent third party who had no knowledge of the fact that the Fifth Respondent did not discharge his duties as aforesaid.
67. The suspensive conditions contained in the agreement of sale, largely follow the provisions of section 80(1).

68. Section 80 (1) on its plain terms, is a protection of the interests of the estate of the *de cujus* by compelling the Master or the Court to have oversight before any immovable property can be validly alienated.
69. The suspensive condition in 3.1. makes no grammatical sense unless it is meant to convey that: should such approval by the Master of the High Court **NOT** be granted within 30 days... the Seller shall be entitled but not obligedto declare the sale as cancelled. The emphasized word having been read in, then and only then does the clause make sense. The provision would in that event clearly be one for the benefit of the Seller because it gives him an election to cancel.
70. Nonetheless, on behalf of the Applicant it was argued that it is a term for the benefit of the Purchaser.
71. Clause 3.6 provides that all the suspensive conditions are for the benefit of the Purchaser who may elect to waive compliance with them.
72. Clearly parties cannot create and prescribe to the courts, new law in their agreements.
73. Clause 3.2 provides for restitution and placing each party in the position it would have been in had the contract not been entered into, in the event that either party cancels the agreement. That is clearly a provision for the benefit of both Seller and Purchaser.

74. Clause 3.3. compels the Purchaser to sign all documents necessary to make application for a loan and if she fails to do so the Seller can do so on her behalf. That is also a term for the benefit of the Seller not the Purchaser.
75. Clause 3.4. provides that if the agreement is cancelled the Purchaser shall not be entitled to payment for any improvements she had made to the property. That provision clearly protects the Seller and is not for the benefit of the Purchaser.
76. Clause 3.5 provides that the suspensive conditions are deemed to be fulfilled as soon as the Seller receives confirmation from the Master that the agreement is in accordance with the law. That may be construed as being for the benefit of the Purchaser, in that the Seller would not be able to cancel the agreement if the Master approves it and the Purchaser has fulfilled her obligations under the agreement.
77. Clause 3.6 has been considered above.
78. Clause 3.7. provides that unless the suspensive conditions have been fulfilled or waived within the stipulated period, the agreement will lapse and be of no force and effect and neither party will have a claim against the other. That is a condition that may be for the benefit of both parties but not for the benefit of the Purchaser only.

Evaluation

79. It appears that despite Applicant's allegations that the deceased was already diagnosed with dementia in 2012, she deemed it acceptable to control the deceased's financial affairs on a General Power of Attorney that the deceased signed in May 2013, at a stage when it seems, on her own version that the deceased's dementia had deteriorated.
80. Consequently the deceased's capacity to fully understand the consequences of the document granting her General Power of Attorney, is not addressed by Applicant.
81. On Applicant's version, she completed her studies in 2009 and in that same year she commenced taking care of the deceased and his financial affairs.
82. Applicant does not take this Court into her confidence by stating what her educational qualifications were in 2009 and subsequently, what her occupation was since 2009, how much she earned, why the deceased's own funds were insufficient to cover his expenses and how she could afford to pay all his expenses as she alleges, when she would have entered the employment market full time only from 2009 or thereafter.
83. Applicant alleges that she honestly believed that the Fifth Respondent was properly appointed as *curator bonis* on 4 September 2015, yet she and not Fifth

Respondent, continued at that date and thereafter, until the death of the deceased, to have access to the deceased's bank account and finances.

84. The Fifth respondent does not allege that he opened a bank account in the name of the deceased- under –curatorship. Clearly for him to do so, he would have been required to present to the bank, Letters of Curatorship, which he did not have because he failed to apply for it.
85. The agreement of sale was clearly not an arm's length transaction because on Applicant's version, she was integrally involved in the financial affairs of the deceased and he had cared for her as though she were his own child.
86. The Fifth Respondent not only didn't know that he had to apply to the Master of the High Court for the issue of Letters of Curatorship, he consequently also didn't appreciate what his role was as *curator bonis*, in that he failed to open a bank account in his capacity as *curator bonis*, he failed to take control of the deceased's assets. He failed to establish what the correct value of the immovable property was at that time and the correct value of the usufruct. He also failed to establish whether the Respondent did in fact pay the purchase price as he alleges in his letter referred to earlier.
87. Most astoundingly, the Fifth Respondent applied to the Master for Letters of Curatorship after the deceased had passed away. He ought to know, as a practising attorney, that he could not do so because the executor would be the

only person authorised to take control of the assets of the deceased at that stage.

88. Fifth Respondent, although not formally appointed by the Master, due to his own misconduct, also did not act with any good faith and certainly not with the utmost good faith towards the estate of the *de cujus*.
89. In accordance with the clear text in section 72, there has not been compliance with the section at all.
90. There is also non-compliance with Section 80(1) and instead of compliance with that section, there is a gross violation of it.
91. Applicant failed to provide this Court with proof that:
 - 91.1. the accounts, invoices or receipts that she annexed as proof of payment were in fact paid from her own funds;
 - 91.2. that they were incurred exclusively for the benefit of the deceased;
 - 91.3. that she had a prior arrangement with the deceased to the effect that she would pay his expenses and deduct it from the purchase price for the property or that she had a prior arrangement with the Fifth Respondent to that effect;
 - 91.4. that she had paid rent for the time that she lived in the deceased's property after she completed her studies and later for her boyfriend who allegedly also lived there;

- 91.5. that the money she paid her mother directly from her bank account were exclusively for her mother acting as carer to the deceased;
- 91.6. that deceased had no or insufficient funds in his bank account from which to pay the said expenses and in that event, how the deceased's funds were managed by the Applicant;
- 91.7. Why there remains on the papers, contradictions on Applicant's version of the amount she allegedly paid at a certain stage, namely R150 590,00; R128 546,00; and R164 547,77;
- 91.8. On what basis the usufruct was allocated a valuation of R726 223,61;
- 91.9. Why the agreement of sale provides for no cash to be paid for the property nor does it state how the balance of the purchase price is to be paid;
- 91.10. On what basis the Fifth Respondent could be satisfied that the purchase price is equal to the market value of the property at the time the agreement was concluded;
- 91.11. What attempts the Fifth Respondent made and what information and proof the applicant gave Fifth Respondent to establish that Applicant had indeed paid the full purchase price; and
- 91.12. the Applicant had lodged a claim against the estate of the late Mr Bester while he was alive, for expenses she allegedly paid on his behalf and which of those claims have prescribed. If no claim was

lodged, on what basis the applicant could have paid, in partial payment of the purchase price.

92. Applicant clearly exercised control over the estate of the deceased during his lifetime without any lawful authority to do so because the deceased was not of sufficient sound mind at the time, for him to understand the nature and consequences of the Power of Attorney. Once it became clear to the Applicant that he was not of sound mind, she ought not to have proceeded in terms of that Power of Attorney.
93. Once the Applicant believed that Fifth Respondent was appointed as curator bonis, she ought not to have believed that she had lawful authority to continue to exercise over the estate of the deceased during his lifetime.
94. At the end of replying argument, Mr Samuels, on behalf of applicant, for the first time mentioned that there is a flash drive in the file that the court should view because it contains the financial records of the Applicant.
95. Respondent's counsel said that they had not received a copy of the flash drive nor the information contained therein.
96. This Court made clear to the parties that it could not access the flash drive and trawl through its content when there is a possibility that it may contain a virus that could infect the Court's computer system and in any event, the Respondent had not seen it nor was there any address to the court on its content.

97. A few days after judgment was reserved, this Court received a link from the Applicant's attorney purporting to contain the information on the flash drive and stating that it had been provided to respondent's attorney as well.
98. It is incumbent on the Applicant to have addressed the content of the link or the flash drive with the Court.
99. The Court cannot trawl through the information and arrive at conclusions on its content without any reference thereto in the papers or in the Heads of Argument or in the Practice Note and without the Respondent having had an opportunity to address the information contained in the link.
100. In **Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others**⁴, the following enunciation on judicial intervention in contracts are important considerations for this court in the light of the unfortunate allegation in the founding papers, that is in fact a legal submission made in an affidavit by the Applicant, to the effect that a strictly legalistic approach to the word "shall" in section 72(1)(d) is to be avoided and a common sense approach ought to be applied:

“[87] In our new constitutional era, pacta sunt servanda is not the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values. There is no basis for privileging pacta sunt servanda over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine

⁴ 2020 (5) SA 247 (CC) at [87] – [90]

whether enforcement of the contractual terms would be contrary to public policy in the circumstances

[88] The second principle requiring elucidation is that of “perceptive restraint”, which has been repeatedly espoused by the Supreme Court of Appeal.^[201] According to this principle a court must exercise “perceptive restraint” when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a “court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases”.

[89] This principle follows from the notion that contracts, freely and voluntarily entered into, should be honoured. This Court has recognised as sound the approach adopted by the Supreme Court of Appeal that the power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases.

*[90] However, courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution. The degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values. **Accordingly, the “perceptive restraint” principle should not be blithely invoked as a protective shield for contracts that undermine the very goals that our Constitution is designed to achieve.** Moreover, the notion that there must be substantial and incontestable “harm to the public” before a court may decline to enforce a contract on public policy grounds is alien to our law of contract.” (emphasis added)*

101. The very goals of the applicable provisions of the Administration of Estates Act, discussed earlier, are the same goals that our Constitution is meant to achieve in that the *de cuius* interests must be protected where there has been a failure of good faith on the part of the curator.

102. The same considerations apply where a litigant, in the position of the Applicant, has clearly arrogated to herself, the right to take control of and cause the alienation of assets belonging to the *de cuius* without making out a case for fairness and equity to the estate of the *de cuius* as well as a case for compliance with the applicable statutory provisions.
103. Applicant, who has legal representation, ought to have been advised that her relief for payments she made on behalf of the deceased, would be to lodge a claim against the estate with the executor.
104. In the light of the finding that the Fifth Respondent, who purported to represent the interests of the *de cuius*, did not in fact and in law, act in those interests and the finding that the Applicant unlawfully took control of the assets and funds of the deceased during his lifetime, it is crucial for the executor to have an audit conducted on the financial affairs of the deceased for the period 2009 until his passing away and to establish whether there has been any fraudulent or unauthorised conduct in the management of the estate of the deceased during that period.
105. Public policy accords with the purpose for which a curator bonis is to apply for Letters of Curatorship, namely, to ensure oversight of his handling of the affairs of the *de cuius*. Fifth Respondent's misconduct as described herein was enabled and apparently on the instructions of or at the behest of Applicant who approached the law firm of Fifth Respondent to apply for the appointment of a

curator ad litem and the appointment of a curator bonis and later, to draft the Agreement of Sale.

106. Should such unlawful conduct be established, the executor ought to report the misconduct to the South African Police Services for investigation.
107. There has been no compliance with the Suspensive Conditions in that the Master's consent was not obtained nor does it seem likely that it was capable of being granted as a result of substantial breaches of the provisions of the Act.
108. The misconduct of the Applicant calls for a serious sanction with regard to costs which the Respondent ought not to bear.
109. Attorney and client costs is appropriate to voice this Court's displeasure with the misconduct of the Applicant in taking over the affairs of the now deceased Mr Bester, when she had no lawful authority to do so.

IT IS ORDERED THAT:

1. The First Respondent shall within 30 days of this order cause an audit of the financial affairs of the deceased to be conducted for the period 1 January 2009 until date 3 June 2021 and to report any misappropriation of funds or assets, to the South African Police Services;
2. The Application is dismissed with costs, such costs shall be on an attorney and client basis.

JUDGE R. ALLIE