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

Case No.: 18214/2019

In the matter between:

ALAN ROY LOUW N.O.	First Applicant
ALAN ROY LOUW	Second Applicant
NASHIED LOUW	Third Applicant

and

JOHN DANIEL LOUW	First Respondent
DAVID ALROY LOUW	Second Respondent
TREVOR KEITH LOUW	Third Respondent
RUDY GEORGE LOUW	Fourth Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	Fifth Respondent
THE REGISTRAR DEEDS, CAPE TOWN	Sixth Respondent
LORENZO RUDY LOUW	Seventh Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 22 SEPTEMBER 2023

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The applicants seek the following relief:

> "1. That it be ordered that the immovable property situated at Erf 122784 Cape Town… Athlone ("*the immovable property*") be sold on the open market and/or private treaty;
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> 2. That the first respondent be authorised to give access to the immovable property and/or that the first to fourth respondents be ordered to give their cooperation with the sale of the immovable property as envisaged in paragraph one above.

[2] The applicants and first to fourth respondents are brothers, and the seventh respondent is also a family member. The fifth respondent is the Master of the High Court ("*the Master*"), and the sixth respondent is the Registrar of Deeds, both of whom do not oppose this application.

[3] There was a long delay between the institution of these proceedings on 1 November 2019 and the hearing thereof on 25 August 2023. The court file indicates that several judges of this Division postponed the proceedings at various times in order to firstly, grant the respondents an opportunity to obtain legal representation and deliver answering affidavits, and secondly, to allow the parties to attempt mediation or settlement of the matter. During that time the respondents did indeed deliver answering affidavits, although they are not very detailed, as will be dealt with below.

[4] When the matter was initially set down before me on 25 October 2022, I postponed the proceedings once again to allow the respondents opportunity to obtain legal representation, and thereafter requested the Cape Bar to appoint *pro bono* legal representation for them. To the Court's gratitude this was duly done, and by the time the matter was argued on 25 August 2023, the respondents were legally represented by Mr.

van Zyl who confirmed his appearance and instructions on behalf of the first to fourth respondents, and not seventh respondent. He also confirmed that he would be proceeding based on the affidavits already filed on behalf of the respondents, and also delivered heads of argument on their behalf.

[5] One of the judicial interventions in the matter was an order granted on 13 November 2019 to facilitate the joinder of the seventh respondent, who was so joined by court order dated 21 January 2020. However, it is recorded in a subsequent court order dated 5 August 2020 that the seventh respondent, who appeared in person, indicated his withdrawal of opposition to these proceedings and was to file confirmation thereof at a later stage. Although no such confirmation was filed, both sides at the hearing before me confirmed that he had indeed withdrawn from these proceedings. However, before he withdrew, he filed an affidavit, the contents of which I deal with later.

B. THE FACTS

[6] During her lifetime, the deceased Annie Elizabeth Louw signed a will and testament dated 5 February 2013 (*"the Will"*), in terms of which the first applicant was nominated as the executor of the deceased's estate, and was so appointed by the Master on 25 April 2016. Paragraph 4 of the Will bequeathed the entire estate of the deceased to her six living sons. The Will also directed that upon the deceased's death the immovable property was to be sold and the proceeds equally divided between the six siblings.

[7] In 2015 the first applicant reported the estate to the Master *via* his agent. When the estate was reported, the Will was submitted to the Master together with a previous will of the deceased dated 26 November 2010, in terms of which the deceased bequeathed her entire estate to the seventh respondent. The Master, having had sight of both wills, accepted the Will. This may well be explained by the various defects contained in the 2010 will amounting to non-compliances with the formalities prescribed in terms of the Wills Act 7 of 1953, to which the applicants point out. What is important

is that the Master's decision of accepting the Will, thereby rejecting the 2010 will, has never been challenged. Nor has anyone ever sought to have the 2010 will declared the valid will of the deceased. Therefore, save to state that the seventh respondent was joined to these proceedings on account of being the sole beneficiary in terms of the 2010 will, nothing further needs to be stated regarding the 2010 will.

[8] It is not in dispute that almost immediately after the first applicant was appointed as executor, his agent sought to gain access to the immovable property in order to market and sell it. However, the first respondent, who continues to reside in the immovable property, has consistently refused to grant access and also refuses sale of the immovable property, even after an offer to purchase was obtained in respect thereof.

[9] Faced with the first respondent's refusal to grant access, the first applicant sent a letter to the Master dated 24 April 2018, reporting on his unsuccessful attempts to market and sell the immovable property, and in the result, his inability to comply with the terms of the Will. The letter requested the Master to provide instructions, in terms of section 47(b) of the Administration of Estates Act 66 of 1965 regarding the manner and conditions for the sale of the property.

[10] The Master responded by letter dated 7 May 2018 stating as follows: *"It should be sold on the open market to the highest bidder. However given that there is one recalcitrant heir, a sworn appraisal should be lodged"*. In compliance with the Master's instruction, the first applicant appointed a sworn valuator who contacted the first respondent for purposes of valuating the property on or about 21 November 2018. However, the sworn valuator too reported that the first respondent refused to grant him access to the property, resulting in further correspondence from the first applicant to the Master dated 11 December 2018 in which further instructions were sought in light of the first respondent's conduct.

[11] The Master responded by letter dated 21 December 2018, stating as follows: *"My office cannot advise you as to what legal route to follow. It is the duty of the executor to resolve this issue and use whatever legal remedies are available to that end"*.

[12] It was as a result of the above events that the first applicant's attorney sent correspondence to the first to third respondents on 30 April 2019 in which it was recorded that they refused to consent to the sale of the property, and their cooperation with the winding up of the estate was requested within seven days, failing which these court proceedings would be instituted with a costs order against them. Although the second respondent initially promised to revert, no response was received from him or from first and third respondents. As for the fourth respondent, after having had sight of the founding affidavit in these proceedings, he indicated that he would not be supporting the relief sought in this court application.

C. THE PARTIES' CASES

[13] The founding affidavit sets out the prejudice suffered by the applicants due to the respondents' conduct of preventing the first applicant from complying with the winding up of the state, and specifically, the marketing and sale of the immovable property. The applicants state that the first applicant is unable to give effect to the terms of the Will and to finalise the winding up of the estate. One of the allegations made in that regard is that, not only have the respondents refused to grant access to the immovable property or to accept the offer to purchase which was obtained before April 2018, but that they have subsequently repeatedly refused to grant access or to cooperate. In that regard, the first applicant states that, after the initial offer to purchase fell through, he has received further inquiries from interested buyers to purchase the immovable property on the open market, but could not proceed as a result of the respondents' conduct.

[14] Furthermore, the first applicant states that access is required to the property, not only for the sworn valuation required in terms of the Master's instructions, but also for

purposes of other inspections which include beetle and electrical inspections, and for purposes of obtaining a rates clearance certificate and valuation for bond guarantee purposes in the event that a valid deed of sale is eventually concluded.

[15] The first respondent's affidavit, which is dated 5 February 2020, does not make any substantive averments in answer to the application, save to point out that he looked after the deceased for years, and that one day she had asked for all the siblings' identity documents before being taken 'somewhere' by his brothers and sister-in-law. That is the full extent of the answering affidavit of the first respondent.

[16] The third respondent's affidavit, also dated 5 February 2020, states as follows in relation to the merits of the application: *"I would like to know from the court how is it possible that the executor can do things without consulting the rest of the family involved by the sale of this using estate to finance the lawyers."*

[17] The fourth respondent's affidavit, which is also dated 5 February 2020, merely confirmed service of the papers upon him by the sheriff, and likewise makes out no case in opposition to the merits of the application.

[18] The seventh respondent's affidavit opposes the application on two bases. First, he wishes for the 2013 Will to be declared null and void on the basis that the deceased was not of sound mind and was suffering from vascular dementia, and attached a medical document, to which I return later. Second, the seventh respondent disagrees with the sale of the immovable property stating that there were no confirmed heirs yet and that the sale would leave *"a 69 year old male without a roof over his head"* - presumably in reference to the first respondent.

[19] As I have already indicated, the respondents' papers were not supplemented, and Mr Van Zyl who represented the first to fourth respondents confirmed that his instructions were to proceed with the opposition relying on the answering affidavits already filed.

[20] Nevertheless, the heads of argument filed on behalf of the respondents introduced a new point of law relying on sections 42(2), 47 and 95 of the Administration of Estates Act. The argument now advanced on behalf of the respondents is that there was no need to bring this application because the first applicant, as executor, is the only one empowered to sign an offer to purchase, which the first applicant states he received. The next step, says the argument, is for the first applicant to give effect to the offer to purchase received by completing what is referred to as a JM33 form and filing it with the Master in terms of section 42(2) of the Act. If the heirs cannot agree on the manner and conditions of the sale, the first applicant may record that on the JM33 form, whereafter the Master can give a decision, in terms of section 47, regarding whether or not the immovable property is to be sold. It is only after that decision by the Master has been made that this Court will have powers, in terms of section 95 of the Act, to appeal or review it. As a result of the first applicant's failure to comply with the statutory requirements, it was argued that the relief sought in paragraphs 1 and 2 of the notice of motion, apart from being clumsily drafted, is premature and should be stayed pending compliance therewith or dismissed with costs.

[21] To this Mr Coston, who appeared on behalf of the applicants, pointed out that firstly, the points now taken on behalf of the respondents are not raised in the papers. Furthermore, it is as a result of the first to fourth respondents' refusal to agree to the sale or the manner and conditions for the sale of the property that there is as yet no sale of the property and no valid offer to purchase. It is also the reason why the first applicant sought instructions from the Master regarding the manner and conditions of a sale, which was given on 7 May 2018. On this basis, the first applicant states that he has complied with section 47 of the Act. Furthermore, it is because of the respondents' refusal to grant access to the sworn valuator to appraise the property in compliance with the Master's instructions, that the applicants have approached this Court for an interdict in order to gain access to the property.

[22] Moreover, the first applicant states that section 42 of the Act is not yet operative because he is not yet seeking transfer of the property. Only once the sale is achieved will the executor have responsibility to submit the JM33 form.

D. DISCUSSION

[23] It is most appropriate to begin with the allegation contained in the seventh respondent's affidavit to the effect that the deceased was not of sound mind and was suffering from vascular dementia. The medical document attached to his affidavit appears to be a surgical in-patient report from Groote Schuur Hospital. It is however undated and is not signed by any medical personnel. It describes the patient as *"E Louw"*, an *"84 year-old"* with *"vascular dementia for the past two years – patient in and out of state of confusion chronically"*. It records that the patient was admitted to hospital on 6 February 2014 and discharged on 10 February 2014.

[24] The respondents have otherwise provided no verification or corroboration for the medical document. No evidence has been provided to establish that the deceased was not of sound mind when she signed the Will. And the respondents have had plenty of time to do so, with or without their legal representatives, between the institution of these proceedings and the hearing of this matter. As the applicants' counsel points out, it would not have been a difficult task to establish the alleged mental incapacity given that the first respondent states that he lived with the deceased for some years. I also observe that the document itself provides contact numbers and names in case anyone wished to make queries or take the matter further. The respondents have simply failed to raise the issue seriously and unambiguously, or to establish a real, *bona fide*, genuine dispute in this

regard.[1] This Court is therefore not able to conclude that the deceased was not of sound mind when she signed the 2013 Will.

[25] Given that the Will has never been challenged in court, and was accepted by the Master, its terms must be complied with. Its terms require the sale of the immovable property, and for the proceeds thereof to be equally divided between the deceased's living sons in equal shares. Thus, the extent that any of the respondents' affidavits oppose the sale of the property, that is in direct contrast to the express directions of the Will, which are valid.

[26] I have already set out the extent of the answering affidavits filed on behalf of the respondents. They do not seriously dispute any of the averments made in the founding affidavit. Those averments include the fact that the agents representing the first applicant have made numerous attempts to gain access to the immovable property for the purpose of selling, marketing and appraising it, but were unsuccessful because the first respondent refused to grant access to the property. The papers also indicate that the remaining respondents failed to cooperate with the winding up of the estate when they were called upon to assist.

[27] It is also not in dispute that the conduct of the respondents led the first applicant's agent to approach the Master by letter dated 24 April 2018. That letter confirms that the first applicant's agents had endeavored to sell the property *via* an estate agent but were refused access to the property for the purposes of marketing, thus hampering his duties of executing the terms of the Will. This is the reason that the letter ended as follows: "*We would like to request, in terms of section 47(b) of the Administration of Estates Act, that you provide us with the manner and subject to the conditions as how we can sell the*

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[1] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008) para 13.

property as we are unable to finalise the estate without selling the property as per the last will and testament".

[28] It is therefore clear from the letter of 24 April 2018 that, contrary to what was argued on behalf of the respondents, the first applicant was aware that he was required to sell the property, and in fact that he had already decided to sell the property. This is why he reported that he had endeavoured to obtain an offer to purchase, and after that fell through, attempted to market to property by gaining access to it. That is in line with the trite law that the decision regarding whether or not to sell the property in the deceased estate falls within the province of the executor alone.[2]

[29] It is also clear from the letter of 24 April 2018 that what the executor was seeking from the Master, in light of the first respondent's refusal to grant access, was directions regarding the manner and conditions of the sale. That, he was entitled to do in terms of section 47 of the Administration of Estate Act.

[30] It is not a coincidence that the first applicant's letter of 24 April 2018 specifically referred to section 47(b). Section 47 provides as follows:

> "Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stockbroker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that—
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> (a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or
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> (b) if the said heirs are unable to agree on the manner and conditions of the sale,
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> the executor shall sell the property in such manner and subject to such conditions as the Master may approve." (my emphasis)

[2] *Essack v Buchner NO and Others* 1987 (4) SA 53 (N) at page 57; Meyerowitz *The Law and Practice of Administration of Estates* 5th ed para 12.27".

[31] The clear text of section 47 empowers an executor to sell property of the deceased estate in the manner and subject to the conditions which the heirs who have an interest therein approve in writing. Here, no such approval could be obtained from the heirs because they did not approve of the sale and still do not approve of the sale. That is not in dispute. It stands to reason that if they did not approve of the sale, they did not approve of the manner and conditions of any such sale.[3]

[32] Subsection (b) of section 47 provides the solution for the position in which he found himself - of being without the required written approval from the heirs regarding the manner and conditions of the sale - namely, to seek the Master's approved manner and conditions of the sale.[4] Section 47 empowers the Master to intervene where the executor and the heirs are unable to agree on the conditions of sale by providing approval for the manner in which the sale is to be carried out by the executor.[5]

[33] In this case, the Master did provide such approval in the letter dated 7 May 2018, which stated as follows: *"It should be sold on the open market to the highest bidder. However given that there is one recalcitrant heir, a sworn appraisal should be lodged"*. From this it is evident that the 'manner and conditions' approved by the Master was a sale on the open market, based on a sworn appraisal by a valuator. It also follows that section 47 was complied with. There was a belated argument on behalf of the respondents to the effect that the Master's letter of 7 May 2018, which was a handwritten letter, did not constitute the approval contemplated by the statute, and that it should have been contained in a prescribed format. No legal authority was provided for this submission.

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[3] See for example *Bester N.O v Master of the High Court and Another* (17428/2021) [2023] ZAWCHC 208 (16 August 2023) para 36.

[4] *Ibid.* See also *Kisten and Another v Moodley and Another* (13043/2012) [2016] ZAKZDHC 31 (22 July 2016) paras 29-30.

[5] See *Essack v Buchner NO and Others* 1987 (4) SA 53 (N) at page 57; Meyerowitz *The Law and Practice of Administration of Estates* 5th ed para 12.27". *Daffue NO v Master of the High Court, Free State High Court, Bloemfontein and Others* (2479/2019) [2020] ZAFSHC 185 (5 November 2020) para 32.

Neither was the submission contained in the respondents' papers to allow at least the Master, who is a party to these proceedings, to respond thereto. This is especially so given that once that letter was issued by the Master it stood as a decision subject to review.[6] Until now it has never been challenged - including on the basis that it was not in the correct format.

[34] I do not agree with the argument advanced on behalf of the respondents that, given the first respondent's refusal to grant access to the property, the first applicant should have proceeded in terms of section 42(2) by submitting a JM33 form to the Master. Firstly, that does not accord with the interpretation of section 47, which I have discussed above. Such an interpretation would render section 47(b) meaningless.

[35] Subsections 42 (1) and (2) provide as follows:

> "**42 Documents to be lodged by executor with registration officer**
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> (1) Except as is otherwise provided in subsection (2), an executor who desires to have any immovable property registered in the name of any heir or other person legally entitled to such property or to have any endorsement made under section 39 or 40 shall, in addition to any other deed or document which he may be by law required to lodge with the registration officer, lodge with the said officer a certificate by a conveyancer that the proposed transfer or endorsement, as the case may be, is in accordance with the liquidation and distribution account.
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> (2) An executor who desires to effect transfer of any immovable 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." (my emphasis)

[36] The clear text of section 42 is that a JM33 form is lodged by *"an executor who desires to effect transfer of any immovable property in pursuance of a sale"*. Here there is no transfer sought to be made by the first applicant, precisely because no sale has been

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6 *Nedbank Ltd v Mendelow NO and Another* (686/12) [2013] ZASCA 98; 2013 (6) SA 130 (SCA) (5 September 2013) paras 26 - 28.

made. It is a matter of logic that, in order for a transfer of the property to take place, it must be preceded at least by an agreement of sale. In turn, if there is to be a sale effected by the executor, the manner and conditions of the sale must have been previously agreed or approved.

[37] The content of the JM33 form supports this view because one of the documents that an executor is required to submit in terms of paragraph 8 thereof is written consent by major heirs to the manner and conditions of sale. In the event that section 47(b) applies, paragraph 9 requires an executor to furnish valuation by an appraiser and reasons why a specific manner and conditions of sale is preferred. Lastly, paragraph 12 of the form requires a deed of sale to be annexed. All these requirements presume that a decision regarding the manner and condition of the sale must have been previously agreed by the heirs or approved by the Master. This can only mean that section 47 is a prior requirement. That is the interpretation followed by the courts.[7]

[38] It is not disputed that, after the Master gave directions for the sale to be conducted on the open market to the highest bidder, and for a sworn appraisal to be lodged, the first respondent's attitude did not improve, and the papers describe the words he used to the sworn valuator when the latter attempted to comply with the Master's direction by gaining access to the property. It was after being informed of this that the Master reminded the first applicant of his duty to resolve the issue by using whatever legal remedies available. Hence the institution of these proceedings.

[39] On the facts of this case, there is no basis to argue that the first applicant failed to take a decision required of him, especially the decision to sell the property. Nor can it be argued that he failed to act in accordance with the requirements of section 47. It is rather

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[7] See *Bester N.O v Master of the High Court and Another* paras 27 and 36; *Kisten and Another v Moodley and Another* paras 29-30.

the respondents' recalcitrance that has prevented him from effecting the sale of the property.

[40] As regards the concerns raised in the respondents' affidavits regarding the first applicant's right to deal with the estate without obtaining their agreement, it is apposite to refer to Meyerowitz' succinct summary of the duties of an executor[8]:

> *"The executor acts upon his own responsibility, but he is not free to deal with the assets of the estate in any manner he pleases. His position is a fiduciary one and therefore he must act not only in good faith but also legally. He must act in terms of the will and in terms of the law, which prescribes his duties and the method of his administration and makes him subject to the supervision of the Master in regards to a number of matters.*
>
> *But where the executor acts legally the court will be very slow to interfere with the exercise of his discretion unless improper conduct is clearly established; the court is in no sense an 'upper executor…*
>
> *"An executor is not a mere procurator or agent for the heirs but is legally vested with the administration of the estate. A deceased estate is an aggregate of assets and liabilities and the totality of the rights, obligations and powers of dealing therewith, vests in the executor, so that he alone can deal with them."*

[41] The executor is the person in whom, for administrative purposes, the deceased's estate vests. It is his function to take all such steps as may be necessary to ensure that the heirs in the estate to which he is appointed receive what in law is due to them.[9] The discretion of the executor cannot be interfered with simply because of the conflict existing between the executor and the heirs to the estate.

[42] As regards the first applicant's right to institute legal proceedings on behalf of the estate - an issue which is also raised in the respondents' affidavits - the general rule of our law is that the proper person to act in legal proceedings on behalf of a deceased estate

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[8] Administration of Estates and their Taxation 2010 edition at 12. 20.

[9] *Segal and Another v Segal and Others* 1976 (2) SA 531 (C) at 535 A-B.

is the executor thereof. [10] Normally, a beneficiary in the estate does not have *locus standi* to do so unless there are exceptional circumstances shown.

[43] The facts discussed above display the need for the relief sought by the applicants. To the extent that it seeks an order that the property be sold on the open market, it seeks to give effect to the terms of the Will as well as Master's direction of 17 May 2018, both of which establish the applicants' clear right for the relief sought.[11]

[44] I emphasise that it is not disputed in the papers that the first respondent has consistently refused to grant access to the property, and that the remaining respondents have consistently failed to cooperate with the winding up of the estate which involves the sale of the property. This is displayed by their failure to cooperate when they have been called upon by the first applicants attorneys with regard to the winding up of the estate. In the context of an interdict, all of that conduct amounts to an injury actually committed.[12]

[45] It is furthermore clear that the first applicant has no alternative remedy available but to obtain a court order in order to facilitate cooperation with the winding up of the deceased estate [13], as also pointed out in the Master's correspondence of 21 December 2018.

[46] As regards costs, I take into account that, although delays have been caused not only to the administration of the estate, but also to these proceedings, it was as a result of family dynamics. I also take note, as set out earlier, that there were many attempts to reach settlement between the parties, but that they were ultimately unsuccessful. I therefore consider that it is appropriate that the costs should be in the deceased estate.

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[10] *Gross and Others v Pentz* [1996] ZASCA 78*;* 1996 (4) SA 617 (SCA) p 19.
[11] *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[12] *Setlogelo v Setlogelo.*
[13] *Setlogelo v Setlogelo.*

E. ORDER

[47] In the circumstances, the following order is granted:

1. The immovable property situated at Erf 122784 Cape Town and also known as 17 Lark Court, Bridgetown, Athlone, Western Cape (*"the immovable property"*) shall be sold on the open market, unless and until the Master approves of changes to the manner and conditions for the sale.

2. The First to Fourth Respondents are ordered to give access to the immovable property and to cooperate with the winding up of the deceased estate.

3. The costs of this application shall be costs in the deceased estate.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicants	**:**	**Adv P. Coston**
Instructed by	**:**	**R. van der Merwe**
		Kessler De Jager Incorporated
For the respondents	**:**	**Adv L. van Zyl**