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**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:

ZWELIBANZI WILLIAM NGQUQU N.O.

Applicant

(In his capacity as the executor of the deceased estate of the late Petru Steyn, Estate Number 360[...])

And

DANE STEYN

Respondent

IN RE:

DANĖ STEYN

Applicant

and

ZWELIBANZI WILLIAM NGQUQU N.O.

1st Respondent

(In his capacity as the executor of the deceased estate of the late Petru Steyn, Estate Number 360[...])

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

JUDGMENT BY:

MHLAMBI, J

DELIVERED ON:

07 DECEMBER 2023

- [1] This is an application for leave to appeal against the whole of the order and judgment delivered in January 2023 as well as the variation order dated 9 June 2023 on the following grounds:

“1. The Honourable Justice Mhlambi, while correctly identifying at paragraph 23 of his judgment, that the controversy between the parties became moot, erred by in fact granting the order of costs against the First Respondent, as his decision was based on his finding that when the Master’s endorsement was granted on 25 August 2022, the contract of sale was concluded in contravention of section 42(2) of the Administration of Estate Act 66 of 1995 as amended (the Act).

1.1 Section 47 of the Act 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 stock-broker 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-

- a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or*
- b) if the said heirs are unable to agree on the manner and condition of the sale, the executor shall sell the property in such manner and subject to such condition as the Master may approve.”*

1.2 The Applicant communicated the disagreement between the heirs to the Second Respondent as early as April 2022, thus evoking that the sale of the immovable properties at the heart of this controversy, be dealt with in terms of section 42(2)(b) of the Act.

- 2. The Learned Judge erred in finding that the matter was urgent when there existed no factual or legal basis for the matter to be adjudicated on an urgent basis when there was no live controversy between the matters.*
- 3. The court a quo erred in making factual findings pertaining the circumstances surrounding the re-payment of the purchase price and the auctioneer’s fees and accepting same to be indicative of termination of the sale agreement in point.*
- 4. Further, the Learned Judge erred in find that the First Respondent’s conduct was unprofessional and warranted that an order of a punitive cost order against the First Respondent in his personal capacity.*

5. Accordingly, it will be argued that there are reasonable prospects of success that another court will come to a different decision to that of the Court a quo and find that the Applicant's application for a final interdict ought to have been dismissed with costs. In the circumstances, leave to appeal ought to be granted in accordance with section 17(1)(a)(i) of the Superior Courts Act 10 of 2013"

- [2] On 03 July 2023 the applicant filed a condonation application for the late filing of the leave to appeal the order granted in January 2023. The application was late by about 5 months. In the founding affidavit, it was stated that:

"11. I was perplexed on 9th June 2023, when I was served with a variation order obtained in terms of uniform court rule 42(1)(b), wherein it was clarified that the cost order granted on January 2023 was against me in my personal capacity. It was at this point that I became aware that there was reason for me to appeal the judgment and order in toto, particularly because the rationale for the grant of the order is premised of the Court's finding that my conduct as an Executor in dealing with the immovable property at the centre of this controversy...

13. It is my submission that in light of the fact that the order which motivated the appeal is the variation order handed down on 9 June 2023. However, should this Court find that the I should have appealed five months ago, I bring this condonation application."

- [3] In paragraph 17 of the affidavit the deponent stated that:

"17. I submit that the I have prospects of success in the appeal, because of the substantial error made by the Learned Judge in both fact and law. It follows therefore that there are reasonable prospects of success that another court will come to a different decision to that of the Court a quo and find that the Respondent's application for final interdict ought to have been dismissed with costs."

- [4] In the heads of argument, it was contended that the presiding officer erroneously relied on an incorrect sub-section¹ and further failed to consider all the facts placed before him.² As regards the variation order, reference was made to Rule 42 of the Uniform Rules of Court and it was submitted that this Rule was confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission.³ It would seem that the crux of this appeal is contained in the following passage:

¹ Section 47 of The Administration of Estate Act 66 of 1965.

² Para 26 of the Applicant's heads of argument.

³ Paragraph 24 of the Applicants Heads or Argument.

“25. It is undeniable that the court a quo’s variation may have been permissible in law, however, in light of the fact that the variation was sought by some form of application by the Respondent, which the Applicant was not aware of, there are reasonable prospects that when afforded an opportunity through the principle of audi alteram partem, prospects of success exist in such a court. There was no application or notice of any form served on the Applicant alerting him of the sought variation.”

There is no merit in the submission that prospects of success will exist if the applicant is afforded *audi alteram partem*. However, it may be a compelling reason that the applicant was not afforded *audi* in respect of the payment of costs in his personal capacity.

[5] The applicant has not made a proper case for the granting of condonation as the explanation for the delay or default is not reasonable or acceptable.

[6] Consequently, I make the following order:

Order

1. The application for condonation is dismissed with costs.
2. The application for leave to appeal the order and judgement delivered in January 2023 is dismissed.
3. Leave to appeal the variation order of June 2023 is granted to the full bench of this court.
4. Costs of the appeal in 3 above will be costs in the appeal.

MHLAMBI, J

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