IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES
[18 January 2018]

CASE NO. 2014/49407

18/1/18

In the matter between:

PQR 82 PROPERTIES (PTY) LTD — Applicant

and

GERALDEAN JAYDE ERASMUS N.O. — Respondent

JUDGMENT

DU PLESSIS AJ:

1. The applicant is being represented by its director, Maria Madalena Consalves Erasmus, who was married to the deceased, Garth Joseph Erasmus, at the

time of his death on 4 October 2013. The respondent is Geraldean Jayde Erasmus, in her capacity as the appointed executrix in the estate of the deceased and who is the deceased's daughter from a previous marriage.

2. The applicant claims a statement and debatement of account from the respondent reflecting all amounts received from the tenant in respect of an agreement of lease relating to an immovable property situated at 7 Les Jardins, 43 Berkeley Avenue, Bryanston ("the immovable property"). It also claims the repayment of an amount of R250 000.00 with interest on the basis that such payment was made unlawfully and irregularly from the account of the applicant.

3. The respondent did not oppose the relief in respect of the statement and debatement, but instituted a counterclaim for the same relief against the applicant. She opposed the claim for the repayment of the sum of R250 000.00.

4. I intend to deal with the applicant's claim for a statement and debatement, the respondent's counterclaim for a statement and debatement and the applicant's claim for repayment of the sum of R250 000.00, in that order.

5. It should immediately be made clear that the applicant's claim for a statement and debatement is very limited. As set out above, in the notice of motion such relief is limited to all amounts received from the tenant in respect of an agreement of lease relating to the immovable property. In argument Adv

Steenekamp, who appeared for the applicant, confirmed that this was the relief sought by the applicant. This also appears from the applicant's heads of argument.

6. The reason I emphasise this point is that in the papers both the applicant and the respondent seemed to assume that much more would be debated.

7. The facts regarding this claim are as follows:

7.1. The applicant is the owner of the immovable property;

7.2. The immovable property is the subject of a lease agreement and, from about August 2013 to April 2014, the tenant made the monthly rental payments into the deceased's personal banking account;

7.3. The respondent made payment of an amount of R180 118.45 to the applicant on about 4 June 2014 in respect of 50% of the funds alleged to have been received by the deceased from the tenant until April 2014;

7.4. From May 2014 the tenant has paid the rental and utility charges into the trust account of the applicant's attorneys of record.

8. As stated above, the respondent did not dispute her liability to render an account to the applicant for the rentals received. In a replying affidavit to the

counter application, she referred to a forensic audit that was conducted on her instructions regarding the indebtedness of the applicant to the estate. A copy of the audit report was annexed to the affidavit. She alleged, and it was argued on her behalf by Adv Grobler, that this audit complied with the requirement to provide an account.

9. I do not agree. The report does not contain any documentary proof of payments received and does not comply with the minimum requirements for a statement of account. It is not something that is capable of being debated. The statement should be limited to the purpose for which the applicant requires it, namely to prove the amounts received by the deceased in respect of rentals for the period stated.

10. The period of the statement to which the applicant is entitled, is also limited. On its own version it has received the rental and utility payments from May 2014 and it is not entitled to a statement for the period thereafter. The respondent would simply not be in a position to provide such a statement and any order to that effect will be incapable of being enforced. Counsel for the applicant could also not provide adequate reasons why the applicant would be entitled to a statement for the period thereafter.

11. In the premises the applicant is entitled to a statement and debatement of an account from the respondent reflecting all amounts received from the tenant in respect of the agreement of lease relating to the immovable property for the period August 2013 to May 2014. As far as the procedure to be adopted is

concerned, I am of the view that a simple procedure should be adequate as the statement is of such a limited nature. There should not be major disputes as far as the receipt of rentals is concerned.

12. In Doyle and another v Fleet Motors PE (Pty) Ltd[1] Holmes JA accepted that in South Africa there is no prescribed procedure for a statement and debatement of an account. He made general observations about the procedure to be adopted when a party sought a statement of account, debatement and payment of moneys due. The learned Judge noted:

> *"The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might be appropriate that vouchers or explanations be included . . . [Where] the plaintiff has [already] received an account which he avers is insufficient, the court may enquire into and determine the issue of sufficiency in order to decide whether to order the rendering of a proper account . . . In general the court should not be bound to a rigid procedure, but should enjoy some measure of flexibility as practical justice may require."*

13. I am of the view that the parties should first debate the account amongst themselves with the help of their attorneys. If they are then still unable to agree, they can follow the procedures suggested in the Doyle- case supra.[2]

14. The respondent's counter application was much wider and sought an account "reflecting all amounts received by the Applicant for the period from 29 March 2011 to date hereof", as well as one reflecting all amounts paid during the

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1 1971 (3) SA 760 (A). See also Grancy Property Ltd and another v Seena Marena Investment (Pty) Ltd and others [2014] 3 All SA 123 (SCA)

2 Nusca v Nusca and another 1995 (4) SA 813 (T) at 820

same period. The basis for the claim was not in the respondent's capacity as a shareholder of the applicant[3], but on the basis of the fiduciary relationship that existed between the deceased (in his capacity as a director) and the applicant.

15. The respondent relied on the Doyle-case supra for her entitlement to the statement. In that matter the court held that a plaintiff should aver its right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise.[4] In Absa Bank Bpk v Janse van Rensburg[5] the SCA subsequently held that a party would have to prove either (a) the existence of a fiduciary relationship between him and the other party, or (b) that the other party had contractually bound himself thereto, or (c) the existence of a statutory duty obliging the other party to deliver and debate an account.[6]

16. In this matter there is no contractual or statutory duty on the applicant to deliver an account to the respondent, nor has the respondent referred to or relied on any such duty. The only question remaining is whether the respondent, in her capacity as the executrix in the deceased's estate, is in a fiduciary relationship with the applicant.

17. In my view the argument that the deceased was in such a relationship and that the respondent can rely thereon, cannot prevail. She represents the

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3 Clutchco (Pty) Ltd v Davis 2005 (3) SA 486 (SCA) at para [14]
4 At 762F
5 2002 (3) SA 701 (SCA)
6 At para [15]

deceased's estate, not the deceased. She does therefore not climb into the shoes of the deceased and cannot rely on the rights that he may have had during his lifetime. To argue otherwise would mean that the executrix would also be able to enforce other rights that the deceased would have had as a director of the applicant. That can never be so.

18. In the absence of a fiduciary relationship between the respondent and the applicant, the respondent is not entitled to claim delivery and debatement of an account from the applicant. The counter application therefore falls to be dismissed.

19. The relevant facts relating to the applicant's claim for repayment of the sum of R250 000.00, are the following:

19.1. An immovable property owned by the deceased was sold by him for an amount of R1 381 037.07, which amount was paid into his bank account on or about 4 September 2013;

19.2. The deceased transferred an amount of R1 000 000.00 into the bank account of the applicant on 9 September 2013;

19.3. The deceased advised Winifred Erasmus ("Winifred"), his ex-wife and the respondent's mother, that he intended paying her half of the net proceeds of the sale;

19.4. On 4 October 2013 the deceased sent a text message to Winifred, advising her that he had transferred an amount of R500 000.00 to her. Because the payment limit on the applicant's bank account was only R250 000.00, only an amount of R250 000.00 was in fact transferred to her.

20. Based on these facts, the applicant alleges that the payment was one for the deceased's personal debts which was made with the applicant's funds. The payment was without the knowledge or consent of the deceased's wife, who was a co-director at the time, and was therefore unlawful and irregular. The applicant claims repayment of the amount from the estate.

21. It is not clear what the reason was for the payment of R1 000 000.00 from the deceased's personal account to the applicant. The applicant's version is that the deceased was indebted to the applicant in the sum of R2 000 000.00 for monies lent and advanced and that the payment of the R1 000 000.00 was for part-payment thereof. On its version the deceased's estate is still indebted to the applicant for the balance of R1 000 000.00. When the payment was therefore made to Winifred out of the applicant's account, it was made from funds belonging to the applicant.

22. The respondent's version is just that the deceased intended to pay R500 000.00 to Winifred. Although it was argued before me that the deceased did not owe the applicant any money and that the payment of the R1 000 000.00 was only for that purpose, no such allegations are contained in

the respondent's affidavits. In fact, there does not seem to be any explanation for the payment of the R1 000 000.00 into the applicant's account as the deceased could have paid the R500 000.00 to Winifred from his personal account. It is also not clear why R1 000 000.00 was transferred if his intention was to only pay R500 000.00 to Winifred.

23. In the absence of an explanation from the respondent, and also on probabilities, I must find that the deceased paid the R1 000 000.00 into the applicant's account as repayment of a debt. If there was no underlying reason for the payment, the respondent would have had a claim against the applicant for repayment thereof. No such claim has been instituted.

24. I am of the view that no factual dispute exists in this regard and that, whatever the reason for the payment into the applicant's account may have been, such fact is irrelevant in the determination of the applicant's right to reclaim the payment of the R250 000.00. Once the R1 000 000.00 was paid into the applicant's account, it was no longer separate from the applicant's funds and could only be dealt with by the applicant in terms of the company laws and good corporate governance. Even if it constituted a loan account in favour of the deceased, he would not have had the right to pay his personal debts without the knowledge and consent of his co-director.

25. The fact remains that the deceased paid a debt, which it is common cause was a personal debt and not one owed by the applicant, from the applicant's account without the knowledge and consent of his co-director. The applicant

is entitled to reclaim the amount from him, which in this case is from the respondent in her capacity as the executrix in his estate.

26. Although the competency of the applicant's claim for repayment was not argued before me, I pause to state that a creditor is not precluded by the provisions of the Administration of Estates Act, 66 of 1965, from instituting action in terms of its common-law right against the deceased estate for the recovery of a debt owed by the deceased.[7] The claim is therefore competent.

27. In the premises I make the following order:

27.1. The respondent is ordered, within 14 calendar days of the granting of this order, to provide the applicant with an account reflecting all amounts received by the deceased estate of Garth Joseph Erasmus ("the deceased estate") from the tenant of the immovable property situated at 7 Les Jardins, 43 Berkeley Avenue, Bryanston ("the immovable property") in terms of the lease agreement entered into on 17 July 2012 at Sandton, for the period 1 August 2013 to 31 May 2014;

27.2. The account shall include:

27.2.1. A list of all amounts received by the deceased estate from the tenant and the date on which each amount was received, duly

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[7] Nedbank Ltd v Steyn and others 2016 (2) SA 416 (SCA)

separated to reflect the amounts received in respect of rental and utilities;

27.2.2. Attached copies of each payment receipt corresponding with each amount listed in the account, alternatively shall include attached copies of the deceased's bank account statements for the bank account into which each payment was received;

27.3. The respondent shall debate with the applicant's duly appointed representative the account so delivered, which debate shall be concluded within 14 calendar days from the date of the delivery of the account;

27.4. The parties are entitled to legal representation at the debate of the account;

27.5. The respondent shall pay within 5 days of the conclusion of the debate referred to above, all amounts found to be due to the applicant plus interest *a tempore morae* at a rate of 10,25% per annum to date of payment, to the applicant;

27.6. Any party is entitled to approach this court on the same papers, duly supplemented where necessary, for the appropriate relief in the event that no agreement can be reached on either the adequacy or accuracy of the account or the amount of the respondent's indebtedness to the applicant, if any;

27.7. The respondent is ordered to pay to the applicant the sum of R250 000.00, together with interest thereon at a rate of 10,25% per annum from 4 July 2014 to date of payment;

27.8. The respondent's counter-application is dismissed;

27.9. The respondent is ordered to pay the applicant's costs of the application and the counter-application.

D T v R DU PLESSIS
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DATE OF HEARING: 30 November 2017

DATE OF JUDGMENT: 18 January 2018

COUNSEL FOR APPLICANT: Adv A Steenekamp

INSTRUCTED BY: Van Wyk Van Deventer Inc.

COUNSEL FOR RESPONDENT: Adv J F Grobler

INSTRUCTED BY: Van der Hoff Inc.