

REPUBLIC OF SOUTH AFRICA


 IN THE HIGH COURT OF SOUTH AFRICA
 (LIMPOPO DIVISION, POLOKWANE)

CASE NO: 3945/2016

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
Signature <i>[Handwritten Signature]</i>	
Date... 17/08/2017	

In the matter between:

MARGARETH JOHANNA CONRADIE JACKSON**APPLICANT**

and

STANFORD CAWOOD**1ST RESPONDENT****STAR CHOICE TRADING 38 (PTY) LTD****2ND RESPONDENT****JOHAN BARRY CORNELIUS****3RD RESPONDENT****CHRISTO QUINTUS NEL N.O****4TH RESPONDENT****FRANCOIS NOLTE N.O****5TH RESPONDENT****THE MASTER OF THE HIGH COURT, POLOKWANE****6TH RESPONDENT**

JUDGMENT

MAKGOBA JP

- [1] There are two applications before me brought under the same case number by the Applicant against the Respondents. I shall refer to the first application issued on 7 September 2016 as the main application and the second application issued on 4 October 2016 as an *ex parte* urgent application.
- [2] By means of the main application the Applicant claims final relief in the form of a declaratory order that a contract entered into between the First or Second Respondent on the one side and the Third Respondent in his capacity as executor in the deceased estate of the Applicant's late husband be declared void and unenforceable. On the back of the declaratory order sought, the Applicant further claims ancillary relief that the First and Second Respondents be ordered to forthwith return any and / or all items which they removed from the property known as the Farm

Doornhoek 342 K.R Naboomspruit, Limpopo Province pursuant to the contract sought to be declared void and unenforceable.

- [3] In the alternative to the final relief sought in respect of the aforementioned contract, the Applicant claims an interim interdict pending the finalization of an action to be instituted within 30 days from date of the order granted. In essence the interim relief sought is concerned with the stay and suspensance of the aforementioned contract.
- [4] The First to Third Respondents opposed the main application. The Fourth and Fifth Respondents deposed to confirmatory affidavits in support of the opposition of the main application.
- [5] In the second application, that is the *ex parte* urgent application, the Applicant on an *ex parte* basis obtained an interim interdict against the execution of the aforementioned contract pending the finalization of the main application. The First to Third Respondents, again supported by the Fourth and Fifth Respondents opposed the final granting of the interim interdict sought by means of the *ex parte* urgent application.

The interim application, that is the second application is set down for hearing on the same day as the main application.

- [6] In my view for all intends and purposes, the interim application in terms of which an interim interdict was granted on *ex parte* basis pending finalization of the main application has thus become obsolete and academic save for the issue of the costs thereof.
- [7] The first issue for adjudication is whether the Applicant in both applications has the necessary *locus standi in indicio*. The Respondents specifically contend that the Applicant has no *locus standi in indicio* to claim any of the relief sought by means of the main application. Accordingly, if it is found that the Applicant lacks *locus standi in indicio* to seek the relief sought by means of the main application, the Applicant will also not have any *locus standi in indicio* to seek on an *ex parte* basis an interim interdict pending the finalisation of the main application.
- [8] The issue for adjudication is whether the Applicant has made out a case on motion to obtain final declaratory relief that the contract

entered into between on the one hand the First or Second Respondent and on the other hand the Third Respondent, that is, the executor in the deceased estate of the Applicant's late husband is void and unenforceable.

[9] The following facts are common cause in this matter:

- 9.1. The Applicant is the widow of the late Hendry Jacob Jackson who died on 5 December 2015 ("the deceased");
- 9.2. The Applicant is not an heir or beneficiary in terms of the last will and testament of her deceased husband;
- 9.3. The deceased was married out of community of property to the Applicant. Accordingly in addition of not being an heir or beneficiary in terms of the last will and testament of the deceased, the Applicant also does not have any interest in the estate of the deceased by virtue of the marital regime that existed between the Applicant and the deceased;
- 9.4. In terms of clause 2 of the last will and testament of the deceased, the Third Respondent was nominated to be the executor of the deceased estate;

- 9.5. The Third Respondent (an attorney) accepted the nomination and was appointed as the executor by the Sixth Respondent on 8 February 2016;
- 9.6. The Applicant is not the executrix of the estate of the deceased;
- 9.7. In terms of the last will and testament of the deceased, he bequeathed his entire estate to a *mortis causa* trust, known as the Boet Jackson Trust;
- 9.8. According to the last will and testament of the deceased three trustees were appointed for the *mortis causa* trust, namely the Applicant, Fourth and Fifth Respondents;
- 9.9. The Sixth Respondent issued the required letter of authority in favour of the three trustees of the Boet Jackson Trust on 25 February 2016;
- 9.10. In *casu* the majority of the trustees did not authorize the Applicant to bring the present application. In fact the majority of the trustees are in support of the opposition of this application. Accordingly the Applicant cannot rely on her capacity as a trustee of the *mortis causa* trust to clothe her with the necessary *locus standi in indicio* to bring this application;

- 9.11. The last will and testament of the deceased identify the Applicant as one of the five income and capital beneficiaries of the *mortis causa* trust;
- 9.12. The Trust is a discretionary trust and no beneficiary is entitled to any benefit other than in the exclusive discretion of the trustees. Accordingly, the Applicant as capital and income beneficiary of the trust does not have any vested right or interest that will clothe her with *locus standi in indicio*;
- 9.13. The present application is not brought by the Applicant on the basis of the improper execution or exercise of the discretion of the trustees. No relief is sought against the trustees of the Boet Jackson *mortis causa* trust, that is the sole beneficiary of the deceased estate;
- 9.14. The principal relief sought by the Applicant is a final declaration that a contract concluded between on the one side, the First Respondent or the Second Respondent and on the other side the Third Respondent, the executor is void. The Applicant is not a party to the contract concerned. Accordingly the Applicant does have *locus standi in indicio* as a party to the contract concerned in respect of which she seeks a declaration that the contract is void;

9.15. The contract concerned is a sale agreement in terms of which the executor of the deceased estate sells to the First or Second Respondents certain scrap, being the estate assets;

9.16. The contract concerned was entered into during April 2016 and thus after the executor (Third Respondent) was properly appointed on 8 February 2016. Accordingly the executor, as the custodian of the entire estate was entitled in fact and law to enter into the contract;

9.17. The last will and testament of the deceased makes provision for the payment of maintenance to the Applicant in the absolute and exclusive discretion of the trustees of the *mortis causa* trust.

[10] It is the Respondents' case that the Applicant lacks the necessary *locus standi in indicio* in respect of the contract concerned to claim any relief in respect of thereof more specifically to claim a declaration that the contract is void.

[11] The Respondents' denial of the Applicant's *locus standi in indicio* is based upon the submission that in law only the trustee is entitled

to take action to recover damages for injury or loss to a trust estate. A beneficiary has no standing to do so.

In order to sustain a direct action the Applicant must have as beneficiary a vested interest in the trust. In *casu* the Applicant's interest in the future income and capital of the Trust is merely contingent. Consequently, the Applicant in this matter lacks *locus standi in indicio*.

- [12] The Applicant in this matter did not approach the Court as trust beneficiary for any relief against any of the trustees for maladministration of the trust estate or transferring to her as trust beneficiary what is due to her. It is accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the executor thereof and that normally a beneficiary in the estate does not have *locus standi* to do so. This was the conclusion reached by the Supreme Court of Appeal in the decision, **Gross & Others v. Pentz 1996 (4) SA 617 (A) at 623 B – 625 E.**

[13]

The principle applicable to the case of the executor applies equally to the trustees of a testamentary trust since he is vested with the dominium of the trust assets.

It follows that a beneficiary under a trust (like the Applicant herein) who considers that the trustee has acted improperly by failing to recover assets on behalf of the trust, will not ordinarily be entitled to take legal action himself and join the trustee as a nominal co – defendant in the proceedings against the third party. See **Gross & Others v. Pentz**, *supra* at 625 B – D.

[14]

The Applicant has no vested interest, right and / or obligation in respect of the *merx* sold by means of the contract concerned. Her interest and rights are dependent upon the discretionary powers of the trustees of the Trust. The Applicant does not have any interest to seek the relief sought in respect of the mentioned contract. It is trite that in order to claim a declaration of right, as the Applicant does in prayer 1 of the Notice of Motion, it is an essential requirement that the litigant must be an interested party. See **Muldersdrift Sustainable Development Forum v. Council of Mogale City Local Municipality 2015 JDR 1879 (SCA)**.

- [15] In terms of section 21 (1) (c) of the Superior Courts Act 10 of 2013 the Court has the power in its discretion and at the instance of an interested person to enquire into and determine any existing, future or contingent right or obligation. In **Illovo Opportunities Partnership v. Illovo Junction Properties (Pty) Ltd & Others [2014] ZASCA 119 at para [14]** it was held that in order to obtain a declaratory order in terms of section 21 (1) (c) of the Superior Courts Act 10 of 2013, the Applicant must have a direct and substantial interest in the order sought.
- [16] It was further specifically held in the aforementioned decision that it is insufficient for the Applicant to have an indirect interest such as a financial or commercial interest in the outcome of the litigation. It was also held that it is also inadequate for the interest to be derivative in the sense that it depends upon the validity and existence of some other right. See also **Polokwane Local & Long Distance Taxi Association v. Limpopo Permissions Board 2017 JDR 0698 (SCA) at para [18]**
- [17] The Applicant has not demonstrated that she has *locus standi in indicio* to claim any relief in respect of the contract concerned. In

the premises, the point *in limine* of a lack of *locus standi in indicio* is upheld and the application is dismissed.

[18] For the sake of completion I proceed to deal with the application on the merits.

[19] Regarding the merits of the main application the Applicant contends that the contract entered into should be declared invalid for one or more of the following reasons or grounds alleged by her:

19.1. The conclusion of the contract allegedly came about as a result of material misrepresentation by the First Respondent;

19.2. The First Respondent is allegedly an unrehabilitated insolvent;

19.3. The Third Respondent (the executor) allegedly did not have the necessary authority in terms of section 47 of the Administration of Estates Act 66 of 1965 (" the Estates Act") to enter into the contract ;

19.4. The *merx* sold is allegedly not properly identifiable as a result of which the contract is void because of it being vague.

- [20] I proceed to deal *seriatim* with the grounds upon which the Applicant relies in seeking a relief declaring the contract void and unenforceable.

Material Misrepresentation

- [21] The Applicant alleges that the First Respondent in negotiating the contract concerned with the executor (the Third Respondent) made material misrepresentations in respect of the value of the *merx*.
- [22] There exist various disputes of fact in relation to the aforementioned ground relied upon by the Applicant which makes the relief sought impossible by being granted by means of motion procedure. The existence of these factual disputes was clearly known or should have been foreseen by the Applicant.
- [23] At best for the Applicant, even if it is accepted that the First Respondent fraudulently misrepresented material facts in respect of the value of the *merx* to the executor, (the Third Respondent), the contract will be voidable at the election of the innocent party to

the contract, that is the executor. The latter has an election whether to claim cancellation of the contract concerned on the basis of the alleged fraudulent misrepresentation or to keep the contract alive and claim damages. It should be borne in mind that the Applicant is not a party to this contract.

- [24] In the circumstances the aforementioned ground relied upon for the relief sought cannot give rise to the granting of the relief sought by the Applicant in the circumstances.

First Respondent is an unrehabilitated insolvent

- [25] The Applicant alleges that the contract should be declared void on the ground that at the time that the contract was entered into, the First Respondent was an unrehabilitated insolvent.
- [26] The allegations that the First Respondent is an unrehabilitated insolvent are misconceived and factually inaccurate. The correct facts are that the First Respondent is not an unrehabilitated insolvent as he was rehabilitated by an order of Court granted as

far back as 28 July 2005. Accordingly there is no merit in the allegation and Applicant's Counsel correctly conceded.

Non – compliance with section 47 of Administration of Estates Act 66 of 1965

[27] The Applicant alleges that there was no written permission in terms of section 47 of the abovementioned Act granted by the beneficiaries of the deceased's will for the executor (Third Respondent) to enter into the contract concerned and that failing such written permission the contract is void.

[28] Section 47 of the Estates Act provides as follows:

"47 Sales by executor

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 conditions of the sale,

the executor shall sell the property in such manner and subject to such conditions as the Master may approve”.

[29] Section 47 of the Act relates to the manner and conditions of sale of estate property by the executor, and not to the decision as to whether or not to sell. That decision falls within the powers of the executor alone. He merely requires approval as to the way in which he intend to carry it out.

See Essack v. Buchner NO & Others 1987 (4) SA 53 (N)

[30] The allegation that there was no permission granted to the executor is inaccurate. In any event the executor does not require the permission of the beneficiaries to enter into the contract concerned.

[31] The undisputed evidence is that all the three trustees (thus also the Applicant) authorised the contract which was entered into by the executor. In this regard the Applicant herself signed a resolution and minutes of a meeting held by the trustees on 5 April 2016 in terms of which the agreement was discussed and authorised. The said resolution and minutes are contained in the Annexures "C5" and "C6" to the Opposing Affidavit.

[32] The objection and ground relied upon herein is not only bad in law but also factually inaccurate. Accordingly, there is no merit in this ground relied upon by the Applicant.

Contract is vague

[33] The last ground relied upon by the Applicant for her claim that the contract (to which she is not a party) be declared void is that the contract is allegedly vague in respect of a material aspect, to wit, the *merx*. This ground can only be raised by one or both of the parties to the contract, that is, the seller and / or the purchaser. The Applicant is neither of these two.

[34] Here we have a situation where the parties to the contract and they being the parties who should execute the contract are *ad idem* that they are willing and able to do so.

In the circumstances it is rather odd that the Applicant who is not a party to the contract wants to declare such contract void.

The Applicant's standpoint in this regard is ill-advised and misconceived.

[35] The requirement of law applicable to this ground relied upon, is that the property sold must be ascertained or ascertainable. It is trite that meticulous accuracy in the description of the *res vendita* is not required. See **Clements v. Simpson 1971 (3) SA 1 (A)**.

[36] In *casu* the contract explicitly states the following:

“Die Verkoper verkoop hiermee aan die Koper, wie hiermee in koop aanneem, die uitgewyste skroot eiendom gelee te:

DIE UITGEWYSTE DEEL TE UNION TIN MYN, PLAAS DOORNHOEK”

The aforementioned *merx* agreed upon is in my view clearly ascertainable and is in conformity with the principle enunciated in **Clements v. Simpson, supra at 7H to 8A**.

If the *merx* is ascertainable as in *casu* clearly is, the contract concerned is not void as contended by the Applicant.

[37] I come to the conclusion that none of the grounds relied upon by the Applicant for her claim that the contract (to which she is not a party) is void, can in fact or in law give rise to a finding that the contract is void.

[38] In the premises of all the aforementioned and even if it is assumed in favour of the Applicant that the Applicant has the necessary *locus standi in indicio* (which she does not have) the interest of justice would not require this Court to come to the assistance of the Applicant in granting a declaration that the contract concerned is void.

[39] The fact that the Applicant does not have *locus standi in indicio* is also decisive of the second application, that is the interim application brought on an urgent *and ex parte* basis.

The rule *nisi* in respect of the interim order obtained *ex parte* is accordingly discharged.

[40] I therefore grant the following order:

- (1) The main application is dismissed with costs.
- (2) The Applicant to pay also the costs of the *ex parte* urgent application.
- (3) All costs payable shall be on party and party scale.

A handwritten signature in black ink, appearing to read 'E M Makgoba', is written over a horizontal line.

E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION,
POLOKWANE

APPEARANCES

Heard on : 7 August 2017

Judgment Delivered : 18 August 2017

For Appellant : Adv. R J Groenewald

**Instructed by : Van Onselen & Partners
c/o Steytler Nel & Partners
Polokwane**

For Respondents : Adv. G F Heyns

**Instructed by : Dawie Beyers Inc
c/o Smit & Maree Attorneys
Polokwane**