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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2023-003795

(1) REPORTABLE: YES / **NO**

(2) OF INTEREST TO OTHER JUDGES: YES/**NO**

(3) REVISED: YES/**NO**

DATE: 20 AUGUST 2025

SIGNATURE

In the matter between: -

NOTEFULL 1122 (PTY) LTD

APPLICANT

and

**MICHAEL BAKER N.O
(IN HIS CAPACITY AS EXECUTOR OF THE
LATE ESTATE THOMAS CHARLES BARKER)**

1st RESPONDENT

**MASTER OF THE HIGH COURT
JOHANNESBURG**

2nd RESPONDENT

REGISTRAR OF DEEDS, PRETORIA

3rd RESPONDENT

**SUSANNA TINTINGER N.O.
(IN HER CAPACITY AS THE
LIQUIDATOR OF THOMAS
MAXWELL KITHCEN (PTY) LTD
(in liquidation)**

INTERVENING PARTY

Case number: 42617/2017

And in the matter between:

**SUSANNA TINTINGER N.O.
(IN HER CAPACITY AS THE LIQUIDATOR OF
THOMAS MAXWELL KITHCEN PTY LTD
(In liquidation)**

APPLICANT

and

**MICHAEL BARKER N.O.
(IN HIS CAPACITY AS EXECUTRIX OF
THE LATE ESTATE THOMAS
CHARLES BARKER)**

1st RESPONDENT

NOTEFUL 1122 (PTY) LTD

2nd RESPONDENT

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

[1] In this matter there are two distinct applications:

[1.1] Case number 2023-003795 concerns an application to transfer Sectional Unit 5[...], G[...] Park ([...] T[...] Ave, Sunninghill, scheme no. 470/1990) (*“the property”*) from the estate of the deceased, Thomas Charles Barker, (*“the deceased’s estate”*) to the Applicant. This application was instituted on 30 April 2021.

[1.1.1] The Applicant asserts that it purchased the property in January 2000 from the deceased; however, transfer of ownership was never effected.

[1.1.2] Michael Barker, the First Respondent and brother of the deceased, is the appointed executor of the estate and does not oppose the relief sought.

[1.1.3] The Fourth Respondent, who opposes the property transfer, is the liquidator of Thomas Maxwell Kitchens (Pty) Ltd [in liquidation] (*“TMK”*), where the deceased was the sole director. The liquidator is responsible for collecting all claims for the insolvent estate.

[1.1.2.1] The insolvent estate of TMK has a claim against the estate of the deceased in the amount of *R1 372 896.00*. This sum relates to a loan account outstanding in favour of the insolvent estate of TMK.

[1.2] The second application, case number 42679/2017, concerns the sequestration of the deceased’s estate, with the First Respondent as executor launched during May 2017.

[1.2.1] This application concerns a claim made by the insolvent estate of the company in liquidation, Thomas Maxwell

Kitchen (Pty) Ltd (referred to as the "insolvent estate"), against the estate of the deceased.

- [1.2.2] The Applicant is the liquidator appointed for the insolvent estate of the company.
- [1.2.3] The First Respondent, the executor of the deceased, did not oppose the application.
- [1.2.4] The Second Respondent, *Notefull 1122 (Pty) Ltd*, who is also the Applicant in the transfer application, pleaded that it purchased the property from the deceased in 2000 but did not receive transfer of ownership. The Second Respondent does not contest the sequestration application.

FACTUAL MATRIX:

FIRST APPLICATION UNDER CASE NUMBER 2023-003795 – TRANSFER OF PROPERTY

FOUNDING AFFIDAVIT

- [2] The Applicant's case, as pleaded in its Founding Affidavit, is reliant on the following facts:

- [2.1] In January 2000, the Applicant (purchaser) and the deceased (seller) entered into an agreement for the sale of the property.¹

- [2.1.1] In the offer to purchase, Annexure FA3,² the seller is depicted as the deceased and the purchaser as *Notefull 1122 (Pty) Ltd*.

¹ Annexure FA3 Case Lines A20

² A20

- [2.1.2] *Notefull 1122 (Pty) Ltd* was represented by *Mr. Phil Hemsley*.
- [2.1.3] The purchase price was *R139 514.57*, although the offer depicts *R139 515.00*.
- [2.1.4] The deceased was paid the purchase price, but no proof was provided.
- [2.2] Before the Applicant could take transfer of the property, the deceased emigrated to the United Kingdom and could not be reached to sign the necessary documents for the registration of transfer.³
- [2.2.1] The Applicant did not specify the date of the deceased's emigration nor detail the efforts undertaken to determine the deceased's whereabouts.
- [2.3] When the Applicant became aware of the deceased's whereabouts and return to South- Africa the Applicant then immediately instructed their Attorney to proceed with the transfer.
- [2.3.1] The Applicant did not specify how it learned of the deceased's return to RSA.
- [2.4] During September 2017, the conveyancers prepared all of the necessary documents to effect transfer of the property.
- [2.5] The deceased committed suicide on 31 March 2018.⁴
- [2.6] The Applicant could not take transfer from 31 March 2018 because the property became part of a deceased estate and there was a delay in obtaining letters of authority to appoint an executor.

³ Founding affidavit at paragraph 22, Case Lines A14.

⁴ Annexure FA4 at A24

[2.7] The Applicant had acted as the "owner" of the property, although the transfer had not yet taken place.

[2.7.1] The Applicant's group of companies (*Advancenet CC* and *Advancenet (Pty) Ltd*) made payments of amenities relating to the property- being payment of the City Councils bills for water, electricity and related services and payment of the levies charged by the company managing the estate.

[2.8] In confirmation of the sale of the property the deceased acknowledged that he was the transferer of the property in an affidavit dated 1 September 2017 and an undated affidavit to the transfer documentation.⁵

INTERVENTION OF TRANSFER APPLICATION BY THE LIQUIDATOR

[3] The Applicant launched the transfer of the property application in the High Court Gauteng Division, Johannesburg. The Liquidator was initially not cited as a party in the proceedings.

[4] The liquidator applied for leave to intervene the specific performance application which application was not opposed.

[4.1] The liquidator was appointed as the final liquidator in *Thomas Maxwell Kitchen (Pty) Ltd*. She also filed a sequestration application against the executor in May 2017.

[5] The specific performance application was transferred to the High Court, Gauteng Division, Pretoria on 26 May 2022.⁶

⁵ Annexures FA5 and FA6 at A25 and A26

⁶ Annexure A at J19

[6] The liquidator in the intervention application pleaded that the Applicant's version is:

- [6.1] not reasonable or possibly true;
- [6.2] the version fails to make any sense; and
- [6.3] is so distorted and void of truth that it should be rejected outright.

[7] The liquidator raised various issues, namely:

- [7.1] the suspicious timing of the sale agreement;
- [7.2] the alleged prescription of the Applicant's claim;
- [7.3] the municipal account being in the deceased's name and
- [7.4] the corporate "*identity issues*" of *Notefull 1122* and *Advancenet*.

APPLICANT'S SUPPLEMENTARY AFFIDAVIT

[8] Subsequent to the intervention application the Applicant filed a supplementary affidavit to address the issues raised by the liquidator in the intervention application. Nevertheless, these are matters that the Applicant should have anticipated and addressed in its Founding Affidavit. The Applicant raised the following issues, which will be examined in detail under the appropriate headings below.

- [8.1] The timing of the sale agreement;
- [8.2] Prescription of its claim for transfer;
- [8.3] Municipal Account registered in the deceased's name;
- [8.4] The corporate entities of *Notefull 1122* and *Advancenet Group of Companies*.

ISSUES RAISED BY LIQUIDATOR

- TIMING OF THE SALE AGREEMENT

[9] The Applicant stated in the Supplementary Affidavit that:

- [9.1] it was informed that the property transfer had not been completed upon receiving notification from their auditor, Phillip Potgieter, through an email dated 12 August 2014.⁷
- [9.2] On 27 January 2015, the Applicant's legal representative, Mr. Frederick Rall (hereinafter referred to as "Mr Rall"), was instructed to facilitate the transfer of the property.⁸
- [9.3] On 23 February 2015, Mr Rall, the Applicant's attorney, met the deceased.⁹
- [9.4] On 19 March 2015, the attorney, Mr. Rall, confirmed that the deceased had submitted a signed copy of the agreement.¹⁰
- [9.5] On 26 March 2015, Mr Rall sent the agreement to Advancenet.¹¹
- [9.6] On 11 April 2015, attorney Mr Rall requested specific conveyancing information from the purchaser.¹²
- [9.7] By 28 January 2016, the purchaser provided all conveyancing information required to pass registration.¹³
- [9.8] In May 2017, TMK filed a sequestration application against the deceased, citing a loan account with an alleged debit balance of *R1 372 896.00*¹⁴

⁷ Annexure 'SA1', Case Lines J22

⁸ Paragraph 19.4 of Supplementary Affidavit, read with annexure 'SA2', Case Lines J24

⁹ Paragraph 19.5, read with annexure 'SA3', J29

¹⁰ Paragraph 19.7 Case Lines J47

¹¹ Supplementary affidavit, Annexure 'SA8', Case Lines J47

¹² Supplementary affidavit, Annexure 'SA9', Case Lines J50

¹³ Supplementary affidavit, paragraph 33 read with Annexure 'SA10', Case Lines J55

¹⁴ Answering affidavit, paragraph 4.1, Case Lines L6

[9.9] In September 2017, all conveyancing documents were completed and prepared.¹⁵

[9.10] Before registration of transfer, on 31 March 2018, Thomas Charles Barker passed away.

[9.11] On 25 September 2020, the executor was appointed in the deceased estate of Thomas Charles Barker.

[9.12] On 30 April 2021, the Applicant launched the current application for transfer and specific performance of the agreement of sale

- PRESCRIPTION OF TRANSFER CLAIM

[10] The Applicant argued that it was not open to the liquidator to try to impugn the agreement. The liquidator was not a party to the written agreement for the purchase of the immovable property.

[11] The debtor is the person who can raise prescription. Not even a court can.¹⁶

[12] The deceased could have raised prescription in this case.

[13] The deceased's emigration suspended the prescription of the claim for the entire period of his absence. This position is entrenched in terms of section 3(1)(b) of the Prescription Act 68 of 1969.

[14] The Applicant pleads that its attorneys only received the signed offer to purchase on 19 March 2015.¹⁷

[15] The conveyancing documents were furthermore only signed during September of 2017.¹⁸

¹⁵ Founding affidavit, paragraphs 25.1 - 25.6, Case Lines A-14 - A-1

¹⁶ Section 17(1) of Act 68 of 1969

¹⁷ Supplementary affidavit, para 19.7

[16] The deceased's suicide resulted in the property being unable to be transferred from 31 March 2018, as it became part of the deceased estate. This caused a delay in obtaining letters of authority to appoint an executor for the late estate. Consequently, the prescription period was extended due to the postponement of the executor's appointment.

[17] The Applicant argued that the claim for transfer did not prescribe.

[17.1] It is settled law that a person invoking prescription bears the full onus to plead and prove it.¹⁹

[17.2] The party who raises prescription must allege and prove the date of the inception of the period of prescription. Prescription begins to run as soon as a debt is due.²⁰

- MUNICIPAL ACCOUNT IN RESPECT OF PROPERTY

[18] The liquidator noted that the municipal accounts remained in the deceased's name²¹, but acknowledged that *Advancenet CC* or *Advancenet (Pty) Ltd*²² had paid these accounts.

[19] The Applicant noted that City Of Johannesburg²³ records lack consistent accuracy and it saw no clear reason for the name change; however, this did not render the action inappropriate.

[19.1] The payments have been included in Notefull's financial statements since 2001 and have been reported on tax returns. There are no VAT implications related to these payments.

¹⁸ Founding affidavit, annexures FA5- FA11

¹⁹ *Dreyer v Tuckers Land & Development Corporation (Pty) Ltd* 1981 1 SA 1219 (T) 1129C;

²⁰ *Gericke v Sack* 1978 (1) SA 821 (A) at 828B

²¹ A69

²² A71

²³ A66

[19.2] The liquidator confirmed that Notefull paid the monthly levies

CORPORATE IDENTITY ISSUES – NOTEFULL 1122 CC, NOTEFULL 1122 (PTY) LTD AND ADVANCENET

- [20] The Applicant, in its Supplementary Affidavit, sought to clarify the confusion regarding the purchaser referenced in the undated offer to purchase as outlined in its Founding Affidavit. The connections between *Notefull 1122 CC*, *Notefull 1122 (Pty) Ltd*, the deceased, and *Advancenet* - which ought to have been addressed in the Founding Affidavit - were only dealt with in the Supplementary Affidavit.
- [21] *Notefull 1122 (Pty) Ltd* was formerly a close corporation – *Notefull 1122 CC*, registered on 17 February 2000.²⁴ Mr. Irving claimed it was always intended for a corporation to own the property.²⁵ The property was paid before the sale agreement was finalized, and the title deed was received at the time of payment.
- [22] Once *Notefull 1122 CC* was registered on 17 February 2000, the transfer was supposed to occur but did not. When it was discovered in 2014 that the property remained in the deceased's name, actions were initiated to process the transfer.
- [23] The liquidator stated that *Advancenet (Pty) Ltd* began trading in 2002 and did not exist in 2000. It is part of a group of companies and was first registered as *Firetrade 26 CC*. The payment to the deceased came from a Standard Bank account active since August 1989.²⁶
- [24] *Firetrade 26 CC*, with registration number 1987/019505/23, was registered in August 1987.²⁷

²⁴ SA 11 at J54

²⁵ Paragraph 36 at J14

²⁶ SA12 at J69

²⁷ SA13 at J70

- [25] The Windeed report shows that *Firetrade 26 CC* was renamed *Micro Configurations CC* immediately after registration. In August 2000, *Micro Configurations CC* became *Advancenet CC*. Following its separation from the Computer Configurations Group, the name was changed to *Advancenet CC* as required. *Advancenet CC* originated from *Firetrade 26 CC*.
- [26] The payment for the property's purchase price originated from the close corporation that later became known as *Advancenet CC*. In 2002, a strategic decision was made to transition operations from a close corporation to a company structure. Consequently, *Freefall Trading 131 (Pty) Ltd* was acquired as a shelf company in October 2002, and was subsequently renamed *Advancenet (Pty) Ltd* in July 2005.
- [27] *Micro Configurations CC* was dissolved in June 2012 as a close corporation.²⁸

SEQUESTRATION APPLICATION UNDER CASE NUMBER 42679/2017

- [28] During May 2017, the liquidator filed an Application for Sequestration against the late Thomas Barker, prior to his passing.
- [29] The Application for Sequestration faced multiple delays due to the death of Thomas Barker and the wait for an executor, the process of appointing or substituting the executor, the Applicant's involvement, and constraints from the Covid-19 pandemic and related lockdowns.
- [30] The claim by the insolvent estate relates to a loan account maintained by the deceased with the insolvent company, Thomas Maxwell Kitchen (Pty) Ltd (in liquidation).
- [31] The deceased estate of Thomas Barker owes R1 372 896.00 to the company's insolvent estate. This amount is unpaid and undisputed.

²⁸ SA14 AT J77

- [32] The Fourth Respondent accordingly has a liquidated claim exceeding R100.00 against the deceased estate (represented by the First Respondent), as per section 10 of the Insolvency Act 24 of 1936.
- [33] On 30 January 2017, the deceased emailed the Fourth Respondent, admitted the debt, and said he was unable to repay it.
- [34] The sequestration application is based on insolvency grounds, specifically referring to a written notice provided by the deceased before his death indicating an inability to repay the loan account. This is regarded as an act of insolvency under Section 8(g) of the Insolvency Act, Act 24 of 1936.
- [35] It is clear that the claim of the insolvent estate of the company is:
- [35.1] a liquidated claim,
 - [35.2] the amount remains due and payable,
 - [35.3] it is enforceable against the deceased estate and
 - [35.4] the deceased has committed an act of insolvency.
- [36] The final criterion for issuing a compulsory sequestration order is the presence of a reasonable belief that such action will be to the advantage of the debtor's creditors.
- [37] The liquidator bears the onus of establishing that there is reason to believe that sequestration will be to the advantage of creditors.
- [38] "*Reason to believe*" denotes facts that establish belief, which the liquidator is required to demonstrate: prima facie for a provisional order and on a balance of probabilities for a final order.²⁹

²⁹ London Estates (Pty) Ltd v Nair 1957 (3) SA 591 (N) at 593

[39] An advantage is established if there are facts proved which indicate that *"there is a reasonable prospect - not necessarily a likelihood, but a prospect which is not too remote - that some pecuniary benefit will result to creditors."*³⁰

[40] It is sufficient for the liquidator to demonstrate that reasonable grounds exist to conclude that, through comprehensive scrutiny of the debtor's affairs or other appropriate methods, a trustee may be able to identify or recover assets for distribution to creditors.³¹

[41] The term *"advantage"* to creditors broadly refers to any meaningful financial benefit or insight from reviewing the debtor's finances, but it must serve a practical purpose.

[42] As was stated by the Constitutional Court in *Stratford and Others v Investec Bank Limited and Others* ³²:

"16.1 [the meaning of the term "advantage" is broad and should not be rigidified. This includes the nebulous "not-negligible" pecuniary benefit... To my mind, specifying the cents in the rand or "not-negligible" benefit in the context of a hostile sequestration where there could be many creditors is unhelpful...The correct approach in evaluating advantage to creditors for a court to exercise its discretion guided by the dicta outlined in Friedman.³³ For example, it is up to a court to assess whether the sequestration will result in some payment to the creditors as a body; that there is a substantial estate from which the creditors cannot get payment except through sequestration; or that some pecuniary benefit will result for the creditors. Given the potential impeachable transactions detailed by Investec, totalling over R37 million, it is evident that there is reason to believe that there will be an advantage to creditors."

³⁰ Meskin & Co v Friedman 1948 (2) SA 555 (W) at 55

³¹ Dunlop Tyres (Pty) Ltd v Brewitt 1999 (2) SA 580 (W) at 58

³² [2015] JOL 32695 (CC) at paras 44-46.

³³ Meskin & Co v Friedman 1948 (2) SA 555 (W)

[43] Ownership of property alone does not establish the relevant belief; there must be evidence that the property is capable of being realised, and the probable proceeds from a forced sale, after satisfying secured creditors, must be sufficient to reasonably expect payment to proven creditors.³⁴

[44] I will deal with the advantage to creditors later on in this judgment.

APPLICATION TO TRANSFER THE PROPERTY UNDER CASE NUMBER 2023-003795

[45] At the heart of the opposition of the first application is the property which is registered in the deceased's name. The property appears to be the estate's largest asset.

[46] In considering whether the Applicant has established grounds for the transfer of the property, I will refer to the evidence provided in the Founding Affidavit.

[47] The facts presented in affidavits supporting the notice of motion should be stated succinctly, clearly, and in chronological order, without including any argumentative material.³⁵

FOUNDING AFFIDAVIT

[48] The Founding Affidavit must set out at least the following information:

[48.1] The Applicant's right to apply for the relief sought – its *locus standi*.

[48.2] Jurisdiction;

[48.3] The cause of action relied upon;

[48.4] The evidence to support the application.

DEPONENT TO FOUNDING AFFIDAVIT

³⁴ Ex parte Steenkamp 1996 (3) SA 822 (W) at 826-82

³⁵ Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 78I

- [49] Mr. Andrew John Irving, Group General Manager of the Applicant, is the deponent to this application.³⁶
- [50] The offer to purchase³⁷ forming the basis of the relief was apparently concluded in *January 2000* between the deceased and Mr. Phil Hemsley, who is both a director of the Applicant and the deponent in the intervention application to the sequestration proceeding.
- [51] Mr Hemsley, apart from the deceased, is the sole source of information on the property's acquisition, its terms, purchase price, and reasons for the transfer delay.
- [52] Although the resolution authorising Mr. Irving to initiate and execute all documentation for the transfer application was duly signed by Mr. Phil Hemsley,³⁸ no explanation is provided regarding why Mr. Hemsley, who is a party to the offer to purchase, did not personally depose to the Founding Affidavit. It is respectfully submitted that Mr. Hemsley would have been best positioned to provide direct evidence concerning the aforementioned offer.
- [53] Mr Irving states that he has direct knowledge of the facts. He maintains that, where information was provided to him, it is accurate, and argues that all hearsay should be allowed under Section 3 of the Law of Evidence Amendment Act 45 of 1988, as this provision aligns with the interests of justice in these circumstances.
- [54] The court has not been apprised of the reasons why Mr. Hemsley, who acted on behalf of the Applicant in relation to the offer to purchase, is unable to present direct evidence or why reliance on hearsay is warranted.

³⁶ A7

³⁷ FA3 at A20

³⁸ Annexure FA1 at A18

- [55] The fact that Mr Hemsley did not provide an affidavit is significant, as hearsay evidence cannot be considered without an explanation for the absence of the direct evidence.
- [56] Mr. Irving has not furnished the court with information or evidence demonstrating personal knowledge, nor has he specified the commencement date of his association with the Applicant.
- [57] It is essential that the deponent possesses personal knowledge of the facts underlying the Applicant's cause of action. In the absence of such knowledge, the deponent cannot attest under oath to the veracity of the statements made.
- [58] The assertion by the deponent of personal knowledge alone is insufficient to be determinative; the court does not simply endorse all claims of personal knowledge without critical evaluation.
- [59] In *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423D-E, the court determined that a deponent's mere claim of being able to attest positively to the facts is insufficient, unless there is a valid basis for concluding that the deponent has a comprehensive understanding of the implications of such an assertion.
- [60] In *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) at paragraph [38], the Supreme Court of Appeal discussed the definition of personal knowledge.

"A court is not bound to accept the ipse dixit of a witness that his or her evidence is admissible... Merely to allege that that information is within the 'personal knowledge' of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired, so as to establish that the information is admissible, and if it is hearsay, to enable its weight to be evaluated. In this case there is no indication that the facts to which Mr Chikane purports to attest came to his knowledge directly, and no other basis

for its admission has been laid. Indeed, the statement of Mr Chikane that I have referred to is not evidence at all: it is no more than bald assertion.”

[61] The personal knowledge of the deponent regarding the material facts contained in the founding affidavit is of significant importance. A lack of such knowledge reduces the evidentiary value of the affidavit. In motion proceedings, affidavits serve as the procedural means by which evidence is introduced.

[62] To examine the personal knowledge requirement for an affidavit, it is firstly important to define an affidavit. An affidavit is a written statement given under oath. As evidence, the information in an affidavit must be based on facts that the person making the statement knows firsthand.

[63] Affidavits must be based on personal knowledge to ensure their reliability as evidence. In application proceedings, affidavits serve as both pleadings and main evidence³⁹, so relief is only granted if supported by admissible primary facts known directly to the deponent. It is trite that an Applicant must make out its case in the founding affidavit which must contain sufficient facts in itself upon which a court may find in the Applicant's favour.

[64] In *Director of Hospital Services v Mistry*⁴⁰ the court put the position as follows:

‘When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ... and as been said in many other cases: “... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.’

³⁹ *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D.

⁴⁰ 1979 (1) SA 626 (A) at 635H-636B

- [65] If reliance is placed on hearsay evidence it must be in accordance with Section 3(4) of the Law of Evidence Amendment Act 45 of 1988. Hearsay evidence is characterised as "*evidence, whether oral or in writing, whose probative value relies upon the credibility of an individual other than the person presenting such evidence.*"
- [66] The personal knowledge of the deponent regarding the material facts contained in the founding affidavit is of significant importance. A lack of such knowledge reduces the evidentiary value of the affidavit. In motion proceedings, affidavits serve as the procedural means by which evidence is introduced.
- [67] It is against this backdrop that the Founding Affidavit must be critically evaluated to determine if the personal knowledge prerequisite has been met.
- [68] Mr Irving's affidavit does not clarify which facts are based on personal knowledge and which on hearsay. There is no explanation for why Mr Phil Hemsley, a signatory to the purchase offer, did not provide an affidavit despite signing the resolution.
- [69] The Applicant, who bears the burden of proving the transfer of property, in motion proceedings, had to determine the most appropriate manner in which to present its evidence. By choosing to present the evidence through Mr Irving, without providing an explanation for why Mr Hemsley could not do so, the probative value of the evidence is affected.
- [70] As the deponent, Mr. Irving was not in a position to provide the most direct (best) evidence, which Mr. Hemsley could have supplied. Although Mr. Hemsley, a representative referenced in the offer to purchase, had signed the resolution, he did not depose to the founding affidavit. No adequate or credible explanation has been offered for Mr. Hemsley's absence as deponent.
- [71] I will now deal with the Applicant's *locus standi*.

APPLICANT'S LOCUS STANDI

[72] In Mr. Andrew John Irving's Affidavit:

[72.1] the Applicant is depicted as *NOTEFULL 1122 (PTY) LTD*;

[72.2] the Applicant during January 2000, represented by Mr Phil Hemsley, concluded a written agreement of purchase of the property known as [...] *T[...] Ave, Sunninghill, being Sectional Unit 5[...], G[...] Park, on Sectional Scheme number 470/1990.*⁴¹

[72.3] the purchase price was stated as *R139 514.57*.⁴²

[72.4] the purchase price had been paid to the deceased being the seller.⁴³

[73] A preliminary procedural question that has to be considered in the judicial process is whether the parties to the litigation have the necessary standing or legal capacity to litigate.⁴⁴

[74] Legal standing is not only a procedural question but is also a question of substance; it concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted. The Applicant has to show that it is the rights-bearing entity, or is acting on the authority of the entity, or has acquired its rights.

[75] The fact of standing must appear from the initiating process.⁴⁵

[75.1] The general rule is that it is for the party instituting proceedings to allege and prove its *locus standi*. It must accordingly appear ex

⁴¹ Annexure FA3 at A20

⁴² A12

⁴³ Clause 1.1. at A20

⁴⁴ *Watt v Sea Plant Products Bpk* 1998 4 All SA 109 (C)113–114; 1999 4 SA 443 (C).

⁴⁵ *Nienaber v Union Government* 1947 1 All SA 244 (T); 1947 1 SA 392 (T); *United Methodist Church of SA v Sokufundumala* 1989 4 SA 1055 (O).

facie the founding papers that the parties have the necessary legal standing (*locus standi in iudicio*).⁴⁶

[76] In *Langeberg Ko-operasie Bpk v Folscher and Another* 1950 (2) SA 618 (C) an application was brought by one Whitehead. In his founding affidavit he described himself as the secretary of the Applicant. After an objection has been taken of no *locus standi* Whitehead filed another affidavit saying that he had been described as secretary in error and that he was, in fact, the general manager of the applicant. At pages 620 - 21 of the case N Thompson J said:

"In my view he (Whitehead) should not be allowed at this stage to amend his first affidavit in such a vital respect, and after the point that he had no locus standi had been taken by the respondent... However that may be, it seems to me to apply for an amendment at this stage is too late, and I am not prepared to accede to the amendment being made in an endeavour to right the question of locus standi. In a recent case, namely the case of Geanotes v Geanotes 1947(2) SA 512 (C) at 515 HERBSTEIN AJ quoted with approval the case of Pountas' Trustees v Lahanas 1924 WLD 67, a decision of KRAUSE J, where he said:

'I think it has been laid down in this Court repeatedly that an applicant must stand or fall by his petition and the facts alleged therein, and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of facts of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.'

HERBSTEIN AJ went on to say:

'It seems to me that correctly state the practice of this Court.'

⁴⁶ *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) p. 575
Kommissaris van Binnelandse Inkomste v Van der Heever [1999] 3 All SA 115 (A), 1999 (3) SA 1051 (SCA) para 10
Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) para 7

I agree with the statement of HERBSEIN AJ. It seems to me that I should not allow the affidavits which were filed yesterday to influence my decision on this point that there was no locus standi as shown by the applicant, and as the matter stood when the objection was taken, because it is quite clear to me that an application by a secretary without anything more being said was not sufficient to show authorisation to embark upon litigation by the applicant."

[77] In the Fourth Respondent's Answering Affidavit she states that it is clear from a CIPC report and search that the Applicant in 2000 did not exist. During 2000 it was a closed corporation named *NOTEFULL 1122 CC* with registration number *2000/007298/23*.⁴⁷ The conversion from a closed corporation to a company took place on *21 February 2003*.⁴⁸

[78] The Applicant subsequently in a Supplementary Affidavit dealt with the "*corporate entities*" issues raised by the Fourth Respondent. Mr Irving on the Applicant's behalf in this affidavit alleged as follows:⁴⁹

[78.1] *Notefull 1122* was previously a, Close Corporation, registered on *17 February 2000* – see Annexure "SA11".⁵⁰

[78.2] It was always intended that a *corporation* would be the owner of the property and not Mr Hemsley in his personal capacity.⁵¹

[78.2.1] Mr Irving in paragraph 36 of the Supplementary Affidavit states:

"36. It was always intended that a corporation would be the owner of the property and not me in my personal capacity" (my underlining)

⁴⁷ Annexure AA2 at L133

⁴⁸ L136

⁴⁹ J13 at paragraph 35 onwards

⁵⁰ J54

⁵¹ Paragraph 36 at J14

[78.2.1.1] The reference to “me” must refer to Mr Phil Hemsley. Mr Irving is however the deponent of the Supplementary Affidavit.

[78.3] Payment for the property was made in advance of the conclusion of the sale agreement. At the same time as payment was made Mr Hemsley received the title deeds of the property.

[78.3.1] Paragraph 37 of the Supplementary Affidavit states:

“Payment for the property was made in advance of the conclusion of the sale agreement. At the same time as payment was made, I received the title deeds of the property.” (my underlining)

[78.3.1.1] The reference to “I” in the above should refer to Mr Phil Hemsley. Mr Irving is however the deponent of the Supplementary Affidavit.

[78.4] Once *Notefull 1122* was registered as a closed corporation on 17 February 2000, transfer should have taken place but it was not done.

[78.4.1] The purchaser in 2000 accordingly had to be NOTEFULL 1122 CC.

[78.4.1.1] This is confirmed in paragraph 36 of the Supplementary Affidavit by Mr. Irving where he states:

“It was always intended that a corporation would be the owner of the property and not

me in my personal capacity.” (my underlining)

[78.4.2] The Offer to Purchase which is undated depicts the seller as the deceased Thomas Charles Barker and the purchaser as *NOTEFULL 1122 (PTY) LIMITED*.⁵²

[78.4.2.1] The corporation was however only converted to a company on *21 February 2003*.⁵³

[78.4.2.2] It follows that the purchaser could not have been the Applicant company as the Applicant company:

[78.4.2.2.1] did not exist at the time and

[78.4.2.2.2] based upon the confirmation in Mr. Irving's Supplementary Affidavit that it was bought by the corporation. (referred to in paragraph 75.4.1.1 here in above)

[78.5] Upon discovery of the issue of transfer and the property still being in the deceased name in 2014, steps were then taken to deal with the issue.

[79] These issues should have been addressed by the Applicant in the Founding Affidavit as it establishes the Applicant's *locus standi*.

[80] It is clear that *Notefull 1122 CC*, a closed corporation, was converted to *Notefull 1122 (Pty) Ltd*, a company in 2003. This fact constitutes material evidence of which the Applicant was cognisant at the time of attesting to the

⁵² Annexure FA3 at A20

⁵³ J59

Founding Affidavit. Nevertheless, the Applicant chose to exclude this information.

[81] It was necessary for the Applicant's *locus standi* to be clearly articulated in the Founding Affidavit, enabling the Respondent to address this issue appropriately in their response.

[82] The subsequent belated attempt to address the Applicant's *locus standi* should be considered in view of the following facts that were known to the Applicant at the time of drafting the Founding Affidavit:

[82.1] The conversion in 2003 of the corporation *Notefull 1122 CC* registered in 2000 to the company - *Notefull 1122 (Pty) Ltd*;

[82.2] the parties to the offer to purchase being depicted as the deceased and *Notefull 1122 (Pty) Ltd* and

[82.3] that the Applicant's *locus standi* would become a fundamental issue in light of the conversion of the corporation to the company only in 2003.

[83] The Applicant's *locus standi*, which is a fundamental element of its claim, was not established in its Founding Affidavit. In its Supplementary Affidavit, the Applicant sought to clarify *locus standi* with the intention of addressing a significant deficiency in the evidentiary support for its claim.

[84] *Locus standi* accordingly did not appear from the initiating process.⁵⁴

CAUSE OF ACTION:

⁵⁴ *United Methodist Church of SA v Sokufundumala* 1989 4 SA 1055 (O).

[85] The Applicant claims that the property was acquired through an offer to purchase concluded in *January 2000* between the deceased and Mr. Hemsley for Notefull 1122 (Pty) Ltd.

[86] The discrepancies outlined below merit particular attention:

[86.1] The offer to purchase is not dated.

[86.2] The contracting parties are depicted in the offer to purchase as the deceased and the Applicant company who did not exist in *2000* and only came into existence in *2003*.

[86.2.1] It was not explained how the deceased and Applicant would conclude an agreement, in the name of the Applicant as a company, which name would only come into existence 3 years later.

[86.3] The purchase price is recorded in the undated offer to purchase as *R139 515.00* although the exact amount was *R139 514.75*.

[86.4] Although it was recorded that the purchase price was paid there is no proof of payment, save for a reflection in the Applicant's records.

[83.4.1] In the Sequestration Application the deceased never admitted receiving payment of the alleged purchase price.

[86.5] Mr Hemsley only became a director of *Notefull 1122 (Pty) Ltd* in *May 2003*, whilst the offer to purchase was signed during *January 2000*.⁵⁵

⁵⁵ Answering affidavit, para 5.23 - 5.28

[86.5.1] Mr. Hamsley's authority to conclude the sale on the company's behalf (which did not exist at the time) in *January 2000* remains unexplained.

[86.6] *Advancenet (Pty) Ltd* who paid the purchase price and the municipal rates and levies in respect of the property only started to trade in 2002.⁵⁶

[86.6.1] The Applicant argued that:

[86.6.1.1] *Advancenet* was registered in *August 1987* and traded as *FireTrade 26 CC*. *Fire Trade* underwent a name change to *Micro Figurations* and thereafter *Advancenet CC*, which was later converted into a PTY (company).

[86.6.1.2] The banking account from which payment was made had been opened since *August 1989*.

[86.6.1.3] *Advancenet* paid the purchase consideration, on behalf of the Applicant, a company within the group of companies.

[86.7] Email correspondence between Mr Frederick Rall – the Applicant's attorney and Mr Irving of the Applicant contain facts which contradicts the Applicant's pleaded case.

⁵⁶ Supplementary affidavit, para 1.2, CaseLines

[86.7.1] In an email from Mr. Frederick Rall to Mr Irving dated 26 January 2015 regarding the property the following was stated:⁵⁷

“Thom has asked me if we know what is happening with the transfer of the flat Phil bought for/from him.” (my underlining)

[86.7.1.1] The reference to Thom must be to the deceased and Phil to Mr Hemsley.

[86.7.1.2] The phrase “*transfer of the flat Phil bought for/from him*” is problematic, as it ambiguously suggests Mr Hemsley bought the property either for or from the deceased - two mutually exclusive scenarios.

[86.7.2] In an email dated 5 March 2015 08:10 AM Mr Rall notified Mr. Irving that the offer was amended and that the deceased would sign the offer.⁵⁸ He stated:

*“Hi
We have amended the offer as per the below and will meet with Thomas to sign shortly.” (my underlining)*

[86.7.2.1] The Applicant’s case is based on an offer signed in *January 2000*.⁵⁹ The

⁵⁷ J27

⁵⁸ J33

⁵⁹ Paragraph 15 at A11

amendment and signing of an offer during 2015 is contradictory to the pleaded case.

[86.7.3] In an email dated 19 March 2015 to Mr. Irving at 08:48, Mr Rall noted:⁶⁰

“Hi Thomas has signed the offer and we have received the signed offer back, which we will now forward to you for signature...”

[86.7.3.1] The signing of an offer in 2015 is in direct conflict with the Applicant’s case that it was signed during January 2000.

[86.7.4] An email from Mr Irving to Mr Rall on 25 February 2015 at 9:00 AM stated:⁶¹

*“Hi Fred,
This Looks fine. The purchase amount should be R139 515.00 though”. (my underlining)*

[86.7.4.1] The purchase price was R139 514.57 as testified to by Mr. Irving in the Founding Affidavit.⁶²

[86.7.4.2] The offer to purchase annexed to the Founding Affidavit⁶³ reflects the amount of R139 515.00 as per the aforesaid email.

⁶⁰ J35

⁶¹ J34

⁶² Paragraph 19.1 at A12

⁶³ Annexure FA3 at A20 clause 1

[86.7.5] Mr Irving also in an email to Mr Rall dated 27 January 2015 at 10:28 AM indicated that the property was bought by one of the Group Companies - *Notefull 1122*.⁶⁴ This statement contradicts his evidence in his Supplementary Affidavit that it was bought by the corporation.⁶⁵

[87] The Applicant had to in the founding affidavit set out sufficient facts to disclose a cause of action, which, as a general rule, should exist at the time of the initiation of the proceedings.⁶⁶ Whereas in pleadings a party may generally not plead evidence, the nature of applications is such that the application forms not only the pleadings, but also provides all the evidence upon which the Applicant relies.⁶⁷ It follows that the founding affidavit, being the equivalent of Plaintiff's pleadings and Plaintiff's case on trial, must in itself contain sufficient facts upon which a court may find in his or her favour.⁶⁸

[88] The Applicant in its Supplementary Affidavit attempted to rectify the confusion in respect of the corporate entities, the fact that *Advancenet* made payments and Mr Hemsley's authority to bind the Applicant. I am of the view that these are crucial and essential elements of the Applicant's claim which had to be canvassed and addressed in detail in the Founding Affidavit.

[89] The Supplementary Affidavit and annexures (email correspondence) thereto raise more questions than provide answers.

[90] The cause of action the transfer of the property as set out in the Founding Affidavit is reliant on an offer to purchase between the deceased and Mr. Phil Hemsley on behalf of the Applicant company in *January of 2000*. A company which did not exist and the authority of Mr. Hemsley not being proved.

⁶⁴ J24

⁶⁵ Paragraph 36 at J14

⁶⁶ *Philotex (Pty) Ltd v Snyman* 1994 1 All SA 95 (T); 1994 2 SA 710 (T).

⁶⁷ *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 1 All SA 586 (D); 1972 1 SA 464 (D);

⁶⁸ *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 1 All SA 1 (W); 1982 2 SA 739 (W);

[91] In its Supplementary Affidavit the Applicant seeks to explain its *locus standi* and the link between the corporation and the company. This in my mind is a little too late. These issues were foreseeable but not dealt with in the Founding Affidavit.

[92] The Applicant did not set out the cause of action in clear and unequivocal terms to enable the Respondent to know what case to meet. This is the very reason why an Applicant is never permitted to change colours which he/she has pinned to the mast and plead a new cause of action in a replying affidavit. A party is duty bound to allege in his or her affidavit all the material facts upon which it relies.

[93] Explaining the crucial role played by affidavits in motion proceedings, Joffe J said in *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* 1999 (2) SA 279 (T) at 323F–324C [also reported at [1998] JOL 4144 (T) – Ed]:

“It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits.” (My underlining.)

[94] In considering the Founding and Supplementary Affidavits inclusive of the email correspondence it is unclear when the offer to purchase was signed. There are simply put too many unexplained contradictions to favour the Applicant’s case.

[95] The Applicant could have anticipated the disputed facts, but they were not addressed in the Founding Affidavit.

[96] Essential elements of the Applicant's case are lacking in its founding affidavit namely the contracting party's identity and *locus standi*. The failure of Mr Hemsley, as a representative party to the offer to purchase, despite signing the resolution to institute proceedings, to depose to the Founding affidavit remains unexplained and is questioned. Mr. Irving's contradictory evidence as alluded to here in before is also indicative of his lack of knowledge of what occurred. He also failed to explain why Mr Hemsley could not himself provide an affidavit as evidence.

[97] The Applicant chose to provide its evidence based upon hearsay evidence of what allegedly occurred in 2000. This was done whilst Mr Hemsley was available to provide direct evidence. It must accordingly stand and fall based upon the presented case as set out in its affidavits.

[98] The Applicant has failed to convince this court that it has made out a case on the affidavits before me. It has not succeeded in proving that the property should be transferred to the Applicant.

[99] The property will accordingly remain in the deceased's estate.

PROPERTY

ADVANTAGE TO CREDITORS

[100] In dealing with an advantage to creditors it is clear that the property is the biggest asset in the deceased's estate.

[101] The court in *Gardee v Dharmanta Holdings and Others*⁶⁹ held that sequestration will only be to the advantage of the creditors if it will result in a greater dividend to them than would otherwise be the case, for example, through the setting aside of impeccable transactions or the exposure of

⁶⁹ 1978 (1) SA 1066 (N) 1068-7

concealed assets, or if it will prevent an unfair division of the proceeds of the assets or some creditors being preferred to others.

[102] The advantage to creditors requirement is also provided for in section 12(c) of the Insolvency Act, which states that a court will grant a final sequestration order if there is reason to believe that it will be to the advantage of creditors of the debtor if his state is sequestrated.

[103] The inquiry is not simply whether sequestration will be to the advantage to creditors, but whether administration of the estate by a trustee in insolvency holds more advantage for creditors as a group than administration of the estate by an executor.⁷⁰ To answer this question the court is obliged to conduct an analytical investigation and evaluation of all the relevant facts and circumstances, including the size of the estate, the complexity and possible complications inherent in the administration of the estate and to what extent the respective Acts offer the best method of dealing with such problems, the competence and independence of the executor of the deceased estate, the costs of different options, the wishes of the majority of the creditors, and the size of the Applicant's claim.⁷¹ None of these factors is necessarily decisive.

[104] This court believes that the legal machinery offered by the Insolvency Act, Act 24 of 1936 for protection of creditors' interests is needed in this case to properly administer the estate.⁷² The effect of an order sequestrating a deceased estate and the appointment of a trustee is, with certain exceptions, to suspend the rights and duties of the executor.⁷³

⁷⁰ *Stainer v Estate Bukes* 1933 OPD 86 90; *Standard Bank van SA Bpk v Van Zyl* 1999 2 SA 221 (O) 225. In the latter case, the court pointed out that it is incorrect to speak of the creditor having the onus of proving advantage to creditors where the court has a discretion to decide on the most appropriate procedure.

⁷¹ *Standard Bank van SA Bpk v Van Zyl* supra.

⁷² *Stainer v Estate Bukes* supra; *Standard Bank van SA Bpk v Van Zyl* supra. See also *Standard Bank of SA Ltd v Estate Steiner* 1925 1 PH C33 (C). This may be the case, for example, where there are impeachable transactions that can only be properly investigated by a trustee using the powers conferred on him or her by the Insolvency Act.

⁷³ *The Master v Omar* [1958] 2 All SA 387 (T); 1958 2 SA 547 (T) 549.

[105] The trustee's role is established by statute, granting powers and duties under the Act. The trustee must act in the interests of both the insolvent and creditors, with primary responsibilities to collect, preserve, and realise estate assets.

[106] Some of the trustee's statutory duties and powers are the following:

[106.1] *To take charge of property.* The trustee is responsible for managing the estate's property and must provide the Master with an appraiser's valuation of all movable assets.

[106.2] *Sale of Assets.* With the approval of the Master, a trustee is authorised to sell the movable assets of the estate prior to the second meeting of creditors.

[106.3] *Investigation of affairs and reports to creditors.* The trustee is required to conduct a thorough investigation into the affairs and transactions of the insolvent preceding sequestration and must present a comprehensive written report at the second meeting, or, with the Master's prior written approval, at an adjourned second meeting.

[106.4] *Accounts.* The trustee is required to submit a liquidation account and a distribution plan of the estate's property proceeds to the Master for payment to creditors. If these proceeds do not cover sequestration costs, the trustee must provide a contribution plan that allocates the liability for any deficiency among creditors who are responsible to contribute.

[106.5] *To take charge of property.* The trustee is responsible for overseeing the estate property and must provide the Master with an appraiser's valuation of all movable assets. Additionally, the trustee is required to establish a banking account and maintain a

ledger that records all funds, goods, books, accounts, and documents received on behalf of the estate.

[106.6] *Investigation of affairs and reports to creditors.* The trustee examines the insolvent's affairs prior to sequestration and provides a comprehensive report at the second meeting, or at an adjourned meeting with the Master's written consent.

[106.7] *Accounts.* The trustee submits a liquidation account and a distribution plan for the proceeds of the estate's property to the Master. If the proceeds are insufficient to cover sequestration costs, the trustee provides a contribution plan that allocates responsibility for the shortfall among creditors required to contribute.

[107] In this matter the trustee will be able to take hold of the property, preserve it and investigate the affairs of the deceased prior to sequestration to the benefit of the body of creditors.

[108] I am satisfied that a final sequestration order can be granted.

[109] I accordingly make the following orders:

Orders

APPLICATION UNDER CASE NUMBER: 21628/2021

[1] The application is dismissed with costs inclusive of counsel's fees on scale B.

SEQUESTRATION APPLICATION UNDER CASE NUMBER: 42617/2017

[1] The Respondent is sequestrated and his estate is placed in the hands of the Master of the High Court;

[2] The costs of this application are cost in the administration of the insolvent estate of the Respondent.

S VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA

Date of Hearing: 23 May 2025
Date of Judgment: 20 August 2025

CASE NUMBER: 21628/2021

For the Applicant: Adv J C Viljoen
Instructed by Fred Rall Attorneys Inc

For the Fourth Respondent: Adv Z Schoeman,
Instructed by Roestoff and Kruse Attorneys

CASE NUMBER: 21628/2021

For the Applicant: Adv Z Schoeman,
Instructed by Roestoff and Kruse Attorneys

For the Second Respondent: Adv J C Viljoen
Instructed by Fred Rall Attorneys Inc