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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

Case no: 1442/2025

In the matter between:

**SIHELE PROPERTIES (PTY) LTD
TABILE MZWAKALI N.O.**

**First Applicant
Second Applicant**

and

**LP PROPERTIES (PTY) LTD
UNKNOWN OCCUPANTS OF ERVEN 4[...] AND 4[...]
AND REMAINDER OF ERF 4[...], BUTTERWORTH**

**First Respondent
Second Respondent**

JUDGMENT

APPELS AJ:

Introduction

[1] In this matter the first and second applicants (“the applicants”) seek that the lease agreement dated 24 June 2013 (“the lease agreement”) concluded between the estate of the late Monde Sihele (“the deceased estate”) and LP Properties (Pty) Ltd (“the first respondent”), be cancelled and that the first respondent be interdicted from collecting, demanding and receiving any rental payments in respect thereof and that same be paid into the designated bank account of the first applicant.

[2] In terms of the lease agreement, the deceased estate, as lessor, leased Erven 4[...] and 4[...] and the remainder of Erf 4[...], Butterworth (“the properties”) to the first respondent, as lessee.

[3] Mr Morne Fourie (“Mr Fourie”) of Absa Trust Limited (“Absa Trust”), was issued with Letters of Executorship and is the duly appointed executor of the deceased estate. He replaced the previous nominee of Absa Trust Limited, Mr Petrus Jacobus Hattingh, as executor of the deceased estate.

[4] The central issue to determine in this matter is whether the applicants have *locus standi* to institute this application. In this regard it should be noted that, despite the fact that he is the executor of the deceased estate, Mr Fourie is not cited as one of the applicants in these proceedings, nor has he been cited as a respondent.

[5] The non-joinder of Mr Fourie and the *locus standi* of the applicants to institute these proceedings have therefore been raised as points *in limine* by the first respondent.

The urgent proceedings on 15 April 2025

[6] The matter was first heard on 15 April 2025 before Lowe J as an urgent application and was thereafter re-enrolled in the ordinary course.

[7] At the commencement of the proceedings before me, there was initially some confusion regarding the nature of the order that Lowe J made on 15 April 2025. In this regard, the inscription on the court file and the typed order inside the court file, bearing the stamp of the Registrar of this court, recorded that Lowe J

dismissed the application with costs on scale B. On the face of it, it therefore appeared as if the matter had already been disposed of finally on 15 April 2025.

[8] Therefore, at the start of the proceedings, I requested the parties to address me on this particular issue before addressing me on the merits of the dispute. Both the second applicant, appearing in person, and Mr. de la Harpe, appearing for the first respondent, assured me that the application was not dismissed but was struck from the roll for lack of urgency.

[9] I therefore requested the Registrar to provide a transcript of the judgment and the order that were made by Lowe J on 15 April 2025. I have since been placed in possession of the transcript of the proceedings from which it appears that Lowe J made the following order on 15 April 2025:

“In the result, the application is struck from the roll with costs, those costs to be taxed on scale B. First and second applicants to pay those costs jointly and severally, the one paying the other to be absolved.”

[10] I was therefore satisfied that the applicants were entitled to re-enrol the matter and that I could proceed to determine the dispute between the parties.

The facts

[11] When the lease agreement was concluded, the deceased estate was not represented by its duly appointed executor. Instead, it appears from the lease agreement that the deceased estate was represented by the late Theresa Nomangesi Sihele (“the late Theresa Sihele”), who was at the time of the conclusion thereof the surviving spouse of the late Monde Sihele. The first respondent was represented by Mr. Livingston Gcobani Nogoduka (“Mr Nogoduka”) who is the director of the first respondent.

[12] The first applicant, Sihele Properties (Pty) Ltd, is a property asset management agency. It appears from the annexures to the founding affidavit that the first applicant is a private company that was, prior to her death, owned by the late Theresa Sihele.

[13] The second applicant, Mr. Tabile Mzwakali N.O., is the executor of the estate of the late Theresa Sihele and is also the sole director of the first applicant. It appears that on 26 April 2021, approximately two months subsequent to the passing of the late Theresa Sihele, the second applicant's name was added as the director of the first applicant in the records of the Companies and Intellectual Property Commission.

[14] How exactly the second respondent became the sole director of the company owned by the late Theresa Sihele is not explained in the papers. It is also not explained why it is necessary for the second applicant, being the executor of the deceased estate of the late Theresa Sihele, to manage, through a privately-owned company of which he is the sole director, the assets of the properties which the late Theresa Sihele inherited.

[15] Prior to their death, the late Monde Sihele and the late Theresa Sihele were married to each other out of community of property. There was therefore no joint estate, and the late Monde Sihele was the sole owner of the properties.

[16] It is apparent from a liquidation and distribution account lodged with the Master of the High Court, that the late Theresa Sihele is an heir in the deceased estate. It must be noted that she is not the only heir in the estate. Furthermore, the records of the office of the Registrar of Deeds reflect that the properties have never been transferred into her name and therefore do not form part of her deceased estate.

[17] There is an allegation in the founding affidavit that the late Theresa Sihele was permitted to enter into lease agreements in respect of the properties and to collect rental in terms thereof. What the legal basis is for this allegation is not apparent from the allegations contained in the founding affidavit. However, reference is made to email correspondence received from Absa Trust, which is annexed to the founding affidavit as "TM1", and is purportedly penned by Mr Fourie. As stated above, Mr Fourie was appointed as executor of the deceased estate. "TM1" reads as follows:

"Good day,

We refer to your letter dated 03rd of March 2025, with reference: MCHAKUVANA and hereby confirm that Theresa Nomangesi Sihele inherited the residue of the estate and part of the residue was ERF 4[...], 4[...], and 4[...] Butterworth.

A cession of right, title and interest to a lease agreement was given to her in 2015.

Although the three properties were not transferred into her name as yet, she was allowed to enter into a new lease agreement and to collect rental.

Her appointed executor is Tabile Mzwakali at Mzwakali and Associates Tel: 0[...]/0[...].

Kindly contact Mr Mzwakali regarding the confirmation of the correct bank details and any other information related to the lease agreement.”

[18] Even though reference is made to a cession agreement in “TM1”, there is no allegation in the founding affidavit that the rights to the lease agreement were ceded to the late Theresa Sihele, nor did Mr Fourie depose to an affidavit in which this is set out. Furthermore, no cession agreement was attached to the papers.

[19] On 11 May 2020 the second applicant wrote a letter to the first respondent, introducing himself as the representative of the first applicant, demanding that all rental payments in terms of the lease agreement, effective from 1 June 2020, should be paid into the bank account of the first applicant. The first respondent initially acceded to the request by the second applicant and paid the rental in terms of the lease agreement into the account designated by the second applicant.

[20] According to Mr. Nogoduka, who deposed to the answering affidavit on behalf of the first respondent, he laboured under the misapprehension that the late Theresa Sihele was, before her passing, the duly appointed executor of the deceased estate and that she concluded the lease agreement with the first respondent in her representative capacity as such.

[21] After her passing, the second applicant informed the first respondent that he had been appointed as the executor of her estate and was taking over as representative in the deceased estate. It appeared to Mr Nogoduka at the time that, if the late Theresa Sihele was the executrix in the deceased estate, the second applicant had taken over from her as executor of the deceased estate and

acquiesced to the second applicant collecting rental in respect of the lease agreement.

[22] However, at the beginning of 2025, Mr. Nogoduka discovered that the late Theresa Sihele was never an executrix of the deceased estate and that Mr Fourie, a nominee of Absa Trust, had in fact been appointed as the executor of the deceased estate. Upon making the aforementioned discovery, the first respondent's attorneys penned a letter to the second applicant informing him that it would cease all rental payments to the second applicant or to the account designated by him and that it would liaise with the rightful executors of the deceased estate.

[23] Following the cessation of the payment of rental by the first respondent, the applicants caused a notice of breach of the lease agreement followed by a notice of cancellation of the lease agreement to be issued to the first respondent by the first applicant's attorneys of record. In the notice of cancellation, the applicants demanded that the first respondent vacate the premises and restore full possession of the properties to the applicants and make payment of all outstanding rental payments in respect of the properties.

[24] The first applicant did not heed the notice and accordingly, the applicants brought the present proceedings for cancellation of the lease, for the respondents to vacate the properties and restore possession to the applicants and to pay outstanding rental in terms of the lease agreement.

Basis for opposition

[25] The first respondent opposes the relief sought by the applicants on three grounds.

(a) Firstly, it is alleged that the applicants have not complied with the provisions of rule 6(9) of the Uniform Rules which requires the Master of the High Court to be notified of the institution of proceedings in connection with a deceased estate and for a report from the Master to be submitted.

(b) Secondly, the first respondent contends that both applicants do not have *locus standi* to deal with the properties forming the subject of the application since

the applicants are not the owners thereof, nor do they have legal right to represent the owners of the property.

(c) Thirdly, the first respondent raises the point of non-joinder in that it is contended that the property of the deceased estate vests in the executor who should have been joined as a respondent in the application.

[26] It is contended that the application should be dismissed on the abovementioned grounds.

Analysis

Rule 6 (9) of the Uniform Rules – Master’s report

[27] This matter is an application in connection with a deceased estate. Rule 6(9) of the Uniform Rules of court stipulates that:

“A copy of every application to court in connection with the estate of any person deceased, or alleged to be a prodigal, or under any legal disability, mental or otherwise, shall before such application is filed with the registrar be submitted to the Master for consideration and report; and if any person to be suggested to the court for appointment as curator to property, such suggestion shall likewise be submitted to the Master for report.”

[28] The object of the subrule is to avoid applications being enrolled only to be postponed in order for the court to have the advantage of the Master’s assistance. The subrule does not operate when the master's involvement is not legally necessary or where the court does not require the Master’s assistance.¹

[29] The Master is not a necessary person with a direct and legal interest in this matter and in my view, his joinder was not required. Furthermore, as a result of the findings I make with regards to *locus standi* of the applicants, this application will be disposed of without a report from the Master.

Non-Joinder of the Executor

¹ Erasmus Vol II [Service 25, 2024] D1 Rule 6 - 49

[30] Where any party is a necessary party with a direct and substantial legal interest in the relief that is sought, he or she should be joined as a party to the court proceedings.²

[31] Immediately after Letters of Executorship are granted to an executor, the control and custody of all the property in the deceased estate vests in him or her.³ There can therefore be no doubt that Mr Fourie, as the executor of the deceased estate, is a necessary party with a direct and substantial legal interest in the relief that is sought in these proceedings.

[32] Generally, in proceedings which are brought in the absence of necessary parties, the appropriate order is to postpone the proceedings to enable the applicants to join the necessary parties as respondents. Non-joinder of a necessary party is therefore not necessarily a ground on which an application should be dismissed. However, as demonstrated below, the joinder of Mr Fourie as a respondent in this matter, will not assist the applicants.

Locus Standi

[33] In *Du Toit v Vermeulen*⁴ the court held that an executor should actively join as plaintiff or applicant in proceedings instituted on behalf of a deceased estate and should not merely be joined as nominal or inactive defendant or respondent. Therefore, while the executor of the deceased estate is a necessary party, it would not suffice to adjourn these proceedings in order to grant the applicants an opportunity to join him.

[34] That is so, because an executor has the sole legal authority to institute proceedings on behalf of the deceased estate. In this regard the following was held in the judgment in the matter of *Gross and Others v Pentz*:⁵

² Erasmus Vol II [Service 25, 2024] D1 – Rule 10 -4

³ Section 26 of the Administration of Estates Act No. 65 of 66

⁴ *Du Toit v Vermeulen* 1973 (3) SA 848 AD at p856E - F

⁵ *Gross and Others v Pentz* 1996 (4) SA 617 AD at p625B-C

“In my view it should be 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.”

[35] The first applicant, not being the executor of the deceased estate, therefore does not have authority to institute these proceedings on behalf of the deceased estate. In fact, it is not clear exactly what the first applicant's interest in this matter is and exactly who allegedly appointed it as asset managing agent of the properties.

[36] This second applicant is also not the executor of the deceased estate and therefore also does not have power to institute proceedings on behalf of the deceased estate. The second applicant's interest in this matter is premised on the basis of his appointment as executor of the estate of the late Theresa Sihele and the fact that she is the heir to the properties. However, the late Theresa Sihele never obtained transfer of ownership of the properties and therefore did not step into the shoes of the lessor of the lease agreement at any point in time.

[37] The properties remain registered in the name of the late Monde Sihele and thus remain part of the deceased estate. The mere fact that the late Theresa Sihele was the heir to the properties, does not vest the executor of her deceased estate with *locus standi* to sue in respect of properties that remain under the control and *dominium* of the executor of her late husband's estate.⁶

[38] The executor of the deceased estate, Mr Fourie, is therefore the only person who may institute the proceedings in respect of the lease agreement.

[39] There was a suggestion that these proceedings have been instituted with the knowledge and permission of Mr Fourie. During the argument, the second applicant sought to rely on correspondence he allegedly received from Absa Trust that was not attached to the papers before me. Mr de la Harpe quite correctly objected to the second applicant's attempts to refer to the documents that are not before me and to attempts to hand up those documents from the bar.

⁶ *Gross and Others v Pentz* 1996 (4) SA 617 AD at p624J to p625A -p625E.

[40] The second applicant also relied on “TM1”, the contents of which are quoted above under discussion of the facts. In “TM1”, there is a suggestion that there has been a cession of the lease agreement to the late Ms Theresa Sihele. It must however be borne in mind that the applicants have not pleaded that the lease agreement has been ceded to the late Ms Sihele, nor is there an affidavit of the author of “TM1”. Moreover, a copy of the cession agreement referred to in “TM1” has not been attached to the papers.

[41] The contents of “TM1” also appears to suggest that Mr Fourie, during the lifetime of the late Theresa Sihele, gave permission to her, and after her death, to the second respondent, to collect rental in respect of the properties. It must however be borne in mind that in terms of Section 52 of the Administration of Estates Act No. 65 of 1966, it is not competent for any executor to substitute any other person to act in his place.⁷

[42] The effect of Section 52 is that an executor does not have the right, while he remains executor, to confer on someone else the power to do what he is entitled or required in law to do as executor.⁸ Neither the first applicant nor the second applicant can therefore derive any *locus standi* from the contents of Annexure “TM1” in order to bring the present application.

Conclusion

[43] The objection *in limine* to the applicants’ *locus standi* to bring this application is well taken.

Order

[44] Accordingly, the following order is issued:

[1] The application is dismissed with costs, those costs to include the costs of counsel, taxed on scale C.

⁷ Section 52 of the Administration of Estates Act 65 of 1966 provide that: “*It shall not be competent for any executor to substitute or surrogate any other person to act in his place.*”

⁸ *Segal and another v Segal and others* 1976(2) SA 531 (C) at p534 A-B

[2] The first and second applicants are directed to pay those costs jointly and severally, the one paying, the other to be absolved.

APPELS AJ

ACTING JUDGE OF THE HIGH COURT

Heard: 31 July 2025
Delivered: 14 August 2025

APPEARANCES:

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