



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 23200/2023

In the matter between:

MARIANNE BRYANT N.O.

Applicant

and

WINSTON CHARLES DELPORT

First Respondent

LIESELL GARMEN DELPORT

Second Respondent

REGISTRAR OF DEEDS

Third Respondent

ABSA BANK LTD

Fourth Respondent

F. SALIE ATTORNEYS

Fifth Respondent

**ABSA HOME LOANS GUARANTEE
CO (RF) (PTY) LTD**

Sixth Respondent

Neutral citation:

Coram: COOKE AJ

Heard: 22 April 2026 and 4 May 2026

Delivered: 13 May 2026

Summary: Condictio sine causa – was there a justifiable cause for the transfer of money from the deceased’s bank account to the first respondent’s bank account – claim for repayment of loan – disputes of fact in application proceedings

ORDER

[1] The first respondent shall pay the sum of R322 600 to the applicant.

[2] The first and second respondents shall pay the sum of R25 090.90 to the applicant.

[3] Interest shall run on the above amounts at the prescribed rate from the date of this order to date of payment.

[4] The first and second respondents shall pay the applicant's costs, with counsel's fees to be taxed on scale B.

JUDGMENT

Cooke AJ:

- [1] This is an all too familiar¹ case of a family fighting over a deceased estate. At its heart lies a contest regarding the proceeds of the sale of immovable property. Who is entitled to these proceeds: the deceased's son and daughter-in-law or the deceased's granddaughter?
- [2] The executrix of the estate of Ms Filida Delport ('Filida'),² Ms Marianne Bryant ('the executrix') seeks payment of R350 000 from Filida's son and daughter-in-law, the first and second respondents ('Winston' and 'Liesell'). The sole beneficiary of the estate is Ms Lynn Delport ('Lynn'), Filida's adult granddaughter. Lynn thus stands to benefit if the claim is successful.
- [3] The immovable property which is the subject of these proceedings is situated at [...] M[...] S[...] Street, Lourensia Park, Somerset West and will be referred to in this judgment as 'the property'.

¹ See *Penwill NO v Penwill* 2016 JDR 1150 (GP) para 3 where Van Oosten J quoted from Piet Botha's 'Begrafnislied': '... Hoe later, hoe kwater die testament, die groot baklei broedertwis, dis gewis want elkeen voel hy moes meer kry...'

² As the main characters are part of the same family it is convenient to refer to them by their first names. In doing so, I mean no disrespect.

Background

- [4] On 29 November 2022, Filida signed a will ('the 2022 will') in which she named Lynn as the sole beneficiary of her estate, and the applicant was nominated as the executrix. It appears that a few months later, on 23 March 2023, Filida signed a deed of sale in terms of which she sold the property, the predominant asset in her estate, to Winston and Liesell for the sum of R350 000. About a week later, on 2 April 2023, Filida suffered her first stroke, after which her health deteriorated.
- [5] On 12 April 2023, a savings account at ABSA was opened in the name of Filida. Winston helped Filida to open this account. Then, on 24 April 2023, the fifth respondent ('Salie Attorneys') received instructions from the fourth respondent to register a mortgage over the property. To this end, on 12 May 2023, an attorney from Salie Attorneys, namely Afton Pillay, met with Winston and Liesell at the Helderberg hospital where Filida was convalescing. Having confirmed that Filida intended selling the property to Winston and Liesell, Ms Pillay obtained Filida's signature on certain documents required for the transfer.
- [6] On 13 June 2023, the property was transferred to Winston and Liesell. It appears that the mortgage was granted by the sixth respondent. (For present purposes, there is no need to distinguish between the fourth and sixth respondents and I therefore refer to them collectively as 'the bank'.) The day after, on 14 June 2023, the purchase price was paid into Filida's bank account less certain deductions. The amount so deposited was R322 690.10. On the same day, the amount of R322 600 was transferred out of Filida's bank account into Winston's cheque account.

It is this transfer that is challenged in these proceedings. A week later, on 21 June 2023, the sum of R309 000 was transferred from Winston's cheque account into Winston's savings account. Prior to this transfer, the savings account was empty.

[7] It appears that Filida then suffered further strokes on 15 July and 19 August, after which she passed away on 26 August 2023, two weeks before her 74th birthday. Just three days after she passed away, on 29 August 2023, R10 000 was transferred from Winston's savings account back into his cheque account. That day, R5 000 was withdrawn in cash from Winston's cheque account, and the following day there was a further cash withdrawal of R1 900. From 11 October 2023, a pattern developed whereby Winston transferred R20 000 from his savings account into his cheque account and then this amount was immediately withdrawn in cash. Over 18 days, Winston withdrew R180 000 using this method. Winston took matters even further on 29 October 2023 when he transferred R100 000 to his cheque account and then withdrew cash amounts of R40 000 and R70 000 on 30 October 2023 and 1 November 2023 respectively. By the beginning of November 2023, just two months after Filida's passing, the balance in Winston's savings account was negligible, and the proceeds of the sale had been dissipated, most of it by way of systematic cash withdrawals.

[8] In the meantime, on 5 September 2023, less than two weeks after Filida had passed away, Winston told Lynn's mother (his sister), Samantha, that he was the owner of the property. On the next day, 6 September 2023, Filida's account was closed. Thereafter, on 8 September 2023,

Winston changed the locks on the property, while Lynn was still residing at the property, and without her knowledge. Lynn responded to the changing of the locks by launching an urgent spoliation application on about 11 September 2023. It is not apparent from the papers what the outcome of that application was, although I infer that the application was successful. This explains why, on 30 October 2023, Winston and Liesell launched an application to evict Lynn from the property.

[9] The application under consideration was then issued on 20 December 2023. The executrix initially sought a range of relief relating to the transfer of the property to Lynn, together with an alternative prayer that Winston and Liesell pay the purchase price of R350 000, and a further alternative that Salie Attorneys pay the purchase price of R350 000.

[10] Various affidavits were filed by Salie Attorneys and the bank. In due course, agreements were reached between the executrix and Salie Attorneys and between the executrix and the bank, in terms of which the relief sought against those parties was withdrawn with each party to pay their own costs. By the time the matter came before me, the only substantive relief sought by the executrix was the alternative prayer for payment of R350 000 by Winston and Liesell.

[11] In the founding affidavit, the executrix placed reliance upon a video recording of a conversation between Filida and Samantha taken by Michelle Jordan on her phone on 18 May 2023, a transcript of which was attached to the affidavit. Winston and Liesell did not admit the authenticity of the video. At the initial hearing on 22 April 2026, I heard evidence virtually from Ms Jordan who confirmed the authenticity of the

video. Having regard to this evidence, I accept that the transcript is a substantially accurate reflection of the discussion between Filida and Samantha.³ It appears from this transcript that Filida had been under the impression that the paperwork she signed the previous week had been in relation to the construction of an extension to the property.

[12] At the initial hearing, I also granted an order in terms of uniform rule 6(5)(e) admitting the supplementary affidavit of the executrix dated 18 July 2024. In response to the admission of this affidavit, counsel for Winston and Liesell requested an opportunity to file a further affidavit. It would have been preferable if the application in terms of uniform rule 6(5)(e) had been set down and determined in advance of the hearing, alternatively if Winston and Liesell had delivered their response prior to the hearing, on a conditional basis if necessary. Nonetheless, it seemed to me that it was important that Winston and Liesell place their position on record and I thus allowed the request. Their further affidavits were handed up after the lunch break, after which counsel for the executrix requested a postponement to allow her client to deliver a reply to these affidavits. The request was granted, and the matter was postponed to 4 May 2026.

[13] In his further affidavit, Winston sought to explain why the sum of R322 600 was transferred to his cheque account on 14 June 2023, and a week later, R309 000 was transferred to his savings account. According to Winston, he had agreed with his mother, Filida, that upon transfer of the property to him, Filida and Lynn would continue to stay in the main

³ Having heard her evidence regarding the video I do not think it is necessary to make any findings regarding the admissibility of her affidavit.

house indefinitely, and he and his family would move into a flatlet that would be built on the property. On Winston's telling, it was also agreed that he would utilise the proceeds of the loan from the bank (ie the purchase price) to build the flatlet. As regards the transfer of R309 000 to his savings account, this was apparently done to earn higher interest rates and incur less banking fees.

[14] The executrix delivered a reply to Winston's further affidavit. She submitted that Winston's version was a recent fabrication and was irreconcilable with his own conduct in launching the eviction application. She also pointed out that in his answering affidavit, when responding to the allegations regarding the transfer, he had not disclosed the alleged agreement. As to the transfer of the R309 000, the executrix argued that the reasons proffered were inconsistent with the transfers back to the cheque account, and the various cash withdrawals that followed at a cost of about R7 550.

[15] Against this backdrop, I examine the issues under three headings. First, I address the executrix's standing to bring the application. After that, I discuss the enrichment claim, and finally I consider the loan claim.

Standing

[16] Winston alleges that Filida was very ill when she signed the 2022 will, and he doubts that she understood what she was signing, or that she was able to provide instructions to the executrix. He denies that this will is valid. These allegations are disputed by the executrix, who points out that, on Winston's version, Filida was well enough to sign the deed of

sale and transfer documents several months later. The executrix notes further that the Master of the High Court accepted the 2022 will.

[17] Notwithstanding Winston's views in relation to the 2022 will, and the fact that he is the sole beneficiary and executrix under an earlier will, he has not taken steps to challenge the 2022 will or have the executrix removed from office. The executrix therefore remains empowered to represent the estate and thus has standing to pursue this application.

Enrichment claim

[18] The executrix claims that Filida always intended to transfer the property to Lynn, and that Winston and Liesell fraudulently or negligently misled Filida into thinking that the documents she was signing were the documents to be signed for the building of an extension. Linked to this claim, the executrix also contends that Winston and Liesell exercised undue influence over Filida.

[19] The executrix put up statements and a petition from community members in support of the proposition that Lynn is the rightful owner of the property. These statements were not confirmed by way of an affidavit, and I do not consider that any weight may be attached to the views expressed by the community members. The executrix also relied upon apparent discrepancies between different signatures. In the absence of evidence from a hand-writing expert, I prefer not to draw any inferences from the signatures.

[20] The executrix's claims are vehemently disputed by Winston and Liesell. Critically, they are also gainsaid by Ms Pillay, who alleged that when she met with Filida at the hospital, she took her time and spoke with Filida in her mother tongue (Afrikaans). In this consultation, Filida confirmed that she was the owner of the property and was selling it to Winston and Liesell for R350 000. She confirmed further that she would no longer be the owner of the property, and Winston and Liesell would become the owners. Filida understood further that the purchase price would be paid into her bank account. According to Ms Pillay, Filida was not under the impression that she signed a document relating to extending a room at the back of the property. In addition, Ms Pillay recorded that Winston and Liesell did not participate in the consultation. They apparently stood on the side of the bed, listening, but not making any intervention. Ms Pillay's evidence is destructive of both the misrepresentation claim, and the undue influence claim. In the executrix's heads of argument, it is accepted that Ms Pillay is an officer of the court and she would not be deceitful, and the executrix records that she believes Ms Pillay's version.

[21] There are thus two competing versions regarding Filida's intentions, reflected on the one hand by what she told Ms Pillay on 12 May 2023, and on the other hand by what she then shared with Samantha on 18 May 2023. As these are application proceedings,⁴ not trial proceedings, the version of the respondents (Winston and Liesell) must be accepted unless that version is so far-fetched or clearly untenable that the court is

⁴ Application proceedings are those where the evidence is set out in affidavits. In trial (or action) proceedings the evidence is given by oral testimony.

justified in rejecting it merely on the papers.⁵ A court should also be careful before accepting allegations of fraud made in application proceedings, especially where these allegations are disputed and have not been properly investigated.⁶ It has been suggested that it is, as a general rule, practically impossible to establish fraud using application proceedings.⁷

[22] In my view, the 2022 will, even if valid, does not prove that Filida did not subsequently intend transferring the property to Winston and Liesell. It may be, for instance, that Filida was content for the property to be sold on the understanding that the proceeds of the sale would form part of her estate and Lynn would in due course inherit the proceeds.

[23] There are several possibilities regarding Filida's apparently inconsistent statements. It may be that she was confused, or that she changed her mind from one week to the next, or that she told her family members what she thought they wanted to hear. In the circumstances, I do not think that the true position may be determined on the papers in this matter. Having regard particularly to the corroborating evidence of Ms Pillay, which the executrix does not dispute, Winston and Liesell's version regarding Filida's intention cannot be said to be far-fetched or untenable. It follows that there is no basis, on these papers, to find that Filida was fraudulently or negligently misled or unduly influenced.⁸

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634D – 635D.

⁶ *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at 304A–C.

⁷ *J.A.N v N.C.N* (2283/2021) [2022] ZAECKMKHC 14 (17 May 2022) para 31.

⁸ This conclusion should not be construed as a positive finding that Winston and Liesell are the lawful owners of the property and thus entitled to the eviction of Lynn. This question must be decided in the eviction proceedings on the application of the evidential rules applicable to those proceedings.

[24] This dispute of fact may well have benefited from a referral to oral evidence (ie a trial). Although it appears that the executrix contemplated making an application for such a referral, in the end, no such application was made. In my view, it would not have been appropriate for me, of my own accord, to make such a referral.⁹

[25] That is not, however, the end of the executrix's claim. The executrix has an alternative ground for the enrichment claim which is based on Winston having transferred the proceeds of the sale to his personal bank account. It is to this alternative ground that I now turn.

[26] When the executrix commenced the application, she did not know that Winston had transferred funds from Filida's bank account into his cheque account. It is therefore not surprising that she did not explicitly rely upon this transfer as a ground for the payment sought. Nonetheless, by the time that the executrix's supplementary affidavit was delivered in July 2024, this ground was stated clearly. According to the executrix '... (Winston)... has unlawfully enriched himself by transferring the proceeds of the sale from (Filida's) account to his personal account and thereafter disposing of same in cash... to the detriment of (Filida's) estate'.

[27] Winston and Liesell argued that the executrix was not entitled to advance her claim based on grounds not raised in the founding affidavit. It is so that ordinarily, an applicant will not be entitled to make or supplement her case in the replying affidavit (or indeed a supplementary

⁹ *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428H-429H.

affidavit). But, in exceptional cases, it will be allowed. Is this such an exceptional case?

[28] *Mostert's* case¹⁰ lists the following relevant factors: (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs.

[29] On the facts of this matter, I think that the executrix should be permitted to advance the new ground for relief. Importantly, the new ground is based on facts which were not known to the executrix at the time that the application was launched. In addition, Winston and Liesell were aware of the new ground almost two years before the hearing when the supplementary affidavit was delivered, and they took no steps to strike out the new matter. They were also afforded an opportunity to respond to the supplementary affidavit, which opportunity they accepted. They are therefore not prejudiced if the new ground is pursued.¹¹

[30] I now examine whether the evidence before me establishes a claim. The relevant legal principle is as follows: where money which has come into the hands or possession of another for no justifiable cause - that is to say, not by gift, payment, discharging a debt, or in terms of a promise, or

¹⁰ *Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) para 13.

¹¹ Compare *JMGW v MJW and Another* [2023] ZAWCHC 201 para 45.

some other obligation or lawful ground for passing of the money to the recipient – that money may be recovered to the extent that the recipient has thereby been enriched at the expense of the person whose money it was.¹²

[31] It is not disputed that the proceeds of the sale of the property, which belonged to Filida, came into the hands of Winston. The primary question that arises for my consideration is whether there was a justifiable cause for the transfer from Filida's bank account to Winston's cheque account.

[32] Winston's case, advanced for the first time in his further affidavit signed on the day of the initial hearing, is that there was a justifiable cause, namely the alleged agreement with Filida that the sale proceeds would be used to pay for the construction of the flatlet. This case is strenuously disputed by the executrix.

[33] Unlike the dispute regarding the sale of the property, I think that this dispute may be determined on the papers. Even in application proceedings, in appropriate circumstances, the court should be prepared to undertake an objective analysis of factual disputes. In my view, this dispute regarding the alleged agreement called for such an analysis.¹³

¹² *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C) at 397E-G, confirmed in *Scholtz Inc v Elandsfontein Beverage Marketing (Pty) Ltd* 2012 JDR 0365 (SCA); see also *Mhlari NO and others v Nedbank Limited* 2024 JDR 1431 (SCA) para 18.

¹³ Compare *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) para 19.

[34] Having analysed the factual dispute, I conclude that Winston's version is far-fetched, untenable, and falls to be rejected. I say so for the following reasons:

- a. Winston's allegations regarding the alleged agreement are devoid of detail. He does not say when or where the agreement was reached, or whether there were any witnesses. It bears the hallmarks of a version contrived after the fact.
- b. The agreement alleged by Winston is also fanciful. If there had been such an agreement, Winston would not have been entitled to change the locks and seek Lynn's eviction. Furthermore, Winston has evidently used the funds for purposes other than the construction of the flatlet. In my view, Winston's conduct is thus plainly inconsistent with the existence of an agreement on the terms he alleges.
- c. It is apparent from Ms Pillay's account of the events in hospital that Filida expressed concern for Lynn's continued accommodation, and these concerns were assuaged by Winston. To my mind, it is inconceivable that Filida would have agreed that Winston could take the proceeds even if he reneged on his undertaking to allow Lynn to remain in the property.
- d. The only supporting documents put up by Winston were two quotations for the preparation of a building application, from the same person, dated 11 and 19 June 2023, in the amounts of R16 499.10 and R13 000 respectively. It appears from

Winston's cheque account statements that he made a payment of R13 000 on 20 June 2023. I assume in favour of Winston that this payment was in respect of the latter quotation. These quotations indicate an intention to design a new living room, garage, kitchen and entrance. Although the new garage could conceivably be used as a flatlet, no mention is made of a toilet or bathroom in the garage. These would be necessary if the garage were to be used as a flatlet for Winston's family. The items in the quotation are thus, in my view, wholly inconsistent with Winston's contention that he intended using the proceeds to build a flatlet for his family. It appears more likely that he intended renovating the main living quarters for his own purposes.

- e. Winston alleges that 'construction was halted' as a result of Filida's death and Lynn's spoliation application. But there is no evidence of construction having been performed before Filida's death, nor is there any explanation for the absence of construction, or even the drafting and/or approval of building plans, during the two-month period from the date of payment of the quotation to Filida's passing.
- f. Finally, in the executrix's founding affidavit, she noted that Filida's bank account revealed that the sum of R322 600 had been transferred into an 'unknown' bank account with number 4[...] on 14 June 2023. At that stage, the executrix did not know that this account belonged to Winston. In his answering

affidavit, Winston responded to this allegation by simply stating ‘The contents of these paragraphs are noted’. If an agreement had been reached with Filida in terms of which he was authorised to make this transfer to his own account, I would expect Winston to have been open with the court and to have advised that the ‘unknown’ account is in fact his, but that the transfer was made by arrangement with Filida. Instead, it was only when the shoe pinched at the hearing, more than two years later, that Winston saw fit to contend that he had made this agreement with Filida. The absence of transparency strongly supports the view that, in fact, there was no agreement.

[35] I therefore conclude that the alleged agreement is manufactured, and there was accordingly no lawful ground for the transfer of R322 600 from Filida’s account to Winston’s cheque account. It follows that there was no valid reason for the transfer. This money therefore came into Winston’s possession for no justifiable cause.

[36] The evidence also shows the additional requirements for an enrichment action¹⁴ - (a) Winston received money to which Filida was entitled, (b) he benefited at the expense of Filida, and (c) Filida was made poorer in the same amount. The requirements for an enrichment claim have therefore been satisfied, and the executrix is entitled to an order that Winston pay the sum of R322 600 to her.

The transfer and bond costs

¹⁴ See the requirements for a *condictio sine causa* set out in LTC Harms and MR Townsend Amler’s Pleadings 10th ed 2024 84.

[37] In terms of the deed of sale, Winston and Liesell were obliged to pay the transfer and bond costs. These costs amounted to R25 090.90. Winston and Liesell informed Salie attorneys that they had no money, but Filida had loaned them the amount required to pay the costs. Salie attorneys were instructed to draft a document for Filida to sign allowing for the transfer and bond costs to be deducted from the proceeds of the sale. Such a document was prepared, and it was signed by Filida on 1 June 2023. The document recorded that Winston and Liesell will reimburse Filida for the deductions after registration. The bank records, however, show that the loan was not repaid after registration, or at any time.

[38] In his further affidavit, Winston confirmed that the costs of R25 090 were lent by Filida. He does not suggest that the amount was repaid to Filida.

[39] Although the executrix did not initially frame her claim as being in any part for the repayment of a loan, in my view, the entitlement is evident from the allegations made by Ms Pillay and Winston. This is thus a case where the facts alleged in the answering affidavits reveal the existence or possible existence of a further ground for relief sought by the applicant.¹⁵ The information regarding the loan agreement was not within the knowledge of the executrix at the time that she launched the application. In my view, the executrix was thus entitled to contend, in reply, that R25 090 was advanced to Winston and Liesell as a loan, and for this reason ought to be repaid to the estate.

¹⁵ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) para 26; *South Peninsula Municipality v Evans and Others* 2001 (1) SA 271 (C) at 281B-C.

[40] Winston and Liesell had ample opportunity to dispute the assertion of a loan. Far from doing so, they accepted that this amount had been loaned to them. In the circumstances, I am satisfied that the executrix is entitled to payment of R25 090 from Winston and Liesell.

Conclusion

[41] I therefore find that Winston is obliged to pay R322 600 to the executrix because of the unjustified transfer to his cheque account. I find further that both Winston and Liesell are obliged to pay R25 090 to the executrix in respect of the loan from Filida in this amount.

[42] As regards interest, the executrix seeks interest at the rate which would have accrued to Filida if the funds had been deposited into her bank account. The executrix has not, however, adduced evidence of this interest rate. In the circumstances, I allow interest at the prescribed rate. In my view, having regard to the fact that the claim has been allowed on grounds which were raised belatedly, interest should only run from the date of this order.

[43] Costs should follow the result. Counsel for the executrix requested that counsel's fees be taxed on scale B. I agree that this scale is appropriate.

[44] I therefore make the order set out above.

DJ COOKE
ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant: E Auret

Instructed by: Hannes Pretorius Bock & Bryant Attorneys

For first respondent: G Papier

Instructed by: Mark Visagie Attorneys