

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 2021-15446

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

23 JANUARY 2023


Judge Mia

In the matter between:

REBECCA SIMONE ROSENZWEIG

APPLICANT

AND

SHELLEY LAZER t/a S LAZER ATTORNEYS

RESPONDENT

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 23 January 2023.

MIA J:

[1] The primary relief sought by the applicant was the payment of money held by the respondent in a trust account. When the matter was finally set down for hearing on the opposed motion roll, the applicant's portion of the proceeds had been paid into her account. The applicant however persisted with the application for payment of interest on the amounts that had been due to her as well as the costs of the application. The respondent initially filed a notice of opposition and filed the opposing affidavit after became due and sought condonation therefore. I deal with this later.

[2] It is useful to narrate the background facts prior to delving into the issue. A family testamentary trust was established in accordance with the will of the applicant's great-grandfather. The Spiz Family Trust was the vehicle which allowed for the a number of family to be provided for. The applicant was a beneficiary and heir of the Spiz Family Trust through the Rosenzweig family in terms of the applicant's grandfather's will. The trustees called for a meeting of the beneficiaries and heirs at Melrose Arch on 27 September 2019. The majority of attendees agreed at that meeting that the funds to be paid out by Safin to the heirs would be paid into the respondent's account. The trustees of the Spiz Family Trust ("the Trust") resolved at the meeting that certain payment conditions were applicable to the distribution of inheritance monies due to the Rosenzweig heirs. The respondent was the attorney instructed by the trustees facilitate payment to the beneficiaries identified in the will. Sasfin paid the funds into the respondent's trust account in favour of the Spiz Family Testamentary Trust on 19 October 2019.

[3] The applicant launched the present application seeking to compel the respondent to make payment of an amount of one third of the proceeds received in her trust account from Safin Bank plus the interest on the amount at a rate of 10.25% per annum to date of

payment to the applicant as well of costs of the application on an attorney and client scale. The respondent opposed the application and paid the amounts due to the applicant which was less than the one-third of the amount received into her account, only after the applicant complied with the payment conditions. The applicant received her inheritance monies within 48 hours, from the respondent after she complied with the payment conditions, on 23 June 2021. The amount the applicant received was R 1 112, 565.81. The applicant seeks interest which she avers accumulated on the aforesaid amount from 24 October 2019 to 23 June 2021 as well as the costs of this application.

[4] The only issues left for adjudication in the present application are whether the respondent is liable for: payment of interest (on the capital amount paid to the applicant) at a rate of 10,25% from 24 October 2019 to the date of payment; and costs of this application on an attorney and client scale.

[5] The applicant delivered a supplementary affidavit without the leave of the Court. The respondent has not objected to the affidavit. The supplementary affidavit is allowed as evidence in the present application. The respondent made a payment on 1 November 2019 and 9 December 2019 respectively to other Rosenzweig heirs, in respect of a will. The applicant contended that her portion of the inheritance was withheld without proper explanation until 23 June 2021. She stated that she was not treated with “the same courtesy as the other beneficiaries and heirs, who were paid almost instantly”. The applicant is of the view that the respondent ought to have communicated with her about the funds to be paid to her. The absence of communication necessitated the application which would otherwise have been unnecessary according to the applicant. She states that she was unsure “to what point the funds would have remained in the respondent’s trust account and how she would have intended to make payment to the applicant as the respondent made no attempt to communicate with her about the funds in circumstances where she had her contact and banking details”.

[6] In opposing the affidavit, the respondent denied that the applicant had been substantially successful. This affidavit was delivered late with an application for

condonation relying on the principles set out in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)*¹. The respondent furnished a full explanation for the full duration of the delay and I am satisfied with the respondent's explanation relating to the respondent's wish to resolve the matter without the necessity to have the application enrolled.

[7] It was argued on behalf of the respondent that payment of the inheritance monies occurred as a result of the applicant's compliance with the payment conditions resolved by the Trustees and was not a result of the present application. So counsel for the respondent continued, the respondent was not *in mora* when the payment was made to the applicant of her inheritance monies. Thus, *mora* interest could not be claimed from the respondent in respect of such payment. The payment followed the condition being met and not the issuance of the application and therefore counsel submitted the present application was unnecessary. The applicant was required to comply with the payment conditions in order to receive payment of her inheritance monies as resolved by the Trustees. The applicant's reasons for non-compliance with the conditions before she elected to launch the present application were not sufficient.

[8] The respondent first addressed the applicant's demand for one third of the monies received, by way of correspondence to the applicant's legal representative in April 2021. It is apparent from this correspondence that the respondent wished to settle the applicant's claim for payment. The respondent tendered payment of the relevant amount of inheritance in accordance with the Trustees' instructions. The payment was to be made on the same terms as the previous beneficiaries received payment namely upon the respondent's receipt of signed documentation as required by the resolution of the Trustees and the applicable Financial Intelligence Centre Act (FICA) documentation.

[9] In *The National Director of Public Prosecutions v Zuma*² the Court held that: motion proceedings, unless concerned with interim relief, are all about the resolution of legal

¹ 2008 (2) SA 472 (CC).

² 2009 (2) SA 277 (SCA)

issues based on common cause facts; unless the circumstances are special, motion procedures, cannot be used to resolve factual issues because they are not designed to determine probabilities.

[10] Moreover, it is well-established under *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*³ that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such an order.

[11] The applicant's case is based on the respondent having received the funds in October 2019 and being in possession of her contact details due to a previous matter. The respondent was not the executrix of the deceased estate. She was appointed by the Trustees of the Spiz Family Trust to receive the Rosenzweig and Picker inheritance monies into her trust account; and subject to and prior to any distribution to any Rosenzweig or Picker heir or heiress made by the respondent:

10.1 "each heir in accepting their distribution was to sign the distribution account and accept and pay their equal portion of the professional fees expended;

10.2 each heir was to provide all FICA documentation and fulfil any further administrative requirements of the respondent;

10.3 each heir was to sign an indemnity in favour of Jonathan Rosenzweig and Fay Picker in accepting such distribution."⁴

[12] The respondent was mandated by the Trustees to attend to the administration and payment of the monies received. She was specifically informed that Mr. Daniel

³ 1984 (3) SA 623 (A)

⁴ CaseLines, Vol: 002-70, para 7(b) read together with Vol: 002-71, paras (i), (ii) and (iii)

Rosenzweig would communicate on behalf of the Rosenzweig heirs with regard to the requirements necessary to effect payment of the distribution. Notwithstanding the undertaking given there was no response to the communication by Mr. Daniel Rosenzweig or the respondent to the applicant at 3 February 2020. The applicant denies any communication and insists that the communication ought to have originated from the respondent. It is inexplicable why the applicant did not approach Mr. Rosenzweig or the Trustees to ascertain what was required in order to access her inheritance. From the correspondence sent from Mr. Rosenzweig and the respondent to the applicant, the applicant would have been aware of what was required of her to receive payment of her inheritance monies and failed to comply with such requirements for whatever reason, or she deliberately refrained from making the necessary inquiries from the respondent in that regard. This resulted in her non-compliance with the Trustees requirement to enable payment to be made.

[13] The clear route to obtaining her inheritance would have been to comply with the requirements set by the Trustees and to sign the FICA documents to enable payment to be made. The respondent made payment within twenty-four hours of receipt of the documents.

[14] In *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga and Others*⁵ the Court held:

“The term *mora* simply means delay or default. When the contract fixes the time for performance, *mora (mora ex re)* arises from the contract itself and no demand (*interpellatio*) is necessary to place the debtor in *mora*. In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (*interpellatio*) becomes necessary to put the debtor in *mora*. This is referred to as *mora ex persona*. (See *Scoin Trading (Pty) Ltd v Bernstein NO 2011 (2) SA 118 (SCA)* paras 11 & 12.) The purpose of *mora* interest is therefore to place the creditor

⁵ 2013 (2) SA 259 (SCA); [2013] 2 All SA 1 (SCA)

in the position that he or she would have been in had the debtor performed in terms of the undertaking.”

[15] The respondent’s knowledge of the applicant’s banking details did not give rise to an obligation on the part of the Trust to mandate the respondent to pay the applicant’s inheritance. The resolution taken by the Trust to make payment was that the Trust’s obligation to pay the inheritance monies to the applicant only arose once all the Trust’s requirements for payment of such had been complied with by the applicant. The respondent cannot be faulted for not having paid the applicant’s inheritance monies to her before obtaining the applicant’s compliance with the payment resolutions of the Trust. Any delay or *mora* by the respondent, on behalf of the Trust, relating to the payment of the inheritance monies to the applicant could only commence, at the earliest, after the applicant had complied with the Trust’s payment requirements and it was delivered to the respondent indicating such compliance. It is common cause that compliance was finally provided by the applicant and obtained from her by the respondent on 21 June 2021. The applicant is thus not entitled to interest from October 2019 and consequently is not successful in this application.

[16] The costs in the matter follow the cause is usual. I have noted that the respondent has not called for a punitive costs order under these circumstances. This matter was resolved except for the costs and the respondent has attempted to resolve the matter.

[17] I grant the following order:

[1] The application is dismissed with costs.



**SC MIA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION**

APPEARANCES

DATE OF HEARING : 04 November 2021

DATE OF JUDGMENT : 23 January 2023

APPLICANT'S COUNSEL : Adv JH Groenwald

APPLICANT'S ATTORNEYS : David H Botha Du Plessis & Kruger Inc

RESPONDENT'S COUNSEL : Adv. A. Roeloffze

RESPONDENT'S ATTORNEYS : S Lazer Attorneys