

SOUTH AFRICA / JUDGMENT

Adoro v Monchusi (A19/2021)

[2021] ZAFSHC 188 (23 August 2021)

[2021] ZAFSHC 188**COURT**

Free State High Court, Bloemfontein

BEFORE

Page, Reinders

CASE / FILE NUMBER

A19/2021

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Policy**IN THE HIGH COURT OF SOUTH****AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Case****no: A19/2021****In the****matter between:**

NTHABISENG
GLADYS
ADORO Appellant
and
ALINA
NTHABISENG
MONCHUSI Respondent

CORAM:

REINDERS ADJP et
PAGE AJ
HEARD

ON:

26 JULY 2021
DELIVERED
ON: 23
AUGUST 2021

JUDGMENT

BY: PAGE, AJ

- [1] These appeal proceedings emanate from an eviction order granted by the Magistrate, Thaba Nchu ordering the eviction of Ms Ntabiseng Gladys Adoro (“the appellant”).
- [2] It is common cause that the respondent, Ms Alina Ntabiseng Monchusi is the duly appointed executrix of the deceased estate of her late father, Mr Motlatsi Isaac Moraile.
- [3] In her founding affidavit to the application in terms of S 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) before the court a quo, the respondent attests as below:

“I, the undersigned,

ALINA NTABISENG MONCHUSI

Do hereby make oath and say:

1.

I am an adult female person, with ID Number [.....], currently residing at [.....], THABA NCHU, Free State Province.

1.1 The facts stated herein falls within my personal knowledge and are both true and correct.

1.2 I depose this affidavit freely and voluntarily, without being subject to any form of duress, whilst of sound and sober senses.

- [4] The respondent, as is clear from the above, attests to her founding affidavit in her personal capacity and not in her capacity as Executrix Nomino Officio (in her capacity as executrix of the Estate Late Motlatsi Isaac Moraile). It is noted that she cites herself in her personal capacity on the papers.
- [5] During argument the respondent’s legal representative conceded that the application was launched by the respondent in her personal capacity as opposed to her capacity as executrix of the deceased estate.
- [6] It is contended further that the respondent in fact holds legal standing based thereon that it is undisputed that the respondent is the duly appointed representative of the deceased estate.
- [7] The appellant has raised the locus standi of the respondent in the proceedings in the court a quo as a point in limine. The learned magistrate dismissed the point in limine.
- [8] The learned magistrate’s dismissal of the point in limine on locus standi is raised as the appellant’s first ground of appeal.

[9] The learned Magistrate deals with the point in limine as follows in his

judgment:

“The Defendant raised a point in limine in her opposing affidavit, par 3.1 alleging that the Applicant is lacking locus standi in judicio and as such then is praying for the dismissal of the application with costs.

The point in limine raised was dismissed. The PIE- Act defines an owner in Section 1 as : “the registered owner of land, including an organ of State.”

Owner in the Deeds Registries Act 47 of 1937 is defined in section 102 as: in relation to “immovable property, subject to paragraph (b) the person registered as the owner or holder thereof and includes...the executor of any owner who has died...provided such ...executor is acting within the authority conferred on him or her by law..”

In this matter applicant was duly authorized by the Master of the High Court to control the assets of the Estate of the late Motlatsi Isaac Moraile (ID: [.....]), who died on 22 May 2006, assets being stand nr [.....] Mokwena Location, Thaba Nchu, to pay the debts, and to transfer the residue of the estate to the heir/s entitled by law”

[10] The learned magistrate seems to agree that the respondent has locus standi to bring the application in her personal capacity, since she is regarded as an owner of the property in issue in her position as executor.

[11] The Legal Position:

Section4

(1) of PIE authorises an owner or a person in charge of land to launch eviction proceedings in terms of the Act.

An “owner” is defined in PIE as the “registered owner of land, including and organ of State.”

[12] The Deeds Registries Act 47 of 1937 (“Act 47 of 1937”) regulates inter alia, the registration of ownership of land. Section 3 of the aforesaid Act stipulates that the Registrar of Deeds is responsible for the registration of certificates of title to land.

[13] It should thus be accepted that a registered owner of land as referred to in the definition of the PIE Act means an owner as further defined in the Act 47 of 1937, as amended.

[14] An “owner” in respect of immovable property is defined in Act 47 of 1937 as follows:

owner” means, in relation to— (a) immovable property, ..., the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, a liquidator or trustee elected or appointed under the Agricultural Credit Act, 1966 (Act 28 of 1966), the liquidator of a company or a close corporation which is an owner and the executor of any owner who has died or the representative recognised by law of any owner who is a minor or of unsound mind or is

otherwise under disability, provided such trustee, liquidator, executor or legal representative is acting within the authority conferred on him or her by law

[15] An executor for purposes of Act 47 of 1937, is regarded as an “owner” on condition that the executor acts within the authority conferred on him/her by law.

[16] An executor of a deceased estate finds authority in the Administration of Estate’s Act 66 of 1965, (“Act 66 of 1965”) as amended. The Master of the High Court holds jurisdiction over the estate of a deceased person.[1]

After letters of executorship is granted by the Master to an executor, he/she takes into his/her custody and under his/her control all the property, books, and documents in the estate.[2]

[17] Meyerowitz[3], a leading author in the administration of estates writes as follows:

...” the executor derives his authority to act only by receiving a grant of letters of executorship from the Master. An executor testamentary has no locus standi on behalf of the estate until such grant.”

[18] In para 12.21 under the heading “Legal Proceedings by and against executor” of the same work it reads further:[4]

“No proceedings can be taken against the estate without making the executor a party to them. Similarly, no person can institute proceedings on behalf of the estate except the executor”.

[19] It is trite that an executor of a deceased is vested with the authority and powers to deal with the assets of a deceased estate in a representative capacity.[5] The executor thus has locus standi to sue or to be sued. An executor holds a fiduciary position over a deceased estate.[6]

[20] Findings

There is no legal basis for a finding that an individual, who is appointed as an executor of a deceased estate, may institute legal proceedings on behalf of the estate in his/her personal capacity. An executor, as is borne out from the authority mentioned hereabove, may only act in his/her representative capacity under the supervision of the Master of the High Court.

It seems that the learned magistrate found that the executor is regarded as an owner of the immovable property as per the definition of “owner” in the Deeds Registries Act and that as a result the executor could institute eviction proceedings in terms of PIE as the owner in her personal capacity.

[21] The learned magistrate is correct in finding that a registered owner in respect of immovable property includes an executor as defined in Act [7]. There is however a proviso to the definition which requires the executor to act within the authority conferred on him/her by law, in this case Act 66 of 1965, as amended.

[22] Act 66 of 1965, as mentioned hereabove does not make provision for an executor to act in his/her personal capacity with the assets of a deceased estate. The executor is only authorised by the act to deal with the assets of the deceased estate in a representative capacity.

[23] In my view the respondent has no locus standi in her personal capacity.

[24] It is trite that locus standi is divorced from the substance of a case and must be determined before the merits are considered. Having found as I did, I will not deal with the rest of the grounds of appeal.

[25] I therefore make the following order:

1. The appeal is upheld with costs.
2. The order of the magistrate is set aside and replaced with the following:

“The application is dismissed with costs.”

C. L. PAGE, AJ

I concur

C. REINDERS, ADJP

On behalf of Appellant:

Instructed by: MOTSOMI

LITHEKO

LITHEKO MOTSOENENG

Bloemfontein

On behalf of Respondent: I L De Wet

BLOEMFONTEIN JUSTICE CENTRE

Instructed by:

Legal Aid South Africa

41 Charlotte Maxeke Street

[1] S 4 of the Administration of Estates Act 66 of 1966.

[2] S 26 of Administration of Estates of 66 of 1965.

[3] Paragraph 8.1 Meyerowitz on the Administration of Estates and their taxation, 1st Ed.

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- [4] Paragraph 12.2 Meyerowitz on the Administration of Estates and their taxation, 1st Ed.
- [5] Neville Booysen and two others v Joseph Gert Booysen and 4 others, South Gauteng High Court Case No 29558/10, Date 25/03/2011; Gerhardus Phillipus Mills N.O vs Zaheeda Hoosen, Witwatersrand Local Division, Case No: A 5007/07 at para 12; Mlungisie Ratsi July and 3 Others v Tembisa Mbuqe & 10 Others, High Court Eastern Cape : Mthata, Case No 2522/2013 Para 6(b), Krige and Others v Scoble & Others 1912 TPD 814; Segal and another v Segal and others 1976(2)SA 531 (C).
- [6] Para 12.20 Meyerowitz on the Administration of Estates and their taxation, 1st Ed.
- [7] Act 66 of 1965
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