

SOUTH AFRICA / JUDGMENT

Britz NO v Strydom and Another (2849/2018) [2019] ZAECPEHC 17 (29 March 2019)

[2019] ZAECPEHC 17

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Beyleveld

CASE / FILE NUMBER

2849/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 2849/2018

Date Heard: 28

March 2019

Date

Delivered: 29 March 2019

In

the matter between:

MALEND
BRITZ NO
Applicant
and
JACOBUS
STEPHANUS STRYDOM
First
Respondent
MASTER
OF THE HIGH COURT
(ESTATE NO:
5872/15)
Second
Respondent

JUDGMENT**BEYLEVELD AJ:**

- [1] In this application the applicant, who is the appointed executrix of the estate of her late husband, the late Lawrence Daniel Britz (“the deceased”) seeks an order of ejectment of the first respondent[1] from premises described as Erf 142 Algoa Park situated in the Nelson Mandela Bay Metropolitan Municipality, Division of Port Elizabeth, Province of the Eastern Cape with physical address at 24 Rodean Street, Algoa Park, Port Elizabeth (“property”).
- [2] The first respondent is the nephew of the deceased who, for all practical purposes, raised the first respondent who resided with him at the property.
- [3] The second respondent is the Master of the High Court.
- [4] As at the date of death of the deceased, the first respondent was still residing at the property and has continued to do so since then. Until the death of the deceased, the applicant also resided at the property, but left thereafter for reasons which do not contribute to a determination of the essential issues in dispute in
this application.
- [5] In terms of a testamentary disposition the deceased bequeathed the property to the first respondent.
- [6] The property is the only asset in the estate of the deceased.
- [7] Prior to the appointment of the applicant as executrix in May 2017 (the deceased died on 13 July 2015) attorney Teresa Heasley was appointed the executrix, but she, apparently as a result of acrimonious discord between the applicant and the first respondent, declined to act further as executrix and resigned. As indicated previously, the applicant, as the surviving spouse, was then appointed executrix.
- [8] The applicant submitted a claim against the estate for maintenance in terms of the Maintenance of Surviving Spouses Act[2].
- [9] Such claim was accepted on 25 November 2016 by the then executrix Heasley, based on an affidavit furnished by the applicant in support of her claim for maintenance.
- [10] On 25 November 2016 executrix Heasley advised applicant and the first respondent that the claim for maintenance was accepted and further advised that as the claim was in excess of the value of the assets in the estate, and sans agreement to the contrary , the property would have to be sold.
- [11] On 29 January 2018 the Master was advised by the applicant[3] and now acting as executrix, that the estate is insolvent and that the applicant intended proceeding in terms of section 34(2) of the Administration of Estate’s Act[4].

- [12] The aforesaid communication was also addressed to the first respondent in a separate letter. In such communication the first respondent was also alerted to the fact that failing an agreement between her and the first respondent relating to a lease in respect of the property, the first respondent was to vacate the property on or before 1 March 2018.
- [13] The first respondent declined to vacate and continues to do so based on his contention that he is the only heir in the estate and that in terms of the will of the deceased he is entitled to reside at the property. He in fact contends that he had ownership rights.
- [14] The first respondent disputes the applicant's claim for maintenance and asserts that no claim as such has been lodged with the Master. The applicant's retort is that she has lodged a claim with the executrix which has been accepted.
- [15] Whether or not the applicant's claim as admitted by the executrix will ultimately be approved by the Master, and whatever the quantum thereof may be, is not the central issue in the dispute in determining whether or not the first respondent is entitled to continue occupying the property.
- [16] A notice in terms of section 34 of the Administration of Estates Act to creditors[5] has the effect of a sequestration order, although no order of court is in fact granted.[6]
- [17] On the face of it, the applicant is required to perform her functions as executrix pursuant to the provisions of section 34 of the aforesaid Act. The deemed date of sequestration has long since passed.[7]
- [18] The applicant was not instructed in writing by any creditor to formally surrender the estate.
- [19] It is, for the purposes of this matter, also necessary to analyse the functions of an appointed executor.
- [20] A deceased estate is comprised of the aggregate of assets and liabilities. Although there were serious academic contentions that an estate of a deceased person is a legal person until an executor has been appointed[8] the Appellate Division (as it was then known) has rejected this theory[9]. Van Zyl *supra* suggests that a deceased estate is comprised of a management body. In this regard he states:
- "(iii) Hierdie regspersoon wat ipso jure by die dood van die erflater ontstaan en voortbestaan totdat die boedelbereddering voltooi is, bestaan uit 'n bestuursliggaam.*
- (iv) Die gemelde bestuursliggaam is deur die wetgewer geskep. Sy regspersoonlikheid het dit egter deur die ontstaan van gewoontereg verwerf."^[10]
- [21] What is however uncontentious, is the fact that a beneficiary never becomes the owner of any inherited asset upon the death of the deceased.[11] The executor of a deceased estate is the owner of the assets during the period of the administration of such estate.[12] An executor takes into custody and control all the property in the estate.[13]

[22] It is for this reason that an executor is the only person who may for instance bring a vindicatory claim in respect of the State assets.[14] In Segal and Segal and Others[15] the court stated as follows:

“It seems to be a necessary corollary of the vesting in the executor of the property belonging to the deceased that he should be and is burdened with the obligation of assuming possession and control of such property and distributing it in accordance with the wishes of the testator or according to the dictates of law.”

[23] The administration of an estate can broadly speaking be divided into three categories. Namely:

- (i) the third phase which starts on the death of the deceased and involves the steps which have to be taken until an executor is appointed; and
- (ii) the second phase which is the actual process of administration that culminates in the submission of a liquidation and distribution account to the master; and
- (iii) the third phase which commences when the account has been approved and certain final requirements are met.[16]

[24] In as much therefore as an executor is the owner of all assets in his official capacity, the applicant is entitled to take possession of the immovable property which is occupied by the first respondent. The first respondent has no entitlement (at least at this stage) to the property and is in unlawful possession thereof.

[25] An executor is not the agent of an heir, but is legally vested with the administration of the estate. Accordingly, it is incumbent upon the applicant to take possession of the estate property (in casu the property) and to liquidate the estate by paying all debts, and if there is a free residue, such to be distributed for the benefit of the heir.[17]

[26] The first respondent's suggestion in paragraph 8.6 of his answering affidavit that he is the rightful owner of the property lacks merit and stands to be rejected.

[27] In addition, there exists no justifiable reason for contending that the applicant in her capacity as former spouse is not entitled to maintenance, whatever the quantum of such claim may be.

[28] The applicant is 53 years old; was married to the deceased for nearly 20 years; never worked during the subsistence of the marriage and was financially dependent on the deceased as she was a housewife.

[29] Prior to the marriage in 1997 the only work she performed by virtue of her lack of qualifications was as a cashier on odd occasion when she was helping out.

[30] That the deceased had a duty of support stante matrimonio towards the applicant is self-evident.[18]

- [31] Ineluctably such duty of support in terms of Act 27 of 1990 is passed onto the estate with a lump sum payment the only practical way in which this particular estate is able to comply with the maintenance obligation towards the applicant.[19]
- [32] Should the first respondent ultimately not be satisfied with the quantum of the maintenance claim[20] he may of course object to the liquidation and distribution account in due course.
- [33] As the property, as previously indicated, is the only asset in the estate, such property would have to be sold, whatever the quantum of the maintenance claim may be.
- [34] All that remains is to determine what a just and equitable date should be for the first respondent to vacate the property.
- [35] In determining such just and equitable date, I must have regard to the interest and circumstances of the first respondent and take into account the broader considerations of fairness and constitutional values.
- [36] As stated by Koen J in Botha NO v Deetlefs.[21]
- “I am required to infuse elements of grace and compassion into the formal structures of the law.”*
- [37] The discretion to be exercised is a wide discretion and not a discretion in the narrow sense. [22]
- [38] I have taken into account, inter alia, the following factors, namely that the first respondent is the appointed heir; that he was requested to vacate the property; that he refused to do so and refused to remain in occupation against payment of an agreed rental; that he is gainfully employed and capable of securing alternative accommodation; that the estate is possessed of only one asset and the fact that the property has to be sold in order to satisfy any claim for maintenance by the applicant in her capacity as former surviving spouse.
- [39] I therefore conclude that the first respondent should be ordered to vacate the property within two months after service of this order.
- [40] The first respondent has consistently denied any obligation to vacate (in fact lays claim to ownership) and there exists no reason to deprive the applicant, who has been successful in this application, of her costs.
- [41] I grant an order in terms of paragraphs 1, 2, 3 and 4 of the Notice of Motion save for the following:
- (i) the words “within one month of the service of this order” in paragraph 1 is substituted with “within two months of the service of this order”.
 - (ii) The words “alternatively within such period as this Honourable Court may deem appropriate” in paragraph 1 is deleted.
 - (iii) The words “on an attorney/client scale” in paragraph 3 is deleted.

(iv) The words “in a manner which this Honourable Court may deem fit” in paragraph 4 is substituted with the following:

“by service on the first respondent in terms of the Rules of Court.”

A BEYLEVELD

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv A Desi instructed by Besters Attorneys, Port

Elizabeth

For First Respondent: Adv V Naidu instructed by Legal Aid South Africa,

Port Elizabeth

[1] And all those occupying through him. The first respondent denies that there are any other persons who occupy through him as tenants.

[2] 27 of 1990

[3] Acting through her attorney

[4] 66 of 1951 as amended

[5] In the present instance there appears only to be one creditor namely the applicant

[6] Fairleigh NO v Whitehead and Another 2001 (2) SA 1197 (SCA)

[7] Section 34(5)

[8] Ian Murray 1961 Annual Survey 259 and (1962) 79 SAJ 37; FJ Van Zyl “Universele Opvolging in Suid-Afrikaanse Erfreg” (Annale Universiteit van Stellenbosch Volume 5, Reeks B, No. 1, 1983)

[9] CIR v Emary NO 1961 (2) SA 621 (A) at 624-625 and CIR v MacNellie’s Estate 1961 (3) SA 833 (A). See also M J de Waal and MC Schoeman-Malan Law of Succession 5th ed at 10 at 11

[10] “(iii) The legal person, which originates ipso jure at the death of the testator and continues to exist until the administration of the estate is completed, comprises of a management

body. (iv) This management body was created by the Legislature. Its legal personality however evolved through customary law.” (My translation)

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body.

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[11] Greenberg v Estate Greenberg 1955 (3) SA 361 (A); Commissioner SARS v Executor Frith’s Estate 2001 (2) SA 261 (SCA) at 270; Dique v Van der Merwe 2001 (2) SA 1006 (T) at 1012F

[12] De Waal and Schoeman-Malan Law of Succession supra at 11

[13] Section 26(1) of the Administration of Estate’s Act. See also Corbett, Hofmeyr and Kahn The Law of Succession in South Africa 2nd ed at 589. See also De Waal and Schoeman-Malan supra at 241

[14] Du Toit v Vermeulen 1972 (3) SA 848 (A) at 856

[15] 1976 (2) SA 531 (CPD) at 535C

[16] Juanita Yamneck (Ed) et al The Law of Succession in South Africa 2nd ed at 267-274; see also De Waal Shoeman-Malan supra at 241-246

[17] Botha NO v Deetlefs and Another 2008 (3) SA 419 (NPD) at para 9

[18] See for example B van Heerden et al Boberg’s Law of Persons and the Family 2nd ed at 235

[19] Oshry v Veldman 2010 (6) SA 19 (SCA)

[20] The determination of reasonable maintenance needs

[21] Supra at para 23

[22] Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA) at para 18

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