

SOUTH AFRICA / JUDGMENT

Szabo N.O v Jarkie-Trust Administrators (Pty) Ltd (Reasons) (2023/038089) [2024] ZAGPJHC 1198 (21 November 2024) [2024] ZAGPJHC 1198

COURT

South Gauteng High Court, Johannesburg

BEFORE

Cajee

CASE / FILE NUMBER

2023/038089

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

NO

21

November 2024

CASE NO: 2023-038089

In

the application between: JOHANNES
LODEWICKUS VENTER SZABO N.O.
APPLICANT
and
JARKIE-TRUST
ADMINISTRATORS (PTY) LTD
(In
its capacity as trustee of the Amarosa Aftree-Oord Trust,
represented
by Johannes Antonie Roets N.O.)
FIRST
RESPONDENT
WILLEM
JOHANNES STEYN N.O
(IDENTITY
NUMBER: 5[...] in his
capacity
as trustee of the Amarosa Aftree-Oord Trust)
SECOND
RESPONDENT
ALMINDA
SOPHIA KRUGER N.O.
(IDENTITY
NUMBER: 6[...] in her
capacity
as trustee of the Amarosa Aftree-Oord Trust)
THIRD
RESPONDENT

REASONS FOR JUDGMENT

1. I have been asked to provide reasons for an order I handed down on the 23rd of July 2004 which reads as follows:

“1. The Respondents are ordered pay the Applicant the amount of R1 274 000.00, together with mora interest calculated from 16 September 2022 until date of final payment;
2. The Respondents are ordered to pay the Applicant’s costs on the scale as between party and party”.
2. The applicant, in his capacity as executor to the estate late Mr Gabor Szabo, in the Notice of Motion, claims payment in the the sum of R 1 274 000-00 from the respondents, as trustess of the Amarosa Aftree-Oord Trust (hereinafter referred to as the Trust). He also claims interest from the 16th of September 2022 to date of final payment and costs.
3. During his lifetime the late Mr Szabo was married to the late Mrs Catharina Maria Szabo. In 2014 the Szabos and the Trust entered into a written contract (‘the contract’) in terms of which they acquired from the Trust an exclusive lifelong occupational right in Unit 11 of a

retirement village known as Amorosa.[1] It is a housing development scheme as defined in terms of the Housing Development Schemes for Retired Persons Act 65 of 1988. In return for the right of lifelong occupation, the Szabos loaned the Trust (who was the developer of Amarosa) the amount of R1 274 000.00 (hereinafter referred to as the loan amount).

4. The contract provides for the return of the unit to the trust on the passing of the Szabos (or the survivor of them), and the repayment of the loan amount after providing for certain charges.

5. The Szabos took occupation of the unit on 29 July

2014. Mrs Szabo passed away on 9 January 2021 and Mr. Szabo passed away on 16 September 2021 respectively. The death of Mr Szabo (as survivor of the Szabos) is the trigger event for the present application.

6. In terms of contract, the Szabos' responsibilities, rights and obligations were joint and several. All the rights and obligations, on the date of the death of the first of the Szabos' to pass away, was to be transferred automatically to the survivor. Upon the passing of the the surviving Szabo, his or her estate was obliged to hand the unit to the Trust to enable the latter to market and sell the unit. The Trust was, after thirty (30) days (free of interest) from the receipt of the consideration from the new occupant (if and when the exclusive right of lifelong occupation to the unit previously occupied by the Szabos was "sold"),

make payment of the loan amount to the estate of the deceased, minus commission and outstanding costs, if any.

7. Upon the passing away of Mr. Szabo the Applicant was appointed executor in his estate on the 15th of October 2021.[2]

8. In the founding affidavit reference is made to an email communication dated the 15th of August 2022[3] from a certain Lorraine from an email account l[...] to one Helena Christie of Crest Trust Holdings Inc at an email address h[...] in which she (Lorraine) states that:

"The keys will be handed over tomorrow 16th August 2022 and therefor the sale of the life right will be concluded on 16th August 2022.

The developer's office will finalise the account for the loan amount due to the estate and forward the account to Juliana Steyn Attorneys with instructions regarding payment.

The developer however has a great backlog in finalising accounts due to circumstances beyond their control and apologise for the delay. They are working hard to rectify this. Due to the delay the estate will receive interest on the loan amount due from the 16th of September 2022 until date of final payment (please see Par 14).

Thank You

Lorraine"

(my emphasis)

9. According to the Applicant, Lorraine and Juliana Steyn Attorneys are representatives of the Trust, while Helena is an agent of the Applicant.
10. In the founding affidavit reference is further made to a letter of demand dated the 27th of January 2023[4] which was sent by the Applicant's attorneys of record addressed to the first to third respondents by being emailed to l[...], r[...], i[...], and l[...]. After recording the material portions of the agreement, the following is stated:

"2.9 Also, you have consequent upon the death of Mr. Szabo, granted to a certain party the exclusive use of lifelong occupation in respect of the unit in question. According to our instructions you have instructed our client on 15 August 2022: "The keys will be handed over tomorrow 16th August 2022 and therefor the sale of the life right will be concluded on 16th August 2022." Also "(the) estate will receive interest on the loan amount due from the 16th of September 2022 until date of final payment"

11. The letter of demand elicited an emailed response from Juliana Steyn Attorneys using the email l[...], acknowledging receipt of the letter and taking note of the content.[5]
12. All of the above are annexes in the founding affidavit.
13. The deponent to the answering affidavit, the third respondent, who describes herself as the managing agent of the Trust, denies that Lorraine was ever authorised or mandated to represent the Trust. It is even denied that the Trust knows the identity of Lorraine or Crest Holdings. The deponent to the answering affidavit states that while Juliana Steyn did receive the letter of demand, the Trust did not and that the Trust did not sell the right to lifelong occupation to anyone. I will revert to this later.
14. It is notable that Juliana Steyn used the same email domain (@[...]) as Lorraine did in communicating with Helena Christie on the 15th of August 2022 and in other communications with them both before and thereafter. Further, she (Ms. Steyn) does not deny the communication

of the 15th of August 2022 nor that neither she, nor Lorraine, were authorised or mandated to act on behalf of the Trust. However, it is not stated by the deponent to the answering affidavit that Juliana Steyn was not authorised to represent the Trust.

15. In the answering affidavit the Respondents contend that the application is premature, that the applicant has not alleged that a new loan agreement was entered into by the Trust with a new occupant of the Unit or that any amount due in terms thereof was paid to the Trust by the new occupier which was a necessary precondition for the repayment of the loan amount to the Applicant. The deponent to the answering affidavit at paragraph 33.6 thereof states that:

"33.6 In the circumstances it would have been prudent for the applicant to provide evidence to this court in respect of:

33.6.1. Whether any amounts were paid to the Trust;

33.6.2. Whether a new occupant took occupation; and

33.6.3. Whether the Trust received the new loan amount which would have triggered the payment provisions in terms of the Agreement”

16. In the replying affidavit, in response to the allegations made in paragraph 33.6 of the answering affidavit, the Applicant provides information relating to the events leading up to the email sent by Lorraine on 15th August 2022, as well as the events between the said email and the letter of demand. In essence it is this:

16.1. At the end of April 2022 the Trust and a certain Ruth Christine Derham entered into a written agreement for the resale of Unit 11 for the price of R 1 450 000-00[6]. The agreement appears to contain materially the same terms and conditions as the original agreement entered into by the Trust with the Szabos. The occupation date is stipulated as 1st July 2022.

16.2. In compliance with this agreement, a net amount of R 1450 000-32 was paid by or on behalf of Mrs. Derham into the account of Julianna Steyn Attorneys in May 2022. An amount of R 1450 000-00 was in turn paid over to the Trust.[7]

16.3. On the 30th of June 2022[8] Lorraine advised Helena Christie by means of an email that the new occupant, Mrs. Derham, was placed on terms to take occupation of the Unit by no later than the 1st of August 2022.

The message further reads as follows:

“There are problems and until she occupies the deal is not concluded. If she does not occupy we will have to repay the amount back to her and remarket the unit”. The communication was acknowledged by Helena on the same date.”

16.4. On the 12th of August 2022 Helena Christie requested an update by email from Lorraine, and on the morning of the 15th of August 2022 she received a reply that an update would be provided.[9] The update, as set out above, was received in the afternoon of the same date from Lorraine. This was followed by an email sent about thirty minutes later by Helena Christie informing Lorraine that late payment would not be accepted (i.e., after 16th September 2022).[10]

16.5. On the 26th of August 2022 Lorraine responded by informing Ms. Christie that henceforth she should communicate directly with the attorney of the Trust, namely Juliana Steyn. Ms. Christie sent an email on even date to Ms. Steyn that since the sale of life right had been concluded, she requested proof of payment.[11] It is however unclear what payment she was referring to, the one made by Ms. Derham to the Trust, or the one to be made by the Trust to the Applicant. Be that as it may, nothing material turns on the point.

16.6. Ms. Steyn responded to the email, also on the same date, by sending the following message to Ms. Christie:

“I refer you to the email from Lorraine dated 16th August 2022. Please be advised that the agreement was one where the developer granted the right of life long occupation in exchange for a loan and the developer now has to repay this loan. The developer will finalise the account. He will then send this to me with instructions regarding payment. I have not received the payment or any instructions as yet. As per Lorraine’s email, the developer’s office has a backlog in finalising accounts. I can confirm that interest will be added to the account of the estate due to this delay.”[12]

16.7. Later that day (i.e., the 26th of August 2022) at 12h41 the applicant personally sent an email to Ms. Steyn in which he records the following:

“Arthur said when we put the market onto the market in Jan/Feb that he had arrange that the developer would pay us out within 30days. Please can you honour this agreement.

From when this unit has been sold and occupation took place it’s been 2-3 months, really don’t see what is taking so long – the renovations are completed and the new owner is in.

So the cost just need to be deducted from the amount owed to us.

Please get this resolved urgently”

In response Ms. Steyn replied that:

“I will give this email to the developer and let you know when he gives me instructions” [13]

It is however unclear when this reply was sent.

16.8. Also on the 26th of August but at 13h05[14] Ms. Steyn sent an email to Ms. Christie which reads as follows:

“Please be advised that the developer is my client and I am not allowed to give his details.

Furthermore, the developers have 12 villages and almost 1000 units. I do not have the time to answer continuous emails from you and from different people. I will communicate with Helena only, for she is dealing with the estate.

I will contact Helena as soon as I have heard back from the developer.”

While it is not explained why this email was sent to Ms. Christie and not the Applicant, it is in view important to note that Ms. Steyn clearly confirms once more that the Trust is her client.

16.9. On Monday the 26th of September 2022[15] Ms. Steyn sent a further email to Ms. Christie written in Afrikaans, confirming an earlier conversation they had that morning, in which she requested an indulgence until Wednesday [the 28th of September 2022], when she would be meeting with the developer. She ended the email with a promise that the money would be paid.

16.10. On the 29th of September 2022[16] Ms. Steyn wrote once more to Ms. Christie in Afrikaans informing her that she had only managed to speak to the developer that day as he had broken his finger. She further informed Ms. Christie that the developer had instructed her that they were 6 to 8 months behind with finalization. She also informed Ms. Christie that she would try and get an undertaking with a date by which the money would be paid, and requested a further indulgence until the following week to obtain such an undertaking.

16.11. On the 12th of October 2022[17] Ms. Steyn addressed a further email in Afrikaans to Ms. Christie in which she states that she had not yet received a written undertaking from the developer, but that he was pushing to finalise the matter. In reference to the earlier email, Ms. Steyn clarified that when she said the developer was “6 to 8 months behind with finalization” meant that the estate would be finalized and that the loan amount owed would be paid anytime between 10th December 2022 and 10th February 2023, but could be earlier. She had received no further instructions from the developer but that he had assured her that they were working hard in the background.

16.13. Having heard nothing further from the Trust, the present application was launched and thereafter served on the 8th of May 2023 by the Sheriff on the Respondents. The founding affidavit was deposed to on the 24th of April 2023.

17. In the founding affidavit the Applicant only relied on the contract and “acknowledgement of debt” contained in the email from Lorraine dated the 15th of August 2022. The remaining allegations are contained in the replying affidavit in response to the answering affidavit.

18. In argument, the Respondent contends that the Applicant has not made out a case in the founding affidavit and that it is precluded from doing so in the reply. It relies on the following passage from the case of *Bowman NO v De Souza Roldao* 1988

(4) SA 326 (T) at 327 C-I:

Generally speaking, an applicant must stand or fall by his founding affidavit; he is not allowed to make out his case or rely upon new grounds in the replying affidavit. See, for example, *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635 in fin - 636 where Diemont JA said the following:

'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases

"... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged "it is not permissible to make out new grounds for the application in the replying affidavit".

What should be set out in the founding affidavit and the particularity required has been dealt with in a number of cases; see, for example, *Joseph and Jeans v Spitz and Others* 1931 WLD 48; *Victor v Victor* 1938 WLD 16 at 17 and *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 369B. Each case will depend on its own facts. The correct approach is set out in the *Titty's Bar* case *supra* as follows:

'It lies, of course, in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit.'

(My emphasis)

19. The Respondent further relies on the following passage from paragraph

[16] of the case of *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 143 (SCA):

[16] Then there is the fact that a voluminous replying affidavit containing a great deal of evidential material relevant to the issues at hand had been filed. Relying upon authorities such as *Sooliman*, the appellant argued that it was 'axiomatic . . . that a reply is not a place to amplify the applicant's case' and that the new matter had been impermissibly raised by Lehane in reply, that it was evidential material to which the appellant had not been able to respond, and that it fell to be ignored. However, again, practical common sense must be used, and it is not without significance that many of the hearsay allegations complained of were admitted by the appellant in its answering affidavit

20. For the sake of completeness, the remainder of paragraph [16] of the judgment reads as follows:

And although Lehane had been appointed the official assignee to Dunne's estate some 13 months before the application was launched in the court *a quo*, and the information set out in reply could therefore have been contained in the founding affidavits, sight must not be lost of the fact that the application was initially launched by Lehane's deputy official, Mr D Ryan, in the absence of Lehane who was abroad at the time and unable to depose to an affidavit. The detailed allegations made by Lehane speak of he, and not Mr Ryan, having been more *au fait* with the facts and circumstances of the matter. Moreover, the initial application was moved as a matter of urgency, and the courts are commonly sympathetic to an applicant in those circumstances, and often allow papers to be amplified in reply as a result, subject of course to the right of a respondent to file further answering papers. Regard should also be had to the intricacy of Mr Dunne's dealings that required intensive and ongoing investigations. Furthermore, the appellant, as respondent *a quo*, did not seek to avail itself of the opportunity to deal with the additional matter Lehane set out in reply, and I see no reason why these allegations should therefore be ignored.

(My emphasis)

21. The primary purpose of the replying affidavit is to put up evidence which serves to refute the case made out by the respondent in his answering affidavit.[18]
22. In my view, while the founding affidavit could have been more detailed and while most of the annexes mentioned in the replying affidavit should have been contained in the founding affidavit for the sake of completeness and context, the founding affidavit contains enough averments to make out at least a prima facie case against the Respondent. In particular, in my view it was enough for the Applicant to rely only on the acknowledgment contained in the email sent by Lorraine dated the 15th of August 2022. It is also notable that at no time did the Respondent seek to strike out any of the averments contained in the replying affidavit but merely sought to deal with them in argument. Further, at no point did the Respondent apply to file a further set of papers to deal with the allegations contained in the replying affidavit.
23. The allegations contained in the answering affidavit are essentially a bare denial. The allegation in the answering affidavit that the Respondent has no knowledge of who Lorraine is appears to be far-fetched especially when cognisance is taken of the email domain used by her, which is the same as that used by Ms. Steyn. Further, Ms. Steyn mentions Lorraine in her email communications with the Applicant's representatives. Likewise, one would have expected the answering affidavit to at least deal with the nature of relationship between the Respondents and Ms. Steyn. The deponent chose to remain silent on the issue. It is also notable that the deponent to the answering affidavit does not deny that there was any relationship between the Respondents and Ms. Steyn, nor that he did not know who she is. From the correspondence attached it is clear that the relationship was one of attorney and client
24. The allegations pertaining to the Derham contract, compelling as they appear, should have been dealt with in the founding affidavit and not in the reply. The Applicant should be constrained to the case made out in the founding affidavit. I thus ignored it as far as fixing a date from which payment of arrear interest is due is concerned, which I fixed to be the 16th of September 2022.
25. I hand down the reasons for judgment

CAJEE AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

DATE OF HEARING: DATE OF ORDER: DATE REASONS GIVEN: 21 FEBRUARY 2024 23 JULY 2024
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- [1] Annexure FA4 to the Founding Affidavit
- [2] Annexure FA1 to the Founding Affidavit
- [3] Annexure FA5 to the Founding Affidavit
- [4] Annexure FA6 to the Founding Affidavit
- [5] Annexure FA7 to the Founding Affidavit
- [6] Annexure RA1 to the Replying Affidavit
- [7] Annexure RA2 to the Replying Affidavit
- [8] Annexure RA3 to the Replying Affidavit
- [9] Annexes RA5 and RA6 to the Replying affidavit
- [10] Annexure RA8 to the Replying Affidavit
- [11] Annexes RA9 and RA10 of the Replying Affidavit
- [12] Annexure RA11 to the Replying Affidavit
- [13] Annexes RA12 and RA13 to the Replying Affidavit
- [14] Annexure RA14 to the Replying Affidavit
- [15] Annexure RA16 of the Replying Affidavit
- [16] Annexure RA16 to the Replying Affidavit
- [17] Annexure RA17 to the Replying Affidavit
- [18] Standard Bank of SA Ltd v Sewpersadh 2005 (4) SA 148 (C) at paragraph [21]

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