REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 1536/18

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.
26/3/2019 R Keightley
DATE SIGNATURE

In the matter between:

RIGACRAFT CC Applicant/Plaintiff
(Respondent in the exception)

and

FIRST NATIONAL BANK LIMITED & OTHERS Respondent/First Defendant
(Excipient)

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

1. This matter comes before me as a combination of an application for an amendment to particulars of claim and a related exception. The excipient opposes the proposed amendments on the basis that they do not cure the defects complained of in its notice of exception, and thus, the amendments should be refused.

2. The plaintiff (and applicant in the amendment application), Rigacraft CC, was the purchaser of certain immovable property that was sold in execution at the instance of

the judgment creditor, First National Bank Limited ("FNB"). FNB is the excipient and the respondent in the amendment application. Rigacraft alleges in its particulars of claim in the main action that the property ended up in the hands of the judgment debtor through what it refers to as the fraudulent "Brusson scheme". That scheme has been held to have been fraudulent by a number of courts, including the Constitutional Court.

3. Rigacraft says that the effect of the various decisions is that there was never a lawful transfer of the property from the first title holder (Mr Ramachela, who is now deceased), to the second title holder, and thence to the judgment debtor, Mr van Eeden (who is cited as a defendant in the main proceedings). Rigacraft alleges in its particulars of claim that this court has previously found that Rigacraft has no legal title as owner of the property, notwithstanding that title was transferred to it following the sale in execution. Accordingly, it has instituted action against a number of parties to obtain redress.

4. It is not necessary for purposes of this application to outline the full suite of relief claimed by Rigacraft. Some of the relief is founded on contract, and some of the relief is founded on delict. The exceptions raised by FNB go to the contractual relief only. In essence, in its original particulars of claim Rigacraft sought a finding that the transfer of the property to it was void or voidable; it wants the sale in execution to be set aside; and it claims restitution of the purchase price.

5. FNB excepted to the particulars of claim on three grounds. In response, Rigacraft filed a notice to amend in terms of Rule 28. However, FNB takes the view that the proposed amendments will not cure the defects identified in its exception, and on this basis opposes the amendments. Although both the amendment application and the exception lie before me, logically everything turns on whether the amendments

should be permitted. If I find that the amendments cure the defects highlighted by FNB, it stands to reason that they should be allowed and the related exceptions dismissed. Because the amendment and the exception are so tightly intertwined, I will structure my judgment around the exceptions that have been raised, and consider whether the amendments sought cure the particular defects complained of.

6. I should add at this stage that there are a number of other parties joined in the main proceedings. These include the Master of the High Court, the persons who occupy the property, the Registrar of Deeds, and the Sheriff. None of them are active parties in the exception or in the amendment application.

THE ALLEGED MISJOINDER OF FNB

7. The first objection raised by FNB to the particulars of claim related to the question of whether, in seeking restitution from FNB, the plaintiff was alleging that FNB was a party to the agreement of sale flowing from the sale in execution. FNB asserted that the particulars were vague and embarrassing in this regard. Further, that if Rigacraft indeed alleged that FNB was a party to the agreement, this was excipiable because in law the agreement of sale flowing from the sale in execution is between the Sheriff and Rigacraft as the purchaser, and not with FNB. In essence, FNB's complaint was that of misjoinder: it ought not to have been joined as a defendant for purposes of the contractual relief of restitution claimed by Rigacraft as this remedy lay against the Sheriff as the lawful contracting party, not FNB.

8. In its notice of intention to amend Rigacraft seeks to cure this defect by inserting the underlined phrase, below:

> "The property was sold on auction in terms of the provisions of Rule 46 of the High Court Rules by the Sheriff of the Honorable Court ... on instructions of

(FNB) subsequent to an order of court obtained by (FNB) against (the judgment debtor)."

In addition, it seeks to amend the relief sought by way of restitution to make it clear that restitution should be effected against "the First Defendant (FNB) and/or Seventh Defendant (the Sheriff)" to repay the purchase price to Rigacraft.

9. FNB persists in its misjoinder complaint, contending that the amendments sought do not cure the defect. The gist of FNB's argument is that in law the Sheriff, not the execution creditor, is the contracting party with a purchaser at execution. As such, in law, no claim from restitution can lie against a non-contracting party, like FNB. FNB says that it does not help to amend and make the Sheriff possibly also liable to make restitution: the point is that FNB should be excluded from being liable for restitution altogether. For so long as FNB remains as a party against whom restitution is sought, the particulars remain excipiable on the basis of misjoinder.

10. FNB submitted that the correct route to be followed procedurally would be for Rigacraft to seek to hold the Sheriff liable, and then for the Sheriff to seek to join FNB by way of third party proceedings on the basis that as execution creditor, FNB would have indemnified the Sheriff against liability for such a claim against him. As things stood, said FNB, the particulars even if amended, would remain excipiable.

11. When the matter was argued before me counsel for Rigacraft, Mr Janse van Rensburg, emphasised the importance of the reference to Rule 46 that his client sought to include in the relevant paragraph of the particulars, as set out above. His submission was that Rule 46 establishes an unusual contractual regime between the purchaser at a sale in execution, the Sheriff and the execution creditor. In other words, although ordinarily a contractual relationship would be established between the pur-

chaser and the seller, being the Sheriff, once Rule 46 comes into play a different contractual dynamic is established. What Rule 46 does is to draw the execution creditor into the contractual relationship in a manner similar to a *stipulatio alteri*. Thus, he argued, the ordinary contractual remedies, including cancellation and restitution, lie against FNB.

12. In furtherance of his submission, Mr Janse van Rensburg highlighted Rule 46(4)(b), which provides for the execution creditor to issue instructions to the Sheriff to proceed with the sale; Rule 46(7)(b), which provides for the execution creditor to prepare the notice of sale, and to publish it; Rule 46(8)(a) which requires the execution creditor to prepare the conditions of sale; and Rule 46(14) which requires the Sheriff to pay the proceeds of the sale to the execution creditor after transfer. It was these characteristics, said Mr Janse van Rensburg, that pointed to the establishment of a three-way contractual relationship between FNB, Rigacraft and the Sheriff.

13. In my view the answer to this particular issue lies in the Full Court decision of *Sedibe and Another v United Building Society and Another*.[1] I was referred to this judgment by Mr Wilson, counsel for FNB, in support of the principle that the Sheriff does not act as agent for any party, but as an executive of the law, when he or she enters into an agreement of sale flowing from a sale in execution. In that case it was held that:

> "When, as part of the process, (the Sheriff) commits himself to contractual terms, he does so *suo nomine* by virtue of his statutory authority; he becomes bound to the terms of the contract in his own name and he may enforce it on his own."[2]

---

[1] 1993 (3) SA 671 (T)
[2] At 676C

14. As Mr Richard submitted, this finding by the court aids FNB's argument. However, the court in *Sedibe* did not stop there. It went on to consider whether, notwithstanding this principle, it was possible to hold an execution creditor bound as a party to the contract. The background facts in *Sedibe* were not dissimilar to those of the present case. The purchaser at a sale in execution sought similar relief to the contractual relief sought by Rigacraft, viz. cancellation of the sale in execution and restitution of the purchase price paid over to the execution creditor on registration.

15. In answering the question of whether the execution creditor was nonetheless a party to the contract with rights and obligations, the court looked specifically to the conditions of sale in question, read with the relevant Rules of court. It analyzed in some detail the provisions of the conditions of sale that had been drawn up by the execution creditor with a view to determining whether the intention had been to confer on the execution creditor rights and obligations flowing from the agreement of sale. The court pointed to a number of provisions in the conditions of sale that, in its view, indicated that this was indeed the intention. Of particular importance in the court's view, was a clause in the conditions of sale which provided that:

> "Should the execution creditor fail to advise the messenger to the contrary within three days of the signing hereof, the execution creditor shall be deemed to have accepted the benefits herein conferred on it."

16. The court concluded as follows:

> "To my mind, the overall position is the following. We have here, not the conventional type of *stipulatio alteri* where benefits are created in favour of the party who was, to begin with, not a party to the contract but may acquire those benefits thereafter, upon which the other party falls out. Here we have a special

type of situation where the UBS stipulated that it may within three days become a party to the contract if it does not do anything by way of repudiation of the sale. If it does not, if it is, in other words, inactive, then it becomes a party to the contract. I think that in the end-result we have a tripartite contract including the UBS as a party."[3]

17. It follows from *Sedibe* that the basic principle in terms of which the Sheriff is recognised as a contracting party in his or her own stead does not necessarily mean that the execution creditor is, as a matter of course, excluded as a contracting party. If the execution creditor intended, in drawing up the conditions of sale, to convey rights and obligations to itself under the contract, it may also be held to be a party. In those circumstances, contractual relief may be sought against it.

18. Turning to the present matter, it seems to me that neither Mr Janse van Rensburg nor Mr Richard were 100% correct in their submissions. Mr Richard's submissions did not take into account the fact that the conditions of sale themselves might establish a *vinculum iuris* between the execution creditor and the purchaser. On the other hand, Mr Janse van Rensburg's submissions did not take into account that, as I read *Sedibe*, it is not the provisions of Rule 46 *per say* that establish the tripartite contractual relationship: something more is needed to do this, viz. the particular conditions of sale relevant to the case at hand.

19. Where does that leave the application to amend that the exception? As I see it, Rigacraft is not necessarily precluded from claiming restitution against FNB. To this extent, the amendment sought is not excipiable. However, there is a catch. In order to seek to hold FNB liable, Rigacraft will have to plead something more than a reli-

[3] At 678A-C

ance on Rule 46 (as it currently seeks to do). In addition, it will have to make it clear that it also places reliance on the conditions relevant to the sale in execution in order to establish the necessary contractual nexus with FNB. In its amendments Rigacraft does not plead the conditions, nor is a copy of the conditions attached to the particulars of claim. Without this, the amendment does not cure the defect complained of.

20. For these reasons, the amendment should not be allowed as the particulars of claim would remain excipiable. The exception should thus be upheld on this ground. However, as the defect remains curable by way of further amendment, Rigacraft should be given the opportunity to do so.

21. Provision is made for this in my order

THE NON-JOINDER OF THE EXECUTOR OF THE DECEASED ESTATE

22. Part of the relief claimed by Rigacraft involves an order directing the Registrar of Deeds to transfer the immovable property to its original owner. As the original owner, Mr Ramachela is deceased, he is no longer a legal person and thus transfer cannot be effected to him. Rigacraft recognises this and seeks an order (in the proposed amendments to the particulars of claim) that the property be transferred to the second defendant, viz. "Estate late Mohale Rufus Ramachela"; alternatively to "the executor as appointed and/or to be appointed" by the Master. Further in the proposed amendments, Rigacraft pleads that it does not know who the executor of the estate is, or whether one has been appointed, or whether the estate has been finalised. It pleads also in the alternative that the estate of the deceased vests in the Master and/or the heirs of the deceased. It describes the second defendant in the proposed amended particulars of claim as "the Estate and/or heirs" of the late Mr Ramachela.

23. FNB excepted to the original particulars of claim on the basis that there was a non-joinder of the executor of the deceased's estate. It persists with this exception, on the basis that the proposed amendments do not cure the defect.

24. Mr Janse van Rensburg submitted that it was no fault of his client that the status of the deceased estate was unknown. As Rigacraft did not know what the status of the estate was, the best it could do was to cite the Master as a party, and to include in the description of the second defendant either the estate itself or the heirs to the estate. Rigacraft accepts that the heirs have a legal interest in the action, and submits that its amendments are sufficient to protect their interests.

25. In my view the question is not whether the interests of the heirs are sufficiently protected. The exception turns on the correct citation of the representative of the estate. In other words, the question is who has *locus standi*, in legal proceedings, to represent the estate.

26. One does not have to look far for the answer, as it is well settled in our law. It is the executor who is the representative of the deceased's estate, and it is the executor who must sue or be sued as representing the estate.[4] The general rule is that the proper person to act in legal proceedings on behalf of the estate is the executor, and normally a beneficiary in the estate does not have *locus standi* to do so.[5] A beneficiary may have *locus standi* where he or she brings a direct action against an executor for, for example, failing to transfer to them what is due.[6] Thus, it is not permissible to cite the heirs in an action in which the deceased estate has a legal interest.

---

[4] Van Loggerenberg Erasmus Superior Court Practice (Original Service, 2015) at D1-199.
[5] *Gross & Others v Pentz* 1996 (4) SA 617 (A) at 625B
[6] *Gross*, above at 625E-H

27. It is also trite, and Mr Janse van Rensburg accepted this, that an estate is not a legal persona in its own right.[7] As such it has no *locus standi* and cannot sue or be sued. This means it cannot be cited as a party in the proceedings. It follows that the particulars of claim manifest a material defect in the citation of the deceased estate as the second defendant. As the heirs also cannot be cited, on the basis that they have no *locus standi* to sue or be sued on behalf of the estate, it follows further that the proposed amendment, which seeks to include the heirs in the description of the second defendant, does not cure this inherent defect.

28. It is also not proper for Rigacraft to rely on the citation of the Master as a party and as a representative of the estate until an executor is appointed. In our law, until an executor is appointed and issued letters of administration by the Master, an estate cannot sue or be sued.[8] In *Ex Parte Jensen*,[9] a plaintiff applied to have a *curator ad litem* appointed to represent a deceased estate in order to defend an action in circumstances where an executor had not been appointed. The plaintiff argued that this was the only way in which it could find someone to defend the action. The court rejected this submission, and held that the proper course to pursue would be to ask the Master either to call on the testamentary executor to apply for letters of administration, or to ask the Master to appoint an executor dative. Thereafter, action could be instituted against the appointed executor.

29. I understand Rigacraft's frustration at not knowing who to cite as the legal representative of the deceased estate. However, the applicable principles are well established in our law and must be adhered to. Before the estate can properly be joined

---

[7] *Commissioner for Inland Revenue v Emary NO* 1961 (2) SA 621 (AD) at 624; *Estate Hughes v Fouche* 1930 TPD 41; *Yoonuce v Pillay NO* 1964 (2) Sa 286 (D)

[8] Erasmus, above at D1-200, and the cases cited at n4

[9] 1902 TH 98

as a party in the proceedings, an executor must be appointed. The executor must then be cited as he or she will be the only person with *locus standi* to act on behalf of the estate. While this may involve certain preparatory steps being taken by the plaintiff before it can join the estate in its action, it cannot avoid doing so by way of the proposed amendments to its particulars of claim. The amendments do not cure the defect in its pleadings.

30. For these reasons I find that the amendments cannot be permitted and the exception in this regard must be upheld.

THE *FACTA PROBANDA* OF THE ALLEGED FRAUDULENT SCHEME

31. The final exception relates to the question of whether Rigacraft has pleaded the necessary *facta probanda* to establish that the Brusson scheme was fraudulent. This is an important issue because the genesis of Rigacraft's entire action is premised on the alleged fraudulent nature of the Brusson scheme which Rigacraft avers affected the legality of all transfers of title in the property preceding its taking transfer following the sale in execution.

32. The gist of Rigacraft's claim is that because no lawful title was passed from Mr Ramachela to the second and third title holders due to the fraud that tainted each of these transfers, FNB could not lawfully acquire a limited real right over the property by way of a mortgage bond associated with the transfer to Mr van Eeden, the third title holder. Thus, says Rigacraft, the enforcement by FNB of its purported rights under the bond by foreclosing and proceeding to a sale in execution was legally invalid, and the agreement of sale should be set aside.

33. In pleading the illegality of the Brusson scheme, Rigacraft avers that (in summary, and taking into account the proposed amendments):

33.1. The Free State High Court and the Constitutional Court have held that the Brusson scheme and any transaction done within the scheme was a simulated transaction; an unlawful *pactum commisorium*; a fraudulent transaction, and was void for non-compliance with the National Credit Act;

33.2. The sale of the property by the deceased to the second and third title holders formed part of the Brusson scheme and was a fraudulent transaction in that it was a simulated transaction; delivery of the property was never effected; it was always the intention that the deceased would remain in possession of the property and would retain ownership; the transaction did not comply with the National Credit Act; it was an unlawful *pactum commissorium*.

33.3. On 8 May 2015 Prinsloo J in this court refused to grant an order of eviction in favour of Rigacraft on the basis that the various transfers were part of the Brusson scheme, involving fraudulent and simulated transactions; ownership never passed from the deceased to the second title holder, nor from the second title holder to the third; the property still belonged to the deceased; FMB could not obtain a mortgage bond over the property; and Rigacraft was not the owner of the property.

33.4. Rigacraft thus sought an order, in the alternative, that the various transfers were simulated transactions, unlawful *pactum commisoriae*; fraudulent transactions and void for non-compliance with the National Credit Act.

33.5. As such, Mr van Eeden (the third title holder) could not have acquired title in the property capable of being bonded to FNB, and thus FNB acquired no rights in respect of the property by virtue of the registered mortgage bond, rendering the sale in execution void.

34. FNB excepts on the basis that the necessary *facta probanda* to establish that the transactions of sale between the deceased and the following title holders were fraudulent have not been pleaded. FNB submits that where fraud is relied on more must be pleaded then merely alleging that a transaction that in the ordinary course would be proper was in fact fraudulent. It points out that the essential requirements for a claim based on fraud are that a representation was made to the party concerned; the content of the representation must be pleaded; it must be pleaded that the representation was untrue; it must be alleged that the fraudulent party knew that the representation was untrue or had no genuine belief that it was true; that the fraudulent party intended that the other party would rely on the representation; and that that party was in fact induced to act on that representation.[10]

35. In considering the particulars of claim, even in their amended version, it is clear that these averments are not made in relation to the transfers of title in question. Instead, Rigacraft pleads what previous courts have found, viz. that the transactions that took place under the auspices of the Brusson scheme were fraudulent. It places particular emphasis on the judgment of Prinsloo J and the findings made therein. Mr Janse van Rensburg submitted that in pleading these findings, the requisite *facta probanda* of fraud are covered.

36. I do not agree with this submission. Rigacraft specifically relies on the transactions having been fraudulent. However, what it avers is that they were simulated transactions; they did not involve a delivery of property; they did not conform to the National Credit Act; there was no intention to transfer ownership and each transaction involved an unlawful pactum commissorium. It may be so that any of these pleaded legal deficiencies, so to speak, might be capable of rendering the transactions void.

[10] Daniels Beck's Theory and Principles of Pleadings in Civil Actions (6ed) para 8.1.1 & 13.44

However, that does not mean that they were *per se* fraudulent. The requirements for establishing fraud do not necessarily overlap with the requirements for establishing, for example, a simulated transaction, or an intention not to give ownership. Something more must be pleaded to establish fraud.

37. Further, the fact that Prinsloo J made a finding that the transactions were fraudulent does not constitute *facta probanda*: it is the opinion of a court, in different proceedings in which FNB was not a party.

38. I accordingly find that the exception is well taken. Should Rigacraft intend persisting in its reliance on the fraudulent nature of the Brusson scheme, it must allege the necessary elements relating to the frauds in question. It seems that the nature of the Brusson scheme is well documented, and Rigacraft should not face any insurmountable obstacle in amending its pleadings further to establish a proper basis for its reliance on the alleged fraud.

CONCLUSION AND ORDER

39. For all the above reasons, I find that the proposed amendments to the particulars of claim do not have the effect of curing the defects complained of by FNB in its notice of exception. For this reason, the application for amendment is dismissed and all three exceptions are upheld.

40. I make the following order:

1. The application to amend is dismissed.

2. All of the exceptions by the excipient are upheld.

3. The plaintiff is afforded 10 days from the date of this order, or such further period as may be permitted by court, to amend its particulars of claim to cure the defects identified in this judgment.

4. Plaintiff is ordered to pay the costs of both the application to amend and the exception.

RM, KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING : **04 MARCH 2019**

DATE OF JUDGMENT : **26 MARCH 2019**

APPEARANCES

PLAINTIFF/APPLICANT'S COUNSEL : **E JANSE VAN RENSBURG**

INSTRUCTED BY : **BAARTMAN & DU PLESSIS ATTORNEYS**

1ST DEFENDANT/RESPONDENT'S COUNSEL: **RH WILSON**

INSTRUCTED BY : **GLOVER KANNIEAPPAN INC**