

## REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE**

**CASE NO: 7303/2019**

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|---------------------------|--|
| (1)                       | <u>REPORTABLE: YES/NO</u>                |
| (2)                       | <u>OF INTEREST TO THE JUDGES: YES/NO</u> |
| (3)                       | <u>REVISED.</u>                          |
| DATE..... SIGNATURE:..... |  |

In the matter between:

**RYNHART KRUGER N.O**

**PLAINTIFF**

**And**

**MARTIN MARK VAN STRAATEN**

**DEFENDANT**

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**JUDGEMENT**

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**KGANYAGO J**

- [1] The plaintiff is an agent and attorney of Merise Montez van Wyk (nominee of Sanlam Trust Limited) who is the executrix in the estate of the late Allan Clive Smith (deceased) who has passed away on 21<sup>st</sup> December 2018. The plaintiff was appointed by the executrix as her agent by virtue of the power of attorney dated 5<sup>th</sup> February 2019. The plaintiff has instituted an action against the defendant in his capacity as a nominee of the deceased estate.
- [2] According to the plaintiff, the deceased and the defendant had purchased 100% membership of OM Fourie in a close corporation (CC) for R1,3 million. The deceased and the defendant would become co-members each holding 50% interest in the CC upon payment of R1,3 million. The deceased had paid the full amount of R1,3 million, and the defendant was supposed to have reimbursed the defendant the amount of R650 000.00 within a reasonable period of time. Both the deceased and the defendant became co-members of the CC on 7<sup>th</sup> December 2012. The defendant had failed to pay the deceased the R650 000.00 as promised. That led to the plaintiff instituting the action against the defendant claiming the amount of R650 000.00 as been due to the deceased in terms of an agreement between the deceased and defendant which agreement was concluded during 2012.
- [3] In the alternative the plaintiff is alleging that on 10<sup>th</sup> October 2019, the plaintiff had demanded payment of R650 000.00 from the defendant failing which the plaintiff intended to cancel the agreement. The plaintiff alleges that the defendant had failed and/or omitted to pay the full amount or portion thereof. Therefore, the plaintiff has cancelled the agreement, and is seeking that restitution should be effected, the defendant's 50% member interest be terminated or cancelled and be transferred into the plaintiff's name.

- [4] The defendant is defending the plaintiff's action and has raised two special pleas. The first special plea been that of *locus standi*, and the second that of prescription. Regarding the first special plea, the defendant is alleging that the plaintiff is not the executor of the deceased estate, and accordingly has no *locus standi* in these proceedings. Regarding the second special plea, the defendant is alleging that the plaintiff's claim has prescribed. In substantiating that contention, the defendant has pleaded that the agreement between the deceased and the defendant was concluded during April 2012. Further that in terms of the agreement, the defendant would have reimbursed the deceased in the sum of R650 000.00 within a reasonable time calculated from April 2012. That the plaintiff's summons was served on the defendant on 18<sup>th</sup> November 2019 being more than three years after the date in which the plaintiff's claim arose.
- [5] The parties have agreed that the two special pleas be heard first and separately from the remainder of the issues in dispute between the parties. The court ruled that the plaintiff bears the onus and duty to begin in establishing that the plaintiff has *locus standi in iudicio*.
- [6] The plaintiff has called two witnesses to testify in discharging its onus. Werner Kruger was the first witness to testify for the plaintiff. He testified that he is an admitted attorney specialising in administration of deceased estates. Merise Van Wyk is the appointed executrix of the deceased estate. The letters of executorship have been issued in the names of Merise. The executrix has in turn signed a power of attorney nominating and appointing the plaintiff as her legal agent to act on her behalf and administer the estate of the deceased. He did not institute the action against the defendant in his personal capacity, but

as a nominee of the deceased estate. That Sanlam Trust has many estates and it was impossible for it to administer all the estates on its own, hence they gave him the power of attorney.

[7] The witness was cross examined and he conceded that he was not the executor of the deceased estate. He conceded that the executor of the deceased estate is not a party to the proceedings. The witness stated that he is having *locus standi* to act on behalf of the estate by virtue of the power of attorney issued to him.

[8] Alison Grunewalt was the plaintiff's second and last witness to testify. She testified that the deceased was her live-in partner even though they were not married. She and the deceased were living together as husband and wife. The deceased and defendant had agreed to buy Portion 22 of Buffelspoort Limpopo for R1,3 million. The deceased and the plaintiff agreed that each of them will pay 50% of the purchase price. The deceased paid the full purchase price of R1,3 million, and the defendant was supposed to have reimbursed the deceased R650 000.00 after the defendant had sold his property at Lochvaal.

[9] However, the defendant never paid the deceased as promised. On numerous occasions the defendant had acknowledged his indebtedness to the deceased. The defendant had acknowledged his indebtedness to the deceased per letter dated 27<sup>th</sup> February 2018. In that letter the defendant has stated that he will pay the deceased upon the sale of his Lochvaal property. Summons against the defendant was issued on 30<sup>th</sup> October 2019. The deceased and the defendant had various discussion regarding what was due to the deceased.

[10] The witness was cross examined and she stated that the prescription was interrupted by the letter of 27<sup>th</sup> February 2018. She further stated that during

2018 they consulted their legal representative as they wanted to have something in writing as the debt became due in 2012. That concluded the evidence of the plaintiff. Both parties have addressed the court on both special pleas.

- [11] It is trite that in litigation proceedings, the first thing to establish is the *locus standi in iudicio* of the litigant. In *Four Wheel Drive v Rattan No*<sup>1</sup> Schippers JA said:

“The logical starting point is *locus standi* – whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally, the requirements for *locus standi* are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not hypothetical one. The duty to allege and prove *locus standi* rest on the party instituting the proceedings.”

- [12] The plaintiff in arguing that he had the necessary *locus standi* is relying on the power of attorney signed by the executrix on 5<sup>th</sup> February 2019 which read as follows:

“I the undersigned, Merise Montez Van Wyk ID no ... in my capacity as Executor/ Executrix in the estate of the late: Allan Clive Smith ID no ... in terms of the Letter of Executorship no ... issued by the Master of the High Court (Marshalltown) dated the 01 day of February 2019 do hereby nominate, constitute and appoint –

Rynhart Kruger as nominee of Rynhart Kruger Attorneys (ID no ... )

To be my legal agent for and on behalf of the estate and to administer the said estate in a lawful manner, according to local laws and usages, to liquidate and to do or cause to be done whatsoever shall be requisite, as fully and effectually, for all intends and purposes, as I might

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<sup>1</sup> 2019 (3) SA 451 (SCA) at para 7

or could do if personally present and acting herein, hereby ratifying, allowing and confirming and promising and agreeing to ratify, allow and confirm all and whatsoever my said agent shall do, or cause to be done, by virtue of the power of attorney.

Without in any way restricting or limiting the aforesaid power of authorities, I do hereby specifically authorise my agent: -

1. To open and operate on a banking account in the name of the estate;
2. To demand, recover and receive all debts or sums of money which now are or hereafter may become due, owing, payable or belong to the estate.
3. To complete and sign all relevant documents for the cancellation or registration of bonds, transfer of fixed properties, deed of sale, transfer of title rights attached to shares and/or immovable and movable property belonging to the estate and in respect of which the estate may be committed to buyers, creditors, legatees or heirs and to represent the estate in matters relating hereto.
4. To collect, for his own account, the entire executor's commission payable by the estate as remuneration for services rendered.
5. To sign the Liquidation and Distribution Account.
6. To choose "domicilium citandi et executandi".
7. To attend to all litigation on behalf of the estate/executor or on behalf of the heirs in the estate."

[13] The executor in the case at hand is not a party to the proceedings. The plaintiff who is an agent of the estate, has instituted these proceedings as a nominee of the estate based on the power of attorney that was given to him by the executor of the deceased estate. In *Gross and Others v Pentz*<sup>2</sup> Corbett CJ said:

"...it should be accepted as a general rule of our law that the proper person to act in legal proceedings on behalf of a deceased estate is the executor thereof and that normally a beneficiary in the estate does not have the *locus standi* to do so."

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<sup>2</sup> 1996 (4) SA 617 (A) at 625B-C

[14] The same principle as stated in Gross case above was restated in *Jones v Pretorius NO*<sup>3</sup> where Van der Merwe JA said:

“A deceased estate is an aggregate of the assets and liabilities. Rights of action that vest in an estate, naturally form part of the assets thereof. See *Lockhat’s Estate v North British & Mercantile Insurance Co. Ltd* 1959 (3) SA 295 at 302F-G. Upon his or her appointment, only the executor has the powers and duties to deal with the estate. His rights and obligations are derived from common law and statutory provisions. One of the main obligations of an executor is to recover what is due to the estate. And only the executor may institute legal proceedings to do so. The position is summarised in D Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* 2010 ed at 12-23 – 12-24, para 12.26:

‘Upon his appointment the executor becomes entitled to deal with all the assets of the estate and it is his duty to recover all assets, in whatever form they may be, whether immovable, movable, corporeal or incorporeal, which belong to the estate but which are in the hands of, or may be owed by, third parties. It is him to decide whether the estate has any claim against the third party and the advisability of instituting action to recover’.

[15] The plaintiff is not the executor of the deceased estate and is claiming in his capacity as the nominee of the deceased estate. The executor is not even a party to the proceedings. From the authorities that I have referred to above, it is clear that it is only the executor who is empowered to institute legal proceedings on behalf of the deceased estate. It is the responsibility of the executor to recover any funds and/or enforce any claim on behalf of the deceased estate. The executor is not empowered to delegate that responsibility to anyone.

[16] The power of attorney signed in favour of the plaintiff, has limited the plaintiff to demand, recover and receive all debts or sums of money which may be due or owing to the estate. In relation to litigation, it has limited the plaintiff only to

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<sup>3</sup> [2020] ZASCA 113; 2022 (1) SA 132 (SCA) (29 September 2020) at para 15

attend to all litigation on behalf of the estate/executor or on behalf of the heirs of the estate. It does not specifically give the plaintiff the power to institute legal proceedings on behalf of the executor of the deceased estate. Attending to litigation is not equivalent to instituting legal proceedings on behalf of the executor. Under the circumstances, the defendant's special plea of *locus standi* has merit and stand to be upheld. Since the special plea of *locus standi* is upheld, there is no need to deal with the special plea of prescription.

[17] In the result the following order is made

- 17.1 The defendant's special plea of *locus standi* is upheld and the plaintiff's claim is dismissed with costs, such costs to include the costs of a senior counsel.

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**KGANYAGO ADJP**  
**JUDGE OF THE HIGH COURT OF SOUTH**  
**AFRICA, LIMPOPO DIVISION,**  
**POLOKWANE**

**APPEARANCES:**

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|----------------------------------|-------------------------------------|
| <b>Counsel for the plaintiff</b> | <b>: FW Botes SC</b>                |
| <b>Instructed by</b>             | <b>: Ryhart Kruger Attorneys</b>    |
| <b>Counsel for the defendant</b> | <b>: C Woodrow SC</b>               |
| <b>Instructed by</b>             | <b>: Wessels &amp; Voster Inc</b>   |
| <b>Date heard</b>                | <b>: 24<sup>th</sup> April 2023</b> |



**Electronically circulated on**

**: 24<sup>th</sup> May 2023**