

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

20957/2010

DATE:

28 OCTOBER 2010

5 In the matter between:

MADISON FINANCING (PTY) LTD

1st Applicant

BERNICE CROESER (formerly Andrews)

2nd Applicant

and

EVA MARIE SWANEPOEL N.O.

1st Respondent

10 PAULUS BERNHARDUS KOCH

2nd Respondent

JOZEPHS INCORPORATED

3rd Respondent

CHRISTINE ADAMS

4th Respondent

CLARA SOLOMONS

5th Respondent

HENNIE JONKERS

6th Respondent

15 SALIE SOLOMONS

7th Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN 8th Respondent

J U D G M E N T

20 STEYN, J:

In essence applicants are applying for an order that first,
second and third respondents be interdicted and restrained
from disposing and/or transferring to any third party, a
25 particular property situate in Atlantis, Cape ("the property"),
/IM

/...

pending the transfer of the property into the name of the second applicant in terms of an agreement entered into between first respondent and second applicant.

- 5 After I had perused the documentation, I requested a report from the Master's Office.

Briefly, first respondent was appointed as a Master's representative in terms of sec 18(3) of the Administration of
10 Estate's Act, 66 of 1965. Her initial appointment in April 2008 was to attend to the finalisation of the estate of Pieter Solomons and it was specifically recorded that the assets she had control over were furniture items to the value of R5 000.

- 15 On 21 October 2009 first respondent was authorised by the Master to take control of further assets, namely, the property in Atlantis, which was valued at R120 000. The total value of assets she was able to administer was now R125 000. A Master's representative can only be appointed if the value of
20 the estate does not exceed the sum of R125 000, being the amount fixed by the Minister in the Gazette. The Act does not allow the appointment of a Master's representative if the amount available for distribution in an estate exceeds that amount.

First respondent, apparently prior to being formally authorised to deal with the immovable property, entered into an agreement of sale with second applicant in respect of the property. The Deed of Sale was duly concluded on 2 June 5 2008. The agreement provides that the offer of the purchaser (second applicant) shall become a final and binding sale upon acceptance by the seller (first respondent), when the seller signs the agreement. This she did on the said date. The purchase price of the property was R120 000, which sum is 10 payable in cash on registration of transfer of the property.

The sale agreement provides that the first respondent, as the seller, appointed a Mr Steyl, who she referred to as "the seller's attorneys", and provided further that the transfer shall 15 be given and taken as soon as possible and after conditions have been met. This particular condition is a condition that had to be met by the first respondent.

The agreement refers to breach of contract which mainly 20 relates to the purchaser failing to pay the purchase price on due date. There is no obligation on the purchaser (second applicant) to attend to the registration of transfer of the property. This is entirely the obligation of the seller, who is the first respondent.

Mindful of her obligations in this regard, the first respondent gave Power of Attorney to her attorneys, the firm where Mr Steyl was employed, who is mentioned by name. These legal gentlemen are authorised "to appear at the office of the
5 Registrar of Deeds and to pass transfer to" second applicant of the property. She signs the document herself.

No immovable property can be transferred by the registration officer unless and until the Master provided a certificate to the
10 executor (or Master's representative) that the Master has no objection that such transfer takes place. Presumably the Master makes some enquiries before such a certificate is issued. In this case, the Master only affixed its stamp of approval for the sale of the property by the first respondent to
15 second applicant on 27 January 2010. This stamp appears on the Power of Attorney that first respondent gave to Mr Steyl. There is no indication why this took so long and the blame can definitely not be laid at the door of the second applicant.

20 In the meantime the heirs to the deceased estate of Mr Solomons became anxious to receive funds in advance in lieu of the eventual payment they expected when the property was ultimately transferred. A total sum of R93 000 was advanced to them by the first applicant, acting in concert with the first
25 respondent, who according to documentation, also received

/IM

/...

some payments. The loans of money appear to be directly linked to the transfer of the property.

It is alleged by the applicants that problems started when the first applicant became reluctant to continue with the advancing of the funds. Be that as it may, the conveyancing attorney was allegedly experiencing various difficulties with the finalisation of the transfer of the property. For some totally inexplicable reason he alleges he approached the second respondent to assist him with the finalisation of the estate.

The very opportunistic second respondent, however, somehow managed to persuade the first respondent to allow him to handle her matters forthwith. He wrote a letter dated 4 June 2010 to De Waal Attorneys, where Mr Steyl is employed, and informed them that he was now the agent for the first respondent, the Master's representative in the Solomons estate matter. He also advised that the mandate previously given to Steyl by first respondent is cancelled and that he has no authority to continue with the transfer of the property transaction. He insists that the Power of Attorney handed to Steyl by first respondent should be handed back to him.

Second respondent annexes a so-called "boedelvolmag" signed by himself and the first respondent. This document, also dated

2 June 2010, states that second respondent is appointed as the authorised agent of the first respondent "om die boedel te administreer, beredder en af te handel volgens geldende wette" etc. He is empowered with wide ranging powers to
5 take all the steps in the administration of the deceased estate that the first respondent should be attending to and he is entitled to an executor's fee. He is *inter alia* authorised to take steps to finalise the deceased estate including, it seems, the transfer of the property.

10

I do not believe this action of the first respondent is legally competent. Sec 52 of the Act specifically provides that it is not competent for any person appointed executor to substitute or surrogate any other person to act in his place.

15

In the meantime, on 26 April 2010, the third respondent, for some totally unfathomable reason, addresses a letter to the unsuspecting undeserving second applicant. He advises her that he acts on behalf of the first respondent in her capacity as
20 the Master's representative. He complains that since the conclusion of the agreement on 2 June 2008, nothing "had expired", presumably meaning "transpired". Then, inexplicably he adds that he demands that should proper performance of the agreement not take place on or before a certain date, his
25 client will treat the agreement as cancelled.

/IM

/...

The contents of this letter and the threat contained therein are nothing short of preposterous. It is the agent of his own client whom he should blame for the fact that transfer is being
5 delayed. It is clear that no basis exists whatsoever for the cancellation of the contract.

Yet, the dubious dealings in this matter are not complete. It was alleged by the applicants that first respondent has now
10 sold the property to an undisclosed third party for a higher purchase consideration than the sum agreed to with second applicant. It is admitted that such an agreement was entered into, co-incidentally on 5 June 2010, just after Mr Steyl was discarded. I note that the respondents are careful not to
15 divulge the identity of the new buyer in their documentation filed by them.

In an attempt to justify the cancellation of the initial agreement with the second applicant, the respondents allege that she was
20 put in *mora*, referring to the inappropriate letter written to her, that I have referred to above. In his affidavit second respondent then refers to a letter dated 5 May 2010 received by the firm De Waal Esterhuize, the attorneys where Mr Steyl is employed. He seems to allege that in this letter Mr Steyl
25 does not give a good explanation why the transfer of the

property is not being attended to and therefore first respondent is entitled to cancel her agreement with the second applicant.

My reading of the letter does not indicate at all that Mr Steyl
5 was aware of the letter to the second applicant. Why should he be? He is not second applicant's representative. His reply cannot have any consequences for the second applicant.

In his affidavit the second respondent states, *inter alia*, the
10 following:

1. Transfer of the property was to take place within a reasonable time. He seems to be unaware that this aspect was a term that the first respondent
15 undertook to comply with when she appointed the transferring attorney.
2. He says second applicant was put to terms to comply within a specified period. There is no indication what exactly she should have or could
20 have done.
3. He says the second respondent did not give an explanation why transfer did not take place, referring to a letter by Steyl, which once again is preposterous.

4. He states that second respondent was informed that the agreement of sale was cancelled, presumably referring to second applicant. No indication or proof in this regard is provided.

5

Of further note from the affidavit of the second respondent is the fact that he alleges that first respondent and the heirs borrowed money from first applicant.

- 10 There is a valid and binding sale agreement that has been authorised and approved of by the Master. There is no reason why the terms of this agreement should not be complied with. It is imperative that transfer of this property should now take place as soon as possible.

15

- I have just received a very informative report from Mr Margolis at the Master's office, for which I am grateful. He described further actions taken by the first three respondents that seem extremely devious. In the telephone conversation with him, he confirmed that there is absolutely no objection to the immediate transfer of the immovable property to the second applicant in terms of the agreement that he has already rectified. If she is willing to take transfer, which I am informed she is.

25

/IM

/...

Lastly, I wish to record that I find the conduct of the first, second and third respondents reprehensible. I do not believe justice will be served by making an order that will have the effect that the heirs to the deceased estate should pay the costs occasioned by the Master's representative and the attorney and other representative who acted unprofessionally and culpably on her behalf.

In the premises, the following order is made:

After perusing the documentation filed and hearing the legal representatives of the parties, the Court orders:

1. Non-compliance with the rules and practice of this Honourable Court is condoned;
2. Pending the final registration of transfer of Erf 6550, Westfleur, in the City of Cape Town, first, second and third respondents are interdicted and restrained from disposing of/and transferring and/of alienating as the case may be the property described as Erf 6550, Westfleur, in the City of Cape Town to any third party.
3. That 8th respondent be authorised to register a *caviat* against the title deed of the property in accordance with the terms of this order.

/IM

/...

- 5
4. That subject to second applicant's written undertaking to fully comply with her obligations in terms of the agreement referred to hereunder, first respondent is ordered to take all necessary steps to pass transfer of the immovable property to second applicant in terms of the written agreement of sale entered into between first respondent and second applicant on 2 June 2008 within twenty one (21) days of today's order.
- 10
5. That in the event of first respondent's failure, within 21 days of this order to take the necessary steps to pass transfer of the property to second applicant, the sheriff of this honourable Court is authorised to take such steps on first respondent's behalf.
- 15
6. That first, second and third respondents are ordered to pay the costs of this application, the one paying the other to be absolved. First respondent's payment to be *de bonis propriis*.
- 20
7. A copy of this order shall be served on the Master's Office within 48 hours of the order being handed down.