

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 009404/2022

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
17 AUGUST 2022

In the matter between:

KOSMOS RIDGE HOMEOWNERS ASSOCIATION APPLICANT

and

BRYAN NYASHAZASHE NYABONDA FIRST RESPONDENT
(Identity Number: [....])

KINTANA INVESTMENTS (PTY) LTD SECOND RESPONDENT

RENEE MOLL ATTORNEYS THIRD RESPONDENT

REGISTRAR OF DEEDS, PRETORIA FOURTH RESPONDENT

JUDGMENT

KUBUSHI J

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 17 August 2022.

INTRODUCTION

[1] The Applicant approached Court on an urgent basis seeking, amongst others, to interdict and restrain the third Respondent from paying out the proceeds of the sale of a property belonging to the Second Respondent, a duly incorporated private company, in order to recover monies due and owing by the First Respondent to the Applicant.

[2] The urgency of the matter was based on the imminent transfer of the property in question and the subsequent pay out of the proceeds thereof. The Court having satisfied itself that the transfer of the property was indeed imminent, and that the Applicant will not be afforded substantial redress in due course, made a ruling that the matter was urgent enough to be heard in the urgent Court.

[3] The application was opposed by the First and Second Respondents only, who for ease of reference are referred to collectively, in this judgment, as the Respondents. The Respondents filed separate notices to oppose the application and answering affidavits, but were, at the hearing of the matter represented by the same counsel.

[4] Of concern however, was that the Respondents had filed their notices to oppose the application as well as their respective answering affidavits out of time, without applying for condonation. The Applicant had also served the Second Respondent with a rule 7 notice which had not been replied to. When the matter appeared in Court the Respondents had not filed applications for condonation, nor had the Second Respondent replied to the rule 7 notice.

[5] Due to the above irregularities, the Applicant's counsel wanted that the matter be proceeded with, on an unopposed basis. Counsel further sought to have the answering affidavit of the Second Respondent to be regarded *post non scripto* by the Court, as it had not been properly commissioned. The Court was made aware of the discrepancy in the commissioning of the answering affidavit, in that, it was signed electronically by the deponent and signed in manuscript by the commissioner of oaths. It meant that the deponent to the answering affidavit did not sign the answering affidavit in the presence of the commissioner of oaths as is required in law.

[6] Counsel who appeared on behalf of the Respondents, sought an indulgence from the Court to file the power of attorney in reply to the rule 7 notice, which indulgence was allowed. The resolution of the Second Respondent which appointed the Second Respondent's current attorneys of record as the legal representative of the Second Respondent, was, consequently, uploaded on Caselines.

[7] The Respondents' counsel, further, sought an indulgence from the Court to accept the respective answering affidavits of the Respondents without the required application for condonation. Counsel contended that if the Court was not inclined to grant such indulgence that the deponent to the Second Respondent's answering affidavit would be called in to give oral evidence.

[8] What became insurmountable for the Respondents' counsel was that due to the issue of urgency, the matter could not be postponed to give the Respondents time to apply for condonation. More insuperable was the defect in the Second Respondent's answering affidavit, the result of which was that there was, in fact, no answering affidavit before the Court.

[9] Having conceded that the matter could not be proceeded with on the affidavits as they stood, without condonation being granted, counsel for the Respondents raised a point *in limine* on behalf of the Second Respondent. It, however, meant that both the answering affidavits of the Respondents were *post non scripto* and, thus, no longer before the Court; and, that the First Respondent was also, not before Court. The point *in limine*, only salvaged the Second Respondent's case in that the point *in*

limine could be argued from the bar without reference to the Second Respondent's answering affidavit.

THE ISSUE FOR DETERMINATION

[10] On the point of law raised by the Second Respondent's counsel, it was contended that, in the circumstances of this matter, there is no ground in law that entitles the Applicant to interdict the payment of the proceeds of the property of the Second Respondent, that is a company with juristic rights. Eventually, this was the only issue that the Court had to decide. The effect thereof is that, should this point be dismissed by the Court, the application was to be granted on the basis of the Applicant's founding affidavit.

BACKGROUND

[11] The application originates from a debt incurred by the First Respondent in failing to pay the levies that are due and payable to the Applicant. The Applicant is the Homeowners Association of K[....]mos Ridge Township. One of the Applicant's duties as a Homeowners Association is to ensure that all its members pay their levies on a timely basis and without any undue delay.

[12] The First Respondent is a registered owner of an erf in K[....]mos Ridge Township and is, thus, a member of the Applicant. The First Respondent is, in terms of the rules of the Applicant, obligated to pay all the levies charged by the directors of the Applicant. The First Respondent has fallen into arrears with the payment of his levies and for the past eleven years, the Applicant has litigated against the First Respondent in order to obtain payment of such levies. The Applicant has, as a result, obtained various judgments against the First Respondent for the unpaid levies, charges, interest and legal costs. At the time of the issuing of this application, the First Respondent was said to be indebted to the Applicant in the sum of R 424 268.43, being for the said arrear levies, charges, interest and legal costs.

[13] The property in question is described as SS21 Melodie Waters ("Melodie Waters") and is owned by the Second Respondent, a private company duly

incorporated in terms of the laws of the Republic of South Africa. As it will more clearly appear hereunder, it is the proceeds of this property that the Applicant wants the payment thereof interdicted.

[14] The Second Respondent comes into the picture in that the Applicant alleges that the First Respondent gave an undertaking to the Applicant that he (the First Respondent) will use the proceeds of the sale of Melodie Waters property which as it has been said, is owned by the Second Respondent, to settle the First Respondent's debt with the Applicant. The said property has now been sold, and is due to be transferred into the name of the new owner, but the First Respondent is said to be refusing to confirm his undertaking that the proceeds of the property will be used to settle the Applicant's debt.

[15] The First Respondent was, at one time, a director of the Second Respondent, together with one Sona Pillay ("Mr Pillay"), but has since resigned leaving Mr Pillay as the sole director of the Second Respondent. The First Respondent and Mr Pillay are, also, two of the four trustees of a trust, The Tomi Trust, that is the sole shareholder of the Second Respondent. The First Respondent is the signatory, on behalf of the Second Respondent, of a Mandate given to Pam Golding Estate Agents ("the Agents") to sell the Melodie Waters property ("the Mandate"). The First Respondent was duly authorised to sign the Mandate by a Resolution passed at a meeting of directors of Kintana Investments Pty Ltd (the Second Respondent) on 21 June 2022 ("the Resolution").

[16] The Applicant avers that it was compelled to institute these proceedings because the First Respondent had previously offered to sell immovable properties registered in his personal name, that of Kintana (the Second Respondent) and Victoria Trust, and would then effect payment of the proceeds to the Applicant until his indebtedness has been extinguished. Despite this express undertaking provided by the First Respondent, the First Respondent proceeded to sell one of his properties known as [...] M[...] K[...] without informing the Applicant, and also, failed to effect payment of the proceeds of that sale to the Applicant.

[17] It is, also, alleged that in order to avoid being sequestrated by the Applicant, the First Respondent gave an express undertaking to the Applicant that the proceeds of the sale of the Melodie Waters property will be paid to the Applicant. Furthermore, it is alleged that the First Respondent, was in terms of the Resolutions signed by the Second Respondent, provided with the express authority to deal with the proceeds of the sale of the immovable properties.

[18] The Applicant contends that it is as a result of the aforesaid, that it approached the Court to declare that the proceeds of the sale of the Melodie Waters property be paid to the Applicant in reduction of the First Respondent's indebtedness to the Applicant, *alternatively*, that such amount be retained on trust with the Third Respondent, pending a reconciliation of the account which might result in such lower amount as agreed between the Applicant and the First Respondent.

ANALYSIS

[19] It is a principle of our common law that, a company, being a legal persona, cannot contract in person but must do so through a person acting under its authority. Such authorisation must be given by means of a directors' resolution expressly stating what is expected of the person so authorised. In this matter, the Second Respondent, as a company, mandated the First Respondent to deal with the Agents to have the Melodie Waters property sold. The Mandate as it has been stated, was issued in terms of a Resolution taken at the directors' meeting of 21 June 2022. The Resolution authorises the First Respondent, in his capacity as a director, to sign the relevant documents which may be necessary for the registration of the transfer of Melodie Waters property to Nonhlanhla Eileen Makgobatlou.

[20] Counsel for the Second Respondent's argument is that it is common cause that the Applicant does not have a dispute with the Second Respondent, and, there is, therefore, no basis upon which the Applicant may interdict the proceeds of the property which belongs to the Second Respondent. The Second Respondent, as a company, has its own rights as a juristic person, and the settlement agreement, which the Applicant concluded with the First Respondent has nothing to do with the

Second Respondent. According to counsel, the First Respondent who owes the Applicant, was a director of the Second Respondent and has since resigned.

[21] The high watermark of the Applicant's case is that the First Respondent was authorised by the Second Respondent to deal with the proceeds of the sale of the Melodie Waters property. For the reasons that follow hereunder, this argument by the Applicant cannot be sustained.

[22] Firstly, there is no evidence presented in the Applicant's papers which indicates that the Second Respondent clearly mandated the First Respondent to deal with the proceeds of the Melodie Waters property sale. Secondly, there is nothing in the Resolution, that mandates the First Respondent to deal with the Agents, authorising the First Respondent to deal with the proceeds of that sale. In order for the First Respondent to deal with the proceeds of the sale he must be expressly so mandated in the Resolution.

[23] According to the Applicant, it should be assumed that the Second Respondent mandated the First Respondent to deal with the proceeds of the sale of Melodie Waters because the First Respondent has been dealing with not only the Agent but also with the transferring attorney of the property throughout the process of the sale of the property. The First Respondent, it is contended, has also instructed the transferring attorney to pay out the proceeds of the sale to some creditors including H[...], a school attended by the First Respondent's son. This, then, according to the Applicant, entitles the Applicant to interdict the pay out of the proceeds.

[24] If it is to be accepted that the First Respondent was authorised to deal with the proceeds of the sale, as suggested by the Applicant, the onus is on the Applicant to establish that in the Resolution, the First Respondent was mandated to pay the Applicant's debt. It might be so that the Second Respondent authorised the First Respondent to deal with the proceeds of the sale, but the question is, was it a blanket authorisation or the authorisation was to deal with the proceeds in a certain way. Without an answer to this question, this Court cannot just assume that the authorisation granted to the First Respondent to deal with the said proceeds, if ever there was any, included the payment of the Applicant's debt.

[25] Except for H[....], there is, no evidence in the papers that shows who the creditors that were to be paid by the transferring attorneys were. The creditors that the Third Respondent was instructed to pay could have been the Second Respondent's creditors, which the First Respondent would have been entitled to pay. It is common cause that the Applicant is not a creditor of the Second Respondent, as such, it would have not been wrong if the Third Respondent was instructed not to pay the Applicant.

[26] The Applicant's other argument is that it can interdict the proceeds of the sale, even if Mr Pillay is now the only director of the Second Respondent, because the First Respondent is the trustee of The Tomi Trust, which is the sole shareholder of the Second Respondent. This argument, in this Court's view has no substance.

[27] It is trite that a trustee cannot bind the trust acting alone but must act together and jointly with the other trustees or he must act on the written authority given by all the trustees, acting jointly.¹

[28] It is not in dispute that the First Respondent is not the only trustee of The Tomi Trust, he is one of four trustees. In order for the undertaking that the First Respondent has made to the Applicant to be valid, the other trustees must have made it jointly with the First Respondent. Additionally, in order for the First Respondent to deal with the proceeds of the sale of the property, he must have been duly and expressly authorised to do so by the other trustees, acting jointly. It has already been shown that this was not the case in this instance.

[29] In its own words, the Applicant contends that during 2018 the Applicant attached a property owned by the Second Respondent, situated at number [....] S[....] Street, S[....]2, and wanted to sell it in execution. However, in an interpleader summons that was issued by Mr Pillay it was established that the attached property indeed belonged to the second respondent and was, as a result released from attachment. Melodie Waters as a property owned by the Second Respondent must be dealt in the same manner as the abovementioned property.

¹ Thorpe and Others v Trittenwein and Another 2007 (2) SA 172 (SCA).

[30] Over and above that, there is nothing, in the circumstances of this matter, that entitles the Applicant to interdict the proceeds of the sale of property owned by the Second Respondent in order to pay a debt owed to it by the First Respondent. Besides, even if it could have been found that the First Respondent has been authorised to deal with the proceeds of the sale of that property, that would not entitle the Applicant to interdict the said proceeds.

[31] The Second Respondent's argument that the Applicant cannot interdict the proceeds of the sale of property which belongs to the Second Respondent, is, in this Court's view, valid. On this point alone the application falls to be dismissed.

[31] The following order is made:

1. The application is dismissed.
2. The Applicant is ordered to pay the cost of the Second Respondent.

E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

APPLICANT'S COUNSEL:

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FIRST & SECOND RESPONDENTS' ATTORNEYS