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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

Case no: D5954/2022

In the matter between:

**AMANZIMTOTI WELFARE ORGANISATION
FOR THE AGED**

APPLICANT

and

DIANA PATRICIA GREGSON

RESPONDENT

ORDER

1 The application is dismissed with costs.

JUDGMENT

Sibisi AJ:

Introduction

[1] The applicant, Amanzimtoti Welfare Organisation for the Aged ('AWOFTA'), has launched an application for the eviction of the respondent, Diana Patricia Gregson, from its property, to wit, Unit 2[...] at Poinsettia Park Retirement Centre (the 'Unit'). The eviction is sought to terminate the respondent's life right and occupation of the aforementioned property.

[2] By and large, the factual matrix underpinning the dispute can be summarised as follows: the respondent has occupied the unit since 1996, pursuant to a life rights agreement originally concluded between AWOFTA and the respondent's late mother on 23 June 1986. On 2 March 1995, the original agreement was amended to substitute Glenda with the respondent as an occupant of the unit and assigned carport number 92. A supplementary agreement for the use of garage number 65 was also concluded on 3 June 1998. On 3 December 2018, this Court granted an order regulating various aspects of the parties' relationship, including the respondent's access to the unit during her absence and the handling of levy-related issues in separate proceedings before the Magistrate's Court. AWOFTA alleges that the respondent has not occupied her unit since December 2019, exceeding the permitted absence period. On 27 January 2022, AWOFTA delivered a letter purporting to terminate the respondent's life right, which was served on her attorneys of record on 9 February 2022.

[3] AWOFTA relies on various clauses in the agreement and house rules to support its right to terminate the respondent's occupation. These include provisions regarding beneficial occupation, the trustees' power to terminate rights of use and occupation, and house rules limiting residents' absences. In broad strokes, AWOFTA contends that the respondent's prolonged absence constitutes a breach of the life

rights agreement and the retirement centre's house rules, thereby justifying termination of her right of occupation.

[4] Conversely, the respondent asserts that her absence was involuntary due to COVID-19 travel restrictions and health issues, invoking the doctrine of *force majeure*.¹ She argues that the original agreement allowed for extended absences, citing her dual citizenship and career as an opera singer. She also raises her constitutional rights to movement, residence, and association. She contends that the terms of usage have been unilaterally altered, infringing her contractual rights and enjoyment of the property. She further raises issues of *locus standi* and disputes the validity of the house rules.

Point in limine

[5] I commence with the respondent's point *in limine* regarding the applicant's *locus standi*. The respondent avers that AWOFTA's founding affidavit is defective due to the absence of the director's name and signature. The basis for this submission is that on the face of it, it appears to be a fraudulent document as no certificate of registration of a non-profit organisation can validly exist without a director's signature. As I see it, while such omissions may constitute an irregularity, they do not, *ipso facto*, render the document fraudulent or fatally defective. However, if one looks at the points raised by both parties, it is clear that there is a dispute of fact and it is clear as to what should happen.

Analysis

[6] Turning to the substantive issues, the crux of this matter lies in the interpretation of the memorandum of agreement concluded by AWOFTA and the respondent's late mother, and its various endorsements concluded on 23 June 1986; the minutes of the applicant's annual general meeting dated 23 July 1985; and the house rules of the retirement centre. In approaching this interpretative exercise, I am guided by the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*² and reaffirmed in *Commissioner for the South African*

¹ See *Frajenron (Pty) Ltd v Metcash Trading Ltd and Others* 2020 (3) SA 2010 (GJ)

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

*Revenue Service v United Manganese of Kalahari (Pty) Ltd.*³ The aforementioned authorities mandate an objective, unitary approach to contractual interpretation, considering the language used, the context, and the purpose of the provisions in question.

[7] Applying these principles to the case at hand, several observations emerge. First, it bears mentioning that there is no agreement that directly refers to AWOFTA and the respondent as parties. As indicated earlier in this judgment, the respondent's late mother is the one who had entered into an agreement with AWOFTA to purchase a life right to a unit at the retirement centre. This agreement was concluded on 23 June 1986, with the respondent substituting her daughter, Glenda, on 2 March 1995. It is common cause that the respondent has been the occupant of the unit throughout the years. AWOFTA agrees to being bound by the original agreement, including its flaws such as the lack of an annexure that is referred to in the agreement, and the ambiguity around whether the life right belonged to the respondent's late mother or the occupant. AWOFTA also elected to honour the interpretation given by the respondent to the effect that she had "inherited" the life right.

[8] Second, the life rights agreement does not contain an express provision governing termination in circumstances analogous to the present situation. Clause 2.5 of the agreement stipulates that the purchaser's rights shall endure "for as long as he continues to be the beneficial occupier of the unit."⁴ However, the agreement is silent on what constitutes "beneficial occupation" in the context of prolonged absences. Clause 10 of the agreement empowers the trustees to terminate rights of use and occupation in cases of physical or mental disability necessitating relocation.⁵

³ *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) at para 8.

⁴ Clause 2.5 of the agreement reads as follows:

'The rights of the purchaser hereunder shall, subject to the conditions hereof, endure for as long as he continues to be the beneficial occupier of the unit and remains in fulfilment of all the terms and conditions of this agreement, and shall terminate 30 days after ceasing to be an occupier of the unit or 30 days after the death of the purchaser, subject, in such event, to the rights of the co-resident'.

⁵ This curtailment of the occupant's right of use and occupation is dealt with in clause 10 of the agreement, which provides that—

'Should the purchaser become physically and/or mentally disabled to such an extent that in the opinion of the trustees of AWOFTA, after consideration of a written report by a medical advisor and (if available) of a report by AWOFTA's own medical advisor, the purchase requires medical treatment

This clause does not directly address voluntary or involuntary absences unrelated to health conditions.

[9] AWOFTA makes reference to clause 18 of the agreement which gives its trustees the authority to lay down terms and conditions of occupancy and use. This clause appears to empower the trustees to manage the day to day issues of the retirement centre.⁶ AWOFTA also makes reference to clause 15.3 of the agreement which permits entry into units as authorised by the trustees, secretary, manager, and supervisor under power delegated by the trustees. This caters for instances where the occupier is absent and if it is necessary, these individuals will be entitled to gain entry.

[10] Against the foregoing backdrop, AWOFTA makes the submission that it has a right to terminate the rights of use and occupation in the event the holder of the rights of use and occupation is unable to occupy their units for a “lengthy duration”. In this regard, AWOFTA points out that the trustees may on one month’s notice terminate the rights of use and occupation. I do not find this is so. I have already given a detailed account of the clauses, which, fairly read, do not give the expression of a power to terminate an occupant’s life right in the circumstances of the respondent and the status of such life rights.

[11] The minutes of the 1985 annual general meeting suggest that, at inception, there were “no restrictions of leave of absence for residents of cottages bought.” This contemporaneous evidence of the parties’ intentions cannot be disregarded in

and/or nursing care/the trustees of AWOFTA will have the power to decide (after consultation with a medical advisor), for medical or such other reasons which are deemed desirable in the interest of the purchaser, that the purchaser must be temporarily moved to a unit in the temporary care unit forming portion of the common property. Should it subsequently appear in the opinion of AWOFTA and any medical advisor that the deterioration in the purchaser’s state of health and/or circumstances, is likely to be permanent or of a lengthy duration, then the trustees of AWOFTA may upon one month’s written notice to the purchaser terminate the purchaser’s rights of use and occupation. In the event of the above, the co-resident may continue to occupy the unit upon the written consent of the trustees of AWOFTA being first had and obtained.’

⁶ Clause 18: Regulations reads:

‘. . .shall be entitled at all times to lay down terms and conditions of an occupancy and use, both in respect of the unit and of the property generally, including those relating to the use of radios, televisions sets and aerials, air conditioning machines and other electrical appliances and apparatus, blinds and awnings and such other matters as the trustees deem fit, for the convenience and comfort and general well being of all occupants of the property and the appearance and management of the affairs of the property, and from time to time to vary, alter or amend the same’.

interpreting the agreement. Whilst there can be no doubt that the trustees have the power to regulate the day to day management of AWOFTA and Poinsettia Park, it is not clear as to where they derive the power to terminate the respondent's life right, nor can any impression from the clauses in the memorandum of agreement be interpreted to squarely deal with the issue of the termination of the respondent's life right.

[12] AWOFTA further placed reliance on the house rules purportedly limiting absences to three months per annum. However, the evidentiary weight of these rules is diminished for two reasons: first, it is not clear whether the AWOFTA, as a housing scheme is registered in terms of the provisions of the Community Schemes Ombuds Service Act 9 of 2011 (the 'Act'), and whether the house rules have been registered in terms of the provisions of the Act. Second, it is not clear whether the unsigned house rules put up by AWOFTA were properly adopted. What does appear is that the respondent is charged, *inter alia*, a levy which is abbreviated as CSOS which I assume means a levy that is payable by members of the scheme to the Community Schemes Ombuds Service.

[13] It is noteworthy that AWOFTA instituted these proceedings fully aware of the dispute that is subject to litigation in the Magistrate's Court. In addition, the unsigned house rules of AWOFTA that have been put up, particularly clause 1, is vague in that there is a set period of absence that is catered for and that permission may be obtained by an unidentified administrator. It is significant that the pending issue of levies deals with the formula employed in the determination of those levies. Furthermore, it is the evidence of the respondent that she has been paying her levies as calculated by her. There is no clause in the memorandum of agreement that can be interpreted to squarely deal with the issue of the termination of the respondent's life right. In light of these findings, it is unnecessary to traverse the respondent's contentions on this score.

[14] In the circumstances, I am of the considered view that the AWOFTA has not established a clear right to the relief sought. The absence of an unequivocal contractual or statutory basis for terminating the respondent's life right, coupled with

the existence of *bona fide* disputes of fact, militates against granting an order for eviction at this juncture.

Order

[15] Accordingly, the following order is made:

1. The application is dismissed with costs.

SIBISI AJ

Acting Judge of the High Court
KwaZulu-Natal Local Division, Durban

Date of hearing: 29 August 2024
Date of judgment: 18 October 2024

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