

SOUTH AFRICA / JUDGMENT

Benninghoff N.O and Another v Michelle N.O and Others (27210/2020) [2020] ZAGPPHC 613 (20 October 2020) [2020] ZAGPPHC 613

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

27210/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, GAUTENG

CASE NUMBER: 27210/2020

DATE: 20 October 2020
MAREDA
RITA BENNINGHOFF
N.O.
First Applicant
(in
her capacity as the joint provisional
Trustee
of the insolvent Estate of Philip
David
Michelle under Master Ref: T2894/2018
MAREDA
RITA BENNINGHOFF
N.O.
Second Applicant
(in

her capacity as the joint provisional
V
PHILIP DAVID MICHELLE
N.O.
First Respondent
(Identity Number: [...])
(in his capacity as trustee of
Bradgate Trust
with registration number
IT452/96)
ANDRIES FREDERICK COETZEE
N.O.
Second Respondent
(Identity Number: [...])
RUSSEL ALAN MICHELLE
N.O.
Third Respondent
THE REGISTRAR OF DEEDS,
PRETORIA
Fourth Respondent

JUDGMENT

MABUSE J

This matter came before me on an urgent basis as an application for a reconsideration of an order that this Court had granted in an urgent application on 30 June 2020. On the said date the Applicants approached the Court seeking, and were granted, the following order by Fabricius J,:

“1 This matter be heard as a matter of urgency in terms of Rule 6(12) of the Uniform Rules of Court and dispense with the forms of service provided for in the said rule.

“2. An order authorising the Applicant to launch these proceedings in terms of section 18(3) of the Insolvency Act, Act 24 of 1936;

3. That the First Respondent register a caveat preventing the transfer of the following immovable properties:

3.1 Erf 123 Witkop Township; Registration Division IR; Province of Gauteng; measuring 2552,0 m² in extent; held by Title Deed: T31639/2010;

3.2 Erf 201 Witkop Township, Registration Division IR; Province of Gauteng; measuring 2552,0 m² in extent; held by Title Deed: T85822/2015;

3.3 Erf 659 Witkop Township, Registration Division IR; Province of Gauteng; measuring 2552,0 m² in extent; held by Title Deed: T83864/2014;

3.4 Erf 315 Witkop Township; Registration Division IR; Province of Gauteng; measuring 2552,0 m² in extent; held by Title Deed: T94841/2013;

3.5 Portion 6 of Erf 159 Witkop Township, Registration Division IR; Province of Gauteng; measuring 9935m² in extent; held by Title Deed: T62149/2011;

(“the immovable properties”).

4. The First and Second Respondents are interdicted from selling, transferring, encumbering, leasing or otherwise dealing with any of the immovable properties registered in the name of the Bradgate Trust “Reg No: IT492/96”;
 5. The Fourth Respondent is interdicted from transferring any of the immovable properties;
 6. The relief sought out in paragraph 2 to 4 operate as an interim interdict, with limited effect, pending the finalisation of Part B;
 7. The Respondent be granted leave to anticipate the provisional order on at least 24 hours’ notice.”
- [2] The Applicants in the said matter brought the application in their capacities as joint provisional trustees of the insolvent estate of Philip David Michelle, having been so appointed by the Master of the High Court by virtue of certificate of appointment No. T2894/18 dated 27 March 2019.
- [3] The application was brought against the First Three Respondents fully described in the Application in their capacities as the duly appointed trustees of Bradgate Trustees, a Trust duly registered in terms of the Trust Property Control Act 57 of 1988 (“The Trust Property Act”) under reference no: IT4521/1996 (“the Trust”), the Fourth Respondent is the Registrar of Deeds.
- [4] The Applicants request Part A of the application to operate as interim relief pending the hearing of Part B that would have been heard on a date still to be allocated by the Registrar of this Court.
- [5] The First Respondent was a director of various companies. One of such companies was called Gentflex (Pty) Ltd (“Gentflex”). Gentflex has now been placed in liquidation. In the said capacity, the First Respondent signed suretyship in favour of one of the creditors of Gentflex. That creditor was Alexander Fraser and Son Group of Companies (Alexander Fraser and Son). According to the said suretyship, a copy of which is attached to the application as annexure ‘MR4’, the First Respondent had bound himself to be indebted to Alexander Fraser and Son in an amount not exceeding R7.5 million.
- [6] On 23 March 2018 the said creditor obtained summary judgment against the First Respondent (Phillip David Michelle) in his personal capacity for the sum of R7.5 million. On the strength of the said judgment, Alexander Fraser and Son provisionally sequestered the estate of the First Respondent. This fact is evidenced by a copy of the sequestration order

annexed to the application as 'MR6'. According to annexure 'MR7', the estate of the First Respondent was finally sequestrated on 3 June 2019. The Applicants were thereafter both appointed as joint provisional trustees in the sequestrated estate of the First Respondent. It is important to point out that Alexander Fraser and Son is a creditor of Gentflex (in liquidation) for approximately R16 million. The First, Second and Third Respondents are the duly appointed trustees

of Bradgate Trust.

- [7] Bradgate Trust is the registered owner of all the immovable properties described hereinabove.
- [8] At the time of this matter an inquiry into the affairs of Gentflex was being held before Adv PC van der Bijl SC, sitting as the commissioner, and having been convened in terms of sections 416 and 418 of the Companies Act 61 of 1973 ("the Companies Act"). The First Respondent, as a director of Gentflex, was subpoenaed at the same inquiry in his capacity as the director of Gentflex. In his testimony before the commissioner the First Respondent testified under oath that Bradgate Trust was indebted to his insolvent estate for a substantial sum of money.
- [9] More importantly, it became obvious that the Bradgate Trust was run in contravention to the provisions of the Trust Property Control Act 57 of 1988, without complying with the statutory provisions of the said Act and without any proper governance. At the said inquiry, the First Respondent testified that dispositions were being made by the Bradgate Trust without value having been received for the dispositions. He testified furthermore that he has a loan account with the Bradgate Trust in the region of R1.4 million. According to annexure 'MR4', the chartered accountant's report attached to the applications, showed that as of 27 June 2016, the First Respondent had a loan account with the Bradgate Trust in the sum of R4,266,247.00. Strange enough, as of 28 February the said loan account was reflected to be in the amount of R1,539,456.00.
- [10] May I hasten to say that the application that led to the order under attack was brought in order to interdict the Respondents from selling, transferring, encumbering, leasing or otherwise dealing with the said immovable properties. Acting in accordance with the court order that permitted them to anticipate the ex parte order on 24 hours' notice, the Respondents duly brought an application for reconsideration on 3 August 2020. In the said application for reconsideration the Respondent sought the following relief:
- "1. that the ex parte interim order granted against the Respondent in favour of the Applicants on 30 June 2020 be discharged;*
2. alternative to paragraph 1 above that the interdict and caveat granted against the Respondents in favour of the Applicants on 30 June 2020 be discharged;

3. that the Applicants be ordered to pay the costs of this application on attorney and own client scale, jointly and severally, the one paying and the other to be absolved.”

[11] In their application for reconsideration the Respondents complained that:

11.1 in obtaining the court order of 30 June 2020 on an ex parte basis the Applicants failed to disclose all relevant facts to the Court;

11.2 the Applicants acted mala fide and were disingenuous in moving an ex parte application on an urgent basis for the relief sought in Part A of their notice of motion; and,

11.3 they also wanted to set out facts to prove that the Bradgate Trust is not insolvent, as rashly and unsubstantiated averred by the Applicants in the ex parte application.

[12] Counsel for the Respondent contends that the utmost good faith, or *uberimae fidei*, must be observed by litigants who make ex parte applications in placing material facts before a Court. If an order has been made upon an ex parte application and it subsequently turns out that there was a failure on the part of the Applicants or litigants to disclose material facts which might have influenced the Court’s decisions, whether to grant the order sought or not, such an order may be set aside on the basis of non-disclosure.

[13] The Respondents contend that the Applicants, without disclosing the entire contents, annexed a letter to the founding papers from Bradgate Trust’s Attorneys addressed to the Applicants’ attorneys dated 18 February 2020 as ‘MR13’. This letter confirms a discussion between one Pieter of the Applicants’ attorneys and the Bradgate Trust’s attorneys. It reads, *inter alia*, as follows:

“Ons verwys na die telefoon gesprek tussen Pieter van u kantore en Andries van ons kantore op 14 Februarie 2020.

Soos bespreek is dit die eerste aanbiedinge wat in die laaste vyf jaar ontvang is, en wel onderhewe aan die verkoop van ‘n ander eiendom van die voornemende koper.

Hierdie skrywe dien as ‘n nakoming van ons onderneming aan u Mnr Romanos gegee dat ons u in kennis sal stel indien die Trust eiendom sou verkoop.

Ons sal met Mnr Michelle se trustees ook in verbinding tree ten einde die uiteindelijke oorbetalings aan hulle toe (sic) doen aangesien Mnr Michelle leningsrekening in die Trust nou as bate in sy insolvente boedel val.”

[14] Relying on the said letter of 18 February 2020 it was argued by counsel for the Respondent that in that letter Bradgate Trust’s attorneys conveyed to the Applicants’ attorneys that there were offers on certain properties of the Bradgate Trust and that in accordance with the undertaking given to Mr Romanos, such information was conveyed to the Applicants. Furthermore, in the said letter the Bradgate Trust’s attorneys conveyed to the Applicants’ attorneys that they would contact the Applicants to pay to the Applicants any profits of the sale in respect of the loan account. Therefore, at that stage when the ex parte application

was brought, the Applicants were well aware, through their attorneys, that Bradgate Trust was in the process of selling the properties and that the proceeds of the sale would be paid to the Applicants in their capacities as trustees of the insolvent estate of the First Respondent. According to the First Respondent, even before the liquidators in the liquidation of Gentflex attached the First Respondent's loan account in the Bradgate Trust, attorney FA Coetzee, on Bradgate Trust's behalf, had given an undertaking that any proceed of sales of BradgateTrust's properties would be paid to the liquidators in order to settle the First Respondent's loan account.

- [15] To the surprise of counsel for the Respondents the only allegation in the founding affidavit regarding the letter of 18 February 2020 is contained in paragraphs 12.2 to 12.14 at pages 20 to 21 of the paginated papers in which the Applicants aver as follows:

"12.3 The Applicants' attorneys received a letter dated 18 February

2020, from AF Coetzee attorneys (the Second Respondent) indicating that:

12.3.1 the Trust has received a written offer;

12.3.2 the Trust are to accept the offer."

The Respondents complained that quite clearly the Applicants did not take the Court into its confidence to convey the entire and true content of the letter to the Court. They contend that the Applicants deliberately failed to disclose the fact that the First Respondent's attorneys indicated that the loan account was an asset in the insolvent estate and that the proceeds of the sales of the immovable properties would be paid over to the Applicant. They contend furthermore that the fact that the Applicants failed to convey the true contents of the letter from AF Coetzee attorneys is indicative of the untrustworthy manner in which the Applicants approached the ex parte application, without disclosing the correct and the material relevant facts to the Court.

- [16] On the other hand, Adv M Jacobs, who appeared for the Applicants pointed out that the learned Judge who had entertained the ex parte application (Fabricius J) had with him the letter referred to by the Respondents as the letter was attached to the founding affidavit as annexure 'MR13' thereto. This letter constituted part of the papers placed before Fabricius J. We can therefore assume safely that he read it with the other papers. He considered its contents and did not find it useful. The fact is that it was placed before the Court. It constituted part of the papers that led to the ex parte order. The accusation that the contents were never disclosed is, in my view, unfair. The Judge was free to be given all the information about the letter. If he did not do so he did not regard it as important.
- [17] According to Adv Jacobs, the purpose of attaching 'MR13' to the application papers was to demonstrate the Respondents'

intention to sell and transfer the properties of the Bradgate Trust.

17.1 the Applicants admit that they attached the whole of the letter marked 'MR13' to

the application papers but add that the sole purpose for doing so was to

demonstrate to the Court the intention of the Respondents to sell the properties registered in Bradgate's name; 17.2. furthermore, they contend that the said letter constitutes a part of the papers

that served before Fabricius J when he read the papers. This Court can therefore safely assume that Fabricius J read the said letter, considered its

contents, importance, and relevance to the application before him but did not

find it purposeful. If the learned Judge felt that he needed any further explanation or further information about the letter, he could have asked for it.

The fact that neither the applicants nor the Learned Judge saw it the way that the Respondents do, is, in my view, immaterial. Accordingly, I find it unfair to the Applicants to suggest that by attaching the said letter to the application and not telling the Court "what the Respondents would have told the court had they been present, to be unfair. The Court took MR13 into account before it granted the order of 30 June 2020. 17.3 It is the Applicants' case that the letters marked 'A1' and 'A2' attached to the

answering affidavit were presented with one purpose only and that was to

serve as confirmation that the Respondents, through the attorneys, were requested to provide proof of the Offers to Purchase Bradgate Trust's properties that they alleged had been

received. 17.4 Accordingly, the argument that the Applicants did not disclose all the material

facts

to the Court that granted the interim order of 30 June 2020 and the

insinuation that the Applicants obtained the said order by underhand means are all displaced. [18]

The next aspect by the Respondents that I turn my attention to is the Respondents'

complaint that the Applicants did not have a prima facie right to apply for an interdict because they were informed of the sales of the immovable properties of the Bradgate Trust and furthermore the Trust had undertaken to pay the nett profit of the sales to the Applicants in discharging BradgateTrust's obligation in respect of the First Respondent's loan account. In the circumstances, the Applicants, so argued advocate Van Rhyn Fouche, for the Respondents, had an alternative remedy due to the fact that they already had requested that all the proceeds of the sales of the Bradgate Trust's immovable properties should be paid to the Applicants' attorneys and the attorneys had received an undertaking that the proceeds would be paid to

them. There was therefore not a well-grounded apprehension of irreparable harm.[19]

19.1 In paragraph [29] of their answering affidavit the Respondents admitted that in

their letter dated 3 March 2020, the Applicants had requested to be furnished with a copy or copies of the Offers to Purchase. The Respondents admitted that they refused to furnish the Applicants' attorneys with a copy of the Offer to Purchase. The result was that the Applicants' attorneys had no means of verifying the allegations by the Respondents' attorneys that they had received Offers to Purchase. This was crucial as the Applicants needed the copies of the Offers to Purchase to make an informed decision . 19.2 Furthermore, it is the Applicants' case that the Respondents' legal representatives could not simply, on their own, make an offer. That was a decision that had to be taken jointly by the trustees, according to the Deed of Trust. As this decision was not taken according to the Deed of Trust, it was accordingly invalid and of no force and effect.

19.3 According to the Applicants, the undertaking proffered by the Bradgate Trust's attorneys was simply not good enough as it failed to address the discrepancy in the First Respondent's loan account.

19.4 Finally, the Applicants contend that they were compelled to launch the application when the Respondents refused to provide them with the copies of the Offers to Purchase. As indicated, the Respondents' attitude was that the Applicants were not entitled to the copies of the Offers to Purchase. They simply kept quiet in this respect and did not even inform the Applicants' attorneys that they were refusing to let them have copies of the Offers to Purchase.

[20]

Finally, there is another aspect that came to the fore in the replying affidavit.

That aspect relates to the First Respondent's legal capacity to depose to the answering affidavit. In paragraph one of the answering affidavit or "The First, Second and Third Respondents' Affidavit in Support of Anticipating the ex parte order granted on 30 to June 2020, the First Respondent states that he acted "in my capacity as the trustee of the Bradgate Trust (the trustees)". This affidavit was sworn to, signed and commissioned on 31 June 2020. 20.2 It is stated in the replying affidavit that the First Respondent was provisionally

sequestered on 16 March 2019 and that the provisional order was made final

on 21 June 2020. It is the Applicants' case that the First Respondent has therefore no locus standi to depose to the answering affidavit since he has been disqualified by the Trust Deed of Bradgate Trust. The said Trust Deed, the Court was informed, specifically provides that:

"A person shall be disqualified from being a trustee if such a person-

(I) Has been placed in sequestration, liquidation or judicial management, whether provisional or final, or committed an act of insolvency as defined

in the Insolvency Act from time to time.”

Quite clearly the First Respondent has been disqualified from being a trustee in the Deed of Trust since 16 March 2019 when he was provisionally sequestrated. He therefore had no authority to depose to the answering affidavit. The result is therefore that the relevant answering affidavit is inadmissible. There is therefore no proper answering affidavit before the Court. The other trustees could therefore not rely on it.

[21]

While I accept that the authority of the First Respondent to depose to the answering affidavit was only raised in the replying affidavit for inexplicable reasons Advocate Van Rhyn Fouche did not challenge it in his heads of argument. I therefore conclude that he accepted the allegation by the Applicants that the First Respondent has been disqualified by the 10th of the Trust Deed from being a trustee. Secondly, the First Respondent had not been authorized by the said Trust to launch an application for reconsideration of the order of 30 June 2020 as there was no resolution by the Trust

authorizing him to act on behalf of the trust. If application proceedings are instituted by a juristic person, there must be at least some proof that the juristic person has authorized the proceedings. (see *Mall (Cape) (Pty) Ltd v. Merino Koop Bpk* 1957 2 SA 347 (C)). No allegations are made in the papers that the respondents have been authorised by the Bradgate Trust to launch these reconsideration proceedings.

[22] The third and last point I wish to turn my attention to is the assertion by the Respondents that the Bradgate Trust is not insolvent. This stage, in my view, is not the proper one to investigate whether Bradgate is insolvent or not. I see no valid reason to engage in that issue at this stage. In the consequence, the First, Second and Third Repondents’ Anticipation Application is dismissed, with costs.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants:

Adv M Jacobs

Instructed by:

Romanos Attorneys

Counsel for the Respondent:

Adv Van Rhyn Fouché

Instructed by:

AF Coetzee Attorneys

Date heard

12 August 2020

Date of Judgment:

20 October 2020

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