

SOUTH AFRICA / JUDGMENT

Combrick N.O and Another v Plooy N.O and Others (59864/2012) [2014] ZAGPPHC 285 (14 May 2014) [2014] ZAGPPHC 285

COURT

North Gauteng High Court, Pretoria

BEFORE

S.A.M Baqwa

CASE / FILE NUMBER

59864/2012

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REPUBLIC OF SOUTH

AFRICA

NORTH GAUTENG

HIGH COURT PRETORIA (REPUBLIC OF SOUTH AFRICA)

CASE

NO: 59864/2012

DATE:14

MAY 2014

In the matter

between:

DA COMRINCK
N.O.....FIRST
APPLICANT
EM COMBRINCK
N.O.....SECOND
APPLICANT
AND
AJ DU PLOOY
N.O.....FIRST
RESPONDENT
M WILKEN
N.O.....SECOND
RESPONDENT
AJ JANSE VAN
RENSBURG N.O.....THIRD
RESPONDENT
C MURRAY
N.O.....FOURTH

RESPONDENT
EM MOTALA
N.O.....FIFTH
RESPONDENT
Z CASSIM
N.O.....SIXTH
RESPONDENT

JUDGMENT

BAQWA J

- [1] This is an application for an order declaring that the Combrinck Trust is entitled to receive R5 million from the proceeds of erf 10, Doornkloof, Centurion by Taberna Trust to Interfocus SA Investments 84 (Pty) Ltd in terms of a sale dated 10 January 2007 and for an order directing the fourth, fifth and sixth respondents in their capacities as duly appointed trustees of the insolvent estate of AJ Du Plooy, the first respondent, to forthwith release the amount of R5 million plus interest to the Combrinck Trust.
- [2] Applicants, who are the trustees in the Combrinck Trust also seek an order directing that the fourth, fifth and sixth respondents pay the costs of the proceedings, jointly and severally, the one paying the other to be absolved.
- [3] The matter has been set down for a trial regarding the issues set out above and the fourth and sixth respondents are opposing the action.
- [4] At the commencement of the hearing of oral evidence the respondents made an application for certain issues to be separated in terms of the provisions of Rule 33(4) of the Uniform Rules of Court and that the remaining issues stand over for determination after the adjudication of the separated issues. The application for separation was not opposed by the applicants and I accordingly granted an order for separation after which the following issues remain for determination:
- 4.1. Whether the Combrinck Trust, at all relevant stages had the capacity to act.
- 4.2. Whether further parties should be joined in the matter or not.
- [5] A brief background to this matter is as follows. The amount of R5 million claimed by the applicants is held by the respondents in an interests bearing trust account. It appears from the founding affidavit that during the steps taken to procure a compromise under the provisions of section 311 of the Companies Act the applicants acquired a right to funds via a company known as Silver Falcon Trading 199 (Pty) Ltd. The funds originate from an immovable property, which was registered in the name of a trust, the Taberna Trust, of which first respondent was one of the trustees.

- [6] In the founding affidavit, the applicants rely upon an agreement to which Silver Falcon Trading 199 (Pty) Ltd was also a party. That company is not a party in these proceedings. The applicants contend that the agreement must be rectified.
- [7] Respondents submit that a rectification of an agreement cannot be sought unless all parties to the agreement are before the Court. The action by the applicants is therefore opposed on the basis of non-joinder.
- [8] Further, the two applicants allege that they are the trustees of the Combrinck Trust and as authority to bring this application they rely upon a resolution signed only by the first and second applicant. As against this letter of authority signed by the Master, the appointment of trustees reveals a third trustee, a company, Jean Management (Pty) Ltd. A search at the CIPC established that Jean Multi Management (Pty) Ltd is in liquidation.
- [9] The person who represented Jean Multi Management in its capacity as a trustee of the Combrinck Trust is the first respondent, who at the time was a director of the company. It is common cause that first respondent is under sequestration and is therefore disqualified to be a director of the company. The fact that Jean Multi Management (Pty) Ltd is under liquidation is not contested by the applicants.
- [10] The applicants admitted in a pre-trial conference held on 6 May 2014 that the Combrinck Trust currently has only two trustees and the trust deed which is part of the papers before me requires that there be a minimum of three trustees to enable it to validly transact. It further empowers the trustees when the number falls below three to appoint a third to the remaining trustees who were the Combrincks.

It is common cause that the applicants did not utilise this power to appoint a third trustee after the liquidation of Jean Multimanagement (Pty) Ltd.

- [11] The question then arises as to whether they had the locus standi in iudicio to act or to institute the present action. The Supreme Court of Appeal considered the question in the matter of Land and Agricultural Bank of South Africa v Parker and Others 2005(2) SA 77 (SCA).

In paragraph (3) of that judgment Cameron J.A (as he then was) stated:

73] The trust deed requires that 'there shall always be a minimum of three trustees in office'. And when the number falls below three, it gives the power to appoint a third to the remaining trustees- who were the Parkers. This power, coupled with the minimum requirement, in effect placed a duty on the Parkers to appoint a third trustee when Senekal resigned. In breach of their duty to give effect to the terms of the trust deed, they failed for nearly two years to do so. Only in June 1998 did they notify the Master of the High Court- who has common law and statutory jurisdiction over the administration of trusts- that Senekal had resigned. "

[12] In casu the Combrincks (applicants) were in exactly the same position as the Parkers and they were similarly in dereliction of duty by failing to appoint a third trustee. This omission was in breach of the terms clearly set out in the trust deed.

The significance of this omission is further dealt with by Justice Cameron in the judgment (*supra*) as follows:

“[11] It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf. ;’(my underlining)

Justice Cameron continues to elucidate the result of the omission when he states:

"14 The Parkers in other words could not bind the trust because no one could. This does not mean that their duties as trustees ceased. On the contrary, their obligation to fulfil the trust objects and to observe the provisions of the trust deed continued. These required that they appoint a third trustee when a vacancy occurred- a duty they signally failed to fulfil. But until they did so the trustee body envisaged in the trust deed was not in existence, and the trust estate was not capable of being bound. For the Parkers to purport to bind the

trust estate during this period was an act of usurpation that simply compounded the breach of trust they committed by failing to appoint a third trustee. Such conduct may, as I indicate later (para 37.3), provide the basis for impugning the very existence of the trust; but that was not the bank's case”.

Similarly, until the Combrincks appointed a third trustee the trust body envisaged in the trust deed was not in existence and for them to purport to institute an action on behalf of the trust estate during this period was an act of usurpation that exacerbated the breach of trust they had committed by failing to appoint a third trustee.

The final impact of the actions of the Parkers in the judgment of Justice Cameron is expressed as follows:

!,[40] In the meanwhile, inattentive as ever to the trust deed, Parker continued to act as though he was a trustee. He signed the trust's petition for leave to appeal to this Court and the appeal to the Full Court was instituted in the names of Parker, Mrs Parker and the son 'in their capacities as appointed trustees for the time being of the Jacky Parker Trust'.

[41] On the principles set out earlier, and vindicated at the instance of the trust, it is clear that none of these actions was validly taken. Mrs Parker and the son could not act on behalf of the trust. No one could, for there were only two trustees. The trust accordingly did not validly petition this Court for leave to appeal against the judgment of Roux J. Nor was it at any stage properly before the Full Court. ”

[13] In casu the Combrincks continued to act as though they were trustees in instituting this action in their names. It is clear that their actions were not

validly taken as the trust at that time lacked capacity to act. They could not act on behalf of the trust and they are accordingly not properly before Court.

[14] The second question I have to determine is whether further parties are to be joined in the matter or not. I do not have to make any further pronouncement regarding this issue due to the fact that the purported action by the applicants is a nullity. No party need be joined to an action not validly instituted.

[15] In the circumstances I have come to the conclusion that the trust is not before this Court and that this case should be struck from the roll.

[16] Regarding the question of costs, I cannot make a costs order against a party that is not before me. In any event, the applicants were quite derelict and inattentive to the execution of their duties in terms of the trust deed. I find that it was necessary that respondents employ the services of two counsel. Respondents' counsel have asked that costs be awarded on a de bonis propriis basis. I find that request to be appropriate in the circumstances.

[17] In the result, the following order is made:

17.1. The matter is struck from the roll;

17.2. It is declared that the Combrinck Trust did not, at the time of the launching of the application, or at anytime thereafter have the capacity to act;

17.3. The applicants are ordered, jointly and severally, in their personal capacities to pay the fourth to sixth respondents' cost. Such costs include all reserved costs, and shall include the costs consequent upon the employment of two counsel.

S.A.M BAQWA (JUDGE OF THE HIGH COURT)

Counsel for the applicants: Adv SWWJ Van Der Sandt

Instructed by: Marie De Jager Attorneys

Counsel for the respondents Adv MP Van Der Merwe

AdvAPJ Els

Instructed by: Tintingers Incorporated

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