

SOUTH AFRICA / JUDGMENT

Consolidated Auctioneers Pretoria CC v Van Staden and Others (665590/2011) [2017] ZAGPPHC 908 (13 December 2017) [2017] ZAGPPHC 908

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse van Nieuwenhuizen

CASE / FILE NUMBER

665590/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 665590/2011

Not reportable

Not of interest to other judges

Revised.

13/12/2017

CONSOLIDATED AUCTIONEERS PRETORIA CC Applicant

AND

PETRUS JACOBS MARYN VAN STADEN N.O. First

Respondent

MOHERANE WILLIAM HARRY MATHIBEDI N.O. Second

Respondent

HERMAN VORSTER Third

Respondent

THE REGISTRAR OF DEEDS Fourth

Respondent

THE MASTER OF THE NORTH GAUTENG HIGH COURT Fifth

Respondent

ABSA BANK LTD Sixth

Respondent

THE SHERIFF, WONDERBOOM Seventh

Respondent

HENDRIE STEPHANUS GREEF Eighth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This application concerns the scope and import of section 359(1)(b) of the Companies Act, 61 of 1973 on a sale in execution of an immovable property prior to liquidation.

[2] Relying on the aforesaid section, the applicant claims the following relief:

"1. Dat 'n verk/arende bevel uitgereik word dat die verkoping in eksekusie van die eiendom bekend as Gedeelte 141 ('n Gedeelte van Gedeelte 94) van die Plaas De Onderstepoort 300, Registrasie Afdeling J.R., Gauteng provinsie; Groot 8, 5653 (AGT komma WF SES WF DR/£) hektaar deur Sewende Respondent aan Applikant nie weens die werking van Artikel 359(1) Wet 61 van 1973 gelees met Item 9(1) van Skedule 5 van Wet 71 van 2008 nietig is nie.

2. Dat die koopkontrak aangegaan tussen die Applikant en Sewende Respondent ingevolge waarvan die eiendom beskryf as Gedeelte 141 ('n Gedeelte van Gedeelte 94) van die Plaas De Onderstepoort 300, Registrasie Afdeling J.R., Gauteng provinsie; Groot 8,5653 (AGT komma WF SES WF DRIE) hektaar, wat in eksekusie aan Applikant verkoop is bekragtig word

3. Dat Sewende Respondent gemagtig en gelas word om oordrag van bovermelde eiendom in die naam van die Applikant te bewerkstellig;

4. Dat die Transportbesorger, Neumann van Rooyen prokureurs, soos aangestel deur die Sesde Respondent gelas word om die netto opbrengs van die verkoopprijs ontvang van Applikant op 15 April 2011 aan Eerste en Tweede Respondente oor te betaal op datum van registrasie van die eiendom in die Applikant se naam;

5. Dat Applikant gelas word om a/le koste verbonde aan die oordrag van die eiendom in Applikant se naam op aanvraag te betaal aan die transportbesorger wat die oordrag van die eiendom waameem.

6. Dat die kontrak ingevolge waarvan Eerste en Tweede Respondente die eiendom bekend as Gedeelte 141 ('n Gedeelte van Gedeelte 94) van die Plaas De Onderstepoort 300, Registrasie Afdeling J.R., Gauteng provinsie; Groot 8,5653 (AGT komma WF SES WF DRIE) aan Derde Respondent verkoop, nietig verklaar word,"

Parties

- [3] The applicant launched the application in its capacity as the purchaser of the subject matter in question, to wit the immovable

property known as Portion 141 (a portion of portion 94) of the farm De Onderstepoort ("the immovable property").

- [4] The first and second respondents are cited in their capacities as liquidators of the insolvent estate of Mannus Homes (Pty) Ltd (in liquidation) ("Mannus Homes"). The first and second respondents will hereinafter be referred to as "the

liquidators".

- [5] The third respondent is cited in his capacity as an attorney and co-director of Vorster Brandt Attorneys

- [6] The fourth respondent is the Registrar of Deeds, Pretoria.

- [7] The fifth respondent is the Master of the North-Gauteng High Court of South Africa ("the Master").

- [8] The sixth respondent is ABSA Bank Ltd ("ABSA"), cited in its capacity as the execution creditor.

- [9] The seventh respondent is the Sheriff, Wonderboom (the Sheriff). The seventh respondent attended to the sale in execution of the immovable property.

- [10] The eighth respondent joined the application in his capacity as the only shareholder and director of Mannus Homes.

- [11] The application is only opposed by the first, second and eighth respondents.

Background

- [12] The application has a somewhat cumbersome litigation history, which I deem to be largely irrelevant to the dispute in casu. In the premises, reference to the litigation history will only be made insofar as necessary for present purposes.

- [13] The facts underlying the relief claimed by the applicant is common cause between the parties. Mannus Homes is the registered owner of the immovable property. During 2010 ABSA obtained judgment against Mannus Homes, which judgment culminated in the immovable property being put up for sale in execution.

- [14] On 15 April 2011 the applicant bought the property at the sale in execution for an amount of R 710 000, 00.
- [15] Shortly thereafter and on 26 April 2011 Mannus Homes was placed in liquidation by special resolution. On 21 July 2011, the first and second respondents were appointed as provisional liquidators of Mannus Homes.
- [16] On 2 August 2011 Leonie Verster, apparently acting on behalf of the liquidators, sought consent from ABSA to ratify the sale agreement in respect of the immovable property.
- [17] At that stage a general meeting of creditors had not been convened and the liquidators had, in terms of the provisions of section 386(2A) and (28), to obtain the authorisation of the Master in order to ratify the sale.
- [18] The liquidators duly requested the consent of the Master in a letter dated 4 August 2011. On 24 August 2011 the Master granted the required consent.
- [19] The liquidators had in the meantime realised that the value of the immovable property was considerably more than the purchase price and declined to ratify the sale agreement. The liquidators, relying on the provisions of section 359(1)(b), deemed the sale in execution to be void. The applicant held a different view, which view led to the present application.
- [20] I pause to mention that the applicant also relied on a further cause of action, to wit the ratification of the sale by the liquidators. Mr Janse van Rensburg, counsel for the applicant, to his credit, did not pursue the issue.

Section 359(1)

[21] Section 359(1) of the Act reads as follows:

"359. Legal proceedings suspended and attachments void.

- (1) When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 –
 - (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and
 - (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding up shall be void." (own emphasis)

Submissions

- [22] Mr Janse van Rensburg submitted that the execution of the immovable property was "put in force" when the property was sold in execution on the 15th of April 2011. Mannus Homes was only liquidated on 26 April 2011 and consequently, according to Mr Janse van Rensburg, the provisions of section 359(1)(b) is not applicable and does not affect the validity of the sale.

[23] Mr Konstantinides SC, counsel for the first and second respondents, and Ms Hartman, counsel for the eighth respondent, did not agree. Both counsel submitted that the execution of the immovable property is only "put in force" once the immovable property has been transferred. Transfer has not occurred and consequently the sale in execution of the immovable property is void.

Legal position

[24] The authors of Henochberg on the Companies Act 71 of 2008, which reference to case law, connotes the following meaning to the term "put in force" on page AAPI -116 (Vol 2):

"An execution is "put in force" within the meaning of these provisions, when in pursuance of a warrant of execution the sheriff enters into possession of the property, i.e when he levies execution (Pols v Pols-Souers & Ingenieurs Edms Bpk 1953 (3) SA 107(T) at 110; Rennie NO v Registrar of Deeds 1977(2) SA 513 (C) at 515; Strydom NO v MGN Construction (Pty) Ltd 1983 (1) SA 799 (D) at 802-806; Namco case supra at 411 -412);... "

[25] The meaning attributed to the phrase "put in force" supra is still the prevailing legal position and was confirmed in the most recent decided case on the matter, to wit LL Mining Corporation Ltd v Namco (Pty) Ltd (in liquidation) and Others 2004

(3) SA 407 CPD at 411H- 412 E.

[26] In the premises, Mr Janse van Rensburg is correct that the sale was not per se void due to the provisions of section 359(1)(b). This is, however, not the end of the matter. The sale of the immovable property created a personal right to enforce transfer of

the immovable property.

[27] Having regard to the relief claimed in prayers 2 to 6 of the Notice of Motion, the question whether the applicant is entitled to transfer of the immovable property, remains to be decided.

Transfer of property

[28] Upon the winding-up of a company and in terms of the provisions of section 361(1) of the Act, all the property of the company is deemed to be in the control of the Master until a provisional liquidator is appointed.

[29] In casu, the immovable property vested in the Master from date of liquidation, to wit 26 April 2011.

[30] The liquidators upon their appointment on 21 July 2011, in terms of the provisions of section 391, had to claim possession of the immovable property from the execution officer, in this instance the Sheriff.

[31] Being deprived of the possession of the property, the Sheriff is no longer in a position to transfer the property into the name of the applicant.

- [32] In the premises, the applicant has to claim transfer of the property from the liquidators. This right is, however, limited and can only be enforced if the liquidators elect to proceed with the sale. In *Shalala v Bowman NO and Others* 1989 (1) SA 900 (WLD) at 904 A
- C, the court described the sale in execution of an immovable property prior to liquidation as voidable rather than void. Should the liquidators elect, in the interest of the *concursum creditorum* not to proceed with the sale, a purchaser no longer have an enforceable right to claim transfer of the property.
- [33] In *casu*, the liquidators elected not to proceed with the sale. In the premises, the applicant is not entitled to transfer of the property.

Conclusion

- [34] The granting of an order in terms of prayer 1 of the Notice of Motion has no force and effect and equates to the restating of the law as it stands.
- [35] The applicant, being aware of the liquidators' election not to proceed with the sale in execution, was ill advised to claim the remainder of the relief in the Notice of Motion.

Costs

- [36] Mr Konstantinides SC and Ms Hartman requested that the applicant be ordered to pay the costs of the application on an attorney and client scale. This request is based on the litigation history of the matter and more specifically on the judgment of De Vos J in a rescission application that was brought at the instance of the liquidators.
- [37] De Vos J's judgment deals extensively with the issue in *casu* and concluded with the following:

"In my view and for purposes of this application I do not have to give a final decision on this point save to state that in my view the liquidation process stayed the execution proceedings and in the absence of proof that the sale in execution was ratified the applicants have shown that they do have a bona fide defence to the plaintiffs claim."

- [38] I have already indicated that the relief claimed in respect of the transfer of the property was ill advised. The situation is exacerbated by the judgment of De Vos J. A mere reading of the judgment makes it clear that the application was doomed. The

applicant's decision to, notwithstanding the prevailing legal position, persist with the application, led to the incurring of unnecessary costs.

- [39] In the premises and in order to demonstrate my disapproval with the applicant's conduct in *casu*, I am prepared to grant a punitive cost order.

[40] The eighth respondent, as alluded to supra, brought an application to be joined as a party in this application. Relief was claimed in the joinder application under three separate heads, to wit Part A, B and C. The applicant was cited as the first respondent in the application.

[41] The joinder application was heard by De Vos J simultaneously with the rescission application brought by the liquidators.

[42] De Vos J granted the following order in respect of the joinder application:

"(2) The third respondent be and is hereby joined as the eighth respondent in the main application under case no. 6655912011, instituted in terms of the notice of motion dated 21 November 2011;

(3) The relief sought in Part C of the third applicant's intervening application is postponed to be adjudicated at the hearing of the main application;"

[44] The relief claimed in Part C of the joinder application reads as follows:

"10. That the main application under case number: 6655912011 be dismissed.

11. That the first respondent be ordered to pay the costs of Part "C" of this application, and in the event that any further Respondents oppose this application, that a cost order be granted against such Respondents opposing the relief sought in Part "C": "

[45] In view of the eighth respondent's successful opposition of this application, Ms Hartman submitted that the costs in terms of Part "C" should be awarded to the eighth respondent. I agree.

ORDER

[43] In the premises, I grant the following order:

1. The application is dismissed with costs on an attorney and client scale.
2. The Applicant is ordered to pay the costs of Part "C" of the Eighth Respondent's joinder application.

N JANSE VAN NIEUWENHUIZEN J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD 24 November 2017

JUDGMENT

DELIVERED 15 December 2017

APPEARANCES

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