

SOUTH AFRICA / JUDGMENT

Corfuscore (Pty) Ltd v Ehler NO and Others (3558/2018) [2018] ZALMPPHC 50 (24 August 2018) [2018] ZALMPPHC 50

COURT

Limpopo High Court, Polokwane

BEFORE

MF Kganyago

CASE / FILE NUMBER

3558/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE

NO: 3558/2018

Reportable

Of

interest to other judges

Revised.

In

the matter between:

CORFUSCORE

(PTY)

LTD APPLICANT

And

GERT

HENDRIK EHLER NO & 03

OTHERS RESPONDENTS

JUDGMENT**KGANYAGO J**

[1] The applicant bought the farms Bonteberg 85, Registration Division L.R. Limpopo; the farm Kalkfontein 84, Registration Division L.R Limpopo and the farm S’Gravenhage 100, Registration Division LR Limpopo (“the farms”) at a public auction that was held on the 19th January 2018. Thereafter, the applicant proceeded to transfer the farms into its names at the Registrar of Deeds for Limpopo Province.

The farms were previously owned by Emberbe Trust (“the trust”). On the 16th February 2018 the trustees of the trust launched an application seeking an order to set aside the sale in execution that took place

on the 19th January 2018. The applicant proceeded with the process of transferring the farms into its names despite the pending application. The farms were registered by the Registrar of Deeds into the names of the applicant on the 30th April 2018.

[2] The applicant has now brought an application against respondents and their employees that they be interdicted to immediately stop conducting any agricultural or farming activities on the farms. The applicant is further seeking an order that the respondents and their employees be evicted from the farms. However, on the date of the hearing of this application, the applicant’s counsel handed in a draft order in which they are no longer seeking an order for the eviction of the respondents and their employees on the farms. The draft order basically amend their notice of motion.

[3] The dispute arose from the sale in execution of the farms that was held on the 19th January 2018. The trust as previous owners of the farms were granted a long term loan by Landbank. The trust defaulted in their repayments of the loan and Land Bank instituted legal action against the trust for the recovery of the loan. Land Bank with the consent of the trustees obtained a default judgment against the trust.

[4] On the 10th October 2017 the sheriff Mokopane placed the farms under judicial attachment. On the 3rd November 2017, the sheriff Bochum also placed the farms under judicial attachment. The farms are situated within the jurisdiction

of the sheriff Mokopane. The sale was advertised to take place on the 19th January 2018 at the office of the sheriff of the High Court Bochum.

[5] On the 17th January 2018 the attorneys of the trust wrote a letter to the sheriff Bochum informing him that he did not have jurisdiction to sell the farms as they fell under the jurisdiction of sheriff Mokopane. The sheriff Bochum responded confirming to the trust attorneys that the sale scheduled for the 19th January 2018 is cancelled due to the investigations by the Department of Justice on sheriff’s jurisdictions. He further informed the trust attorneys that the attachment will remain in force until further notice. On the 18th

January 2018, the sheriff Bochum wrote a retraction letter notifying the trust Attorneys that the cancellation of the sale letter dated 17th January 2018 was irregular and was withdrawn. He further notified the trust Attorneys that the sale will proceed on the 19th January 2018 as previously scheduled. Indeed on the 19th January 2018 the sale of the farms proceeded by way of public auction and the applicant was the successful bidder.

- [6] According to the fourth respondent, it signed an offer to purchase the farm S'Gravenhage 100, LR, Limpopo Province on the 28th June 2017. It also paid a deposit and delivered guarantees. The process of transferring the farm into its name was started and it was also furnished with clearance and cancellation figures. The fourth respondent took occupation of the farm based on the permission from the trust and commenced with its farming activities. The transfer process was stalled by the auction of the 19th January 2018.
- [7] The applicant as the registered owner of the farms wants an order interdicting the respondents from continuing with their farming

activities on the farm. The intention of the applicant is to take immediate occupation of the farms to enable it to commence with its own farming activities. The respondents contends that the applicant does not have a clear right to the farms as the sale in execution that took place on the 19th January 2018 is been challenged. The basis of their challenge is that the sheriff Bochum did not have the authority to sell the farms. They are also challenging the ad hoc appointment of the sheriff Bochum to sell the farms. The fourth respondent contends that it has signed a valid offer to purchase and has already paid a deposit on one of the three farms at the time the farms were sold at a public auction.

- [8] The respondents contends that the applicant has failed to establish a clear right of ownership of the farms and therefore its application should be dismissed. In the alternative they are seeking an order that the proceedings be stayed pending the outcome of their application to set aside the sale in execution which was held on the 19th January 2018.
- [9] It is trite that in an application for the grant of a final interdict, the applicant must satisfy three requirements which are a clear right on the part of the applicant, an injury actually committed or reasonably apprehended, and the absence of any other

satisfactory remedy available. (See *Setlogelo vs Setlogelo* 1914 AD 221).

- [10] The applicant in establishing a clear right is relying on its ownership of the farms. The farms were registered by the Registrar of Deeds into the applicant's names on the 30th April 2018. The respondents are challenging the applicant's ownership of the farms. According to the respondents there were

procedural irregularities that occurred in the process of the applicant acquiring ownership of the farms. The respondents contends

that the alleged procedural irregularities renders the applicant's ownership of the farms to be invalid. The respondents argues that since there is still a dispute in relation to the farms, the applicant has failed to establish a clear right to enable it to obtain a final interdict.

[11] In *Legator Mckenna v Sheba* 2010 (1) SA 35 (SCA) at para 22 Brand JA said:

"In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely, delivery which in the case of immovable property is effected by registration of transfer in the deeds office – coupled with a so- called real agreement or 'saaklike ooreenkoms'. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property (See eg Air-kel (Edms) Bpk h/a Merkel Motors v Badenstein en 'n Ander 1980 (3) SA 1917 (A) at 922 E-F, Dreyer and Another NNO v AXZS Industries (Pty) Ltd supra at para 17). Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass-despite registration of transfer if there is a defect in the real agreement. (See Preller and Others v Jordaan 1956(1) SA 483 (A) at 496; Klerk NO v Van Zyl and Maritz NNO Supra at 274 A-B, Silberg and Schoeman op cit at 79-80)".

[12] In *Quartemark Investment v Mkhwanazi* 2014 (3) SA 96 (SCA) at para 24 Theron JA said:

"...a valid underlying agreement to pass ownership, such as in this instance a contract of sale, is not required. However, where such

underlying transaction is tainted by fraud, ownership will not pass, despite registration of transfer."

[13] The respondents are challenging the authority of the sheriff Bochum to sell the farms at a public auction that was held on the 19th January 2018. The farms in question fell under the jurisdiction of sheriff Mokopane. Both sheriffs' have placed the farms under judicial attachment. However, it was the sheriff Bochum who proceeded with the sale in execution. On the 17th January 2018 the first, second and third respondents' attorneys brought it to the attention of the sheriff Bochum that the farms does not fell under his area of jurisdiction and therefore he lacked the authority to sell them at a public auction scheduled for the 19th January 2018.

[14] The sheriff Bochum per his letter dated 17th January 2018 confirmed to the first, second and third respondents' attorneys that the sale scheduled for 19th January 2018 was cancelled. In his letter the main reason why the sale was cancelled was that the Department of Justice was investigating the jurisdiction of sheriffs'. However, on the 18th January 2018 the sheriff Bochum wrote a retraction letter to the first, second and third respondents' attorneys notifying them that the cancellation letter of the 17th January 2018 was irregular and that the sale of the 19th January 2018 will proceed as scheduled. He did not inform the first, second and third respondents' attorneys of the outcome of the investigation by the Department of Justice despite it being the main reason for the cancellation of sale. He did not inform the attorneys in what respect was he stating that the cancellation letter was irregular.

[15] Rule 46(2) of the Uniform Rules of Courts (“the Rules”) reads as follows:

“An attachment shall be made by any sheriff of the district in which the property is situate or by any sheriff of the district in which the office of the registrar of deeds or other officer charged with the registration of such property is situate, upon a writ corresponding substantially with Form 20 of the First Schedule”

[16] The Rule use the word “shall”, and it therefore follows that it is peremptory that the attachment must be made by the sheriff of the district in which the property is situated. In this case it will be the sheriff Mokopane.

[17] The applicant is contending that the sheriff Bochum was appointed on ad hoc basis to sell these three farms and is relying on an appointment letter dated 18th January 2018. However, the sheriff Bochum has made an attachment on the 3rd November 2017 and the appointment letter does not apply retrospectively. The applicant could not produce any letter of appointment authorizing the sheriff Bochum to attach the farms on the 3rd November 2017.

[18] The first paragraph of the appointment letter of the 18th January 2018 reads as follows:

“By virtue of the authority delegated to me by the Minister of Justice in accordance with the provisions of section 63(a) and (b) of Act 90 of 1986, I hereby appoint Mr Ramaala (The sheriff for the District of Bochum District) on an ad hoc basis as acting sheriff of the High and Lower Court of the district Bochum”.

[19] The appointment letter has been signed by one of the Registrar’s of this court. The sheriff Bochum has been appointed as a permanent sheriff for the area of Bochum, and it is unclear why it was necessary that he be appointed on ad hoc basis for his area of jurisdiction. Even though the appointment letter refers to the correct parties and case number, it appoints the sheriff Bochum for a jurisdiction in which the farms are not situated. In my view, this appointment letter was defective. The sheriff Bochum has used a defective appointment letter to sell the farms.

[20] The sheriff Mokopane has deposed a confirmatory affidavit confirming that on the 10th October 2017 he placed the farms under judicial attachment. He further stated that he had never authorized the sale in execution of the three farms to be conducted outside his designated service area and by another sheriff.

[21] The fourth respondent has attached a duly signed offer to purchase the farm S’Gravenhage. There is also proof that at the time when the sale in execution was held, the fourth respondent was in the process of transferring the farm into its names. By then it has also paid a deposit to the seller and had taken occupation of the farm with the consent of the seller.

- [22] In my view even though transfer of ownership has already been passed to the applicant, it has been passed in a questionable manner. That can be cleared by the respondents' pending application which they seek to set aside the sale in execution of the farms. If the respondents' succeed with their application, its outcome will have a serious bearing on the present application.
- [23] The orders which the respondents' are seeking in their application to set aside the sale in execution are different from the orders that the applicant is seeking in the present case. The question is whether a plea of *lis pendens* will be successful under the circumstances if the orders been sought by the parties are different. The requisite for a successful plea of *lis pendens* are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint. (See Herbstein and van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* fifth edition at page 311).
- [24] The requirements of *lis pendens* are the same as the plea of *res judicata*. In *Caesarstone Sdot-yam v World of Marble and Granite* 2000 2013(6) SA 499 (SCA) at para 21 Wallis JA said:
- "On this basis the requirements of the same course of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case. Boshoff was followed in a number of cases in provincial courts, but was regarded as controversial because it was thought to import into South African law the English principles of issue estoppel. It is unnecessary to explore that controversy because the court laid it to rest in Kommissaris van Binnelandse Inkomste v ABSA Bank Bpk. There Botha JA held that Boshoff was based on the principles of our law. He said that its ratio that the same thing be claimed, must not be understood in a literal sense and as immutable rules. There is room for their adaption and extension based on the underlying requirement that the same thing is in issue as well as the reason for the existence of the plea".*
- [25] The main dispute is centred around the ownership of the farms. Even though both parties in their different applications are seeking different orders, however the main dispute is about the farms. In both applications the end result will be the same, the parties are seeking to determine the rightful owner of the farms. That in my view amounts to the same issue. I don't find any reason why the requirements of *lis pendens* should not be extended in the present application since it is the same parties litigating against one another regarding the same farms even though they are seeking different orders. If the respondents are successful in their application it will render the present application moot. The respondents' application is entirely relevant to the current proceedings and substantially determinative of the outcome of current application.
- [26] Based in the manner in which the sheriffs' Bochum and Mokopane have put the farms under judicial attachment, the manner in which the sheriff Bochum was appointed on ad hoc basis and the manner in which the sale in execution was conducted, that in my view taint ownership of the applicant on the farms. These discrepancies need to be clarified first, and in my view, that can be clarified by the respondents' pending application. Based on these

discrepancies I am satisfied that at this stage the applicant has failed to establish a clear right to obtain a final interdict. However, in my view at this stage that is not a ground to dismiss the applicants' application. It will be just and equitable if the proceedings are stayed pending the outcome of the respondents' pending application.

[27] The court is mindful that this matter might take years before it is finally resolved. The applicant has taken a loan over the farms and in the meantime will be required to service the loan whilst it is unable to take occupation of the farms and start farming in order to generate income. The applicant will be prejudiced in servicing a loan which it is unable to generate income on the farms which the loan was specifically taken for. However, the applicant proceeded with the process of transferring the farms into its own names well aware that the respondents have launched an application to challenge the validity of the sale execution. The applicant was the creator of its own misfortune.

[28] Since the application involves the same farms, it is possible that the same arguments raised in the present application might be raised again in the respondents' application. It was unavoidable not to have made findings or comments which may have a bearing on the respondents' application. Therefore, the presiding Judge who will be hearing the respondents' application should not consider himself or herself bound by my findings or comments in this application.

[29] In the result I make the following order:

29.1 The proceedings in the present application is stayed pending the outcome of the respondents' application to set aside the sale in execution under case number 2919/2016.

29.2 Costs reserved.

MF KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

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 10. Date of Argument: 2nd August 2018
 11. Date of Judgment: 24th August 2018
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