

SOUTH AFRICA / JUDGMENT

Culverwell N.O and Others v Bidvest Properties (Pty) Ltd and Others (82188A/2014) [2015] ZAGPPHC 989 (4 September 2015)

[2015] ZAGPPHC 989**COURT**

North Gauteng High Court, Pretoria

BEFORE

JJ Strijdom

CASE / FILE NUMBER

82188A/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 82188A/2014

DATE: 4 SEPTEMBER 2015

In the matter between:

DUSTIN MONTAGUE CULVERWELL N.O.....FIRST APPLICANT

BERNICE ELIZABETH CULVERWELL N.O.....SECOND APPLICANT

JAN HENDRIK WENTZEL N.O.....THIRD APPLICANT

PEPPY SOUSA N.O.....FOURTH APPLICANT

ALLAN MONTAGUE CULVERWELL N.O.....FIFTH APPLICANT

DUSTIN MONTAGUE CULVERWELL.....SIXTH APPLICANT

ELDACC (PTY) LTD.....SEVENTH APPLICANT

And

BIDVEST PROPERTIES (PTY) LTD.....FIRST RESPONDENT

MERCANTILE BANK LIMITEDSECOND RESPONDENT

EHURHULENI METROPOLITAN MUNICIPALITY.....THIRD RESPONDENT

REGISTRAR OF DEEDS.....FOURTH RESPONDENT

THE SHERIFF, GERMISTON.....FIFTH RESPONDENT

JUDGMENT:

INTRODUCTION

1. In this Application the Applicants sought the following relief:

1.1. That the Respondents be prohibited from proceeding with the transfer of Erf 134, Elandshaven, Ext 4, Township Registration Division IR, Province of Gauteng.

1.2. That the judgment of the Supreme Court of Appeal under case number 20531/2009 handed down on 26 September 2011 may not in law be enforced against Applicants as a result of a lack of compliance with the provisions of sections 112 and 115 of the Companies Act, no 71 of 2008.

1.3. That absence of a special resolution in terms of section 112 and 115 of the Companies Act, no 71 of 2008, constitute impossibility of performance of the aforesaid judgment and that Applicants are absolved from complying such order.

1.4. A declaratory order that Respondents are prohibited from taking any further steps to transfer the property referred to from Seventh Applicant to Second Respondent.

FACTUAL BACKGROUND:

2. On 30 June 2006 Eldacc, as lessor, and Rennies Distribution Services (“RDS”) as lessee, entered into a written lease agreement in respect of the property referred to in the lease agreement. RDS, a wholly owned subsidiary of the Bidvest Group Limited was granted an option in terms of the lease agreement to purchase the property.

3. Bidvest Group, as nominee of RDS accepted the option granted by Eldacc in the lease agreement.

4. A dispute between the parties arose whether the purported exercise of the option resulted in there coming into existence a valid and enforceable agreement of sale.

5. As a result of the dispute Bidvest launched an application under case no 2009/20531 in the South Gauteng High Court, Johannesburg. It was ordered that a binding agreement of sale exists between Bidvest and Eldacc. Subsequently this order was confirmed in the Supreme Court of Appeal in case no 692/2010.

6. On 26 September 2011 the Applicants again seek to attack the validity and enforceability of the sale agreement on the basis that the director of Eldacc who signed the sale on behalf of Eldacc was not authorised by the shareholders Eldacc to do so. The Learned judge held that the validity and enforceability of the sale was res judicata and could not be challenged by Eldacc on a fresh legal basis that was not specifically considered in the previous proceedings.

7. On 18 November 2014 a second application to interdict the transfer was issued. In this application on an urgent basis, the applicants sought to interdict the transfer of the property pending finalisation of their application for declaratory relief that the judgment in the SCA under case number 682/10 handed down on 26 September 2011 may not in law be enforced against the applicants and Bidvest as a result of lack of compliance with the provisions of section 112 and 115 of the 2008 Companies Act. This application was struck from the roll with costs.
8. The applicants now seek to prevent the transfer ordered by Masipa J on the basis that the director of Eldacc who signed the transaction on behalf of Eldacc was not authorised by the shareholders of Eldacc to do so.
9. On 28 August 2014 the attorneys of the first respondent addressed a letter to the seventh applicant requesting copies of documents for purpose of transfer of the property requesting a written confirmation that the property does not constitute a sale or major asset of the seventh applicant and if it does not constitute the sole or major asset a shareholder resolution had to be signed by the shareholders.
10. It is common cause that when the lease agreement was entered into the property was not the major asset of the seventh applicant. The property currently forms the greater part of the assets of seventh applicant according to the applicants.
11. Counsel for applicants contended that for purposes of the court order to be executed a special resolution as meant in section 115 (1) and (2) of Act 71 of 2008 read with section 112 (2) should be adopted by the shareholders, for purposes of disposing of the greater part of the assets of Eldacc. The shareholders recently held a shareholders meeting during which it was decided that the disposal of the greater part of the assets of Edacc will not be approved by a special resolution as required in terms of section 112 (2) read with sections 115 (1) and (2) of the Act. He further submitted that in the absence of such a resolution transfer cannot lawfully occur, and that the court order is therefore unenforceable.
12. Counsel for the first respondent contended that at the date of the disposal of the property (being the date on which the transaction was concluded), it was not the whole or the greater part of the assets of Eldacc and did not require a resolution of the members as envisaged by section 228 of the Companies Act, no 61 of 1973.
13. It was also submitted by counsel for the first respondent that the issue of the validity and enforceability of the sale agreement is res judicata.

APPLICABLE LAW

14. The Companies Act No 71 of 2008 came into force on 14 December 2007 and was not in force at the time the transaction was concluded in May 2007.
15. In my view the applicable provisions regulating the transaction at the time of its conclusion was section 228 of the Companies Act, 61 of 1973.

16. Section 228 (1) provides that the directors of the company shall not have the power, save by a special resolution of its members, “to dispose of the whole of the greater part of the undertaking of the company, or the whole or the greater part of the assets of the company.”
17. It is common cause that the property was not the whole or the greater part of the assets of Eidacc when the transaction was concluded either on 30 June 2006 or 30 May 2007 and did not require a resolution of members as envisaged by section 228.
18. It was submitted by counsel for the applicants that disposal of the property meant actual transfer of the property in the name of the first respondent and not the granting of the right to acquire ownership.
19. The word “dispose” in section 228 (1) of Act 61 of 1973 has its ordinary meaning of “to part”, “to get rid of”, “to pass over the control of a thing to someone else”.
20. In my view the disposal of a right connotes some legal act on the part of the person of inherence of that right. In the case of a contract disposing of a right by one party to the other the making of the contract is the legal act which disposes of the right concerned.
21. I cannot agree with the submission made by counsel for the applicants that “disposal” as referred to in sections 112 and 115, if applicable, mean the actual transfer of the property and not the conclusion of the transactions. The disposal of the property occurred either when the option to purchase was granted or when the option was exercised.

RES JUDICATA

22. The validity and enforceability of the sale agreement had been finally determined on two occasions.
23. The validity and enforceability of this sale agreement was finally pronounced on by the Supreme Court of Appeal on 26 September 2011.
24. Masipa J handed down judgment under case number 2012/47819 on 30 August 2013 marked “AA1” and granted an application by Bidvest to give effect to the judgment of Van der Linde AJ. The Learned Judge held that the validity and enforceability of the sale was *res judicata* and could not be challenged by Erldacc on a fresh legal basis.
25. The *exceptio re indicatae* is based on the irrebutable presumption that a final judgment on a claim submitted to a competent court is correct. This presumption is founded on public policy which requires that litigation should not be endless and on the requirement of good faith, which does not permit of the same things being demanded more than once.
26. In her judgment Masipa J concluded in paragraph 52 that “Eidacc put up the most unmeritorious defences in the face of a final judgment by the Supreme Court of Appeal. The conduct by Eidacc can only be described as an abuse of process.”

27. Masipa J ordered that the parties comply with certain specific terms, the purpose whereof was to give effect to the transaction by securing transfer thereof from Eldacc to Bidvest.
28. I must agree with counsel for the first respondent that this application is based on the same cause of action, seeking the same relief as was previously the case in the counter-application brought by Eldacc.
29. The validity and enforceability of the sale agreement had been finally determined between the same parties, pertaining to the same cause of action and pertaining to the same relief.
30. It is clear that Eldacc failed to provide the transfer information and to sign the transfer documents as directed in terms of the court order by Masipa

J. They also failed to pay the costs of the cancellation of the mortgage bond registered in respect of the property in favour of Mercantile Bank as ordered.

Bidvest paid the bond cancellation costs prior to lodgement of the transaction in the Deeds Office to ensure that the bond cancellation linked to the transfer of the property is secured.

31. I am of the view that the application is another attempt to frustrate and delay transfer of the property to Bidvest.

32. In the result the following order is made:

32.1. The application is dismissed with costs.

32.2. The applicants are ordered to pay the costs of this application including the reserved costs on the scale as between attorney and client.

32.3. Costs are to include costs of two counsel one of whom is senior counsel.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON: 19 AUGUST 2015

DELIVERED ON: 04 September 2015 APPEARANCES:

On behalf of the Appellants: Adv R du Plessis Sc

Adv Riaan Grundlingh Instructed by: Pagel Schulenburg Inc Attorneys

On behalf of Respondents: Adv A Subel SC

Adv W la Grange

Instructed by: Coetzee E van Rensburg Inc Attorneys

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2015/989.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/culverwell-no-and-others-v-bidvest-unknown-topic-agpphc-2015>

Prepared on 11 October 2026 · Esheria