

SOUTH AFRICA / JUDGMENT

Dalhousie Land Corporation (Pty) Ltd and Others v Absa Bank Ltd and five other cases (49241/12; 43239/12; 49240/12; 49241/12; 29884/12; 64888/12) [2016] ZAGPPHC 912 (20 October 2016) [2016] ZAGPPHC 912

COURT

North Gauteng High Court, Pretoria

BEFORE

E Swartz

CASE / FILE NUMBER

49241/12

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 49241/12

CASE

NO: 49239/12

CASE

NO: 49240/12

CASE

NO: 29884/12

CASE

NO: 64888/12

Reportable:

No

Of

interest to other judges: No

Revised.

20/10/2016

In

the matter between:

DALHOUSIE
 LAND CORPORATION (PTY)
 LTD 1st
 APPLICANT
 DALHOUSIE
 FORESTS
 CC 2ND
 APPLICANT
 MOGWELE
 TRADING 154 (PTY)
 LTD 3RD
 APPLICANT
 and
 ABSA
 BANK
 LTD 1st
 RESPONDENT
 ETIENNE
 NAUDE
 N.O. 2nd
 RESPONDENT
 ABSA
 BANK
 LTD APPLICANT
 DALHOUSIE
 LAND CORPORATION (PTY)
 LTD RESPONDENT
 DALHOUSIE
 FORESTS
 CC RESPONDENT
 DALHOUSIE
 MOGWELE TRADING 154 (PTY)
 LTD RESPONDENT
 GLYNIS
 MERELE
 RAMSAY 1ST
 APPLICANT
 GEOFFREY
 GRANT
 RAMSAY 2ND
 APPLICANT
 GRANT
 HUGH
 RAMSAY 3RD
 APPLICANT
 GLYNIS
 MERLE RAMSAY
 N.O. 4TH
 APPLICANT
 GEOFFREY
 GRANT RAMSAY

N.O. 5TH
APPLICANT
IVAN
JAMES EMMETT
N.O. 6TH
APPLICANT
GRANADA
BUSINESS SOLUTIONS (PTY)
LTD 7TH
APPLICANT
ETIENNE
NAUDE
N.O. 1ST
RESPONDENT
ETIENNE
NAUDE 2ND
RESPONDENT
ETIENNE
NAUDE N.
O. 1ST
RESPONDENT
RAMDALE
STUD (PTY)
LTD 3RD
RESPONDENT
DALHOUSIE
LAND CORPORATION (PTY) LTD 4TH
RESPONDENT
MOGWELE
TRADING 154 (PTY)
LTD 5TH
RESPONDENT
DALHOUSIE
FORESTS
CC 6TH
RESPONDENT

JUDGMENT

SWARTZ AJ

- [1] This is an application for the variation of an interlocutory order handed down by Hughes J in this court on 28 November 2013. The issue for determination is whether this court has the authority to vary the order of 28 November 2013. Counsel for the applicant argued that this can be done under the common law. Counsel for the respondent disagreed and argued that also the provisions of rule 42 (1)(a)(b) or

(c) do not find application. It was argued that this was a veiled attempt to appeal the decision of Hughes J.

[2] The background facts relating to this application are briefly as follows: The respondents are companies and a close corporation

controlled by the Ramsey family. During August 2011 the companies resolved to voluntarily begin business rescue proceedings and one Naude was appointed as business rescue practitioner for these entities. The business rescue proceedings did not proceed and a falling out between the Ramsey's and Naude gave rise to litigation. The parties were ad idem that the business rescue plan had become null and void. The applicant, ABSA, as a creditor launched applications, with the consent of Naude, for the winding-up of the respondents. These applications were issued in August 2012. In November 2012 the Ramsey's launched an application to remove Naude as business rescue practitioner. The winding-up applications together with the removal application were set down to be heard in November

2013. Naude, separately sought an order that the removal application be stayed for various reasons. This order was granted by Nkosi AJ on 21 November 2013. As a result thereof, an application was launched before Hughes J to postpone and stay the applications for winding-up

pending an application for leave to appeal against the order of Nkosi AJ. Hughes J granted the order. To date, the application for leave to appeal the decision of Nkosi AJ had not been heard. ABSA was not a litigant in the proceedings before Nkosi AJ and has no locus standi to expedite the finalization of the appeal proceedings. It is now almost three years later and there appears to be no attempt to

prosecute the main relief expeditiously. Having read the papers filed of record and after hearing submissions by counsel, it is evident that there is no serious effort to prosecute the application for leave to appeal with any haste.

[3] The complaint by ABSA, the applicant, is that it is now almost four years after the liquidation applications were launched; that the respondents are unable to pay its debts (in fact, Dalsiehouse Land Corporation (Pty) Ltd has since been wound up in the Gauteng Local Division on 20 April 2016); the Ramsey's have been as dilatory as possible, and ABSA is suffering prejudice. The Ramsey's continue to conduct business as if there is no pending liquidation or business rescue.

[4] In my view, the order of Hughes J can be amended as it merely dealt with the postponement of the matter. The order was interlocutory in nature. It was never meant to dispose of any issue and having a final and definitive effect on the main action. In fact, the order does not determine any of the issues in the main action. Stated differently, if the intention was that the order had a final effect, it means that the applicant's winding up application would never be finalized should they be subjected to the tardy attitude of the Ramsey's and Naude in the finalization of the appeal process. This is not in the interests of justice. The applicants are

denied justice. The sole purpose of the applicant in bringing this application is to have the issue surrounding the winding-up application heard and finalized, irrespective of the outcome of those proceedings. The suggestion therefore that this is veiled appeal proceedings is incorrect

See: Erasmus, rule 42, Commentary on Superior Court Practice at B1-306 H:

'At common law an interlocutory order may at any time before final judgment in the suit be varied or set aside by the judge who made it or by any other judge sitting in the same court and exercising the same jurisdiction. While the courts are generally reluctant to grant such a variation, they will do so where the variation sought is purely procedural or incidental, where fresh facts have arisen since the granting of the order, where the order does not reflect the intention of the applicant or serve the object for which it was sought, and where variation will not affect the final judgment' ..

[5] As stated above, the order of Hughes J was merely incidental to the main dispute. I am satisfied that the applicant is entitled to the relief sought.

[6] In the result the following order is made;

6.1. Paragraph 2 of the order of 28 November 2013 is set aside.

6.2. The applicant is entitled to set down the liquidation applications under case numbers; 49239/12; 49240/12 and 49241/12 for hearing on the opposed roll.

6.3. The respondents is ordered to pay the costs of the application.

E. SWARTZ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 17 October 2016

Date of Judgment: 20 October 2016

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