

SOUTH AFRICA / JUDGMENT

Draht N.O. and Others v Mangele and Others (18771/13) [2015] ZAGPPHC 701 (7 August 2015)

[2015] ZAGPPHC 701

COURT

North Gauteng High Court, Pretoria

BEFORE

Hughes

CASE / FILE NUMBER

18771/13

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Policy

IN

THE

HIGH

COURT

OF

SOUTH

AFRICA

GAUTENG

DIVISION,

PRETORIA

Case

Number:

18771/13

Not

Reportable

Not

of Interest to other Judges

In

the

matter

between: HEIKO
DRAHT
N.O.
.....1st
APPLICANT
MARC
BRADLEY
BEGINSEL
N.O.
.....2nd
APPLICANT
DONOVAN
THEODORE
MAJIEDT
N.O.
.....3RD
APPLICANT
DYNAMIC
AUCTIONEERS
CC
.....4TH
APPLICANT
and
MBONGISENI
ISAAC
MANQELE
.....1ST
RESPONDENT
LINDIWE
GRACE
MANQELE
.....2ND
RESPONDENT
EKURHULENI
METROPOLITAN
MUNICIPALITY3RD
RESPONDENT

Coram: HUGHES
J

JUDGMENT

Heard on: 21 April 2015

Delivered on: 07 August 2015

HUGHES J

1. In this opposed eviction application the applicant seeks the eviction of the first and second respondent and all those occupying the property [...], Leondale, Roodekop, Johannesburg, Gauteng ("the property").
2. The first and second applicants are trustees over the insolvent estate of the first and second respondents. The respondents were the registered owners of the property having two mortgage bond registered against it.
3. The first respondent was a director of a company that ran into financial difficulties in addition, the respondents failed to comply with their legal obligation to service their bonds. The respondents, as husband and wife, applied for voluntary sequestration which was granted on 4 November 2011. As a result the property together with the legal right thereto was placed in full control of the trustees.
4. The applicant's submit that they are unable to finalise the sequestration the estate as the respondents are living on the property. The property cannot be rented or sold to gain income for the insolvent estate. The applicants have notified the respondents to vacate the property, orally and in writing, but they have failed and refused to do so.
5. The property is used as the primary residence of the respondents. To the best of the applicant's knowledge they are not aware of any minor children, disabled and elder persons who occupying the property.
6. The applicants submits futher that there is no lease agreement between the parties and that the respondents have had ample time to seek alternative accommodation.
7. The applicants submit that under the circumstances set out above they are entitled to the order as sought in their notice of motion.
8. The respondents argue that a deed of sale was provided to the applicant's for the property, where the purchaser was Gonda Logistics CC ("the CC"). the CC offered to purchase the property for R450 000.00 on 20 June 2012. The CC paid the amount of R45 000.00 being a 10%

deposit

together

with

5%

commission

of R25 650.00

on 20 and 22

June 2012

respectively.

On 6 August

2012

a further R10 000.00 was paid at the request of the applicants. These amounts were paid into the account of Dynamic Auctioneers.

9. From the respondents

submissions

the deed of sale came about from an auction sale of the property. The bond holders, SA Home Loans Guarantee Trust, were auctioning off the property and were represented by the trustees together with the auctioneers were Dynamic Auctioneers.

10. The applicants denied that a sale was entered into and that any monies were received from any of the parties. They went on further to state that they declined the purchasers offer and were not aware that monies had been paid into Dynamic Auctioneers account. I note at this point that the proof of the aforesaid deposits was supplied to the applicants.
11. The respondents submit that the payments made in 2012 are still being held and have not been paid back to the CC. The applicants argue that they are not responsible for those payments and any

issues

in that regard are to be taken up with Dynamic Auctioneers as the payment is alleged to have been mad to Dynamic Auctioneers.

12. Sometime in October 2012 it would seem that Dynamic Auctioneers under the instructions of the applicants requested the CC to increase their offer. The CC responded that it would increase its offer to R550 000.00. However when the purchaser was requested to complete a new deed of sale the CC advised that the applicants had taken too long to get back to it and it had purchased other properties and was no longer interested in the property, requesting the return of the monies paid.
13. The applicants concluded by stating that as at February 2014 the arrears on the bond stand at R211 182.44 whilst the amount loaned was R597 266.69.

14. It is trite that the property in question is immovable property. In terms of the legal position, as soon as there is a sequestration order and the trustee is appointed by the Master the property vests in the trustee or in this case trustees so appointed. See EX PARTE VAN DER MERWE 2008 (6) SA 451 (W) where MOSHIDI J sets out the legal position at paragraph [6] on 455 and 456:

"The legal position

- [6] There is no doubt that the immovable property in question falls within the definition of 'immovable property' as defined in s 2 of the Insolvency Act 24 of 1936 (the Act). It is trite law that the effect of sequestration of the estate of an insolvent is to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in the trustee. In this regard, s 20 of the Act provides as follows:

20 Effect of sequestration on insolvent property

The effect of the sequestration of the estate of an insolvent shall be -

to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in him;

- (b) to stay, until the appointment of a trustee, any civil proceedings instituted by or against the insolvent save such proceedings as may, in terms of section twenty-three, be instituted by the insolvent for his own benefit or be instituted against the insolvent: Provided that if any claim which formed the subject of legal proceedings against the insolvent which were so stayed, has been proved and admitted against the insolvent's estate in terms of section forty-four or seventy-eight, the claimant may also prove against the estate a claim for his taxed costs, incurred in connection with those proceedings before the sequestration of the insolvent's estate; (c) as soon as any sheriff or messenger, whose duty it is to execute any

judgment

given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs; (d) to empower the insolvent, if in prison for debt, to apply to the court for his release, after notice to the creditor at whose suit he is so imprisoned, and to empower the court to order his release, on such conditions as it may think fit to impose. (2) For the purposes of subsection (1) the estate of an insolvent shall include - (a) all property of the insolvent at the date of the sequestration, including the property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment; (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three."

15. Further at 456 and 457

paragraph

[7] MOSHIDI J

sets out the duties of a trustee:

"[7] The functions of a trustee are essentially to control and administer the property and affairs of the estate and to liquidate it in accordance with the applicable law. In this regard s 69 of the Act provides:

69 Trustee must take charge of property of estate

A trustee shall, as soon as possible after his appointment, but not before the deputy sheriff has made the inventory referred to in subsection (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of estates of deceased persons or by a person approved by the Master for the purpose.

If the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in subsection (3).

If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.

Such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustee."

16. Their duty is from the onset to realise the assets and one of the manners to do so is to sell the property that is now vested in them in manner that is approved the creditor. See OERTEL AND OTHERS NNO v DIRECTOR OF LOCAL GOVERNMENT AND OTHERS 1981 (4) SA 491 (T) where NESTADT J at 508H stated:

"In terms of s 82 the trustee of an insolvent estate shall, as soon as he is authorised to do so at the second meeting of the creditors of that estate, sell all the property in such manner and upon such conditions as the creditors may direct."

17. In this instance this is exactly what the trustees tried to do when they engaged the CC in the sale of the property. However that sale is no longer on the table and as such they need to move on and quickly as the arrears are accumulating as time is a wasted.

18. In the circumstances of this case it is prudent to bear in mind that the duty of the trustee is take control and administer the estates affairs and property. The situation is that the respondents are living in the property not paying any rental and not serving the bond over the property. The arrears are escalating month by month. The trustees are left with no option but to realise the asset and pay off the creditor being SA Home Loans Guarantee Trust.
19. The respondents have been given ample time to find alternative accommodation. They do not address their efforts to do in their papers. They have also been notified in term of section 4(2)(a) on 13 October 2013 by personal service upon the second respondent and still they have done nothing to solve the dilemma they are in.
20. The

conclusion

is clearly that the trustees who are vested with the legal rights over the property are duty bound to realise the property to pay off the debt that is not been serviced and attracting interest monthly.

21. In the result the relief as set out in the notice of motion is duly granted with an amendment to the costs order to read party and party costs and not attorney and client costs as appears in prayer 3 in the notice of motion.
22. The order made is set out below, it is ordered that:
 - 22.1 The first and second respondents, and all those who occupy the property [.....], Leondale, Roodekop, Johannesburg, Gauteng (hereafter referred to as "the property"), by virtue of the first and second respondents' occupation thereof, is to vacate the property within 14 (fourteen) days from the date of this order.
 - 22.2 In the event of the first and second respondents and/or any of those who occupy the property under and by virtue of their occupation thereof fail and/or refuse to vacate the property within the period stipulated in prayer 22.1, then and in that event, the Sherriff of the Honourable Court, alternatively for the district where the property is located, be and is authorized and ordered, after 30 (thirty) days from the granting of this order, to forthwith enter into the property and to evict the first and second respondent and/or any of those who occupy the property under and by virtue of their occupation thereof.
 - 22.3 That the first and second respondents be ordered to pay the cost of this application as between attorney and client.

W. Huges Judge of the High Court

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