

SOUTH AFRICA / JUDGMENT

Erasmus N.O and Others v Van Der Linde and Others (2197/23) [2023] ZAMPMHC 37 (20 October 2023) [2023] ZAMPMHC 37

COURT

Middelburg High Court, Mpumalanga

BEFORE

Z Gumede

CASE / FILE NUMBER

2197/23

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(MPUMALANGA DIVISION,

MIDDLEBURG)

CASE NO: 2197/23

(1)

REPORTABLE:NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE: 20/10/2023

SIGNATURE

In the matter between:

MAGDALEEN
ERASMUS N.O.
1ST APPLICANT
(in
her capacity as Trustee of Carel Van Der Linde Trust)
MAGDALEEN
ERASMUS
2ND APPLICANT
MAGDALEEN
ERASMUS
3RD APPLICANT
(in
her capacity as mother and natural
guardian
of her minor children)
and
NICOLAAS
JOHANNES VAN DER LINDE
1ST RESPONDENT
NICOLAAS
JOHANNES VAN DER LINDE N.O.
2ND RESPONDENT
(in
his capacity as Trustee of Carel Van Der Linde Trust)
EIKE
BOERDERY (PTY)
LTD
3RD RESPONDENT

JUDGMENT

GUMEDE AJ

1. In their notice of motion, applicants seek an order to interdict the respondents from commencing and/or continuing with any construction or building works on any of the farms or other immovable property registered in the name of the Carel Van Der Linde Trust [IT5588/94], pending the outcome of an action in which the applicants will seek a materially similar relief from the respondents. At the hearing of this application, I was informed that the aforesaid action has already been instituted.
2. This application was brought on an urgent basis. I permitted the parties to fully argue the merits.

3. The applicant is Magdaleen Erasmus who brings this application in three different capacities, firstly, in her own capacity as a beneficiary of the Carel Van Der Linde Trust, secondly, in her representative capacity as the mother and guardian of her minor children who are also beneficiaries of the Carel Van Der Linde Trust and lastly, as a Trustee of the Carel Van Der Linde Trust.
4. The main respondent is Nicolaas Johannes Van Der Linde who is the brother to the applicant. He is also a Trustee of the Carel Van Der Linde Trust as well as the shareholder of the third respondent.

BACKGROUND

5. The papers reveal that the Carel Van Der Linde Trust was established on 25 August 1994, in terms of the Trust Deed. The first Trustees were Carel Van Der Linde who is the father to both the applicant and respondent, David Van Der Linde who is a brother to Carel Van Der Linde and an uncle to applicant and respondent as well as Nicolaas Van Der Linde who is the father to both Carel and David Van Der Linde and the grandfather to applicant and respondent were the first Trustees.
6. The Trust Deed is in the Afrikaans language. Clause 18.1 thereof as translated[1] by the parties, provides

“On the vesting date, the Trustees will hold the assets of the Trust that have not been distributed and/or applied in the Trust and for the benefit of the beneficiaries in accordance with a distribution that may be determined in his exclusive (uitsluitlike) discretion by Carel in his will/as testator; and in the absence of any such testamentary provisions be held for the beneficiaries in paragraph 1.2.2.1 in equal parts; with the understanding that if any of them die before or on the vesting date, then his share shall be held in Trust for his legal children by absolute substitution per stirpes, and in the absence of such any such children, it shall be held for the survivors exclusively and with the further understanding that if the survivors died before or on the vesting date, then the legal children by way of absolute per stirpes and with further understanding that if all the persons referred to in this paragraph have died before or on the vesting date so that, for this provision the Trust fund has not been disposed of according to the Trust deed, then the Trust fund shall be held in Trust and divided amongst the children of Carel David Van Der Linde.”[2]

7. In his last will and testament, Carel David Van Der Linde acting in terms of clause 18.1 of the Trust Deed, bequeathed R1 million of the Trust property to the applicant and the remainder of the Trust assets, which are said to be valued at an estimated total of R300 million were bequeathed to the respondent.
8. Following this bequest, applicant lodged a claim against the respondent in which she seeks a declaration that the testamentary reservation in clause 18.1 of the Carel Van Der Linde Trust Deed above, is against public policy and/or unenforceable, alternatively that the manner in which Carel Van Der Linde exercised his testamentary discretion be declared to be contrary to public policy and be set aside.[3]

9. The papers also reveal a very acrimonious relationship between the parties, both of them having disclosed numerous accusations and

counter accusations against each other, which are not relevant for the determination of the issues in this application, ie, whether the reconstruction of the family house that is currently taking place is unlawful and should be stopped.[4]

10. The applicant and respondent are the only Trustees of the Carel Van Der Linder Trust and the respondent is in charge of the farming operations which are run by the Trust through the third respondent.

THE TEST FOR AN INTERIM INTERDICT

11. In Webster vs Mitchell[5], the court confirmed the test for an interim interdict as follows:

“In an application for a temporary interdict, applicant’s right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of applicant, he could not succeed. In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted. Subject, if possible, to conditions which will protect the respondent.”

HAS THE APPLICANT MADE OUT A CASE FOR THE RELIEF SOUGHT

12. In her notice of motion, applicant seeks to interdict any construction or building works on any of the farms or other immovable property registered in the name of the Carel Van Der Linde Trust. Applicant in her founding affidavit, does not provide any evidence of any structure that is being built or intended to be built within the Trust property, except what she refers to as rebuilding of the family house.[6] Although there is a complaint regarding barns, stable and other structures having been unlawfully constructed without authorization of Trustees, it appears that the construction of these structures has already been completed.
13. This court cannot interdict construction of a building that has already been completed, nor can it issue an interdict in respect of future construction, where there is no threat or any evidence that any unlawful construction may take place. The only structure that this court concerned with, is the family house which is currently being reconstructed.
14. Applicant contends that the respondent demolished the family house to its foundation with some supporting walls left. She also contends that the respondent is building what appears[7] to be a threefold larger residence.[8]

15. Applicant contends that the reconstruction of the family home was not authorized by the Trustees and therefore the actions of the respondent are unlawful. She also invokes the provisions of section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 to argue that there are no approved building plans for the family home, as such, construction should be interdicted on this ground also.

UNLAWFUL AND UNAUTHORISED BUILDING

16. In this regard, applicant contends that the rebuilding a new and larger family house, is without the authorization of the Trustees. She argues that even if permission was given prior to 5 April 2022, same could not have been acted upon after the respondent undertook that pending the finalization of the action wherein the applicant seeks a declaration that clause 18.1 of the Trust Deed is unlawful, the respondent would not deal with the Trust assets in a manner that is prejudicial to the applicant or to use the funds of the Trust or Company except for the administration of either the Trust or Company in the ordinary course of business.[9]
17. She alleges that the resolution which the respondent relies on, is vague, nonspecific and is open to interpretive manipulation.
18. The respondent denies that he has breached the aforesaid undertaking. According to him, the activities that the applicant complains of, are part and parcel of the normal operations of the farming activities. He denies that he has dealt with the Trust properties in any prejudicial manner.
19. The case for the respondent is that the family house is in the center of the area where the main farming activities are operated. According to him, his late father, Carel Van Der Linde, used to live at this very house. When his father passed on, his stepmother indicated that she was no longer interested in remaining on the farm.
20. The respondent contends that on 8 October 2021, the two Trustees at the time, being the respondent and David van der Linde had a meeting and discussed in detail the affairs of the Trust. According to him, up to that stage, David had very limited knowledge of the affairs of the Trust.[10] He submits that his stepmother was also in attendance and informed them that the roof of the house was leaking and in desperate need of repair, only a small section of the house could be occupied.
21. After his stepmother vacated the house, the respondent started to remove the roof in order to carry out the repairs, only to discover that the entire roof structure had become rotten and had to be replaced. The electrical system was also in a state of disrepair and needed urgent replacement. Whilst removing the roof, the walls also collapsed. According to the respondent, although the roof was rotten, it kept the wall structure in place.[11]
22. He submits that the house needed to be knocked down and rebuilt as salvaging parts of old structure would compromise the new structure

and make it more expensive to build.[12]

23. He alleges that he will occupy the new house once complete and the house which he is presently occupying, will be used by one of the Farm's Foreman who is currently residing in Standerton. The Foreman's rent is being paid for by the third respondent.
24. A copy of a resolution of 8 October 2021 is annexed to the answering affidavit.[13] This resolution authorized the respondent to do whatever is necessary to give effect to the resolution and to enter into and sign agreement/s on behalf of the Trust with such modification as he is in his sole discretion shall deem fit, his signature to be conclusive proof that the documents which bear it are authorized in terms thereof.[14]
25. Applicant denies that such a meeting took place on 8 October 2021. For her denial, she relies on the affidavit by Maritha (their stepmother).
26. In a confirmatory affidavit, Maritha alleges that between 29 September and 10 October 2021, she was in Kruger National Park. The replying affidavit contains a confirmation that Maritha had booked in at the Skukuza Rest Camp.
27. It is true that the respondent may not deal with the Trust property without the authorization of other Trustees. However, I am unable to find that the respondent's reconstruction of the family home is unauthorized, in the face of the aforesaid resolution, signed by the only existing Trustees on 8 October 2021, purportedly authorizing him to deal with the Trust property.

NATIONAL BUILDING REGULATIONS AND BUILDING STANDARDS ACT

28. Section 4(1) of the National Building Regulations and Building Standards Act provides that no person shall, without the prior approval in writing of a local authority, erect any building in respect of which plans and specifications are to be drawn. Applicant contends that the impugned reconstruction of the family house, is illegal as there are no building plans which have been approved by the local authority.
29. The applicant provides no evidence whether she lodged a complaint against the respondent with the local authority. It is unclear whether new plans would have to be approved by the local authority for the rebuilding of a house that had collapsed. If the building plans are indeed required, it is possible for the respondent to submit them to the local authority for approval even after the reconstruction of the family house is completed.
30. Applicant's reliance on the case of *Shilane v Ten Napel and Others*[15] is misplaced. In that case, the respondent had conceded that his structure was illegal for reasons that he had not been granted the necessary rezoning of the property and had no approved building plans. In that case, the relevant local authority sought an order to demolish and remove unauthorized structures. That case is distinguishable from the present case which involves a reconstruction of a collapsed structure.

31. I am not persuaded that the applicant has made out a case on this ground.

INTERIM INTERDICT

32. It is not entirely clear what harm the applicant is likely to suffer should the interdict not be granted. On the other hand, the prejudice that would be suffered by the respondent if the interdict is granted is readily apparent.
33. It cannot be genuinely disputed that the improvements that have been carried out are likely to deteriorate, should the works be halted, as the main application may take years to finalize. It can hardly be disputed also that a completed house will enhance the value of the Trust property. Respondent has also submitted that the Trust is currently paying rental for the Farm Foreman, who would be accommodated within the Trust property should the family house be completed, resulting in the saving of the rental

monies which are currently spent on the Farm Foreman.

34. Applicant contends that she has no other remedy but to approach this court for an interim relief. Counsel for the respondent submitted that even if the applicant succeeds with the main action against the respondent, she could claim damages. I agree with this submission.
35. Accordingly, I am not persuaded that the balance of convenience, favors the granting of the relief claimed.
36. I am of the view that the applicant fell far short of satisfying the test for the grant of an interim interdict as set out in the Webster case above and repeated in many other cases.

In the premises, I make the following order:

1. The application is heard as an urgent application in accordance with Rule 6(12) of the Uniform Rules of this Court and the applicant's failure to comply with the rules relating to forms and service is condoned.
2. The application is dismissed with costs.

Z GUMEDE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDLEBURG

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 20 October 2023 at 10:00.

APPEARANCES

For the applicant: BH SWART SC with him, HP WESSELS Instructed by: MACROBERT INC, PRETORIA For the Respondent: R STOCKWELL SC with him, WJ SCHOLTZ Instructed by: BIANCA VAN DER MERWE ATTORNEYS, RANDBURG Date of hearing: 25 JULY 2023 Date of judgment: 20 OCTOBER 2023

- [1] The translation is not disputed
 - [2] Annexure FA5 to Founding Affidavit at para 14.10
 - [3] FA, para 6.6, p18
 - [4][4] RA, para 2.1
 - [5] 1948 (1) SA 1186 (WLD)
 - [6] FA, para 9.2
 - [7] My underlining
 - [8] FA, para 9.1 and 9.2
 - [9] FA, para 7.1
 - [10] AA, para 77
 - [11] AA, paras 70-72
 - [12] AA, para 72
 - [13] Annexure AA6
 - [14] AA, para 77-83
 - [15] (A5017/2022) ZAGP JHC 913 (17 NOVEMBER 2022)
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Prepared on 9 October 2026 · Esheria