

SOUTH AFRICA / JUDGMENT

George Speropoulos Trust v Tau Rollermeule CC; In re: Sheriff Klerksdorp v Tau Rollermeule CC and Others (56776/2012) [2017] ZAGPPHC 637 (29 September 2017)

[2017] ZAGPPHC 637

COURT

North Gauteng High Court, Pretoria

BEFORE

DP de Villiers

CASE / FILE NUMBER

56776/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 56776/2012

Not

reportable

Not

of interest to other judges

Revised.

29

September 2017

In

the matter between: GEORGE
 SPEROPOULOS
 TRUST Applicant
 and
 TAU
 ROLLERMEULE
 CC Respondent
In
re
THE
SHERIFF
KLERKSDORP Applicant
TAU
ROLLERMEULE
CC Execution
Creditor/Plaintiff
BUSINESS
DEPOT NO 2 CC t/a GS
POULTRY First
Defendant
GEORGE
RAYMOND SPEROPOULUS Execution
Debtor/Second Defendant
GEORGE
SPEROPOULUS
TRUST Claimant

JUDGMENT

DE VILLIERS, AJ:

Introduction

- [1] This is an application for leave to appeal against my order issued on 21 November 2016.
- [2] I have relied on the bound papers (index dated 7 June 2016) in considering this application.
- [3] The test I applied in essence were the powers given to me in Uniform Rule 58(6)(a). Those powers, relevant to this matter, are

(underlining added):

"(6) If a claimant delivers particulars of his claim and appears before it, the court may-

- (a) then and there adjudicate upon such claim after hearing such evidence as it deems fit;"

[4] I decided the matter on the basis that the agreement of sale in issue required payment of the purchase price to an attorney's trust account by a certain date (30 September 2010) for ownership to pass to the purchaser. Without such payment, ownership would not pass. That payment had been issue all along, and formed the subject matter of correspondence before commencement of the proceedings.

[5] The relevant paragraphs in the "founding" affidavit read:

"3. Die balju van Klerksdorp het by die woning gelee te Villa Toscana 5, Irenestraat, Irenepark, Klerksdorp op 19 Junie 2014 beslag gele op sekere eiendom. Die balju het van 'n slotmaker gebruik gemaak om toegang tot die perseel te kry.

4. Ek wens te bevestig dat die eiendom soos op beslag gele asook die onroerende eiendom, aan 'n trust by name George Speropoulos Trust met ITno: 747912004 behoort. 'n Afskrif van die trustakte, balansstaat en relevante dokumente word hierby aangeheg ten einde bogenoemde te bevestig.

5. Die eiendom waarop die balju beslag gele het, is deur die bovermelde trust aangekoop gedurende

2010. Ek heg hierby aan 'n afskrif van die koopoooreenkoms ten opsigte van die goedere. Ten tye van die verkryging van die beslaggelegde eiendom, was ek 'n trustee van die trust en val die bovermelde feit binne my persoonlike kennis. "

[6] In terms of the agreement of sale, the payment had to have been made Qy George Speropoulos Trust (the purported purchaser) to Jassat Mitchell Ingelyf, Klerksdorp. A repeated averment in reply was that the payment was not made to the attorney as required by the agreement, but to (not by) the trust. This may have been the end of the matter, due to the wording of the agreement, and because payment had to have been made by the trust and not to the trust. For instance, paragraph 20 of the "replying" affidavit reads:

"Ek bevestig dat die bedrag van R 100 000.00 direk in die bankrekening van die George Speropoulos Trust inbetaal is en nie aan Jassat Mitchell Ingelyf, Klerksdorp nie.'n Afskrif van die ABSA bankstaat van George Speropoulos Trust word hierby aangeheg as aanhangsel "C", waarin die bedrag van R100 000.00 verskyn."

[7] The purported proof of the averment attached in reply, in the form of a bank statement of the trust, did not sustain the allegation of payment by the trust. On the same day two transactions occurred, a payment of R100 000.00 by an unidentified party to the trust, and on the same day the money was paid out again. Mr Schoeman asked me to have this aspect clarified by oral evidence.

[8] Paragraph 20 about payment to the trust was not a typing error. Paragraphs 39 and 40 of the "replying" affidavit both read:

"Ek bevestig dat die bedrag van R 100 000.00 we/ oorbetaal is direk aan die George Speropoulos Trust soos hierbo vermeld, derhalwe is eiendomsreg oorgedra."

- [9] The same averment of payment to the trust is made in paragraph 41 of the "replying" affidavit.
- [10] In the light of the repeated averments under oath, and the absence of proof to contradict the averments, I declined to have the matter referred to oral evidence. I found that the applicant failed to produce evidence to rebut the presumption of ownership of assets by person in whose possession assets were found.
- [11] I gave an ex tempore judgment on 21 November 2016.
- [12] The application for leave to appeal was delivered on 13 April 2017. It was well out of time.
- [13] I received notification of the application on 7 September 2017. This judgment follows on the hearing of the application for leave to appeal.

The late application for leave to appeal

- [14] The normal period to apply for leave to appeal is fifteen court days from date of the order as I quote Uniform Rule 49(1)(b) (underlining added):

"When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days."

- [15] The application for leave to appeal had to be delivered by about 12 December 2016. It was delivered about four months out of time.

The application for an extension of time

- [16] The applicant delivered an application purportedly in terms of Rule 27 on 9 May 2017, about a month after the delivery of the notice seeking leave to appeal. It seeks the following relief:

"a. That the time periods, as provided for in Rules of this Honourable Court for the filing of an Application for Leave to Appeal be extended to 13 April 2017;

b. That the Applicant's late filing of his Application for Leave to Appeal be condoned;

c. That the Respondent pay the costs of this application, only if opposed'.

- [17] I have dealt with the wording of Rule 49(1)(b) in terms of which I may, upon good cause shown, extend the period of fifteen days to apply for leave to appeal. I have reflected that instead the applicant applies for such an extension under a different rule, Uniform Rule 27.

[18] The sub-rule dealing with an extension of time is Rule 27(1). It has an important prior requirement, agreement has to be sought between the parties first (underlining added):

"In the absence of agreement between the parties, the court may upon application on notice and on good cause shown. make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet."

[19] The condonation sub-rule is Rule 27(3):

"The court may, on good cause shown. condone any non-compliance with these rules."

[20] I do not intend to address the interaction between the three sub-rules, and address simply the issue of the "good cause requirement" that appears in all three rules. In brief, the requirement of good cause first requires an assessment of the default.

Good cause: Part 1

[21] The founding affidavit in that application shows that the attorney received instructions to apply for leave to appeal on about 3 January

2017. This is after the period to apply for leave to appeal had lapsed. This delay is not explained. This failure may mean that condonation should be refused for this reason alone.

[22] The delay is blamed on the correspondent attorneys who allegedly had failed to apply for the reasons of my judgment in the period 4 January 2017 to about April 2017. As will appear below I have reservations about the use of this alleged failure as an excuse for the late delivery of the application for leave to appeal. It is in conflict with the wording of the annexures to the founding affidavit which show that attorney knew that I had given an *ex tempore*

judgment.

[23] The attorney does not aver that he was in court on 21 November 2016. Still he avers that I had granted the order without giving

reasons.[1] Factually the averment is wrong.

[24] Allegedly labouring under the impression that he had to ask for reasons for my judgment, the attorney asked his then correspondent by e-mail on 4 January 2017 to deliver such a request for the reasons for my judgment.

[25] The actual document prepared by the attorney requesting my reasons in reality request written reasons consequent upon my (oral)

judgment:

"GELIEWE HIERMEE KENNIS TE NEEM dat die Applikant/Aanspraakmaker hiermee versoek dat die Agbare Regter De Villiers redes op skrif uiteensit na aanleiding van die uitspraak gelewer op 21 November 2016."

[26] This on face value, is contrary to the attorney's explanation.[2]

[27] The attorney's then correspondent acknowledged on 16 January 2017 the instruction to request the reasons for my judgment, but despite numerous further e-mails, no proof of delivery of the request has been provided. I did not receive it.

[28] The applicant's real basis for seeking an extension of time is "... that this was a bona fide administrative error on the part of the correspondent attorney, where the correspondent attorney simply neglected to execute its mandate".[3]

[29] Despite not having received my reasons so requested, and allegedly upon becoming frustrated with his correspondent's failure to react to his e-mails, the attorney instructed counsel to prepare the application for leave to appeal (on his version without knowing the reasons for my judgment).[4] When this was done, is not explained. It seems to have been done in about April 2017.

[30] The fact that the attorney prima facie always knew that I had given an ex tempore judgment further appears from the e-mails sent by the attorneys to their correspondent (underlining added):

[30.1] On 4 January 2017 the attorneys wrote:

"Vind hierby aangeheg 'n Versoek om Redes na aanleiding van die uitspraak soos gelewer op 21 November 2016";

[30.2] On 20 February 2017 the attorneys wrote:

"Ons versoek intussen van u om die bande van die uitspraak soos per versoek om redes vanaf die hof te bekom ten einde ons in staat te stel om dit te laat transkribeer'.

[31] Prima facie, the attorney at all times knew that I had given an oral judgment. The purported excuse for the late delivery of the notice seeking leave to appeal seems to be contrived.

[32] I should not easily find that an attorney provided me with a misleading explanation for the default. I put my concerns to the

counsel appearing for the attorney. In short, the explanation is that it is all a misunderstanding. I have decided to leave this matter at that explanation.

[33] The founding affidavit does not contain a sufficiently full explanation to enable me to understand how the default really came

about. This may have been a sufficient reason to dismiss the application.

Good cause: Part 2

- [34] However, the application in my view in any event must fail as the applicant has no prospects of success on appeal, the second main requirement to show good cause.
- [35] The test on appeal in this matter predates the application of the test set out in section 17 of the Superior Courts Act, 10 of 2013. See *Gonya v S* (891/15) [2016] ZASCA 34 (24 March 2016) at Para 6 and 7 and referred to in *Khobane v S* (887/2015) [2016] ZASCA 124 (26 September 2016) at Para 19. That test is if there are reasonable prospect of success.
- [36] In my view there are no reasonable prospects of success. The applicant had ample time to produce a case that would reflect its ownership of the goods in issue. It has been awarded every leniency in presenting its case, even being allowed to do so in reply.
- [37] In the absence of proof of ownership of the goods allegedly purchased, the presumption set out Chief Justice Lord de Villiers in *Zandberg v Van Zyl* 1910 (AD) 302 at 308 applies. I refer especially to:

"... The principle, however, underlying the decision in that case appears to me quite in accord with our law, namely, that possession of a movable raises a presumption of ownership, and that, therefore, a claimant in an interpleader suit, claiming the ownership on the ground that he has bought such movable from a person whom he has allowed to retain possession of it, must rebut that presumption by clear and satisfactory evidence. The fact that he has bought a thing which he does not require himself, but allows the seller to use, requires full explanation, and in the absence of such explanation a Court is justified in drawing its own reasonable inferences. ..."

- [38] See too *Stassen Sheriff of the High Court, Bellville v De Ville Cabinet Component CC and Others* (16118/2012) [2014] ZAWCHC 71 (9 May 2014) at Para 4 to 5.
- [39] *Henning J in Ebrahim v Deputy Sheriff, Durban and Another* 1961
- (4) SA 265 (N) at 267G to 2688 accepted that a presumption of ownership exists, but formed the view that the remarks by Chief Justice Lord de Villiers on clear and satisfactory evidence, were fact specific. I express no views thereon, or on the application of *stare decisis*, as on the application of the normal balance of probabilities test would have resulted in the same outcome in this case. The applicant did not present proof of ownership. There was no reason to refer the matter to the hearing of oral evidence.
- [40] In my view, I correctly brought the matter to an end. I did not err in exercising my discretion under Uniform Rule 58(6)(a). The lack of prospects of success, and the deficient explanation of the default means that the applicant should not obtain an extension of time to serve its notice of application for leave to appeal.

Conclusion

- [41] I make the following order:

1. The application in terms of Rule 27 dated 8 May 2017 is dismissed;
2. The application for leave to appeal is struck from the roll with costs;

DP de Villiers

Acting Judge of the High Court

Gauteng Division

Heard on: 29 September 2017

On behalf of the Applicant: Adv Z Schoeman

Instructed by: Theron, Jordaan & Smit Inc.

On behalf of the Respondent: Adv EJJ Nel

Instructed by: De Kocks Attorneys

Judgment

handed down: 29 September 2017

- [1] "5.3 I confirm that on the 21st of November 2016, the Honourable Judge De Villier handed down an order in the Interpleader

proceedings, but only and order was handed down, and no reasons were provided for the order."

- [2] It seems to me to be the request for written reasons to a Magistrate in terms of the Rules of the Magistrates' Courts, Rule 51, after an oral judgment had been given.

- [3] "5.14 I confirm that the Applicant is not deliberately delaying the matter, but that due to unforeseen circumstances at the offices of Marais Attorneys, being the correspondent attorneys of the Applicant, together with the fact that I was not aware of the fact that the Request for Reasons were never served, and that the time periods provided for in the Rules of this Honourable Court had lapsed." "5.16 I therefore humbly submit that the Applicant has made out a proper case for the relief sought, and that the Applicant should not be penalised or prejudiced for what is clearly an administrative error of the correspondent attorneys of the Applicant. I humbly submit that the Applicant is completely bona fide in this regard." "5.19 I humbly submit that this was a bona fide administrative error on the part of the correspondent attorney, where the correspondent attorney simply neglected to execute its mandate, where both the Applicant and I were completely unaware of, and the Applicant had no intention to prejudice the Respondent in any manner whatsoever. I humbly request the Honourable Court to extend the time periods of the rules of this Honourable Court and to condone the late filing of the Applicant's Application for Leave to Appeal."

[3] "5.14 I confirm that the Applicant is not deliberately delaying the matter, but that due to unforeseen circumstances at the offices of Marais Attorneys, being the correspondent attorneys of the Applicant, together with the fact that I was not aware of the fact that the Request for Reasons were never served, and that the time periods provided for in the Rules of this Honourable Court had lapsed."

"5.16 I therefore humbly submit that the Applicant has made out a proper case for the relief sought, and that the Applicant should not be penalised or prejudiced for what is clearly an administrative error of the correspondent attorneys of the Applicant. I humbly submit that the Applicant is completely bona fide in this regard."

"5.19 I humbly submit that this was a bona fide administrative error on the part of the correspondent attorney, where the correspondent attorney simply neglected to execute its mandate, where both the Applicant and I were completely unaware of, and the Applicant had no intention to prejudice the Respondent in any manner whatsoever. I humbly request the Honourable Court to extend the time periods of the rules of this Honourable Court and to condone the late filing of the Applicant's Application for Leave to Appeal."

[4] "5.10 I further confirm that, as the time allowed for the Request for Reasons had already passed, I proceeded to instruct

counsel to rather proceed with the drafting of an Application for Leave to Appeal, in the absence of the reasons, in order to have the matter proceeded with as soon as possible."

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