

SOUTH AFRICA / JUDGMENT

Goolam v Pristina Investments CC and Others (63204/2013) [2013] ZAGPPHC 457; [2014] 2 All SA 312 (GNP); [2014] 2 All SA 312 (GNP) (11 November 2013)

[2013] ZAGPPHC 457

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

63204/2013

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REPUBLIC

OF SOUTH AFRICA

GAUTENG HIGH COURT

(PRETORIA DIVISION)

CASE NO: 63204/2013

DATE: 11 NOVEMBER 2013

In the matter between:

SHAHEEN GOOLAM.....Applicant
and
PRISTINA INVESTMENTS CC.....1st
Respondent
CHARL ARRANGIES.....2nd
Respondent
DAWOOD YUSUF SEEDAT.....3rd
Respondent
THE
REGISTRAR OF DEEDS, PRETORIA.....4th
Respondent
RIDWAN GHOD.....5th
Respondent
CORAL LAGOON
INVESTMENTS 225 (PTY) LTD.....6th
Respondent

JUDGMENT

MNGQIBISA-THUSI J:

[1] The applicant is seeking relief in two parts:

PART A

1.1 pending finalisation of Part B, an urgent interim interdict preventing the first respondent from effecting the transfer or alienation of the following properties:

1.1.1 Portion 5 of Erf 654, situated in the Township of Duncanville, Registration Division I.Q., held by Deed of Transfer T102490/2003;

1.1.2 Portion 6 of Erf 654, situated in the Township of Duncanville, Registration Division I.Q., held by Deed of Transfer T165040/2006 (“the properties”).

PART B

1.2 an order setting aside the certified copies of title deeds of the properties, issued by the fourth respondent to the first respondent.

[2] With regard to Part A, no relief is sought against the second, third, fifth and sixth respondents and no cost order against the fourth respondent unless it opposes this part of the application.

[3] The third respondent’s estate has been sequestrated and the insolvent estate’s trustee has indicated that he is not

opposing Part A of the application but will be opposing Part B if the interim interdict is granted.

[4] The properties are currently registered in the name of the first respondent.

[5] In an application for an interim interdict, in order to succeed the applicant has to show that:

5.1 it has a prima facie right, though open to some doubt;

5.2 it has a well-grounded apprehension of irreparable harm if the order is not granted;

5.3 that the balance of convenience favour the granting of the order; and

5.4 that the applicant has no other satisfactory remedy.

[6] As appears from the founding affidavit, on 30 May 2012 the applicant concluded a loan agreement with the third respondent in the amount of R5 000 000.00 repayable by 25 June 2012. As security for the loan the third respondent gave the applicant’s attorney, Monte Phillipus Coetzer (“Coetzer”), title deeds of the following properties for safekeeping until the loan is fully paid:

6.1 the properties mentioned in sub-paragraphs 1.1.1 and 1.1.2 above; and

6.2 Erf 642, situated in the Township of Duncanville, Registration Division I.Q., held by Deed of Transfer T100214/2004,

subject to the attorney giving the title deeds to the fifth respondent once the loan is fully repaid.

[7] At the time the loan agreement was concluded and the title deeds were given to Coetzer, a certain Aziz Patel (Patel), was the sole member of the first respondent, and appears to have given the third respondent the title deeds to

use as security for the loan. Patel has filed an affidavit confirming that he has given the title deeds to the third respondent to use 'as he deems fit'.

[8] On 10 September 2012 Patel sold his 100% member's interest in the first respondent to the third respondent. On the same day the third respondent sold his member's interest in the first respondent to Hassim Tayob ("Tayob") who is currently the sole member of the first respondent.

[9] On 26 October 2012 Tayob, on behalf of the first respondent, applied for certified copies of the title deeds of the properties from the Registrar Deeds (fourth respondent) after submitting an affidavit in which he claimed that the title deeds to the properties were lost. The certified title deeds were issued on 9 November 2012. Subsequent thereto a bond was registered over the properties in favour of Coral Lagoon Investments 255 (Pty) Ltd ("Coral Lagoon Investments 255") after Tayob sold the first respondent on 12 September 2013 to the second respondent.

[10] It was submitted on behalf of the applicant that Tayob was aware at the time he applied for the certified copies of the title deeds that the applicant's attorney was in possession of the original title deeds.

[11] In its answering affidavit first respondent has raised as a preliminary point the fact that the applicant has served its application on the sixth respondent, who should not have been cited, and not on Coral Lagoon Investments 255 which has an interest in the matter as bondholder.

[12] The applicant's attorney, Coetzer has filed an affidavit that after discovering the mistake that the wrong entity has been cited and served, attempted to serve Coral Lagoon Investments 255 at its registered address. However, it was discovered that no such address exists.

[13] As it has become apparent that Coral Lagoon Investments 255 holds a bond over the properties, it does have a direct and substantial interest in the application and should have been joined. Without being given notice of this application, Coral Lagoon Investments 255 cannot be bound by an order of this court. However, I am satisfied by the steps taken by the applicant after it discovered that it had not cited the correct bondholder in order to effect service. As the listed registered address of Coral Lagoon Investments 255 has been found to be non-existing nothing more could be expected from the applicant in relation to service. However, as suggested by counsel for the applicant, should I grant the relief sought, a rule

nisi will be granted so as to give Coral Lagoon Investments 255 an opportunity to react to the application.

[14] The first respondent has raised a number of grounds for the refusal of the application. The main ground raised is that the loan agreement between the applicant and the third respondent is invalid in that the applicant is a credit provider and should have been registered as such in terms of the National Credit Act 34 of 2005 ("the Act"). The first respondent relies on section 40(4) read with section 89(5) of the Act which renders any agreement by a credit provider who was required to be registered as a credit provider in terms of section 8 of the Act, void for lack of registration. This would automatically render any security given also void. It is the first respondent's contention that since the amount of the loan the applicant gave to the third respondent was above the threshold set, the applicant was obliged to register as a credit provider.

[15] On behalf of the applicant it was submitted that he was not aware that in giving the loan to the third respondent, he ought to have

registered as a credit provider in terms of the Act. The applicant further submitted that he was prepared to forego the interest charged on the loan. This could amount to the loan agreement qualifying as an incidental agreement, and as a credit provider, would not be obliged to register. Furthermore, the applicant contends that he still has an enrichment claim, even if the agreement is declared to be void and would therefore suffer irreparable harm if the interim order was not granted.

[16] I am of the view that the enrichment claim which the applicant might have, amounts to a prima facie right which qualifies for protection

in the event that when Part B of this application is considered, it is found that the applicant should have registered as a credit provider.

[17] It was further submitted that the agreement between the applicant and the third respondent was invalid in that the third respondent

indicated to Tayob that he signed the agreement under duress. In this regard reliance is placed, not upon a confirmatory affidavit by the third respondent but on a written statement he made. Not much reliance can be placed on the statement which was not made under oath and amounts to hearsay evidence.

[18] It was argued on behalf of the first respondent that the first respondent would suffer irreparable harm if, as a result of the interim interdict being granted, the second respondent as purchaser of the properties decided to cancel the sale agreement. Further it was submitted that should the order be granted, the applicant should be directed to pay into the first respondent's attorney's

trust account an amount of R650 000.00 plus value added tax, being the amount the first respondent would be liable to pay in the event that the sale agreement is cancelled. Furthermore, that an order be made that the applicant should provide an indemnity in favour of the first respondent for any damages it may sustain should he not be ultimately successful.

- [19] Furthermore, the first respondent argued that the applicant has not complied with the practice manual as it relates to urgent matters in that he had not provided the respondents sufficient time to file their answering affidavits. It is the first respondent's contention that it only got knowledge of the application on 8 October 2013, giving it insufficient time to consult its legal representatives and preparing an answering affidavit for the hearing on 15 October 2013. Nothing turns on this point raised by the first respondent, as appears from the return of service, the application was served at its registered address on 04 October 2013.
- [20] I am of the view that the applicant has shown that he has a prima facie right, though open to some doubt as he holds the title deeds as security for the repayment of the loan. Further that the balance of convenience favours the granting of the interim interdict as the applicant would suffer irreparable harm if the fourth respondent was not ordered to suspend the transfer of the properties to the second respondent pending the finalisation of Part B of the application.
- [21] I am therefore satisfied that the applicant has shown sufficient cause for an interim interdict to be granted. Any prejudice which the first respondent may suffer can be accommodated by an order that the applicant provide an indemnity to the first respondent for any damages the first respondent may suffer.
- [22] The parties have not reached agreement as to the amount the applicant should give as security. The applicant has offered to deposit an amount of R741 000 into the trust account of his attorney pending the finalisation of Part B of the application. Further, the applicant has undertaken not to withdraw the said amount from his attorney's trust account until Part B is finalised. While accepting the undertaking made by the applicant, it is the respondent's view that the amount tendered is equivalent to the agent's commission and does not address the potential damages the respondent may suffer with regard to the properties pending the finalisation of Part B. It is the respondent's contention that over and above the amount tendered by the applicant, the applicant should also deposit an amount of R4 250 000 as indemnity should the potential damage result.

[23] Accordingly the following order is made:

20.1 An interim interdict is granted directing the fourth respondent not to effect the transfer or alienation of the following properties:

20.1.1 Portion 5 of Erf 654, situated in the Township of Duncanville, Registration Division I.Q., held by Deed of Transfer T102490/2003;

20.1.2 Portion 6 of Erf 654, situated in the Township of Duncanville, Registration Division I.Q., held by Deed of Transfer T165040/2006, pending the finalisation of Part B of this application.

20.2 The applicant is ordered to publish this order in one edition of two newspapers circulating within the Gauteng Province.

20.3 Coral Lagoon Investments 255 (Pty) Ltd is called upon to, within 30 days of the publication of this order, show cause why the order in paragraph 1 should not be made against it.

20.4 The applicant is directed to deposit the amount of R741 000.00 plus VAT into its attorney's account within fourteen (14) days of this order, which amount should not be withdrawn pending the determination of Part B of the application;

20.5 The applicant is further ordered to provide the first respondent with security to the amount of R4 250 000.00 within fourteen (14) days of this order pending the determination of Part B of the application.

20.6 Costs are reserved.

NP MNGQIBISA-THUSI

Judge of the Gauteng High Court

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