

SOUTH AFRICA / JUDGMENT

Hatting v Marule N.O and Others (1863/2022) [2024]

ZAMPMHC 22 (8 March 2024)

[2024] ZAMPMHC 22

COURT

Middelburg High Court, Mpumalanga

BEFORE

GUMEDE AJ

CASE / FILE NUMBER

1863/2022

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

MPUMALANGA DIVISION,

MIDDLEBURG (LOCAL SEAT)

CASE NUMBER: 1863/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

DATE:

8/03/2024

SIGNATURE

DEWALD

JOHANNES HATTING

Applicant

and

TSHIDI

LENNI MARULE N.O

First Respondent

YVONNE

MADIRE MARULE

N.O

Second Respondent

NEO
LENNIN MARULE
N.O
Third Respondent
VICTORIA
RENEILOE MARULE
N.O
Fourth Respondent

JUDGMENT

GUMEDE AJ

1. The applicant seeks an order directing the respondents to sign all documents and do all things necessary to effect transfer of an immovable property described as ERF 1275 WITBANK EXT 8 TOWNSHIP, REGISTRATION DIVISION JS, MPUMALANGA, IN EXTENT 2654 SQUARE METRES (“the property”), in favor of the applicant.
2. The property is registered in the name of the Marule Family Trust (“the Trust”). The respondents are the trustees of the Trust.

BACKGROUND

3. The applicant and the Trust entered into a surety agreement, in terms of which, the Trust tendered the above immovable property as security, for a debt due by the third respondent to the applicant.
4. On 19 April 2021, the applicant entered into an oral agreement with the third respondent for the sale of earthmoving machinery in the amount of R3 million. Because the third respondent did not have liquid cash with which to pay for the machinery and the applicant had insisted on security for the debt, the third respondent offered to surrender a Ferrari Spider together with the Natis documents as a pledge and security for the payment.
5. The oral agreement was recorded in a document titled “Memorandum of Understanding” which was signed by the applicant and the first and third respondents on 20 April 2021.[1]
6. According to the applicant, the agreement was supposed to be between himself and the third respondent in their personal capacity. When he realized that the aforementioned Memorandum of Understanding had been prepared in the name of their respective businesses instead of their personal names, he requested an amendment to the Memorandum to reflect the correct contracting parties.
7. On 21 April 2021, the applicant and third respondent signed a new agreement (annexure “FA3”), in which the contracting parties were rectified to reflect the applicant and the third respondent in their personal capacities.

8. The amended agreement reads as follows:

“Both parties agree and confirm that both parties’ equipment and vehicles have been paid in full, there are no outstanding fees or instalments on these vehicles and the respective parties are full owners of their respective vehicles. Transaction is “voetstoots” as is, and there are no guarantees/warranties whatsoever.”[2]

9. The parties’ vehicles are fully described in the amended agreement, the applicant is the owner of the earthmoving machinery and the third respondent, is purportedly, the owner of the Ferrari.
10. The third respondent delivered the Ferrari to the applicant together with the registration (Natis) documents on 19 April 2021[3]
11. Applicant alleges that he sought to transfer the Ferrari into his name and was unsuccessful because the Ferrari was subject to a finance agreement with a bank. This was in breach of the warranty in the agreement which expressly states that the vehicles are unencumbered.
12. According to the applicant, he threatened the third respondent with criminal charges of fraud, but the third respondent apologized and agreed to void the previous agreement on account of misrepresentation.
13. On 7 May 2021, the parties then agreed to sign a new agreement. They further agreed that the new agreement would be prepared by an attorney.
14. The new agreement was styled and titled “Surety Agreement with Tender of Property as Security” (Annexure “FA5”).[4]
15. The new agreement stipulates that the third respondent shall settle the outstanding finance charges on the Ferrari within 60 days of the agreement and provide the applicant with the vehicle papers within 90 days of the agreement, failing which, the Marule Family

Trust shall transfer the immovable property to the applicant. The Trust agreed to cooperate and to do all such things and signing all such documents as may be necessary to give effect to the transfer of the property into the applicant’s name.[5]

16. The applicant alleges that the third respondent failed to settle the outstanding finance charges to the financing bank within 60 days as agreed and on 31 August 2021, his attorneys sent a letter of demand for the supply of the registration papers of a Ferrari, failing which he (the applicant) would pursue the transfer of the property of the Family Trust.[6]
17. The Trust responded to the letter of demand through its attorneys, stating that they consulted with the first respondent who denied that the third respondent had authority to bind the Trust.
18. According to the applicant, the first respondent had been part of the various consultations and had been actively engaged in the negotiations leading up to the conclusion of the operative agreement. The first respondent even made available an extract of the Trust Deed

which is attached to the agreement. The first respondent also provided a copy of the resolution of the Family Trust, authorizing himself to bind the Family Trust. The first respondent then proceeded to personally sign the surety agreement, binding the Trust as aforesaid.[7]

19. The respondents oppose the application on the following grounds:
20. They raise non joinder of the Family Trust and argue that the registered Trust had to be joined to the proceedings and not the individual

Trustees. This argument can be dismissed out of hand as the Supreme Court of Appeal in *Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust*,[8] has again confirmed the trite principle that in legal proceedings by or against a trust, the trustees must be cited in their representative

capacity. In that case, the SCA allowed an amendment to the pleadings to replace a trust which had been cited as a defendant with the individual trustees in their representative capacity.

21. The respondents raise a further point in limine that the third respondent dealt with the applicant in his capacity as a director of Atlas Machines (Pty) Ltd and submits that the applicant in his personal capacity lacks locus standi.
22. They allege that the applicant, in his capacity as a director of Atlas Machines (Pty) Ltd, rendered a quotation to MPH Mining (Pty) Ltd, who was represented by the third respondent, in respect of the hiring and purchase of certain plant and earth moving machinery. The respondents confirm that annexure FA2 which is attached to the founding papers was indeed concluded between MPH Mining (Pty) Ltd and Atlas Machines (Pty) Ltd, for the trade of the Ferrari and earth moving machinery with a proviso that the first respondent can buy back the Ferrari in the amount of R3 million.
23. Moreover, the third respondent denies that he or the first respondent ever signed the surety agreement[9] which is the basis of this application.
24. In his answering affidavit, the third respondent states that “I categorically deny that I and/or my father Tshidi Lennin Marule attended to the signature of Annexure FA5 ..., or at all nor did the respondents and I sign the resolution dated 7 May 2021. This denial is repeated at paragraph 40.4 of the answering affidavit, where the third respondent denies both the sale of the Ferrari as well as the pledge of immovable property as security. At paragraph 70 of the answering affidavit, he goes as far as to say “the purported suretyship document has been fraudulently signed.[10]

25. The difficulty I have in accepting this denial by the respondents is that the applicant is in possession of copies of the Family Trust Documents as well as the resolution of the trust dated 2 February 2013, which is annexed to the papers as FA8.2, appointing the first respondent a the only signatory on behalf of the trustees to open an account for the trust. On a balance of probabilities, the documents could only have been furnished by the members of the trust.
26. The signed suretyship agreement is in line with the averments made by the applicant that when it came to light that the Ferrari which had been tendered by the third respondent was still encumbered under a finance agreement with a bank, and to avoid a criminal case of fraud, emanating from a warranty that the Ferrari was unencumbered, the respondents agreed to a new agreement which culminated in the signature of the suretyship agreement with the Family Trust.
27. In the replying affidavit, the applicant alleges that on signature of the surety agreement, the respondents furnished him with the original title deed of the property in question. What fortifies my acceptance of the applicant's version is the letter which is attached to the respondents' answering affidavit as annexure "NLM6". This letter was placed in the respondents' papers to persuade me to find that the surety agreement had been cancelled by mutual agreement.[11] However, the letter is not an agreement signed by the parties, but a mere proposal written by the respondents to the applicant which at face value has not been accepted by the applicant.
28. In this letter, the respondents, record, inter alia, a suggestion which had been made by the applicant as follows:
- "U suggest that we paid rent on the 375 Excavator and the 2x725 ADT's at a 43.5 hour per week rate and cancelled the original agreement on the Ferrari and surety on the building"[12] [sic]*
29. It is clear from the reading of annexure NLM6 that the respondents acknowledge that there was a surety agreement in respect of a building, which the applicant has confirmed with documentation, to be the property as described in the surety agreement. The allegations of fraudulent signatures in the surety agreement therefore cannot be true.
30. I agree with the applicant that the respondent is estopped from denying the surety agreement. I also agree with the applicant that the previous agreements whether they were entered into between the applicant and third respondent in their personal capacity or otherwise, have been superseded by the surety agreement. It no longer matters whether the third respondent was entitled to pledge the Ferrari which was registered in the name of the first respondent.

PACTUM COMMISSORIUM

31. The respondents submit that the surety is unenforceable as it is impermissible to pledge an immovable property which ought to be

covered by a special mortgage bond.[13] The respondents did not refer to any authority in support of this submission. The applicant also did not point me to any

authority which confirms that he is entitled to, without more, acquire the property solely based on the surety agreement.

32. In *Bock and Others v Duburoro Investments (Pty) Ltd*, [14] the Supreme Court of Appeal discussed the three legal concepts, being (a) the right to dispose of a pledged article without the intervention of a court order, commonly known as *parate executie*,

(b) the contractual right of taking over a pledged article by the creditor, a *pactum commissorium*, and (c) the quasi conditional sale whereby the creditor may, upon default, take over a pledge at a fair price.

33. The SCA concluded that a clause in a mortgage bond (*parate executie*), permitting the bondholder to execute without recourse to the

mortgagor or the court by taking possession of the property and selling it is void.[15]

34. The SCA also confirmed that a *pactum commissorium* is void. A *pactum commissorium* in the context of a pledge, is an agreement that if the pledgor defaults, the pledgee may keep the security as his own property.

This prohibition had also been confirmed in *Graf v Buechel*, [16] where the SCA said that a creditor cannot, in case of non-payment, dispose of the pawn: but he can apply to the Court to be authorized to retain the pawn as payment to the extent of its value, according to an appraisal made by experts, or to have it sold at auction. This is so because anyone with whom the arrangement is made that, on the debt not being paid within a definite time, the pledge shall remain with the creditor for the debt, would often find that things of the greatest import and value would go to pay off a paltry liability. A needy debtor, pressed by tightness of ready cash, will readily allow any hard and inhuman terms to be written down against him.[17]

CONCLUSION

35. Although I am of the view that the respondents are estopped from denying liability under the suretyship agreement. The applicant is not entitled simply take ownership of the immovable property without the court's intervention. The fair value of the immovable property has to be determined and any other relevant factors, be taken into account.

36. The application before me is only limited to an order to compel signing of documents for the purposes of transferring of the immovable property without the court's intervention to ascertain the value of the said property or any prejudice that may be involved. For that reason, the application must fail.

37. In the result I make the following order:

1. The application is dismissed

2. No order as to costs.

Z GUMEDE

Acting Judge of the High Court

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 8 March 2024 at 10:00.

APPEARANCES

For the Appellant: JC VILJOEN Instructed by: MCKENZIE VAN DER MERWE & WILLEMSE For the Respondents: M RODRIGUES Instructed by: PAUL T LEISHER & ASSOCIATES Date of hearing: 20 JULY 2023 Date of judgment: 8 MARCH 2024

[1] FA, para 44

[2] Annexure FA3 to FA

[3] FA, para 38

[4] FA, para 62-63

[5] Clause 4.2 of the new agreement (FA5)

[6] FA, para 67

[7] FA, para 69 - 75

[8] 364/2019) [2020] at para 16 and 17

[9] AA, para 39.3

[10] AA, para 70

[11] AA, para 20

[12] Annexure "NLM6", unnumbered para 2

[13] AA, para 70

[14] 2004 (2) SA 242 (SCA)

[15] Para 7

[16]

[2003] 2 All SA 123 (SCA)

[17] Graf v Beuchel, para 12

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Prepared on 9 October 2026 · Esheria