

SOUTH AFRICA / JUDGMENT

Henque 1237 CC v Du Plessis NO and Others (2119/2020) [2020] ZAFSHC 205 (7 September 2020)

[2020] ZAFSHC 205

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

2119/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Case

number: 2119/2020

In

the matter between:

HENQUE
1273
CC Applicant
and
WILLEM
CAREL ERNST DU PLESSIS N.O. 1st
Respondent
RINDA
– MARIANNE DU
PLESSIS 2nd
Respondent
GUILLAUME
JOHANNES OBERHOLSTER N.O. 3rd
Respondent
[In
their capacities as Trustees of the WCE Trust]
BEUKES
&
BEUKES 4th
Respondent

JAC
N COETZER
INCORPORATED 5th
Respondent
FANCOR
BOERDERY (PTY)
LTD 6th
Respondent
THE
REGISTRAR OF DEEDS, PRETORIA 7th
Respondent

CORAM: NAIDOO J

JUDGMENT

BY: NAIDOO J

HEARD ON: 13 AUGUST 2020

DELIVERED ON: 7 SEPTEMBER 2020

INTRODUCTION

[1] This matter came before this court as an urgent application on 29 June 2020, in which the applicant sought and was granted the

following order, by agreement between the parties:

“1. The applicant’s non-compliance with the rules relating to service and process is condoned and this application is to be

considered on an urgent basis as is provided for in Rule 6(12) of the Uniform Rules of Court.

2. The first to third respondents, and the fifth and sixth respondent (sic) are called upon to show cause, if any, to the above Honourable Court at 9.30 on 6 August 2020 or as soon thereafter as counsel may be heard (sic), why an order should not be granted in the following terms:

2.1 the first through third respondents and the fifth Respondent are interdicted from requesting the seventh respondent to transport (sic) Portion 16 of the farm Rustkraal 129 division H.P. Northwest Province, being 336,6705 hectares in extent, that is held under certificate of consolidated title no. T102578/2015 into the name of the sixth

respondent pending the finalisation of the action referred to paragraph 2.2 below.

2.2 The applicant is ordered to, within 14 days from the date of this order, institute the action referred to in paragraph 2.1 above for an order declaring the written agreement of sale dated 24 February 2020 that is attached to the founding affidavit of John Glen Visser as annexure “FA2” (the agreement) to be of full force and effect:

2.3 Should the applicant fail to comply with the provisions of paragraph 2.2 above, or should it fail to diligently prosecute the aforesaid action, any respondent may approach this Court on the same papers, amplified as may be necessary, for an order setting the present order aside.

2.4 In the event that the documents required for the transportation (sic) of portion 16 into the name of the sixth respondent have already been filed with the seventh respondent, the seventh respondent is, pending the finalisation of the action referred to in paragraph 2.2 above, directed not to proceed with the registration of portion 16 into the name of the sixth respondent.

2.5 The first through third respondents are jointly and severally ordered to pay the costs of this application, the one paying the other to be absolved pro tanto.

3. The relief set out in paragraphs 2.1 to 2.4 above shall operate as an interim interdict pending the finalisation of this application.”

Adv B Knoetze SC appeared for the applicant and Adv HJ Benade for the first to third respondents. The other respondents played no part in this application.

[2] The litigation in this matter has its genesis in an agreement of sale (the agreement) entered into between the applicant and the WCE Trust (the Trust), of which the first, second and third respondents are trustees. The Trust sold to the applicant certain property, being a farm, described as Portion 16 of the Farm Rustkraal 129 Division H.P. North West Province, which is 336, 6705 hectares in extent (the property). The applicant took occupation of the property in terms of the agreement, and bore the risk of loss and damage in respect of the property, from the date of its occupation. It was also required to pay occupational rent of R15 000.00 per month.

[3] The time frames for payment terms were not strictly adhered to by the applicant, but it did ultimately make the required payments and issued the requisite guarantee. The transfer of the property was, however, delayed due to a query being raised by the applicant in respect of the capacity of a water pump on the farm. After numerous letters being exchanged between the parties’ legal

representatives, the Trust provided the documentation in respect of the water capacity of the pump, to the satisfaction of the applicant. In the correspondence that flowed between the legal representatives, several issues were raised regarding, inter alia, compliance with the agreement by the respective parties, the way forward if the water issue was not adequately resolved to the satisfaction of the appellant, and a demand for fulfilment of the payment terms stipulated in the contract.

[4] Ultimately, when the applicant requested transfer of the property into its name, the Trust informed the applicant that it had already cancelled the agreement, and had in fact sold the property to the sixth respondent. A dispute then arose between the parties as to whether the agreement had been properly cancelled, the applicant alleging that the Trust had elected to enforce the agreement, and was therefore not permitted to change that election. The Trust, for its part, alleged that the applicant failed to comply with the terms of the agreement, and had indicated its intention to cancel the agreement. It cannot therefore now seek to enforce the agreement against the Trust. The Trust refused to hold off on the transfer of the property to the sixth respondent, pending the applicant instituting an action in order to resolve the dispute about whether the agreement had been cancelled or was still in force. This precipitated the launching of this application on an urgent basis and the granting of the order I have set out above. I pause to note that the action envisaged in paragraph 2.2 of the court order mentioned above, was instituted by the applicant by way of a summons issued on 13 July 2020, under case number 2491/2020.

[5] There were two points in limine raised by the parties. The Trust denied that this court has jurisdiction to make an order in respect of the property, as it was

situated in the North West Province. As such, only the North West Court has jurisdiction to deal with the property. The applicant

disputed the locus standi of the Trust's deponent, Mr Willem Carel Ernst Du Plessis, to oppose this application on behalf of the Trust, alleging that the resolution purporting to give him the authority to do so was defective. I deal now with these two points in limine.

[6] The Trust argued that the court in whose jurisdiction the property is situated has exclusive jurisdiction to hear an application of this nature, which directly raises the issue of title to the property. In this matter that court would be the North West Division of the High Court.

The Trust argues that the applicant wishes to interdict the Trust from transferring the property, situated in the North West Province. Put differently, the applicant seeks to interdict the Trust, which has the title in and to the property, from using its title to the property to dispose of such property by transferring it to the sixth respondent. This application directly raises the issue of title to the property. The Trust, therefore, argues that it is settled law that in real actions raising the issue of title to property, the court in whose jurisdiction such immovable property is situated is the only court which has jurisdiction over that property. The respondent referred the court to case law on which it relies. I will deal with the legal position hereunder.

[7] The applicant persists in its argument that this court has jurisdiction to hear this matter. In substantiation of its submissions, the appellant referred me to the provisions of section 97 of the Deeds Registries Act 47 of 1937 (the Act), as well as relevant case law, which I will also deal with hereunder. The nub of the applicant's argument is that the Act as well as the case law supports its contention that the fact that immovable property is situated in the jurisdiction of a particular Provincial or Local Division of the High Court does not give such Provincial or Local Division exclusive jurisdiction in actions or proceedings where title to or

transfer of such property is claimed.

[8] Section 97 of the Act provides as follows:

“Notice to registrar of application to court

- (1) Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days' notice before the hearing of such application and such registrar may submit to the court such report thereon as he may deem desirable to make.
- (2) Subject to notice in terms of subsection (1) being given to the registrar

concerned, any order made by a court having jurisdiction over a person in respect of that person's property or rights to property situate in another province shall be given effect to by the registrar of such other province without the necessity of having such order confirmed by the court of the province in which the property is situate.”

[9] The Trust referred to a number of cases but relied largely on the matter of *Eilon v Eilon* 1965(1) SA 701 AD at 726 H. This matter involved an action in which an order for divorce and other relief was sought. This matter was decided on the basis of whether the appellant (plaintiff in the court a quo) had discharged the onus of showing that the respondent (defendant in the court a quo), was domiciled within the jurisdiction of the court, thus conferring jurisdiction on the court to hear the matter. The court a quo found that the appellant/plaintiff had failed to do so and granted the respondent/defendant absolution from the instance. It is that decision that was taken on appeal. The parties were born and married in Israel, but came to South Africa to teach for a limited time. They owned assets in South Africa as well as immovable property in Israel. For the purposes of this matter, the only remarks of the Appeal Court that are relevant, are those relating to the immovable property situated in Israel, which I will deal with in more detail hereunder.

[10] In its argument in respect of jurisdiction, the applicant placed reliance on the provisions of section 97 of the Act, submitting that this court is legally clothed with jurisdiction to make an order in respect of the property. Section 97(2) was judically considered in the matter of *Wessels v Hugo* 1985(4) SA 262 (OPD), which is one of the cases relied upon by the applicant. The matter involved a divorce action where the parties entered into a settlement

agreement which was incorporated in the decree of divorce granted by this Division, when it was known as the Orange Free State Provincial Division. The agreement stipulated that the plaintiff (the husband) would pay to the defendant an amount of R25 000.00 to enable her to purchase a house to be occupied by her and the parties' three sons. It was specifically agreed that the property would be registered in the names of the three sons, subject to a life-long usufruct over the property in favour of the defendant. The latter purchased a house in Ermelo in the (then) Transvaal and, contrary to the settlement agreement, registered a ,48 share in the names of the three sons and a ,52 share in her name.

- [11] The plaintiff instituted proceedings against the defendeant in which he sought an order directing her to take all the necessary steps to effect registration of the property in the name of their sons only. The defendant raised a special plea in which she alleged that the property was situated and registered outside the jurisdiction of the (Orange Free State) Court, and that she and her children, of whom she was the custodial parent, were domiciled outside the jurisdicthuion of the court. Hence, the Orange Free State Court did not have jurisdiction to adjudicate upon the matter. She also raised an alternative to the special plea relating to the interpretation of the agreement, which is not relevant for this matter. The parties, in any event, agreed that only the special plea would be adjudicated.
- [12] In dismissing the special plea, the court held that it had jurisdiction for various reasons, the most significant of which are that at the time the divorce action was instituted, the defendant was domiciled within the court's jurisdiction, and the fact that she left the court's jurisdiction thereafter did not affect the court's jurisdiction as the current proceedings were a consequence of the divorce action, in which the court had made an order. The court also took into account considerations of convenieince and logic in applying the doctrine of effectiveness when it held that the order it would make would be enforceable in terms of section 97(2) of the Act and section 26(1) of the Supreme Court Act 59 of 1959.
- [13] With regard to considerations of convenience and logic, the court in Wessels cited with approval the decision in *Estate Agents Board v Lek* 1979(3) SA 1048 (A) where the court said "In the present context of our unitary judicial system of having one Supreme Court with different Divisions, as set out earlier in this judgment, convenience

and common cause are, inter alia, valid considerations in determining whether a particular Division has jurisdiction to hear and determine the particular cause."

The decision in Wessels was taken on appeal, and was confirmed on appeal [cited as *Hugo v Wessels* 1987(3) SA 837 (A)]. Hoexter JA remarked that in the arguments before the appeal court, no decision of our courts was cited as authority for the proposition

that the *forum rei sitae* has exclusive jurisdiction in an action for the registration of transfer of property situated in the Republic (of South Africa).

- [14] Hoexter JA did find an answer in the dicta of the court in *Ward v Burgess and Another* 1976 (3) SA 104 (Tk), and cited, with approval, the following extract from p106 C - D

'It would seem... that the ratio for holding that the jurisdiction of a Court of a defendant's domicile or residence which would normally have jurisdiction on the basis of the maxim *actor sequitur forum rei* (see *Sciacerro & Co v Central SAR* 1910 TS 119 at 121) is excluded in cases involving claims relating to title to and transfer of property, is that the latter Court would be unable to enforce its order if granted.

It follows, therefore, that, if the Court which has jurisdiction by virtue of the defendant's domicile or residence is able to enforce

its order if granted, then the reason for denying such Court jurisdiction, albeit concurrent jurisdiction, with the forum rei sitae falls away.'

[15] The learned appeal judge, in confirming the decision of De Wet J in *Wessels v Hugo*, also agreed with the conclusion of the court in the *Ward v Burgess* matter, where the latter court said at p107 B – C:

'I have come to the conclusion... that, in the South African context as between rival Provincial or Local Division (in which I include this Court as it at present exists), the fact that immovable property is situate within the jurisdiction of such Provincial or Local Division does not give such Provincial or Local Division exclusive jurisdiction in actions in which a title to or transfer of such property is claimed.'

[16] I turn now to examine the *Eilon* matter cited by the respondent in this matter. Potgieter AJA, writing for the majority, said at p726 A to p727 B:

"The immovable property situated in Israel is, however, on a different footing. In the case of Rosa's Heirs v Imhambane Sugar Estates Ltd., 1905 T.H. 11, MASON, J, decided that in respect of real actions directly raising the title to property the forum rei sitae is the only Court which has jurisdiction. As our law on jurisdiction is based on Roman Dutch law, he relied on Voet 5.1.77 and Donellus, 17 Chap. 17. He points out, however, that certain other Roman Dutch authorities hold the view that domicile of the defendant also confers jurisdiction to determine the title to property situated outside the Court's territorial jurisdiction. I incline to the view preferred by MASON, J. We were referred, however, to the case of Coombe v Coombe, 1909 T.H. 241, where the same learned Judge expressed the opinion that the Court could declare the rights to property situated outside the Court's area, though it could not direct actual delivery of it. He quoted no authority for that proposition and it seems to conflict

somewhat with his view in *Rosa's Heirs'* case. But, in any event, in that case the defendant was domiciled within the Court's jurisdiction which is not the case here.

In my view, therefore, the Court a quo had no jurisdiction to determine in any way the rights of appellant to the immovable property situated in Israel."

[17] Potgieter AJA relied on a 1905 decision of Mason J, who, in turn, relied on the Roman-Dutch authorities. It is clear that some Roman-Dutch

authorities held the view that the domicile of the defendant also confers jurisdiction on a court to decide on rights to property

situated outside the court's jurisdiction. It seems however that Mason J, whose statement the Trust in the present matter relies on, held a conflicting view a few years later in the *Coombe* matter cited above.

[18] Some observations that can be made in respect of the *Eilon* case is that it dealt with the issue of jurisdiction based on the domicile of the parties in a matrimonial matter. The dictum of Mason J was made in 1905, some thirty two (32) years prior to the Act being promulgated. Subsection 2 of section 97 of the Act was added in 1957 (section 39 of Act 43 of 1957), and was

in force when Eilon was decided. The property in that matter was situated in a foreign jurisdiction and therefore did not fall within the purview of section 97(2) of the Act. In my view, the remarks of the court in Eilon which I have quoted above are germane to the situation prevailing in that matter, namely that the respondent was not domiciled within the jurisdiction of the court a quo, and the immovable property was situated in another country; therefore that court did not have jurisdiction to determine the appellant's

rights or make any order in respect of the property in Israel. Eilon can, therefore be distinguished from the present matter, as the court has jurisdiction over the parties, and the property is situated in South Africa, albeit in the jurisdiction of another court. The reliance placed by the Trust on the extract taken from Mason J's judgment in the Rosa's Heirs matter (which was relied upon in Eilon) is misplaced. I furthermore, cannot agree that the said dictum is "settled law" regarding the court's jurisdiction in respect of property situated in South Africa, as claimed by the Trust.

[19] My view is fortified by the remarks of the court in *Gallo Africa v Sting Music* 2010(6) SA 329 (SCA), which dealt with the jurisdiction of a High Court to decide matters relating to foreign copyright. The court referred to Eilon in its discussion regarding jurisdiction, to illustrate the point that "...claims in relation to property situated in South Africa were also justiciable. However, in relation to the claims relating to property

situated in Israel, the court held, South African courts had no jurisdiction". The court remarked in paragraph [12]

"It may be mentioned that this rule does not necessarily apply in respect of immovable property situated within South Africa because a distinction is drawn between the jurisdiction of country state courts and that of South African High Courts".

[20] In my view, therefore, this court is bound by the provisions of section 97 of the Act as well as the decision in *Hugo v Wessels*. In respect of jurisdiction relating to property outside of a court's area, I also align myself with the findings of the courts in *Ward v Burgess* and the *Lek* matters. The Registrar of Deeds, Pretoria was given the appropriate notice, envisaged in section 97(1) of the Act, and seemingly chose not to furnish a report referred to in that subsection. This was however, not an issue in this matter. In the circumstances this court would therefore have jurisdiction to adjudicate this matter, and any order that this court may make in respect of the rights to the property in this matter shall be given effect to by the Registrar of Deeds, Pretoria.

[21] I deal now with the point in limine, raised by the applicant, relating to the lack of authority of the respondent's deponent to oppose the application. It is common

cause that the Trust has three trustees, only two of whom signed the resolution authorising one of the trustees, Willem Carel Ernst Du Plessis (du Plessis), to sign all affidavits and documents necessary to oppose the application. Although the name of the third trustee, Guillaume Johannes Oberholster and a space for him to sign are printed on the resolution, it was not signed by him. I

also mention that printed in capital letters on the resolution are the words “Moet deur alle trustees geteken word”, which, loosely translated, mean “must be signed by all trustees”. The resolution is, furthermore, not dated.

[22] The appellant contends that a trite principle of Trust Law is that in the absence of a contrary provision in the trust deed, the trustees of the trust must act jointly if the trust estate is to be bound by their acts. It cited as its authority for this proposition, the case of Land and Agricultural Bank of South Africa v Parker and Others 2005(2) SA 77 (SCA) par [15], where the court said that “The rule derives from the nature of the trustees’ joint ownership of the trust property. Since co-owners must act jointly, trustees must also act jointly.” In Parker, the trust deed required there to be a minimum of three trustees in office. Mr and Mrs Parker acted on behalf of the trust

and purported to bind it, after the third trustee resigned, informing the Master of the resignation only two years after the third trustee resigned. After litigation was instituted by the bank against the trust and the Parkers for debts incurred by the Parkers on behalf of the trust, they (the Parkers) appointed their son as the third trustee. Although the facts are slightly different from the present matter, I will deal later with the principles of trust law that may be applicable in this matter.

[23] The Trust maintained that Du Plessis was authorised to oppose the application and, to this end, handed up the Trust Deed, with the consent of the applicant. The court was referred to clause 8.2 thereof, in support of the Trust’s contention. The relevant

portion of that clause reads as follows:

“Besluite wat die trustees neem, geskied:

8.2.1 as daar meer as twee trustees is, by wyse van ‘n gewone meerderheid van stemme”

The provisions of this clause are in essence that where there are more than two trustees, then decisions/resolutions taken by a normal two thirds majority will be valid. The Trust contends therefore, that the resolution was taken by two of the three trustees in office, constituting compliance with clause 8.2.1 of the Trust Deed. The resolution was, therefore, validly taken. The Trust denied that the Parker case is applicable in the present matter and can be distinguished from this case. This stance was based upon a remark in Parker where the court said in Para [15] that “It is a fundamental rule of trust law, which this Court recently restated in **Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk*, that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts.”. (** 2004(3) SA 486 (SCA)* at para [16])

The respondent contends that clause 8.2 of the Trust Deed, which I have detailed above, is the contrary provision that Cameron JA referred to in Parker, hence Parker can be distinguished from this case.

[24] In countering the latter submission, the applicant, in addition to the Parker case, referred to the matter of Steyn and Others NNO v Blockpave (Pty) Ltd 2011(3) SA 528 (FB) where a similar situation to the present matter prevailed. There were three trustees in office, but only two signed the document purporting to be the resolution

authorising the first applicant to institute the proceedings. The third trustee appeared to play no part in the proceedings, was not consulted and did not sign the resolution. The authority to sue was disputed in this matter. The trust deed provided that there must be a minimum of three trustees and all decisions of the trustees shall be by majority vote. A meeting of trustees was held and the minutes of such meeting formed part of the papers. The first and second applicants attended the meeting and, the court remarked at para [14] that, they could theoretically have taken the decision to sue the respondent on behalf of the trust “provided the third applicant was consulted in advance about this”. The reason provided by the the court for this proviso contains the importance thereof: “Whether she was for or against such a decision would not have been an important matter, if only she had been properly consulted but outvoted by two to one out of the trust body of three”. The decision to sue would have been competently taken as the majority vote prevails in the running of the business affairs of the trust (para [15]).

[25] The court remarked at para [16] that it was not necessary for the third trustee to attend the meeting and the court’s ensuing remarks give further clarity on this aspect, which in my view, are relevant to the present matter:

“However, it was imperative for the majority trustees to keep the minority trustee informed about meetings to be held, their agenda, and the decisions taken at such meetings. This is important for a variety of reasons. For instance, a trustee who cannot personally attend a meeting may want to send a proxy or make her input telephonically or otherwise. If she were aware of a meeting, she could even have indirectly exercised her vote. An uninformed trustee, I should imagine, would not easily sign a decision taken in her absence, in order to validate it as a written resolution as envisaged in clause 3.3.”

[26] Two principles of trust law, relevant to this matter, that were enunciated in Parker are that firstly, a trust does not have legal personality and secondly, in the absence of authorisation in the trust deed, trustees must act jointly. In respect of the first, the court held that the trust estate, which is an accumulation of assets and liabilities is a separate entity and vests in the trustees who administer such trust estate, as specified in the trust deed. The latter document sets out the details of who the trustees are, how many they number, what their powers are and how they may bind the trust. The trust cannot be bound beyond the provisions of the trust deed.

[27] With regard to the joint action requirement which entails that trustees

must act together, I have set out the the court’s remarks above, relied on by both the applicant and respondents in the present matter. The court’s opening remarks (in the Parker matter) in para [15], are echoed in the dicta by my brother Rampai J in Steyn, which I have set out above, regarding consultation with an absent trustee. It appears that the Parkers’ son, who was appointed as the third trustee, was also not informed or consulted regarding binding of the trust

by his parents. The court in Parker had this to say: “For the Parkers to purport to bind the trust estate after the son's appointment, without (according to his evidence) consulting him, constituted a further usurpation and a further breach of their obligations under the trust deed.”

- [28] The court continued in para [17], where it stated: “The bank does not suggest that any meeting or consultation of the trustees was convened, or that any vote took place in which the majority will was exercised. On the contrary, on the evidence which it has chosen not to challenge no such meeting, consultation or majority decision ever occurred. In these circumstances the Parkers on their own were not entitled to bind the trust.” This also appeared to be similarly the situation in Steyn, which prompted the court’s remarks I have set out above. I pause to mention that the Steyn matter emanates from this Division and has not been overturned, hence this court is bound by those findings, unless Steyn can be distinguished from this matter. I am of the view that the principles enunciated in the Steyn matter and the reasoning of the court are apposite and applicable in this matter.
- [29] Although 8.2 of the Trust Deed in this matter authorises a valid resolution to be taken by two trustees, where there are three or more trustees in office, the purported resolution is not dated and there is no indication that a meeting was, in fact, held, at which the trustees were present. It is, therefore, not known whether the third respondent was present at the meeting, if it was held, or what his view was with regard to opposing this application. There is also no indication whatsoever of whether he was aware of the application and the opposition to it and whether he would have endorsed the resolution or not. The respondents simply avoid any comment in this regard and merely allege that the trust deed authorises two trustees to validly pass the resolution.
- [30] As was held in Steyn, it is imperative for the minority trustee to be kept informed of the meeting, the agenda and proposed resolution, so that he could have exercised the various options open to him in making known his views. Even if he disagreed and voted against the resolution, he would have been outvoted two to one, and the resolution would have been validly taken. The complete avoidance of this aspect by the respondents creates a strong impression that the meeting was never held and that the third respondent may well have been unaware of the resolution. If the first respondent had annexed a copy of the minutes of the meeting or a confirmatory affidavit by the third respondent, to the Opposing Affidavit, the court may have been in a position to deduce that the third respondent did in fact participate in the taking of the resolution. In my view, therefore, the resolution could not have been validly taken, and the first respondent could not have been validly authorised to oppose this application on behalf of the Trust
- [31] Both counsel addressed me with regard to the merits of the case, and the repudiation of the agreement between them, in particular. The nub of both arguments centred around whether the agreement was validly cancelled, due to a repudiation on the part of the Trust. The purpose of the hearing before this court was for the first to third and sixth and seventh respondents to show cause why the order foreshadowed in the body of order that was granted on 29 June 2020, and which I have set out fully in paragraph [1] above, should not be

granted. The issue of repudiation of the agreement, and its subsequent alleged cancellation go to the heart of the order contained in para 2.2 of the order dated 29 June 2020. The entire order was clearly premised on the institution of the action foreshadowed

therein. It follows, as a matter of logic, that for a trial court to decide whether or not the agreement is “of full force and effect”, the issue of repudiation and cancellation must be fully and thoroughly canvassed in the evidence that will be led before the trial court. It is not within the purview of this court to decide that matter on the papers, nor is it appropriate for this court to bind the trial court by an order made at this stage in respect of the merits.

[32] The action foreshadowed in para 2.2 of the court order has already been sued out under case number 2491/2020, which summons was issued on 13 July 2020. It therefore, falls on the trial court to consider the merits in order to rule on the currency or not of the agreement. In any event, this court was requested to decide on the points in limine raised respectively by the respondent and the applicant, before deciding whether to grant the order sought. I also point out that the order granted on 29 June 2020 was taken by agreement between the parties. The parties ought to have been aware that the merits of the matter could not have been decided by this court, as the issue of repudiation and cancellation of the agreement was to be canvassed in the action that the applicant was directed to institute. I have found that the first respondent was not validly authorised to oppose this matter, meaning that the trust is not validly before me in this application. This, however, does not affect the standing of the Trust in the action, as it would have had to pass another resolution to defend the action instituted.

[33] With regard to costs, the applicant requests that the respondents be ordered to pay the costs of this application, the one paying, the others to be absolved. In view of my finding that the opposition of the Trust is not validly before me, the trial court will be better placed to enquire into and obtain evidence relating to the circumstances under which the resolution was taken and to decide on an appropriate costs order, for example, whether an order should be made against all the respondents involved or only the first and second respondents, or whether it should make any other appropriate order.

ORDER

[34] In the circumstances, the following order is made:

34.1 the first, second, third and the fifth Respondents are interdicted from requesting the seventh respondent to transfer Portion 16 of the farm Rustkraal 129 division H.P. Northwest Province, being 336,6705 hectares in extent, that is held under certificate of consolidated title no. T102578/2015 into the name of the sixth respondent pending the finalisation of the action referred to paragraph 34.2 below.

34.2 The applicant was ordered to institute, within 14 days from the date of the order of this court dated 29 June 2020, the action referred to in paragraph 34.1 above, for an order declaring the written agreement of sale dated 24 February 2020 that is attached to the founding affidavit of John Glen Visser as annexure “FA2” (the agreement) to be of full force and effect. It is recorded that such action was instituted on 13 July 2020 under case number 2491/2020

34.3 Should the applicant fail to diligently prosecute the aforesaid action, any respondent may approach this Court on the same papers, amplified as may be necessary, for an order setting the present order aside.

34.4 In the event that the documents, required for the transfer of portion 16 into the name of the sixth respondent, having already been filed with the seventh respondent, the seventh respondent is, pending the finalisation of the action referred to in paragraph 34.2 above, directed not to proceed with the registration of portion 16 into the name of the sixth respondent.

34.5 The costs of this application are to stand over for determination by the court hearing the trial of the action referred to in 34.2 above

S. NAIDOO, J

On behalf of Applicant: Adv. B Knoetze SC

Instructed by: Honey Attorneys

Honey Chambers

Northridge Mall

Kenneth Kaunda Road

Bloemfontein

(Ref: M van Aardt)

On behalf of 1st

to 3rd Respondents: Adv. HJ Benade

Instructed by: Symington De Kok

169B Nelson Mandela Drive

BLOEMFONTEIN

(Ref: T O'Reilly/EC/FXW2202)

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/henque-1237-cc-v-du-plessis-no-and-others-unknown-topic-afshc-2020--6a3ea51f3b1caa9129815a80>

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