

SOUTH AFRICA / JUDGMENT

Kliprant Agri (Pty) Ltd and Others v Firststrand Bank Limited and Others (46489/2021) [2021] ZAGPPHC 605 (23 September 2021)

[2021] ZAGPPHC 605

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

46489/2021

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 46489/2021

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

DATE:

23 SEPTEMBER 2021

In

the matter between:

KLIPRANT

AGRI (PTY)

LTD First

Applicant

ANNA

MARGARIETHA

VERSTER Second

Applicant

JAN

LODEWYK

VERSTER Third

Applicant

JOSEPH

DEARLOVE HARDY VERSTER Fourth

Applicant
ANNA
MARGARIETHA VERSTER
N.O. Fifth
Applicant
JOSEPH
DEARLOVE HARDY VERSTER N.O. Sixth
Applicant
and
FIRSTRAND
BANK
LIMITED First
Respondent
REGISTRAR
OF DEEDS, PRETORIA Second
Respondent
CAREL
LODEWIKUS
VIVIERS Third
Respondent
CASPARUS
HENDRICK BADENHORST BOTHA Fourth
Respondent

JUDGMENT

This matter has been heard virtually and otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

1.1 For purposes of this judgment, I shall refer to the parties as in the main application for, as shall be seen, the first respondent in the main application subsequently became the applicant in an application in terms of Rule 6(12)(c) (the reconsideration application).

1.2 On Monday 13 September 2021 I granted an order in the urgent court interdicting the transfer of a certain immovable property which forms the subject matter of a pending dispute in this Court's North West Division, Mahikeng, pending a hearing of that matter on 21 October 2021. As the main application in this Court had been brought on an ex parte basis, a rule nisi was also issued.

1.3 On Friday 17 September 2021, I heard the reconsideration application, launched by the first respondent (FirstRand), on an opposed basis, after which the order of 13 September 2021 was set aside and the rule nisi was discharged.

1.4 Having regard to the urgency and timing of the reconsideration application, having been heard on the last day of a congested urgent court week, I merely granted the order, indicating that the reasons would be furnished within a week. This judgment constitutes those reasons.

[2] The relevance of the matter pending in case no M535/2021 in the North West Division, Mahikeng:

2.1 The application launched by the applicants in that court (being also the applicants in this court) is for the setting aside of a special power of attorney granted to FirstRand by the owner of the property, known as Syferfontein, being the Syferfontein Trust, (the Trust) represented by its trustees (who also feature as applicants in both matters in their capacities as such).

2.2 Pursuant to default of repayment of loans advanced by FirstRand to the first applicant, a company called Kliprant Agri (Pty) Ltd (Kliprant), FirstRand instructed an auctioneering house to sell Syferfontein in terms of the special power of attorney. This was eventually done for some R 17,1 million to a company under the control of the current fourth respondent, a certain Mr Botha, who also leases a part of Syferfontein from the Trust.

2.3 The transfer of Syferfontein was pending in the Deeds Office, Pretoria, with expected registration on 14 September 2021. The refusal of FirstRand to hold over this registration pending the finalization of the dispute in Mahikeng which might impact upon the validity of the preceeding sale, prompted the main application in this court on 13 September 2021.

2.4 On that day, I formed the view that, prima facie, depending on facts disclosed on the return day, transfer of Syferfontein should be interdicted for failure to do so, might render the application pending in Mahikeng moot or might pre-judge that dispute and thereby encroach on the jurisdiction of that court.

2.5 Subsequently, and after having heard FirstRand in the reconsideration application and being more fully appraised of the facts, I concluded that, without attempting to bind any other court, but insofar as the applications are interrelated, both the application in Mahikeng and the main application in this court, amounted to abuses of process and were launched without proper grounds and in fact, for ulterior purposes. These conclusions, based the facts and considerations set out hereunder, resulted in the order referred to in paragraph 1.3 above, which is, of course, only limited to the proceedings in this court.

[3] Summary of relevant facts

3.1 During November 2016 FirstRand loaned and advanced R2,3 million to Kliprant and in March 2019 advanced a further R 3, 1 million, totaling a principal debt of R 5,4 million.

3.2 The loans were secured by suretyships provided by the second applicant (Anna Margarietha Verster), the third applicant (Jan Lodewyk Verster) and the fourth applicant (Joseph Dearlove Hardy Verster) as well as the Trust, all furnished on 25 November 2016.

3.3 In addition, on 26 January 2017, a continuing covering mortgage bond was registered in favour of FirstRand over Syferfontein in the amount of R 7 million as further security for the loans to Kliprant.

3.4 By the applicants' own admissions made on oath in the Mahikeng application (which papers were placed before this court by the applicants themselves), Kliprant has breached the repayment terms of its loan agreements with FirstRand. As the applicants put it in that application further: "consequently, FirstRand became entitled to claim immediate repayment of the full outstanding balances owing in terms of the facility and loan agreements".

3.5 On 7 July 2020 the applicants and FirstRand concluded a Memorandum of Agreement which included the following elements:

- an acknowledgment of debt of some R 5 million together with interest and the liability of attorney and (own) client costs;
- an extension of time to pay the acknowledged debt;
- an agreement to pay the full outstanding debt by 31 December 2020;
- a statement that the applicants "have no claim of whatsoever nature against FirstRand from whatsoever cause and howsoever arising and that payment shall be made without set-off or deduction and that their undertaking and agreement in this regard is unconditional" (to quote from the principal founding affidavit in the Mahikeng application);
- an acknowledgment that the terms of the agreement were fair and reasonable and that the agreement was entered into without any undue

influence by FirstRand.

3.6 Simultaneously with the signing of the Memorandum of Agreement, the Trust furnished FirstRand with a signed, irrevocable Special Power of Attorney, authorizing FirstRand to sell and transfer Syferfontein upon failure by the applicants to pay the debt by 31 December 2020. Apart from the other extensive terms of the Power of Attorney, it contains the following term: "This power of attorney shall be irrevocable and shall not be subject to any revocation under any circumstances whatsoever and shall endure for an indefinite period until such time as the property has been sold and transferred to the purchaser thereof or until the Trust's indebtedness to FirstRand has been extinguished in full, whichever occurs first".

3.7 On the applicant's own version, since the date of the signing of the Memorandum of Agreement, Kliprant has been attempting to source alternative financing "... in order to alleviate the debt owed to FirstRand ...". This was principally done via a loan application to an entity known as "Citizens Chamber of Commerce Africa" (CCCA).

3.8 On 3 November 2020 FirstRand's attorneys via e-mail inquired from the applicants detail as to how the outstanding debt would be paid by 31 December 2020.

3.9 The response was that a “planned loan application” had been submitted to CCCA, then called the “Community Chest Circle Association”.

3.10 FirstRand’s attorneys have been able to establish that CCCA appears to be an “administrator” of African Economic Revival (Pty) Ltd (AER) who allegedly “facilitates” financial “support” from an international “Foundation for African Countries”. Despite best efforts, no further particulars of these entities or funds could be ascertained and none were supplied by the applicants.

3.11 It is common cause that the debt was not paid on 31 December 2020.

3.12 In January 2021, FirstRand appointed auctioneers to proceed in terms of the Special Power of Attorney to sell Syferfontein.

3.13 In February 2021, one Louis Gerber of the CCCA entered the scene. He advised FirstRand and its attorneys that AER, on behalf of the Trust, was making progress at having the South African Reserve Bank “release” funds of AER which have allegedly illegally been “deducted from South African Citizens since 1961”. This was followed up by a request from the applicants’

attorneys for copies of loan and security documents together with a request that the sale of the property be held over, failing which, an interdict would be sought from the High Court.

3.14 FirstRand’s representatives have by 10 March 2021 forwarded two offers to purchase Syferfontein to the Trust, both of which have been declined and advised that, should no further offers be received by 16 March 2021, the highest offer would be accepted.

3.15 Despite some earlier squirming about a delay in the date of the furnishing of the certified copies of the bond and title deed, the applicants collected those documents (copies of which had been provided a month earlier) from FirstRand only on 9 April 2021 and advised it that they will be proceeding with their loan application to CCCA. Nothing has however, been forthcoming in this regard.

3.16 On 2 June 2021, FirstRand’s attorneys reminded the applicants of the above chronology and informed them that an offer to purchase in an amount of R 13, 35 million had been received which FirstRand intended accepting if no higher offer was received within 10 days.

3.17 In the end, a higher offer in an amount of R17, 1 million was indeed received and accepted on 14 July 2021, after the applicants had been informed of the offer on 6 July 2021.

3.18 On 24 August 2021, FirstRand’s attorneys informed the applicants that the guarantees contemplated in the accepted offer had been furnished.

3.19 On 27 August 2021, FirstRand’s attorneys informed the applicant that the transfer documents had been lodged at the Deeds Office,

Pretoria and enquired the banking particulars of the account into which the applicants would prefer the balance of the purchase price to be paid (after satisfaction of the debt due to FirstRand).

3.20 On 30 August 2021, Anna Margarietha Verster advised FirstRand's attorneys that the Trust did not have an "operating" bank account, but that particulars of one would be forwarded, once opened.

3.21 Two days later, however, the application referred to in paragraph 2 above, was launched in Mahikeng.

[4] The abuse of process

4.1 During the hearing of the reconsideration application, I enquired from the applicants' counsel, what his clients' actual objection was to the sale of Syferfontein for R 17, 1 million, an amount that by far exceeds the debt due to FirstRand. Counsel then took instructions from the applicants' attorney (on more than one occasion) and informed the court that the applicants had experienced difficulties in obtaining alternate finance. When pushed for an answer as to whether the applications to the High Court in Mahikeng and to this court were simply attempts to buy time, counsel conceded this but added that some of the applicants have been living on Syferfontein for a generation or more and are still, although to a lesser degree, farming thereon.

4.2 When it became clear that the launching of an application simply to buy time is not a permissible stratagem, counsel for the applicants

(again after taking instructions from their attorney), informed the court that the actual reason was for other, as yet undisclosed

investigative purposes which may reveal criminal conduct on the part of FirstRand and which involves "Securitization practices".

Not only did this submission immediately prompt objection from FirstRand's counsel, but it is legally and procedurally impermissible. These "reasons" were nowhere disclosed on the papers, nor were they even alluded to. The tenor thereof, unless substantiated, are defamatory and scandalous. They amount to attempts by the applicants, abetted by their legal practitioners, to motivate or justify their conduct on grounds other than legal grounds, without even laying any foundation therefor.

4.3 It is trite that this court has the inherent power to prevent its processes from being abused. The Supreme Court of Appeal has put it as follows in *Phillips v Botha*

[1998] ZASCA 105; 1999 (2) SA 555 (SCA) at 655 G-H: "where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the Court's duty to prevent such abuse".

4.4 The same court in the above judgment, referred to the "useful definition" of abuse of process in the judgment of Isaacs J in the Australian High Court case of *Varawa v Howard Smith Co Ltd* [1911] HCA 46; (1911) 13 CLR 35 at 91 "... the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate, they are regarded as an

abuse for this purpose ...”.

4.5 In the present case, it is, to my mind, clear that the applicants, having waited more than a year before attacking the power of attorney furnished to FirstRand to sell Syferfontein and by also waiting more than eight months after their agreed deadline to pay and by only launching the applications when transfer is about to happen, are only attempting to obtain, not legal redress, but to secure yet a further period of time to remain in occupation and to attempt to obtain alternate finance. The applicants’ motive, not only as demonstrated by their conduct and the chronology of facts but also a conceded on their behalf by their legal representatives, is not to obtain adjudication on a flimsy point of law by launching a process of adjudication, but to secure an ulterior benefit. This benefit is either a delay or an impermissible and undisclosed investigative opportunity. They are therefore abusing the process of this court for benefits other than those disclosed in the papers. Such conduct cannot be allowed by a court of law.

4.6 In passing, as it were, the applicants’ counsel also pleaded that the applicants simply want FirstRand “to follow the rules”. It was suggested that FirstRand could not sell the property in question, but first had to institute action and obtain judgment, default or otherwise. It is clear that the applicants have, by their own admissions, raised no defence on the merits and this suggestion of the institution of an action, is not only a transparent alternate attempt to buy more time, but it is unfounded. The applicants have raised this same issue in their application in the High Court in Mahikeng, alleging that FirstRand’s sale of Syferfontein amounts to “parate executie”, that is to say, execution without legal process. This suggestion is without merit and can summarily be rejected on the following basis: in *Bock and others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) the relevant law has been summarized as follows at para 7: “The principles concerning parate executie (immediate execution) are trite. A clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgagor or the court by taking possession the property and selling it is void. Nevertheless, after default, the mortgagor may grant the bondholder the necessary authority to realise the bonded property”. (my emphasis).

4.7 Clearly, the uncontested facts and the Trust’s conduct, place this matter in the latter category of the quotation. Even more so, the conduct of FirstRand by selling the property, has been taken with numerous recourse to the Trust, without demur. I find that FirstRand had “played within the rules” as agreed to by the applicants, including the Trust, as long as July 2020.

4.8 There is no merit in this latest submission and neither can or did it create even a prima facie right upon which an interdict preventing

transfer of the property can or should have been granted.

[5] Conclusion

I find, upon hearing of the reconsideration application, that, not only have the grounds for the relief sought by the applicants not been established, but that their application (in this court at least) amounts to an abuse of process. Apart from the fact that costs should follow the event, abuses of court processes should be deprecated, justifying a punitive costs order.

[6] Order

For the reasons set out in this judgment, an order in the following terms was granted on 17 September 2021.

1. The order granted by this court in this matter on 13 September 2021, is set aside and the rule nisi is discharged.
2. The applicants in the main application, jointly and severally, are ordered to pay the costs of the application on the scale between attorney and client.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 17

September 2021

Judgment

delivered: 23

September 2021

APPEARANCES:

For the Applicants: Adv.

C Oberholzer

Attorney for Applicants: Bekker Attorneys, Bloemfontein

c/o De Meyer Attorneys, Pretoria

For the 1st Respondents: Adv. J. E Smit

Attorney for 1st Respondents: Werkmans Incorporated, Sandton

c/o Serfontein, Viljoen & Swart, Pretoria

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2021/605.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/kliprant-agri-pty-ltd-and-others-v-firststrand-unknown-topic-agpphc-2021--6a3ea50c3b1caa91298067c9>

Prepared on 15 October 2026 · Esheria