

SOUTH AFRICA / JUDGMENT

Makgoba and Others v Kloppe and Others (81488/15) [2019] ZAGPPHC 190 (29 April 2019)

[2019] ZAGPPHC 190

COURT

North Gauteng High Court, Pretoria

BEFORE

AE Andrews

CASE / FILE NUMBER

81488/15

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

CASE

NO: 81488/15

29/4/2019

In

the matter between:

HENDRICK
KHALIME MAKGOBA
1st
APPLICANT
LERATO
JOYCE ELEANOR MAKGOBA
2nd
APPLICANT
OCCUPANTS
OF ERF 3709 ATTERIDGEVILLE
TSHWANE
METROPOLITAN MUNICIPALITY
GAUTENG,
REGISTRATION DIVISION JR
SITUATED
AT 2 NTJAPEDI STREET
ATTERIDGEVILLE,
PRETORIA
3rd APPLICANT
And
JOHANNED
FREDERICK KLOPPER
1st
RESPONDENT
PHAHLAPHAHLAHUMPHREYLEBEDE
2nd
RESPONDENT
AVIWE
NTANDAZO NDYAMARA NO
3rd RESPONDENT
(In
her capacity as the duly appointed Trustee
of the HK and LJE Family Trust)

JUDGMENT

AE ANDREWS, AJ

1. In this matter the applicants seek an order in the following terms:
 - a. That the eviction order granted against the applicants by Vorster AJ in the North Gauteng High Court under case number 81488/2015 dated 30 January 2017 be rescinded and set aside;
 - b. that to the extent necessary the late filing of this application be condoned;
 - c. that any party who opposes this application be ordered to pay the costs of this application.
2. The application is opposed by the third respondent in her capacity as the duly appointed trustee of the HK and LJE Family trust (in sequestration).

3. The background to this matter is that according to the records of this Court, an eviction order was granted by Vorster AJ on 30th January 2017 against the applicants, pursuant to an application brought by the first and second respondents, as joint trustees of the insolvent estate of the HK and LJE Family Trust. The original order under case number 81488/2015 is missing from the Court file, but copies thereof are annexed to both parties' respective papers. The file itself appears to be a duplicate of the original and no record is made on the front of the cover as to the nature of the order granted on 30th January 2017.
4. The third respondent annexed to her answering affidavit a copy of an order before the Honourable Mr Justice Vorster AJ dated 30th January 2017, ordering the eviction of the applicants (respondents in that matter) from Erf 3709 Atteridgeville. The order states that the time allowed for the respondents to vacate is one (1) month. The third respondent avers that the applicants were evicted from the property by the Sheriff of Court on 5th July 2017 pursuant to that order, which is referred to hereafter as the "eviction order".
5. The applicants state that they were provided with a court order by their attorneys after the hearing on 30th January 2017 and annex it to their founding affidavit. It differs from the order annexed to third respondent's answering affidavit. The former postpones the application pending reports to be filed by the National Credit Regulator (NCR) and the Master of the High Court, Pretoria. It also states: "The time allowed for the respondent to vacate (verbatim transcript) shall be one (1) month." This shall be referred to hereafter as the "postponement order".
6. The applicant has corresponded with the registrar of this Court enquiring as to the status of these two orders and was advised that the only order to be found on the Gauteng High Court system is the eviction order.
7. The rescission application is brought in terms of the common law as the grounds upon which applicants primarily rely late to new material evidence and/or information, as well as fraud and dishonesty.

Condonation

8. Judgment was granted on 30th January 2017. The application for condonation was brought on 25th April 2018. In order to assess whether it was brought within a reasonable time, precise dates of relevant events are required. These are however not supplied by the applicants.
9. They do not state on what date their attorneys informed them of the order, or when they wrote to the registrar of this Court, to investigate the issue of multiple judgments. Both versions of the order give them one month to vacate the Premises. On their version they were waiting for the outcome of the NCR investigation, but this did not override the order to vacate within one month contained in the postponement order. It is hence not credible that the applicants were surprised, as stated in the founding affidavit, to hear from the first

respondent that they had one month to vacate. They also do not indicate to the Court in their affidavits that they were evicted in July 2017.

10. There is therefore no reasonable explanation given for why it took the applicants from January 2017, (or at least from July 2017 when they were evicted), until March 2018 to start investigating the first respondent with the Companies and Intellectual Property Commission, and thereafter to bring the application on 25th April 2018. The basis for condonation has not been established by the applicants.
11. Even if this conclusion is incorrect the applicants must show that they have a reasonable prospect of success in proving a bona fide defence to the eviction application which they fail to do as set out below.[1]

Status of the order

12. The applicants state that they have applied for the rescission of the eviction order of Vorster AJ granted on 30th January 2017, because it was not the order granted on that day in this matter. They submit that in circumstances where the parties

dispute the status of an order it should be rescinded, referring to Erasmus Superior Court Practice.[2] They do not apply for both purported orders to be rescinded

13. The following factors have been considered in determining the status of the eviction order.
 - a. As it appears annexed to the respondent's reply, the eviction order bears the hallmarks of an order of this Court. It is stamped and signed by the registrar of the Court and correspondence with registrar confirms that it is registered on the Court system. It is an order that exactly mirrors the relief sought in the notice of motion.
 - b. The postponement order does not appear on the Court system. It appears unlike an order of the High Court. It contains a typological error referring to "vacate" as "verate". The first sentence of the order makes no sense. It is contradictory. It purports to postpone the matter but gives the respondents a month to vacate, which is an effective order of eviction.

It is therefore not a credible order of this Court.

- c. The eviction order was acted upon by the respondents, shortly after it was signed by the registrar, as is evident from the fact that the applicants were evicted in terms of it in July 2017. In an affidavit deposed to in March 2018 by Brad Hutchinson, an attorney acting for the respondents, he avers that he was sent the eviction order in March 2017 by his correspondent. He states that he first saw the postponement order when advised of it by the SAPS in 2018, almost seven months after the eviction.

The SAPS informed him that a case relating to a fraudulent court order had been opened relating to the eviction order. The applicants aver no knowledge of when the postponement order came to the knowledge of Hutchinson and baldly deny these statements by him.

- d. Although the applicants state that they were provided with the court order declaring that the postponement was indeed granted, they do not state when this took place and no contemporaneous correspondence confirming that this took place is annexed to their application. There is indeed no corroboration that this order was granted emanating from their legal representatives who were presumably present when the matter was heard on 30th January 2017.
 - e. The appearance of an order (that is not on the Gauteng High Court system) does not necessarily indicate that the initial eviction order was not granted or that the proceedings up to the granting of this order were tainted by fraud as contended by the applicants. There could be another explanation, namely that the postponement order was a fabrication. Only copies of the postponement order appear in the pleadings and no original of this order was tendered in this application, nor appears on the file.
 - a. The applicant's conclusion that the proceedings, by which I understand the proceedings up to the granting of the order on 30 January 2017, have been tainted by fraud, is not supported by evidence. At this stage they are merely the subject of an investigation.
14. Considering the above, the applicants have failed to provide any evidence that the eviction order was not granted on 30th January 2017, and that the postponement order was. Their averments are far-fetched, unsubstantiated and are disputed by the respondents who provide corroborating evidence of the granting of the eviction order. The eviction order stands until set aside by a competent court. (see *Department of Transport v Tasima (Pty) Ltd.* [3] The applicants have failed to establish any uncertainty as to its status. The application for rescission on this basis must therefore

fail.

New information

15. The applicants state that new information has come to hand indicating fraud and dishonesty by the first respondent, as he acted both as a trustee of the insolvent estate and business rescue practitioner for its creditor when the application for eviction was brought. They argue that this constituted a conflict of interest between him and the trust, and that he had an interest opposed to the interest of the trust and its creditors. His conduct was dishonest and, fraudulent, and constituted perjury in failing to disclose this conflict to the Court. They contend that his intention in bringing the application for eviction was *ma/a fide* and that he intended to mislead the Court. Had the Court been provided with this information it would have reached a different conclusion.

The failure to disclose these facts to the Court is thus causally linked to it granting the order of eviction.

16. The conflict of interest is explained by the applicants to have arisen for the following reasons. Because first respondent had multiple interests, serving one interest meant working against the other interest, in this case the Interests of the trust and its beneficiaries. He could not act in the Interests of a creditor without acting to the detriment of the trust and its beneficiaries. The duty of the trustee is to act in good faith in administering the trust property and this the first respondent failed to do.
17. The applicants also referred to three provisions of Insolvency Act no 24 of 1936 (the Act), which they argued demonstrated that the roles occupied by first respondent created a serious conflict of interest. The first is that he could give himself permission to institute proceedings against the applicants as contemplated in terms of section 73(1) of the Act. Secondly by being both trustee

and business rescue practitioner he could direct himself as to what action to take as trustee as contemplated in section 81(3) of the Act. Thirdly, according to section 80(1) of the Act a trustee shall not carry on the business of the insolvent concerned or any part thereof unless authorised thereto by creditors of the insolvent estate or in the absence thereof by the Master.

18. The eviction application was launched on 9th October 2015 and the matter was heard on 30th January 2017. It is common cause that there was only one proven creditor, Bondro Finance (Pty) Ltd (Bondpro Finance) whose mortgage

bond had been proved in 2013. The first respondent became its business rescue practitioner in 2014.

19. The respondents deny fraud or dishonesty or any conflict of interest as alleged by the applicants. They state that the first respondent did not manage or have any involvement with the secured claim of Bondro Finance at the time of bringing the eviction application as it had ceded its interests to other entities before first respondent became its business rescue practitioner. Hence there was no basis to allege a conflict of interest, fraud or dishonesty. This reply is baldly denied by the applicants.
20. The matter is made more complex by the fact that in 2015 first respondent stated under oath in the eviction application that he and his co-trustee were "obliged to alienate the immovable properties for the benefit of the creditors particularly that of Bondpro Finance (Pty) Ltd." He now states that at the time, Bondpro Finance had no further interest in the insolvent estate, having ceded its claims to other entities. This apparent contradiction in the pleadings was not explained by the respondents. I therefore regard the evidence of the respondent on this issue as unreliable, and will treat it as true that at the time of bringing the eviction application Bondpro Finance held a mortgage bond over the property, and first respondent was its business rescue practitioner.
21. First respondent states in an affidavit in the eviction application that in the discharge of their duties it is incumbent upon the joint trustees to market the immovable property of the Trust and sell it to the benefit of the creditors of the Trust at the highest possible value. In order to

give vacant possession of the property to a prospective purchaser the applicants needed to move out of the immovable property. It was averred that the trustees are obliged to alienate the immoveable properties for the benefit of the creditors particularly that of Bondpro Finance which held a covering bond over the immoveable property in the amount of R875 000.

22. The respondents argue that acting as both trustee and business rescue

practitioner of the only creditor did not create a conflict of interest. They argue that the applicants misunderstand the obligations of the trustee in the insolvent estate.

Analysis

23. Firstly the first respondent is one of two trustees. He alone did not determine how the assets of the insolvent estate would be dealt with, and no evidence was provided suggesting any conflict of interest in the case of the second trustee. The concerns which the applicants raise regarding the potential consequences of playing two roles, and in particular referring to sections 73(1) and 80(1) of the Act, would only have arisen in a case where he was a sole trustee.

24. The applicants argue that because the first respondent had multiple interests, he worked against the trust and its beneficiaries. By advancing the interests of the sole proven creditor he acted against the trust's interests. However no evidence is provided to support this claim, which is based purely on an assumption by the applicants.

25. The obligations of a trustee of an insolvent estate are set out in the judgment in *Hobson NO v Abib*[4] as follows:

"Granted that the trustee occupies a position of trust towards the insolvent, the object of the Insolvency Act is to ensure the due distribution of the insolvent's assets among his creditors in the order of their preference, and it is the trustee's function to achieve that object. As sequestration is intended to be to the advantage of creditors (see secs. 6 (1) and 12 of the Act) the trustee cannot be said to be acting improperly or in breach of his trust if he takes all lawful steps in his power to ensure that it is the creditors rather than the insolvent who benefit from the sequestration. (emphasis added). In the present case the trustee has stated that he intends to do just that, and says, in effect, "If that means I am biased or prejudiced in favour of the creditor and against the insolvent, so be it." I consider that to be a perfectly proper attitude for him to adopt."

26. The respondents argue that the only grounds upon which the applicants could contend that the first respondent was disqualified to act as a trustee is in terms of section 55(e) of the Insolvency Act, which provides for the disqualification of a trustee who has an interest opposed to the general interest of the creditors. As there was only one proven creditor in this case this concern does not arise.

27. The interpretation of the disqualification provisions in our insolvency legislation sheds some light on what types of conduct could be regarded as unacceptable, in particular conflict of interest, in a case where a trustee of an insolvent estate is also closely associated with a creditor.
28. In *Pretoria Estate Co Ltd v Rood's Trustees*[5] the Court considered facts similar to the present case, in an application to remove a trustee. Here a bank manager of a bank that was a secured creditor of an insolvent estate had been elected trustee of an insolvent estate. The application for his removal was based on the grounds that the bank's interests were opposed to those of the remaining creditors. The Court held that in the absence of proof of some positive act of misconduct or some act amounting to negligence on the part of the trustee, or in the absence of proof of some undue influence by the bank resulting or likely to result in misconduct or negligence on the part of the trustee, the application must be refused.[6] The mere fact that he was the bank manager and the bank was to a certain extent interested in the liquidation of the estate, was not enough, because, as stated by the Court[7]:

"Nowhere does the law say that a person, who is the nominee of a creditor who has a particular interest, shall be excluded from the trusteeship, or that, having been appointed, he can be dismissed from it. As our courts have repeatedly held, a trustee in insolvency is personally answerable to the Court.

Directly he obtains this Court's confirmation of his appointment as trustee he no longer acts in any representative capacity, he is no longer regarded as the nominee of the creditors who elected him, or as the secretary of a company, or the manager of a bank."

29. The Court went on to state that it would require an extremely strong case, and would need to be fully satisfied that it is impossible or extremely unlikely that the trustee will be able properly to perform his duties before it would remove such trustee. The Court would need to consider whether, upon the facts brought to its notice upon the affidavits, there is a real and substantial fear that the creditor, may use its influence over the trustee in such a way that he will not be able properly to perform his duties as a trustee. In considering this question the Court asked whether the bank had done anything that it was not justified in doing.[8]
30. As trustee the first respondent had a duty to act in good faith towards the trust in liquidation. The intention of the two trustees in bringing the eviction application was stated to be so as to render the property vacant so that they could sell it at the highest price for the benefit of the sole proven creditor, Bondpro Finance which had proved its claim long before the first respondent became its business rescue practitioner. Selling its sole asset as part of a decision by both trustees, for the highest price, is not conduct that demonstrates undue influence by Bondpro Finance that would be likely to result in misconduct or negligence on

the part of the first respondent, to the extent that he could not properly perform his duties. There is no evidence that he conducted

the business of the insolvent trust. If he had intended to do so he could in any event have obtained the authorisation of the Master and did not need the permission of the creditors.

31. No evidence has thus been provided to support the conclusion that the first respondent, in playing the two roles, acted fraudulently and dishonestly, and that failure to inform the Court that he was the business rescue practitioner of Bondpro Finance was fraudulent or dishonest conduct. Further, no basis has been provided to support the claim that the Court, had it known of first respondent's two roles, would have come to a different conclusion regarding the decision to grant an eviction order, nor do I think it would have.
32. Given the attitude of our courts regarding disqualification of trustees under the Insolvency Act discussed above, the Court would have had little interest in the relationship between one of the trustees and the main creditor, unless there was some misconduct, or an interest opposed to the general interest of the creditors involved, and none has been proved to exist.
33. The basis of an application for rescission based on new information, fraud and dishonesty has therefore not been established by the applicants.

The offer to purchase

34. The applicants final contention is that Mrs Tsie Ella Makgoba purchased the property from ClareMart Auction Group on the 3rd February 2014 and paid R47 000 to this entity. Thereafter however the property was sold to Mrs Bridgette Phaswane Maleka for R59 200 on the instructions of the first and second respondents. This information was not available to the applicants at the time of the application for eviction and would have constituted a defence to the eviction application.
35. These allegations are disputed by the respondents who describe an auction type sale where a higher offer than that of Mrs Makgoba was agreed to be acceptable in the sale process, after Mrs Makgoba failed to come up with an offer greater than that of Ms Maleka. Further, the offer to purchase was never signed by the trustees and hence respondent argues it failed to give rise to any binding obligations.
36. It is also disputed that the applicants were unaware until after the eviction of her purchase of the property as she is directly related to the applicants. Finally the respondents state that the applicants have failed to show how an agreement of sale to Ms Makgoba who is not one of the applicants would somehow constitute a lawful defence in the eviction application.
37. This basis for rescission was not persisted with by the applicants in their heads of argument. The respondent's arguments have merit. I conclude that the applicants have failed to establish a defence to their eviction based on Ms Makgoba's offer to purchase the property and payment of a deposit, in the circumstances in which it took place.
38. The applicants have therefore failed to establish a bona fide defence to the application for their eviction.

39. Finally I pause to reflect on the conundrum that if the eviction order is rescinded and the applicants contend that the postponement order was validly granted, it is not clear what purpose will be served thereby, as the postponement order gives the applicants have one month to vacate the premises and they have already been evicted. The applicants should have applied to rescind both judgments in order to secure any relief based on the facts they allege but would still have had to satisfy the requirements for rescission.

The application for rescission is therefore dismissed with costs.

A ANDREWS

ACTING JUDGE OF THE HIGH COURT

DATE HEARD

: 4th February 2019

DATE DELIVERED

: 29th April 2019

FOR THE APPLICANTS : ADV MG SKHOSANA

INSTRUCTED BY

: STEVEN MAGORO ATTORNEYS

FOR THE RESPONDENTS : ADV RJ BOUWER

INSTRUCTED BY

: GA RANKUWA JUSTICE CENTRE

[1] Condonation ought to be refused if the proceedings lack merit See Harms, D Civil Procedure in the Superior Courts Part B at B 27.7

[2] A2 -95 Vol 1 Service 6 2018

[3] 2017(2) SA 622 (CC).

[4]

[1981] 1 AU SA 198 (N) at page 202

[5] 1910 TS 1085

[6] At page 1093

[7] At page 1090

[8] id

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