

SOUTH AFRICA / JUDGMENT

Mdlalana v van der Decken NO and Others (3777/2016) [2016] ZAECHGHC 154 (15 November 2016) [2016] ZAECHGHC 154

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Roberson

CASE / FILE NUMBER

3777/2016

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 3777/2016

DATE HEARD: 10/11/2016

DATE REASONS AVAILABLE:

15/11/2016

In the matter between

MZOXOLO MDLALANA APPLICANT

and

BRIAN VAN DER DECKEN N.O. 1ST RESPONDENT

EUGENE LETTON OSTERLOH N.O. 2ND RESPONDENT

ERA SUN PROPERTIES 3RD RESPONDENT

MASTER OF THE HIGH COURT 4TH RESPONDENT

REGISTRAR OF DEEDS, KING WILLIAMS TOWN 5TH RESPONDENT

REASONS FOR ORDER

ROBERSON J:-

[1] On 10 November 2016 I made the following order:

“1. THAT the point in limine of non-joinder is hereby upheld. The application is postponed to 15th December 2016 and the rule is extended accordingly, pending the joinder of the heirs and beneficiaries in the estate of the late

Templeton Mdlalana.

2. THAT the Applicant is to pay the costs of today’s hearing.

3. THAT the reasons for this order will follow.”

[2] The reasons for the order now follow.

[3] The applicant is one of the heirs in the estate of the late Templeton Mdlalana. The other heirs are his mother, the surviving spouse of the deceased, and his three siblings. The first respondent is the executor in the estate. The first respondent concluded an agreement of sale of immovable property, an asset in the estate, with the second respondent. The surviving spouse, who was married to the deceased in community of property, was also a signatory to the agreement. The applicant obtained a rule nisi interdicting the transfer of the property to the second respondent, and other relief. The applicant maintains that it had been agreed between the heirs that the property should be transferred into his name. According to the first respondent’s answering affidavit, although there was initial agreement, he was instructed by the surviving spouse and one of the siblings to proceed with the sale to the second respondent.

[4] The first respondent raised a point in limine of non-joinder of the other heirs in the estate. It was agreed on the return date that this point would be argued separately. It was submitted on behalf of the first respondent that the other heirs had a direct and substantial interest in the subject matter of the application.

[5] On the other hand it was submitted on behalf of the applicant that only the executor has legal capacity to deal with the assets in the estate and the heirs are not vested with such authority. Further, there had been a family resolution that the property would be sold to the applicant and therefore none of them would be prejudicially affected if the order was granted.

[6] In *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (CPD) at 415 E-H, Corbett J, as he then was, set out the law relating to joinder as follows:

*“It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see *Amalgamated Engineering Union v Minister of Labour*, 1949*

(3) SA 637 (AD); *Koch and Schmidt v Alma Modehuis (Edms.) Bpk.*, 1959

- (3) SA 308 (AD). In *Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers*, 1953
- (2) SA 151 (O), *HORWITZ, A.J.P. (with whom VAN BLERK, J., concurred)* analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169) -

'... an interest in the right which is the subject-matter of the litigation and... not merely a financial interest which is only an indirect interest in such litigation'.

This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division (see *Brauer v Cape Liquor Licensing Board*, 1953

- (3) SA 752 (C) - a Full Bench decision which is binding upon me - and *Abrahamse and Others v Cape Town City Council*, 1953
- (3) SA 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see *Henri Viljoen's case*, *supra* at p. 167)."
- [7] All the heirs in the estate have a right to inherit his or her share in the estate. The subject matter in this application is an asset in the estate. The sale of the asset to the applicant or to the second respondent will have an effect on the heir's right to his or her particular share. Merely because the executor has powers in respect of the assets of the estate, does not mean that he is the only person with a direct and substantial interest in the distribution of the assets of the estate.
- [8] In *Fakroodeen v Fakroodeen and Others*, NNO 1971 (3) SA 395 (D&CLD) the applicant was an heir in the estate and brought an application against the executors for an order, *inter alia*, that they realise certain immovable property in the estate. The heirs in the estate were not joined as respondents. At 397E-F Leon J said the following:

"It is clear from the papers that each of the heirs has a right to delivery of his or her share of the residue of the estate. The order sought relates to the subject-matter of that right. That subject-matter is immovable property. The order which the applicant

seeks involves the substitution for that immovable property of the proceeds to be derived from a sale thereof. In these circumstances it appears to me that each heir has a most material interest in these proceedings."

- [9] In my view and having regard to the subject matter of the application, the other heirs in the estate have a legal interest in

the subject matter of the application which could be prejudicially affected by the court's judgment. In particular in this matter there is an apparent dispute about the wishes of all the heirs relating to the sale of the property to the applicant or to the second respondent. To submit that the heirs had agreed to sell the property to the applicant ignores the dispute on the papers and prematurely delves into the merits of the application.

[10] These were my reasons for the order.

J M ROBERSON

JUDGE OF THE HIGH COURT

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