

SOUTH AFRICA / JUDGMENT

Mulder v Fourie N.O and Others (66730/17) [2020] ZAGPPHC 210 (12 May 2020) [2020] ZAGPPHC 210

COURT

North Gauteng High Court, Pretoria

BEFORE

C.J. Collis

CASE / FILE NUMBER

66730/17

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE:

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

CASE

NO: 66730/17

12/5/2020

In

the matter between:

EMANUEL
MULDER
APPLICANT
and
JOSEPH
MARKUS FOURIE N.O.
(ID
NO: [...])
(In
his capacity as trustee of the Joey Fourie Trust)
FIRST RESPONDENT
(In
his capacity as a trustee of the Joey Fourie Trust)
SECOND RESPONDENT
(In
his capacity as a trustee of the Joey Fourie Trust)
THIRD RESPONDENT
DEON
NEL
FOURTH RESPONDENT
REGISTRAR
OF DEEDS, PRETORIA
FIFTH RESPONDENT

JUDGMENT

COLLIS J:

INTRODUCTION

1. This is an opposed application wherein the applicant seeks an order directing the first to third respondents jointly referred to as the Trust), to transfer certain immovable properties into his name.
2. The sole basis for the above relief is a judgment handed down by Prinsloo J on 13 October 2014, wherein the fourth respondent (Nel), as applicant, was the successful party. Mulder elected not to participate in that application.
3. The above judgment emanates from an application launched by Nel during 2013, wherein he sought to declare void the sale agreement concluded between the applicant herein (Mulder) and the Trust and wherein simultaneously, he sought an order to compel the Trust to transfer the property back into his name.
4. In terms of the judgment so handed down by Prinsloo J, Nel obtained relief wherein the court ordered that the Registrar of Deeds

Pretoria, is to cancel the registration of the deed of transfer concerning four immovable properties in the Deeds Office Pretoria,

into the name the Trust. The order directed that the registration of transfer of the four immovable properties that occurred on 18 May 2012, from the name of the applicant (who was the first respondent) in those proceedings, be cancelled.

5. In the present proceedings whilst the main relief sought is also directed as against Nel, the applicant merely seeks costs against him in the event that he opposes the application.

THE

FACTS

6. It is now convenient to set out the facts. The applicant (Mulder), up until 18 May 2012, was the registered owner of four immovable

properties forming the subject matter of this application.[1]

7. On or about 12 August 2011, Mulder together with Nel concluded a written lease agreement in terms whereof the property of Mulder at the time, was let to Nel. The lease in question commenced on 1 October 2011 and expired on 30 September 2016. It further contained an option and pre-emption clause which could be exercised at the election of the tenant (Nel). [2]
8. A few months thereafter and before the expiry of the lease, at around 24 September 2011, Mulder as registered owner concluded a written agreement of loan with the Trust. The loan agreement recorded that the Trust lent and advanced an amount of R 4 463 000.00 to Mulder who was required to repay this amount together with interest thereon by no later than 24 February 2012. It further provided for the registration of a mortgage bond in order to secure this debt.[3]
9. By the appointed due date, the repayment of the loan had not occurred. A sale agreement for the property was subsequently concluded between Mulder and the Trust in order for Mulder to settle his indebtedness to the Trust. This agreement of sale was concluded on 29 March 2012, for the agreed indebtedness in terms of the loan agreement in the amount of R 6 757 450.00. The purchase price was paid by way of set off and simultaneously the parties concluded a separate option agreement permitting Mulder the option to repurchase the property, which option he had to exercise by no later than 27 February 2013.[4]
10. What followed thereafter was the transfer of the properties into the name of the Trust on 18 May 2012. This pursuant to the sale agreement having been concluded with Mulder.[5]

11. On 13 October 2014 as mentioned, Prinsloo J handed down his judgment, wherein this sale agreement between Mulder and the Trust was declared void. Thereafter, the Trust being the unsuccessful party in those proceedings, sought leave to appeal the judgment of Prinsloo J, which leave was granted by the court.[6]
12. However, notwithstanding the leave to appeal having been granted, the Trust never prosecuted the appeal and on 29 May 2015, the Trust and Nel concluded a settlement agreement.
13. It terms of the settlement agreement so concluded, it provided amongst others that:
 - 13.1 The applications under case no. 49102/2013 and case no. 16614/2014 referred to in the founding affidavit being settled during May 2015;
 - 13.2 clause 1 of the agreement provided that Nel abandoned, the whole of the Prinsloo judgment and all the orders granted on 13 October 2014;
 - 13.3 the parties further agreed that Nel would purchase the properties from the trust for a purchase price of R 15 040 524.00 plus VAT; and
 - 13.4 that the Trust will not proceed with the prosecution of its appeal.[7]
14. It is noteworthy that Mulder, albeit that he was cited in the heading of the settlement agreement, was not a party nor a signatory to the said settlement agreement. The settlement agreement was exclusively concluded between the Trust and Nel.

That being said, the terms of the settlement agreement was however communicated to Mulder's attorney of record on 9 July 2015.[8]

On 5 August 2015, the property was thereafter registered in the name of Nel as provided for in the settlement agreement concluded between the parties as mentioned supra.[9]

On 28 September 2017, Mulder launched the present application.[10]

ISSUES

TO BE DETERMINED

18. The main issues that this court was called upon to determine can succinctly be recorded as follows:
 - 18.1 whether this court has the necessary jurisdiction to determine this application;
 - 18.2 whether Mulder had knowledge of the settlement agreement, and if so, whether he is entitled to now seek enforcement of the order of Prinsloo J, despite the fact that the properties were subsequently registered into the name of Nel;
 - 18.3 whether Nel, by concluding the settlement agreement to the exclusion of the applicant, had effectively abandoned the order of Prinsloo J.

Jurisdiction

19. At the outset it should be mentioned that this court's alleged lack of jurisdiction was a point in limine raised by only the fourth respondent in these proceedings.
20. In this regard counsel on behalf of the fourth respondent submitted that this court lacked the necessary jurisdiction to adjudicate the present application as the properties in question are all situated outside the area of jurisdiction of this Court.
21. This assertion is further supported by the fact that none of the respondents are resident or carrying on business within the court's jurisdiction.
22. In addition to the above, it was argued that the applicant further failed to allege and prove the facts necessary to establish jurisdiction.
23. It was on this basis that it was contended that this court lacked the necessary jurisdiction to adjudicate the present application and as a consequence thereof it was submitted that the application falls to be dismissed with costs.
24. On the question of jurisdiction, it is indisputable that the relief sought in the present application is for the enforcement of an order of this court, that is the order of Prinsloo J. In terms of this order, the Registrar of Deeds, Pretoria, as mentioned, was ordered to give effect to an order of this court, which would have resulted in the retransfer back of the properties into the name of Mulder.
25. It is trite law, that a High Court has jurisdiction to enforce its own orders.[11] In the present case the immovable properties in question were previously registered in the Deeds Office, Pretoria, and remained so registered albeit that now it is registered in the name of Nel.
26. Furthermore, where there has been non-compliance with a court order and a party affected by such court order seeks compliance with the order; it must follow that the court that granted the order will have jurisdiction to adjudicate over an application to enforce its own order.
27. It matters not, whether the respondents are all residing or carrying on business outside of this court's jurisdiction, nor is it of relevance that the properties are all situated outside of this court's jurisdiction.
28. On the strength of what has been set out above, I cannot conclude that the point in limine has any merit and consequently the point in limine raised by the fourth respondent is dismissed with costs, including the costs of senior counsel.
29. As mentioned supra, during 2013, Nel launched proceedings to declare void the sale agreement between Mulder and the Trust. At the time when the sale agreement was so concluded, Nel, had the first option to purchase the immovable property from the applicant.

30. Mulder, as mentioned, did not partake in those proceedings, adopted a passive attitude and as such acquiesced to the outcome of that application.[12] He also subsequently, did not appeal the judgment by Prinsloo J.
31. On 13 October 2014, the judgment by Prinsloo J was handed down and at that stage by then, the properties were registered into the name of the Trust.
32. What followed thereafter, constitute steps taken subsequent to this judgment by Prinsloo J. More specifically on 5 August 2015, the properties were registered into the name of the Nel, following a settlement agreement between Nel and the Trust. This was the status quo when the present application was launched.
33. The conclusion of a settlement agreement between Nel and the Trust was brought to the attention of the applicant's attorney of record under cover of an email dated 9 July 2015.[13] At the same time, the settlement agreement concluded between Nel and the Trust was dispatched to him.
34. In his Replying affidavit, the applicant however contends, that it was only upon receipt of the Answering affidavit that he became aware of the conclusion of the settlement agreement referred to above, which ultimately resulted in the registration of the properties into the name of Nel.[14]
35. In this regard the applicant however fails to explain the reasons why, when his attorney Mr Grosskopf, when furnished with the settlement agreement on 9 July 2015, failed to inform him of the terms contained therein, or better still to challenge the abandonment by Nel of the Prinsloo judgment or any orders made in terms of that judgment.[15]
36. His attorney, Mr. Grosskopf in support of the above, deposed to a confirmatory affidavit and he too was remiss to deal with this aspect explicitly in his affidavit.[16]
37. It as a result must follow that knowledge by his attorney, Mr Grosskopf must be imputed to the Applicant,[17] and consequently, I cannot but conclude that the applicant indeed had knowledge of the settlement agreement at the time that it was concluded.

Abandonment of a

judgment

38. The applicant inter alia contends that this transfer was effected purely as part of a scheme in order to attempt to render the Prinsloo judgment incapable of implementation and to circumvent him .
39. Furthermore , that the Trust and Nel, in any event, had no right or power to compromise or abandon his rights arising from a judgment of this Court, which he now seeks to enforce by way of the present application. He did not abandon any rights arising from the Prinsloo judgment, to which at all material times he was a party to.[18]

40. Rule 41(2) prescribes the procedure for the abandonment of a judgment. It reads as follows:

"(2) Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of subrule (1) relating to costs shall mutatis mutandis apply in the case of a notice delivered in terms of this subrule."

41. Now in the present instance, the Prinsloo judgment emanates from proceedings initiated by Nel, and in which proceedings Nel, was the successful party. It thus follows that at best it would be Nel who accrued the right to abandon either the whole or part of the Prinsloo judgment and not the applicant as contended for by him. This assumption made by Mulder that his consent and co-operation was necessary in order to nullify the Prinsloo judgment is accordingly misguided and the argument falls to be rejected.
42. Mr Swart further submitted on behalf of the Trust, that there was no obligation on the Trust and Nel, to include Mulder in the settlement negotiations under circumstances where he elected not to partake in the proceedings, notwithstanding having been cited as a respondent in the proceedings initiated by Mr Nel. Furthermore, that Nel and the Trust were perfectly entitled to conclude an agreement in settlement of their dispute without involving Mulder and in the event of them electing to make their settlement agreement an order of court, such court order would have been binding on him.[19] I agree with this argument proffered by counsel on behalf of the Trust.

Legality of the relief sought by the Applicant

43. In further evaluating the validity of the relief sought by the applicant, more precisely prayer 1 of the Notice of Motion, it is noteworthy to have regard to the provisions of section 6 of the Deeds Registries Act, Act 47 of 1937. The relevant section is quoted hereunder for ease of reference:

"6 Registered deeds not to be cancelled except upon an order of court

- (1) Save as is otherwise provided in this Act, or in any other Jaw no registered deed of grant, deed of transfer, certificates of transfer or deed conferring or conveying title land or any real right in land other than mortgage bond, and no cession of any registered bond, and no cession of any registered bond shall be cancelled by a registrar except upon an order of court.
- (2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in subsection (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed."

44. It should be borne in mind that the purpose of the registration of immovable property in the Deeds Office, which is a public office, is to keep public records of registered immovable properties. They also provide information about the identity of the registered owner of property, the purpose of which is to inform the public whether such a person may transact in the alienation of such property.
45. From the section quoted above, if indeed the present deed of transfer of the properties (presently registered into the name of Nel) is now to be cancelled to give effect to the judgment by Prinsloo J, the properties would then be registered into the name of the Trust and not fall to be registered into the name of the applicant.
46. This is so as the deed under which the land was held immediately prior to the registration of the deed into the name of Nel, is a deed registered into the name of the Trust and not a deed registered into the name of Mulder.
47. In addition to the above, the founding affidavit fails to provide any factual or legal basis for the relief sought in prayer 1 of the Notice of Motion. This in circumstances where presently Nel is the registered owner over the properties, and not the Trust. It is also significant that at no stage during the hearing of the application, did the applicant seek an amendment of his notice of motion to bring such prayers in line with the evidence as set out in the affidavits. This failure to amend the prayers in his notice of motion will prove to be fatal.
48. In addition further, the founding affidavit is also evidently silent as to what steps the applicant took earlier, if any, to enforce the order issued in consequence of the Prinsloo judgment.[20] After all, the Prinsloo judgment ordered the Registrar of Deeds, (although not cited in those proceedings) to cancel the registration

of four immovable properties at the time registered into the name of the Trust and this would have, if complied with at the time, resulted in the properties having to be retransferred into the name of the applicant.

49. The failure by the applicant to address this aspect in his founding affidavit is also of significance, as it points to his bona fides by which he now approaches this court.
50. Any order made by a court, including the order made by Prinsloo J, should as soon as it was made be readily enforceable.[21] In other words the order must give finality to the dispute between the parties and not leave compliance therewith to the discretion of the party who is expected to comply with such an order.
51. Furthermore, having regard to the principles espoused in the decision *Eke v Parsons* 2016 (3) SA 37 (CC) a court judgment cannot just be ignored. This court is in full agreement with this sentiment. However, in casu the applicant's failure to approach this court earlier in order to give effect to the Prinsloo judgment is of significance, as with the effluxion of time and as things stand presently, the properties are now no longer registered in the name of the Trust, but have since 5 August 2015, been registered into the name of Nel.

52. In addition to the above, the applicant's interpretation of the order of Prinsloo J, would lead to untenable consequences in that the applicant would obtain transfer of the properties without now having to pay a cent therefor. On the applicant's own version he had sold the properties to the Trust and which obligation to pay was discharged by way of set off at the time.[22] It is this sale that was set aside by the Prinsloo order. It is also noteworthy that at present the applicant does not tender to pay back the money received by him for the sale of the properties to the Trust. He has also stated unequivocally, that there exists no obligation on his part to tender paying back the purchase price paid by Nel to the Trust.[23] So it follows, by him succeeding with the present application he would stand to benefit twice. This absurd results could neither be what the judgment of Prinsloo J sought to achieve nor can it be in the interest of justice.
53. Consequently, I cannot but conclude that the relief sought by Mulder cannot now be legally given effect to, and it therefore must follow that the application must fall to be dismissed.

ORDER

54. Accordingly, I make the following order: -

54.1 The point in limine raised by the fourth respondent is dismissed with costs, including cost upon the employment of senior counsel;

54.2 The application is dismissed with costs on an Attorney and Client scale.

54.3 The costs in paragraph 54.2 to include the costs consequent upon the employment of two counsel in respect of the first to third respondents and in respect of the fourth respondent the costs of one counsel.

C.J. COLLIS

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

Appearances as follows:

Counsel for the Applicant

: Adv. C.M. Eloff SC

Attorney for the Applicant

: Grosskopf Attorneys

Counsel for the First to Third Respondents : Adv B.H.Swart SC

Attorney for the First to Third Respondents : Tim Du Tait & Co. Inc

Counsel for the Fourth Respondent

: W.F. Pienaar SC & N.C Hartman

Attorney for the Fourth Respondent : Maree & Bernard Attorneys

Date of Hearing

: 14 November 2019

Date of Judgment

: 12 May 2020

Judgment

electronically transmitted

- [1] Founding affidavit para 8 p 7-8
- [2] Clause 16 of Lease agreement p 26
- [3] Founding affidavit para 11 p 8-9; Annexure "FA2", p 28-41
- [4] Founding affidavit para 14 p 10-11; Annexure "FA3" p 42-57
- [5] Founding affidavit para 15 p 11
- [6] Answering affidavit par 10.1p 105; Annexure "AA 14.1" p 154
- [7] Annexure "AA 8" p 126-131
- [8] Annexure HAA7" p 124-125; Replying affidavit para 7.3.1 to 7.3.5
- [9] Answering affidavit para 2.1 p 96; Annexures "AA3-AA6" p 114-123
- [10] Notice of Motion p 1
- [11] TC v SC 2018 (4) SA 530 (WCC) at 545; Estate Agents Board v Lek 197913) SA 1048 (A) at 1067D-E
- [12] Founding affidavit para 19 p 13
- [13] Answering affidavit para 2.2 p 97
- [14] Replying affidavit para 5.3 p 212
- [15] Annexure "AA8" P 126
- [16] Annexure "RA3" P 234
- [17] Momentum Group Ltd v Van Staden NO and Another 2010 (2) SA 135 (SCA) at paragraph 18
- [18] Replying affidavit para 5.4 p 212
- [19] Annexure "AA8" Clause 13 p 130
- [20] Founding affidavit para 27 p 15

[21] Weiner NO v Broekhysen 2001 (2) SA 716 (C) at 722J-723A

[22] Founding affidavit para 14 & 15 p 11

[23] Replying affidavit para 22.9 p 228

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