

SOUTH AFRICA / JUDGMENT

Naidoo and Another v Chetty and Others (6546/06) [2009] ZAKZPHC 84 (1 December 2009)

[2009] ZAKZPHC 84

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Steyn

CASE / FILE NUMBER

6546/06

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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG REPUBLIC OF SOUTH AFRICA

Case No: 6546/06

In the matter between

Rubindren NaidooFirst Applicant

Ragini NaidooSecond Applicant

and

Sargan Velu ChettyFirst Respondent

Rhona Helen ChettySecond Respondent

U.J VatherThird Respondent

Subash MaikooFourth Respondent

Mohammed Ashraf Cassim N.O.Fifth Respondent

Dawood MohammedSixth Respondent

The Registrar of Deeds for

The Province of KwaZulu-NatalSeventh Respondent

Standard Bank of SA LtdInterested Party

JUDGMENT

Delivered on: 1 December 2009

STEYN J

[1] This is an application brought by first and second Applicant, to obtain an order whereby a portion of a property described as Portion 5 (of 1) of Erf 153, Pietermaritzburg, Registration Division FT in extent 2322 m², namely Portion 91 (of 5) of Erf 153, Pietermaritzburg, situate in the Msunduzi Municipality, Registration Division FT, in extent 1105 m² (hereinafter referred to as ‘the Property’) be registered in their names. Further that all interdicts noted against the property be removed or purged. The following interdicts are presently registered against the main property,¹ and recorded by the Registrar of Deeds:

“:I 1344/2007 AT-V.J. Vather versus S. V. Chetty.

:I 976/2007 AT-Mohammed Dawood versus S.V. Chetty.

:I 5392/2008AT- Subash Maikoo and Associates versus S.V. Chetty.

:I 5576/2008AT-Mahommed Ashraff Cassim NO and others Versus S.V. and R.H. Chetty.

:I 2470/2008 LG-Withdrawal of diagrams S.G 2783/1991 and S.G. 1901/2005.

:I 4351/2009 I-Interdict in relation to Notice of Motion Case No 6546/2009.”

[2] The applicants have based their right to the property on an order granted by this Court which ordered the first and second Respondent to effect transfer of the property described as Portion 91 (of 5) of Erf 153, to the Applicants. The order reads as follows:²

“It is ordered (by consent) that:

Defendants perform, forthwith, any further steps that have to be performed in order to complete the subdivision referred to in paragraph 9.5 (at page 8) of the sale agreement, referred to at 5 of the Particulars of Claim.

Should Defendants fail to perform such steps within seven days of written demand, then Plaintiffs are authorised and permitted to perform such steps, provided that this paragraph does not derogate from any right that Plaintiffs may have to claim from Defendants any costs related to the performance for any such steps.

Any party may take the steps required to obtain the certificate required under section 18(4) of KZN Ordinance No. 14 of 1936 in respect of the subdivision.

Any party who obtains such certificate shall immediately furnish this to K. Ramkaran & Co. (“the Conveyancers”).

Plaintiffs shall within two months after the certificate has been so furnished:

lodge with the conveyancers a bank guarantee to secure payment of the balance of the purchase price in the sum of R150 000.00.

deliver to Defendants’ attorneys copies of such bank guarantee.

Defendants on request, sign all documents and to perform all steps necessary to pass transfer to Plaintiffs the property described as Portion 88 of Erf 153, Pietermaritzburg, Registration Division, FT situate in the Province of KwaZulu-Natal.

Should Defendants fail, within five days after demand, to perform any of their obligations due in terms of this agreement, then the Sheriff of this Court is authorised and directed to take such steps on behalf of Defendants.

Defendants pay jointly and severally, the costs of this action.”

- [3] The Fifth Respondent opposed the application on the basis that he would be prejudiced if the property is subdivided, and if such division gets registered in the names of the Applicants. It has been contended on behalf of the Fifth Respondent that the property purchased by the Applicants cannot be registered before the interdicts are withdrawn. This contention is in line with the report of the Registrar of deeds which provides as follows:

“3.2 All the attachment interdicts must first be withdrawn by the Sheriff or by the Court before any dealings with the property.”

- [4] Mr Padayachee SC, acting on behalf of the applicants, however, submitted that the applicants are in possession of a real right to the subdivision and he based his submission on various theories supported by various scholars. In contrast to the right of the applicants he contended, the respondent has only a personal right and hence the right of the applicants should trump the right of the Fifth Respondent. Mr Bezuidenhout SC, acting on behalf of the Fifth Respondent, contended differently. He submitted that even though the subdivision has been approved, such division has not yet been registered and accordingly the applicants have only a contractual right to demand transfer. In order to get the property registered, the interdicts must be withdrawn or uplifted.³ At the most so it is argued, the applicants have a *ius personam ad rem acquirendam*.⁴

- [5] Mr Padayachee relied on *Fine Wool Products of SA, Ltd, and Another v Director of Valuations* (1)⁵ inter alia in support of his contention that a real right should attach to the thing itself, and thus running with the thing’. In my view the *Fine Wool* case is distinguishable from the applicant’s case, especially since the property in *casu* is not burdened with a mere idea of a law suit, but in fact burdened by real court interdicts. In the *Fine Wool* case Reynolds J dealt with this consideration as follows:

“We are dealing with something that cannot be allowed in law to affect the value of the land even if it did exist, and still more could not affect the value of the land if it did not exist. If we were to allow a mere idea of a law suit to be taken into consideration by the valuator in such a case it is difficult to know where we must stop, and any baseless but strong assertion of the existence of something that is not allowed in law to affect the value of the land could be taken into account.”

[6] Having perused the papers, and after due consideration of all the arguments by counsel, I am not persuaded that the Fifth Respondent would not suffer prejudice if the property is subdivided and the division referred to as Portion 91 (of 5) of Erf 153 is transferred and registered in the Applicants' names and the interdicts be registered against the 'Remainder of Portion 5 of Erf 153', of the property.

[7] Accordingly the following order is made:

The application is hereby dismissed.

Applicants to pay the costs of the application.

Steyn, J

Date of Hearing: 11 November 2009

Date of Judgment: 1 December 2009

Counsel for the Applicants: Adv R Padayachee SC

Instructed by: Govindasamy & Pillay

Counsel for the Fifth Respondent: Adv PC Bezuidenhout SC

Instructed by: Essa and Associates Attorneys

1Portion 5 (of 1) of Erf 153, shall be referred to as the main property.

2The order which was an order obtained by consent and granted on 19 August 2008 by Hunt J.

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3See Silberburg and Schoeman "The Law of Property 5th edition at 69: "Thus if a (personal) pre-emptive right has been registered against the title deed of the land concerned, the registrar of deeds will not allow a subsequent transfer for land to any person other than the pre-emptor unless a written consent by the pre-emptor has been lodged."

3See Silberburg and Schoeman "The Law of Property 5th edition at 69:

"Thus if a (personal) pre-emptive right has been registered against the title deed of the land concerned, the registrar of deeds will not allow a subsequent transfer for land to any person other than the pre-emptor unless a written consent by the pre-emptor has been lodged."

4 A personal right arising from an obligation.

4

A personal right arising from an obligation.

5 1950

(4) SA 490 (E).

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Prepared on 11 October 2026 · Esheria