

SOUTH AFRICA / JUDGMENT

Nedbank Ltd v Venter NO and Others (15370/2012) [2013] ZAGPPHC 206 (26 June 2013) [2013] ZAGPPHC 206

COURT

North Gauteng High Court, Pretoria

BEFORE

A.A. Louw

CASE / FILE NUMBER

15370/2012

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IN

THE NORTH GAUTENG HIGH COURT, PRETORIA

CASE

NO: 15370/2012

DATE:26/06/2013

In

the matter between:

NEDBANK
LIMITED APPLICANT
and
ETTIENE
MAURITZ VENTER N.O. 1st RESPONDENT
ENVER
MOHAMED IVIOTALA N.O. 2nd RESPONDENT
TSEKE
JOHANNES MPHAHLELE N.O. 3rd RESPONDENT
THE
REGISTRAR OF DEEDS 4th RESPONDENT
TARRYN
DE JONGH 5th RESPONDENT
HENRY
ALEXANDER THOMSON MYERS 6th RESPONDENT
THE
TRUSTEES FROM TIME TO TIME OF
PROPERTY
ONE TRUST 7th RESPONDENT

JUDGMENT

A.A. LOUW J

Introduction

[1] The applicant, Nedbank Limited, seeks the cancellation of two mortgage bonds which were apparently fraudulently registered against

the respective title deeds.

[2] The first and second respondents are sued nomine officio as joint provisional liquidators of Altivex 208 (Pty) Ltd which company owns the one property.

[3] The third respondent is sued in a similar capacity as the provisional liquidator of Four Arrows Investments 257 (Pty) Ltd which company owns the other property.

[4] The fourth respondent is the registrar of deeds, the fifth, ms de Jongh was the conveyancer who saw to the registration of these

properties and the registration of the bonds.

[5] The application is opposed only by the sixth and seventh respondents. The deponents to these affidavits appear to be a husband and former wife and the contents of the two opposing affidavits are similar in most relevant respects.

Common cause facts

[6]

a. The sixth respondent sold his immovable property to Four

Arrows Investments 257 (Pty) Ltd;

b. The seventh respondent's trustee who was previously married to the sixth respondents sold the trust's immovable property to Altivex 208 (Pty) Ltd. Copies of the sale agreements

appear as annexures "ZB4" and "ZB9", the terms of which are not disputed;

c. Nedbank (i.e. the applicant) financed the acquisition of the property by Four Arrows Investment 257 (Pty) Ltd;

d. The acquisition by Altivex 208 (Pty) Ltd was initially financed by Absa Bank but the applicant took over the bond loan during May 2007;

e. The sixth respondent acted as the agent in the sale of the properties and received substantial commissions;

- f. Usufructs were registered against the title deeds of the properties owned by the mentioned companies in favour of the sixth respondent

and the trust controlled by the sixth

respondent's former spouse. In both instances ms Tarryn de Jongh acted as the conveyancing attorney. As the transferee companies did not pay they were both placed in voluntary liquidation by the sixth respondent.

Could the Usufructs be registered?

[7] Although the sixth and seventh respondents claim in their answer as follows in par 12.2:

“/ reiterate that paragraphs 3 and 4 of the agreement of purchase and sale, annexure “ZB9”, provides for the registration of a usufruct in my favour for a period of 20 years against the property. ”

One look at the clauses referred to show that they exist of three lines of calculations which to the ordinary reader thereof will mean nothing. The word “usufruct” or the alleged period of such a usufruct is not even mentioned.

Conclusion on existence of usufruct.

[8] The answer is quite clear that no such usufructs ever came into existence.

I need only in passing referred to the Alienation of Land Act, 65 of 1981, which states that all essential terms of a sale must be clearly stipulated in the signed contract and furthermore section 65(3) of the Deeds Registries Act 1937 as follows:

If the land to be encumbered by a personal servitude is mortgaged or subject to any other real right with which the said personal

servitude may conflict, the bond or other registered deed by which such right is held shall be provided to the registrar together with a consent in writing of the legal holder of such bond or other right to the registration of the said personal servitude and, in the case of a bond, free from the bond.”

[9] Before I proceed to give the order, it is my unfortunate duty to report the conduct of ms Tarryn de Jongh to the Law Society of the Northern Provinces. Enough background detail has been set out above but it is prudent to add references to a few further paragraphs:

- “5.5. Unbeknown to the Applicant, the sixth respondent...

acting as the seller of the immovable property, requested the attorneys tasked with the registration of the bond, De Jongh & Pienaar attorneys, to simultaneous with the bond registration also register a usufruct in favour of the sixth respondent over the property. This request was made to fifth respondent, ms Tarryn de Jongh. ”

To this allegation mr. Myers answers as follows on p 101:

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Ad paragrapgh 5.5:

15.1 I admit that the transferring attorney was instructed to give effect to the usufruct which was properly agreed by the parties and described in the agreement to [sic] purchase and sale

[10] “ZB15”: to the papers is an affidavit by Marlon Stuart practising as a director and attorney of the firm Stuart Van Der Merwe Inc in Arcadia Pretoria. I quote the following subparagraphs from his affidavit:

“1.4. I confirm that I am the only director of Stuart Van der Merwe Inc. Attorneys and that Me. de Jongh (fifth respondent) was previously

employed by me. I also confirm that me [sic] firm is the custodians of the files of the eartwhile firm De Jongh & Pienaar Attorneys.

The partners of this firm were struck from the roll of practising attorneys as such, and in agreement with the Law Society of the

Northern Provinces, I am the custodian of all the old files of this firm.

1.5 The files related to the registration of the bonds and usufructs referred to in the Founding Affidavit are amongst the files over which I have control, I perused the files and supplied the Applicant with all the information it needed to compile its application. I also discussed the matter with Me. Tarryn de Jongh (the fifth Respondent) the attorney involved with this transaction. She confirmed that she received and instructions from the sixth and seventh Respondents to register a usufruct over the property and that se did so without further enquiries.
”

[11] This judgment will be referred to the Law Society of the Northern Provinces and the Director of Public Prosecutions for urgent

investigation into the fitness of the attorney to remain on the roll of practitioners and as far as the DPP is concerned fraud.

Conclusion

[12] There was an application for condonation for the late filling of answering papers which was not seriously contested. The sixth and seventh respondents however will have to pay ail the costs relating thereto.

Order

1. That the fourth respondent is authorised to cancel with immediate effect the usufructs registered against the title deed / bond

documents of the following immovable properties:

1.1 Erf 51, Montana Park, Registration Division JR (T35770/2007)

1.2 Erf 28, Wonderboom, Registration Division JR (T95697/2006)

2. That the first, second, third, fifth and sixth respondents be ordered to pay the cost of this application jointly and severally.
3. The sixth and seventh respondents are ordered to pay the costs relating to their application for condonation for the late filing of their opposing affidavits.

AA LOUW

JUDGE of THE HIGH COURT

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