

SOUTH AFRICA / JUDGMENT

Nel v Be Bruyn and Others (67855/17) [2017] ZAGPPHC 1095 (1 November 2017)

[2017] ZAGPPHC 1095

COURT

North Gauteng High Court, Pretoria

BEFORE

MNGQIBISA-THUSI

CASE / FILE NUMBER

67855/17

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 67855/17

1/11/2017

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

In the matter between:

ANITA

HELENA

NEL

Applicant

and

ANDRIES DE

BRUYN

1st

Respondent

REGISTRAR OF

DEEDS

2nd

Respondent

SHERIFF

OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, PRETORIA

EAST

3rd
Respondent
ABSA
BANK (PTY)
LTD
4th
Respondent
LYNNWOOD
WEG 222 (PTY)
LTD
5th
Respondent

JUDGMENT

MNGQIBISA-THUSI, J

[1] The applicant, Ms Anita Helena Nel ("Ms Nel") seeks on an urgent basis the suspension and stay of the operation and execution

of the judgement and order of Victor J handed down on 9 May 2017 ("the main application").

[2] The first respondent, Mr Andries De Bruyn ("Mr De Bruyn")

opposes the application and also filed a counter-application in terms of which he seeks relief on the following terms:

2.1 that leave be granted for the execution of the order of Victor J pending Ms Nel's possible petition of the Supreme Court of Appeal for leave to appeal; and

2.2 that Ms Nel be ordered to deposit the proceeds of the rental income from the Willows property into the trust account of Mr De Bruyn's attorneys ("the counter-application").

[3] On the day of the hearing of this matter this court and Mr De Bruyn's attorneys were handed an Application for leave to Appeal to the Supreme Court of Appeal in terms of section 17 (2) (b) of the Superior Courts Act[1] read with Rule 6 of the Rules of the Supreme Court of Appeal' ("the petition"). However, there was no indication that the application has been lodged with the registrar of the Supreme Court of Appeal. Mr Prinsloo, counsel for Ms Nel, could also not confirm if same has been lodged.

[4] In view of Ms Nel's petition to the Supreme Court of Appeal, the main application has become moot as the operation and execution of the order of Victor J is in terms of section 18 (1)[2] of the Superior Courts Act ("the Act") suspended pending the outcome of Ms Nel's petition.

[5] The parties will be referred to as they are cited in the main application.

[6] During 2005 Ms Nel and Mr De Bruyn entered into a written partnership

agreement. In terms of the agreement, the partners had agreed, in the main, that two properties, described as Lot No. 474, Glenmore,

KwaZulu Natal ("Glenmore property") and Portion 284 (a Portion of Portion 12) of the farm The Willows No.340, Registration

Division JR, Gauteng, situated in Willowglen, Pretoria ("Willows property"), registered in the name of the Ms Nel would form part of the assets of the partnership.

[7] During 2011 disputes between the partners arose and as a result Mr De Bruyn instituted an action against the Ms Nel under case number 50948/2011. On the day of the hearing of the application, on 11 February 2013, the parties concluded a deed of settlement in which the agreed, inter alia, that:

7.1 the parties acknowledge that they have a partnership in respect of the following two immovable properties, being the Glenmore and the Willows properties.

7.2 as partners they had a 50% interest in both of the two immovable properties.

7.3 Ms Nel was prohibited from disposing or encumbering the two immovable properties without the written consent of Mr De Bruyn.

7.4 the partnership is dissolved upon signature of the settlement agreement.

7.5 in order to determine each partner's financial interest in respect of its 50% interest in the two immovable properties, a referee would be appointed in terms of section 19bis of the Supreme Court Act[3] to debate the accounts of the partners.

7.6 the decision of the referee would be final and binding.

7.7 the settlement agreement to be made an order of court.

[8] On 11 February 2013 the deed of settlement was made an order of court.

[9] Adv. S W Davies SC was appointed as referee and his findings with regard to the Willows property in particular were as follows:

9.1 a partnership existed between Ms Nel and Mr De Bruyn.

9.2 that an evaluator be appointed to determine the fair market value of the Willows property and its improvements as at 11 February 2013.

9.3 that it was not the intention of the parties that the Willows property was to be retained by Ms Nel and be made available for the partnership's use.

9.4 that Ms Nel to pay to Mr De Bruyn half of the net value as determined by the valuator after deducting the outstanding amount of the bond as at 11 February 2013.

9.5 that should Ms Nel fail to pay Mr De Bruyn, the property should be sold for an amount not less than the evaluated value and that the net profits to be shared equally.

9.6 that if the property is not sold on the open market or Ms Nel is unwilling to retain the property, the property to be sold at a public auction .

- [10] Subsequent to the referee's decision Ms Nel launched an urgent application for the review and setting aside of the referee's report, in particular, the referee's finding that Ms Nel is not entitled to the benefit of the starting capital value of the Willows property. In opposing the application Mr De Bruyn filed a counter application in which he sought an order adopting the report of the referee. On 29 June 2016 Makgoka J dismissed the application with costs on an attorney and client basis; granted the counterclaim and further held that 'the report of the referee, Advocate Norman Davis SC , under case number 50948/11, is adopted in whole, without any modifications, in terms of sections 19bis (1) (c) of their Supreme Court that 59 of 1959, read, to the extent necessary, with section 38 of the Superior Courts Act 10 of 2013'.
- [11] Ms Nel's application for leave to appeal Makgoka J's judgement and order was refused on 28 October 2016.
- [12] On 07 March 2017 the Willows property, despite objections from Ms Nel, was sold by public auction. The auction sale was subject to certain conditions, in particular clause 23 thereof in terms of which the seller undertook to provide the purchaser with an electrical certificate of compliance in terms of the electrical installation regulations of 2009. However, it is common cause that before the commencement of the auction, potential buyers were warned about a number of contraventions in relation to zoning rights, building plans, electricity installation. Furthermore, the property was sold voetstoots. It is further common cause that the purchaser, Lynwood Weg 222 (Pty) Ltd ("Lynwood Weg"), was aware of these contraventions when he bought the property.
- [13] After the sale of the Willows property, Ms Nel, in whose name the property was still registered, refused to sign the necessary documentation to give effect to the sale and for the transfer of the property. As a result Mr De Bruyn launched an urgent application to compel Ms Nel to sign the necessary documents for the sale and transfer of the property to Lynwood Weg.
- [14] Due to Ms Nel's refusal to sign the necessary documents for the transfer and registration of the Willows property to Lynwood Weg, Mr De Bruyn launched an urgent application in which he sought an order compelling Ms Nel to sign documentation necessary to effect the sale and transfer of the of the Willow property and that the deputy sheriff be authorised to sign the necessary documents on her behalf in the event that she refuses to sign. Furthermore; Ms Nel was ordered to pay all rentals collected from the Willows property into the trust account of Mr De Bruyn's attorneys who in turn should pay Ms Nel' s indebtedness to the local authority.
- [15] In opposing the application to compel brought by Mr De Bruyn, it was argued on behalf of Ms Nel that the sale agreement pursuant to the auction was null and void in that it Lynwood Weg did not timeously sign the conditions of sale and therefore that the sale had lapsed. In this regard Ms Nel relied on clauses 1.12 and 1.18 of the rules of auction and conditions of

sale[4] It was further argued that it Ms Nel sign the documents because of improvements made to the property were illegal and she would not be able to comply with clause 23[5] of the agreement.

[16] On 9 May 2017 Victor J ordered Ms Nel granted the application and ordered Ms Nel to pay costs of the application on an attorney and client scale.

[17] On 27 September 2017 Ms Nel's application for leave to appeal Victor J's judgement and order of 9 May 2017 was refused.

[18] The issues to be decided are:

18.1 Mr De Bruyn's counter application.

18.2 The costs in the main application.

[19] In the counter application Mr De Bruyn seeks an order in terms of section 18(3) read with section 18(1) of the Act allowing for the operation and execution of Victor J's order of 9 May 2017, pending the outcome of Ms Nel's petition to the Supreme Court of Appeal.

[20] Under the common law[6] the execution of a judgement is automatically suspended upon the notice of an appeal pending. In explaining the purpose of this rule in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[7]:

"... It is today the accepted common law rule of practice ... that generally the execution of a judgement is automatically suspended upon the noting of an appeal with the result that pending the appeal the judgement cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgement. To obtain such leave the party in whose favour the judgement was given must make special application The purpose of this rule as to the suspension of judgement on the notice of an appeal is to prevent irreparable damage from being done to the intending appellant, either by levy under a writ of execution or the execution of the judgement in any other manner appropriate to the nature of the judgement appeal fromThe court to which application was made for leave to execute the judgement pending appeal, had a wide general discretion to grant or refuse such leave and would, inter alia, have regard to the following factors:

(1.) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted.

(2.) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal ... if leave to execute were to be refused.

(3.) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with a bona fide intention of seeking to reverse the judgement but for some indirect propose

(4.) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

[21] Section 18 of the Act now provides that :

"Suspension of decision pending appeal

- (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is in interlocutory order not having the effect of a final judgement, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in subsection (1)-
 - (i) the court must immediately record its reasons for doing so;
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court;
 - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
 - (iv) such an order will be automatically suspended, pending the outcome of such appeal.
- (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules"[8] •

[22] In dealing with the requirements of section 18(3) read with section 18(1) of the Act, in *University of the Free State v Afriforum*[9] the Supreme Court of Appeal held that:

"[10] It is further apparent that the requirements introduced by ss 18 (1) and

- (3) are more onerous than those of the common law. Apart from the requirement of 'exceptional circumstances' in s 18 (1), s 18 (3) requires the applicant 'in addition' to proof on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not made, and that the other party 'will not' suffer irreparable harm if the order is made... Section 18 (3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, in the order is granted"[10]

[23] With regard to the existence of exceptional circumstances warranting the granting of the relief sought Mr Vermeulen argued that Ms Nel was not before this court with clean hands in that:

23.1 despite the order of Victor J compelling her to pay the monthly rentals received from the Willows property into the trust account of Mr De Bruyn's attorneys, Ms Nel has failed to do so and has actually appropriated the rentals for her sole benefit despite having acknowledged not only to the referee but also before Makgoka J and Victor J that a partnership between her and Mr De Bruyn existed in terms of which the partners had 50% interest in the Willows property; and despite conceding that the Willows property formed part of the partnership assets. Mr Vermeulen submitted that the portion of Victor J's order pertaining to the rentals is *res judicata* in that Ms Nel is not seeking to appeal that part of the judgement.

23.2 despite Ms Nel receiving the rentals in the amount estimated at R90, 000 per month for the Willows property, she has failed to honour her obligations to pay the local authority the amounts owing for rates and taxes levied against the property which arrears currently stand at approximately R1, 000, 000, which is not disputed.

23.3 even if Ms Nel successfully prosecutes her appeal, this will not in any way alter her position in that Ms Nel is not attacking the validity of the sale of the Willows property at an auction. Mr Vermeulen contends Ms Nel is only attacking the requirement that the seller is obliged to provide the purchaser with an electrical certificate of compliance. Further it is Mr Vermeulen's contention that in terms of section 3 of the Alienation of Land Act the sale of immovable property by means of public auction is an exception to the requirement that the sale should be in writing and signed by both parties. In this regard reliance is placed on the matter of *Pledge Investments (Pty) Ltd v Kramer N.O*: In restate *Selesnik*[11] where the court stated that:

"Finally, as to the formalities in respect of the Alienation of Land Act 71 of 1969, its provisions are inapplicable to a contract of sale of land by public auction. Here the sale of the property was by public auction and the mere fact that it was then recorded and made effective in the same document, did not render it any less a sale by public option. Hence the signed document cannot be regarded as was contended as being itself the contract of the sale of the property, separate from an independent sale of the auction and which therefore had to comply with the formalities of the Land Act, that the auctioneer signed the document without the administrator's written authority did not therefore invalidate the "recorded sale".

[24] Furthermore, Mr Vermeulen argued that it was appropriate, as proof of the existence of exceptional circumstances, that the prospects of Ms Nel succeeding in the appeal should be taken into account.

[25] With regard to irreparable harm Mr Vermeulen submitted that despite the fact that Ms Nel receives rentals each month for the property, and the rates and taxes for the property and not up to date because Ms Nel is not pay the local authority, any delay in the transfer of the property would lead to an escalation of the debt owed to the municipality which would lead to a depletion of the actual net proceeds derived from any sale. Further it was submitted that

since 2013 attempts have been made to sell the property at an auction without success. The property has now been sold at a market related amount (R13, 000,

000) and a transfer is not effected soon and the purchaser withdraws from the sale, Mr De Bruyn stands to suffer irreparable harm.

[26] Mr Prinsloo, on behalf of Ms Nel, argued that if the order sought is granted, Ms Nel's application for leave to appeal would become academic. He argued that once the Willows property is registered in the name of Lynnwood Weg, Ms Nel would suffer irreparable harm even before the Supreme Court of Appeal adjudicates on the pertinent issues. Mr Prinsloo submitted that the potential harm to the applicant far outweighed the harm Mr De Bruyn would sustain if the property was transferred in that in the event of Ms Nel being successful in the appeal, she would not be able to get the property back. Further that in the event of Ms Nel not succeeding with the appeal, Mr De Bruyn could seek a cost order.

[27] It is common cause that the partnership existed between Ms Nel and Mr De Bruyn and that each had a 50% interest in the partnership. Even though in the main application Ms Nel appears to deny that the partnership existed between herself and Mr the brain and consequently that each had a 50% interest in the partnership, in neither the petition to the Supreme Court of appeal nor the applications before Makgoka J and Victor J does Ms Nel dispute the fact that a partnership existed between herself and Mr De Bruyn. Further, neither does Ms Nel dispute that she and Mr De Bruyn have a 50% interest in the partnership's assets and that the Willows property formed part of the partnership assets.

[28] Before Makgoka J, Ms Nel's only complaint was the fact that she was entitled to the start-up value of the proceeds of the Willows property which should be deducted before any sharing of the proceeds of the property. Moreover, despite the fact that her application for leave to appeal Makgoka J's judgement and order was refused, Ms Nel made no effort since 2016 to petition the Supreme Court of Appeal to appeal the judgement. Even though Ms Nel attempted in the main application to allude to the fact that she intended appealing both the Makgoka J and Victor J judgements, I am not convinced in that the subject matter of the petition to the Supreme Court of Appeal only relates to the Victor J judgement and order.

[29] Ms Nel's contention that the Willows property is the sole property in that she is the registered owner and pays the race in taxes of the property, is misplaced if one takes into account the fact that in the deed of settlement which was made an order of court Ms Nel agreed that the Willows property was a partnership asset to which the partners had a 50% interest. She even went as far as participating in the debatement of accounts by the referee.

[30] Taking into account that for all intents and purposes Ms Nel cannot dispute that a partnership was in existence in which the partners had an equal share in the partnership assets, the fact that the property has been sold to third party and that there is no prospects of Ms Nel succeeding in an appeal in view of the fact that the property was sold voetstoots and that the purchaser has undertaken the risks pertaining to the numerous contraventions he is owner will have to contend with, I am satisfied that Mr De Bruyn has shown sufficient

cause of the existence of exceptional circumstances warranting the order sought to be granted.

- [31] With regard to irreparable harm that could be sustained by either Ms Nel and Mr De Bruyn in the order sought is granted or refused, I am of the view that should the order not be granted, Mr De Bruyn would sustain far more irreparable harm in that he has a buyer for the property which is prepared to buy in spite of all its problems and that if the transfer it is not effected soon, the purchaser will in all likelihood walk away from the sale.
- [32] As pointed out by Mr Vermeulen, Ms Nel's main complaint in the petition and also in the main application is that she is not in a position to sign the conditions of sale because clause 23 thereof requires her to provide the purchaser with an electrical compliance certificate. It is common cause that the Willows property does not and never did have an electrical compliance certificate. However, it is common cause that the purchaser is aware of the fact that the property does not have an electrical compliance certificate. Mr Franciscus Gerhardus De Clercq, a director of Lynwood Weg, has deposed to an affidavit in support of Mr De Bruyn's counter application that he owns a property adjacent to the Willows property and being aware of the problems with regard to non-compliance, he has made it clear that he will not insist on Ms Nel providing Lynwood Weg with the electrical certificate as contemplated in clause 23 of the sale agreement.
- [33] Further if Ms Nel does not succeed in her appeal, it will be difficult to find a buyer who would be prepared buy the property with all its attendant problems. In view of the fact that the partnership has been dissolved, Mr De Bruyn is entitled to his 50% share in the partnership assets. Whether Mr Nel success in her appeal she will not, as correctly pointed out by Mr Vermeulen, be in a better position. She will still be entitled to 50% of the proceeds of Willows property on the basis of the partnership and its terms. Furthermore, Mr Vermeulen argued, on the basis of Ivoral Properties {Pty} Ltd v Sheriff of Cape Town and four others,[12] that even if Ms Nel ultimately succeeds with the appeal, she will not be able to set aside the sale.
- [34] I am therefore started satisfied that Mr De Bruyn has met the requirements of subsections 18(1) and (3) for the order sought to be granted.
- [35] On the issue of costs in the main application, it was submitted on behalf of Ms Nel that costs should be reserved until the intended appeal is finalised. In the alternative it was argued that Mr De Bruyn should be liable for the costs in the main application. Mr Prinsloo submitted on behalf of Ms Nel that Mr De Bruyn's actions necessitated the urgent application in that he refused to give an undertaking that the property would not be transferred to Lynwood Weg pending the decision to petition the Supreme Court of Appeal. Counsel argued that had the undertaking been given it would have made a great difference to the legal costs incurred in bringing the urgent application which has now become redundant .

[36] On behalf of Mr De Bruyn it was argued that costs in the main application should be paid by Ms Nel in that had she filed her petition earlier after her application for leave to appeal was refused, it would not have been necessary for Mr De Bruyn to file a counterclaim.

[37] I am of the view that it would be prudent for the costs in the main application to be reserved pending the finalisation of the appeal process.

[38] In the result, the following order is made:

1. The order of this Court dated 9 May 2017 shall operate pending the outcome of the appeal process.
2. The costs of this application shall be costs in the appeal.
3. The costs in the main application are reserved.

NP MNGQIBISA THUSI

Judge of the High Court

Appearances :

For the Ms Nel: Adv JM Prinsloo

Instructed by: Walker Attorneys Inc.

For the Respondent : Adv PM Vermeulen

Instructed by: JPA Venter Attorneys

[1] Act 10 of 2013.

[2] Section 18 (1) of the Act provides that: "subject to subsections (2) and {3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of the decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal" .

[3] Act 59 of 1959. The section has now been replaced by section 38 of the Act.

[4] Clause 1.12 provides that: 'The sale shall be by the rise and the property shall be sold to the has bidder, subject to the Rules of auction' and clause 1.8 provides that: 'The highest bidder ("purchaser") shall on the fall of the hammer be deemed to have offered to purchase the property for the amount of his or her bid on the terms and conditions contained herein and shall sign the Rules of Auction immediately after the fall of the hammer'.

[5] Clause 23 requires that before transfer of the property is effected, the seller must provide the purchaser with an electrical compliance certificate.

[6] The common law was encapsulated in Rule 49(11) of the Rules of Court which has been replaced by Section 18 of the Superior Courts Act 10 of 2013.

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- [7] 1977 (3) SA 534{A} at 54H-545B - C.
- [8] Section 18 replaced Rule 49 (11) of the Rules of Court.
- [9] 2016 JDR 2151(SCA).
- [10] In Incubeta Holdings (Pty) Ltd and another v Ellis and another 2014 (3) SA 189 (GJ) at 24 the court set out two requirements to be satisfied in order to muster the test in 18 (3) read with the provisions of section 18 (1) of the Act: i) whether or not 'exceptional circumstances' exist; and ii) proof on a balance of probabilities by the applicant of the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and the absence of irreparable harm to the respondent/loser, who seeks leave to appeal".
- [11] 1975 (3) SA 696(0) AT 703 C-D.
- [12] 2005 6) SA 96 C). At (54) the court stated that "... a valid agreement of sale comes into being at a sale in execution at the fall of the hammer on the terms and conditions set out in the Conditions of sale which are displayed, pronounced or read out by the auctioneer".
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Prepared on 11 October 2026 · Esheria