

SOUTH AFRICA / JUDGMENT

Pienaar N.O and Others v Matthysen and Others (UM26/2020) [2020] ZANWHC 45 (5 March 2020) [2020] ZANWHC 45

COURT

North West High Court, Mafikeng

BEFORE

J T Djaje

CASE / FILE NUMBER

UM26/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE

NO: UM26/2020

In

the matter between:

LYDIA

CHRISTINA PIENAAR N.O.

1ST

APPLICANT

WILLIAM

GODFREY SCHICKERLING N.O.

2ND

APPLICANT

WOUTER

DE VOS N.O.

3RD

APPLICANT

And

WILLEM

HENDRIK MATTHYSEN

1ST

RESPONDENT

MARIA

ELIZABETH MATTHYSEN

2ND

RESPONDENT
XINOX
INVESTMENTS (PTY) LTD
3RD
RESPONDENT

JUDGMENT

DJAJE J

[1] This matter came as an urgent application and the following orders sought in the notice of motion:

“1. Dispensing with the forms and service provided for in the Rules of Court and allowing this application to be heard as one of urgency in terms of Rule 6(12)

2. That the First, Second and Third Respondents be ordered to immediately grant the Applicants unrestricted access and control to the property, bearing the following description:

2.1 ERF 1129 VAN DER HOFFPARK EXTENSION 30 TOWNSHIP, REGISTRATION DIVISION IQ, NORTH WEST PROVINCE;

MEASURING 754 (SEVEN HUNDRED AND FIFTY FOUR) SQUARE METRES;

FIRST REGISTERED BY CERTIFICATE OF REGISTERED TITLE NUMBER T.16973/2013 WITH GENERAL PLAN S.G. NUMBER 9028/2007 RELATING THERETO AND HELD BY DEED OF TRANSFER NUMBER T.94779/2017;

2.2 ERF 1130 VAN DER HOFFPARK EXTENSION 30 TOWNSHIP, REGISTRATION DIVISION IQ, NORTH WEST PROVINCE;

FIRST REGISTERED BY CERTIFICATE OF REGISTERED TITLE NUMBER T.16973/2013 WITH GENERAL PLAN S.G. NUMBER 9028/2007 RELATING THERETO AND HELD BY DEED OF TRANSFER NUMBER T.94485/2017;

2.3 ERF 1131 VAN DER HOFFPARK EXTENSION 30 TOWNSHIP, REGISTRATION DIVISION IQ, NORTH WEST PROVINCE;

FIRST REGISTERED BY CERTIFICATE OF REGISTERED TITLE NUMBER T.26685/2014 WITH GENERAL PLAN S.G. NUMBER 9028/2007 RELATING THERETO AND HELD BY DEED OF TRANSFER NUMBER T.4398/2018;

(Hereafter the property)

And forthwith hand over all keys and access controls necessary to gain access to the property;

3. The First, Second and Third Respondents are ordered to forthwith divulge to the Applicants details of the tenants occupying the property together with the copies of all signed leases;
4. The First, Second and Third Respondents are to confirm in writing within 2 days of date of this order, all rental deposits and rental income received over the properties for the following period:
 - 4.1 Er! 1129, all rental deposits and rentals received post 31 October 2019;
 - 4.2 Er! 1130, all rental deposits and rentals received post 8 November 2019;
 - 4.3 Er! 1131, all rental deposits and rentals received post 13 November 2019;
5. The First, Second and Third Respondents are to make repayment of such rentals and rental deposits to the Applicants within seven days of date of this order;
6. The First, Second and Third Respondents are precluded from representing to the tenants and students that they hold the authority of the Applicants as leasing agent;
7. The First, Second and Third Respondents shall be interdicted from inducing tenants to pay and/or to act on the Respondents' authority or otherwise;
8. The First, Second and Third Respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved;
9. Further and/or alternative relief.”

[2] The applicants are trustees in the Pinarski trust which was created to provide an income for the first applicant and her children after the passing of her late husband in 2014. The first applicant was then approached by Patrick Jurgens Marx (“Marx”) who borrowed an amount of five million rand from her. Marx was not able to repay the loan and as repayment of the loan, he transferred his three properties into the name of the Pinarski trust. It was Erf 1129, Erf 1130 and Erf 1131 in Potchefstroom. The properties were registered into the name of the

trust in October and November 2019. Prior to the said properties being transferred into the name of the trust, they had been used for student accommodation. According to the first applicant Marx advised her that the said properties yielded a substantial rental return and that she was going to have an income to take care of her living expenses. After registration of the properties the first applicant was not able to get full control of the properties. This was hampered by the respondents who informed the first applicant that the third respondent was a renting agent and thus responsible for the lease and the placing of the students in the said properties. The first applicant was thus denied information of the rental paid and to whom it was paid.

[3] The respondents’ version was that the said properties were built by them in 2013 next to the university in Potchefstroom to be used as student accommodation. It was six properties three of which were bonded and

the other three unencumbered. The first respondent is a 50% shareholder and director in the third respondent and the other 50%

was previously held by one Mr Mitzi van Vuuren. The third respondent was then mandated to provide rental for the students, to liaise with the university to obtain and maintain accreditation for any bursary students, collect rental, pay the bonds for the other three properties and declare profit to the shareholders. In 2016 Van Vuuren wanted out of the shareholding of the third respondent and his shareholding was sold to Marx. In 2016 Marx became a 50% shareholder and director of the third respondent. The three unencumbered properties were then transferred to Marx in anticipation of future plans between the parties as well as for tax purposes. After the transfer of the properties to Marx the third respondent continued with the mandate as agreed previously.

- [4] According to the respondents, when the properties were transferred to the trust by Marx, they had no knowledge and did not approve of such a transfer. They only learnt in December 2019 that the three properties have been transferred in the name of the trust. The case argued by the respondents was that the third respondent through its mandate and as agreed with Marx, is a bona fide possessor of the three properties and as such the first applicant cannot have control over them even though the trust now has ownership.
- [5] The applicants raised a point in limine that the first respondent had no authority to act on behalf of the third respondent. It is important to deal with this point first to determine if the third respondent is really before this court. The argument advanced by the applicants was that Marx as a 50% shareholder and director deposed to an affidavit that he did not authorise the opposition of the application by the third respondent. As such the first respondent as a 50% shareholder has no authority to act on behalf of the third respondent and should have invoked the provisions of section 163 of the Company's Act 71 of 2008. Counsel referred to the case of *Mall (Cape) (Pty) Ltd v Marino Ko-operasie Beperk* 1957 (2) SA 347 (C) at 351H that some evidence should be placed before court to show that a company has duly resolved to institute proceedings.
- [6] In contention the respondents argued that there was a resolution taken by the third respondent which was handed into court at the commencement of the proceedings authorising the first respondent to act on behalf of the third respondent. The said resolution was taken at a meeting of the third respondent on 26 February 2020 which was attended by the first respondent alone. According to the first respondent an invitation to the meeting was sent to Marx and the purpose thereof explained but Marx did not respond and did not attend the meeting. As a result the first respondent proceeded to hold the meeting alone and take the resolution to oppose the urgent application by the applicants and to appoint the attorneys of record of the respondents.

- [7] The urgent application was served on the respondents on 18 February 2020. The first respondent then deposed to an opposing affidavit on behalf of the third respondent as its shareholder and director on 19 February 2020. At that time no resolution by the third respondent was taken and therefore not attached to the answering affidavit. On 25 February 2020, Marx deposed to an affidavit which was attached to the applicants' replying affidavit. In the said affidavit Marx stated that:

"1. I am a major male businessman and 50% shareholder in the Third Respondent

2. The facts hereinafter contained fall within my own personal knowledge, unless otherwise stated, which are to the best of my belief both true and correct.
3. I have received notice of the present application, as the application had been served upon me in my capacity as shareholder and director of the Third Respondent.
4. As 50% shareholder, I have not agreed to the Third Respondent opposing the application. No resolutions have been signed to this effect.
5. In as much as it is suggested that I have an interest in the application in my personal capacity, such allegations are denied.
6. I was merely the seller of the properties which I acquired from the Third Respondent in 2017.
7. I confirm that the disputes narrated in the affidavit relates to a dispute between myself and the Third Respondent.
8. It is clear that there was no restriction on my ability to transfer such properties as is plain from the power of attorney to pass transfer, coupled with the ultimate registration of the properties in my name This the First Respondent himself has authorized.
9. I reserve my right to deal with those allegations should the First Respondent institute proceedings against me.
10. I specifically confirm that the First Applicant had no knowledge of the disagreement that prevail between the First Respondent and me.
11. On this score, albeit that I am aware of the present application, I do not have any legal interest in the present application for which reason I abide the Honorable Court's findings."

[8] It is clear from the affidavit by Marx that he did receive the notice of the application as a 50% shareholder and is aware of it. He states clearly that as a shareholder he did not agree to the third respondent opposing the application. The replying affidavit together with the affidavit of Marx were emailed to the attorneys of the respondents on 25 February 2020 at 01:14PM. When the first respondent continued with the third respondent's meeting on 26 February 2020, he knew the stance of Marx as the 50% shareholder and director.

[9] In the case of *Mall (Cape)* supra the following was stated:

"Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution.....It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport to be brought in its name have in fact been authorised by it." The court went on further to state that: "The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf".

[10] Section 163 (1) of the Company's Act provides that:

"Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company

163.

- (1) A shareholder or a director of a company may apply to a court for relief if—
- (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
 - (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

[11] The first respondent knew on 25 February 2020 that there is disagreement in relation to the opposing of the application by the third respondent. Despite this knowledge he went ahead and held a meeting during which he took a resolution alone to oppose the application without relying on the provisions of section 163 of the Company's Act which allows a company to approach a Court when the powers of a director or a person related to the company are being exercised in a manner that is oppressive or unfairly prejudicial to the company. There is evidence of a dispute between the first respondent and Marx in relation to the sale of the three properties and as such the third respondent could not have

authorised the opposition of the application. The evidence placed before the Court is such that the first respondent was not authorised to act on behalf of the third respondent and the resolution attached cannot be accepted as a proper one. The first respondent in this matter lacks the authority to act on behalf of the third respondent and in my view the third respondent

is not before Court.

[12] The question is if the third respondent is not before Court, is there any defence on its behalf that should be considered. The first respondent had argued that the third respondent as a bona fide possessor of the three properties has a real right over the ownership by the trust. As I have found that the third respondent is not before Court, I do not see the need for this Court to deal with any case for the third respondent. The point in limine is upheld and as such disposes of the defence raised by the respondents. The application should succeed on the ground that the

trust as the owner of the three properties is entitled to access and control.

[13] At the time the properties were transferred to the trust, it had no knowledge of the dispute between the first respondent and Marx. The trust acted bona fide in acquiring the properties and the first respondent is fully aware of such transfer and ownership. The three properties were properly

transferred to Marx and then to the trust. The first respondent duly signed the power of attorney and the transfer documents to give effect to the transfer. If any dispute exists in relation to the transfer of the properties to the trust, such evidence has not been placed before this Court for determination. As such the trust as owner of the properties has succeeded in this application.

[14] On the issue of urgency, there is no doubt that the matter is urgent. The first applicant had been engaging the respondents since January 2020 about having information regarding the leases signed by the students and the rental amount paid. She was required to do the accreditation with the university immediately to secure the leases with the students as it's still the beginning of the year. The other factor that renders the matter urgent is the commercial interest that the trust has in this matter. There is rental being collected and not accounted for to the trust. As such the trust stands to be prejudiced if the matter is not heard on an urgent basis.

Order

[15] In the result the following order is made:

1. The application is urgent.
2. The the First, Second and Third Respondents are ordered to immediately grant the Applicants unrestricted access and control to the property, bearing the following description:

2.1 ERF 1129 VAN DER HOFFPARK EXTENSION 30 TOWNSHIP, REGISTRATION DIVISION IQ, NORTH WEST PROVINCE;

2.2 ERF 1130 VAN DER HOFFPARK EXTENSION 30 TOWNSHIP, REGISTRATION DIVISION IQ, NORTH WEST PROVINCE;

2.3 ERF 1131 VAN DER HOFFPARK EXTENSION 30 TOWNSHIP, REGISTRATION DIVISION IQ, NORTH WEST PROVINCE;

And forthwith hand over all keys and access controls necessary to gain access to the property;

3. The First, Second and Third Respondents are ordered to forthwith divulge to the Applicants details of the tenants occupying the property together with the copies of all signed leases;
4. The First, Second and Third Respondents are to confirm in writing within 2 days of date of this order, all rental deposits and rental income received over the properties for the following period:
 - 4.1 Er! 1129, all rental deposits and rentals received post 31 October 2019;
 - 4.2 Er! 1130, all rental deposits and rentals received post 8 November 2019;
 - 4.3 Er! 1131, all rental deposits and rentals received post 13 November 2019;
5. The First, Second and Third Respondents are to make repayment of such rentals and rental deposits to the Applicants within seven days of date of this order;
6. The First, Second and Third Respondents are precluded from representing to the tenants and students that they hold the authority of the Applicants as leasing agent;
7. The First, Second and Third Respondents are interdicted from inducing tenants to pay and/or to act on the Applicants' authority or otherwise;
8. The First and Second Respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved;

J T DJAJE

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING

28 FEBRUARY 2020

DATE OF JUDGMENT

05 MARCH 2020

COUNSEL FOR THE APPLICANTS

ADV J C VILJOEN

COUNSEL FOR THE RESPONDENTS ADV E JANSE VAN RENSBURG

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