

SOUTH AFRICA / JUDGMENT

Pieterse v Broderick and Others (CA96/2013) [2014] ZAECHGHC 8 (27 February 2014) [2014] ZAECHGHC 8

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J W Eksteen, M S Dunywa

CASE / FILE NUMBER

CA96/2013

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE,
GRAHAMSTOWN

Case

No.: CA96/2013

Date

Heard: 21 February 2014

Date

Delivered: 27 February 2014

In the matter between:

IZAK
JOHANNES PIETERSE
Appellant
and
NIGEL
BRODERICK First
Respondent
PAULA
BRODERICK Second
Respondent
ATTORNEYS
DE JAGER &
LORDON Third
Respondent

JUDGMENT

EKSTEEN J:

- [1] The appellant obtained a rule nisi on an ex parte basis in the Regional Court of the Eastern Cape against the first, second and third respondents that they show cause on the return day of the rule nisi why a final order should not be made:

“That the amount of R152 000.00 and interest being held by Attorneys De Jager & Lordon on behalf of the Respondent in their Trust Account or any other investment account be attached in that account or any other account to which it is transferred pending the outcome of an action instituted by the Applicant in the High Court under Case No. 2257/2012 against the Respondent (sic) in respect of commission due in terms of an agreement between the parties.”

- [2] On the return day the matter was further postponed and finally the rule was discharged and the appellant was ordered to pay the costs of the application including the costs of the postponement. The appellant appeals against these orders.
- [3] The appellant is a businessman resident in Bathurst. First and second respondents are British citizens and resident in Britain. They had previously resided in South Africa and the third respondent, a firm of attorneys in Alexandria, acted as attorneys for the first and second respondent in various matters.
- [4] Prior to their return to the United Kingdom the first and second respondents owned the shares in a concern known as Khusela Reserve (Pty) Ltd (herein referred to as “the Company”). They have sold their shareholding in the company. In addition, in an unrelated transaction the first respondent sold a sable antelope which he had owned. The amount of R152 000, 00 currently held in the trust account of the third respondent was obtained from the sale of the sable antelope.
- [5] In his founding papers the appellant contended that he had received a mandate from the respondent (presumably the first respondent) to sell his property known as Khusela Reserve. The appellant contended that it was an express term of the agreement of mandate that the first respondent would pay to the appellant 7% of the purchase price in respect of commission. He duly set about introducing other estate agents to the property and ultimately, he says, the property was sold for R11 500 000, 00. It is clear from the supporting documents filed on behalf of the third respondent, as is recorded above, that it was the shareholding in the company which was sold rather than the property itself. Nothing turns on this issue.

- [6] Upon the sale of the shareholding the first respondent paid to the appellant an amount of R71 762, 00, which represents 0, 7% of the purchase price less value added tax calculated on such amount. The first and second respondents thereafter returned to the United Kingdom. The appellant contends that, to the best of his knowledge, the first and second respondents do not have any further assets in South Africa save for the amount held in trust by the third respondent. In his founding papers he states:

“I submit that the First Respondent was aware that he would be returning to the United Kingdom immediately after the sale of the farm and paid the lesser amount in an attempt to escape liability for payment of the balance of the commission due to me in terms of our agreement.”

- [7] Appellant has therefore issued summons against the first and second respondents and obtained an order to sue by way of edictal citation in respect of the remainder of the commission which the appellant contends is due to him. By virtue of him being unaware of any further assets belonging to the first and second respondents in South Africa he contends that he would be unable to execute any order obtained in due course against the first and second respondents in South Africa. In these circumstances the application was launched and he alleged that he has a prima facie right to the funds which are held by the third respondent in trust. The balance of convenience he contended favoured the granting of the interim interdict.
- [8] The first and second respondents did not enter an appearance in the application, however, the third respondent filed an opposing affidavit in which he set out numerous defences, some procedural and others substantive. I intend herein to deal only with those facts which are material to the issues in this judgment. The third respondent acknowledges that he holds R152 000, 00 in trust on behalf of the first respondent which was paid to him as the proceeds of the sale of the sable antelope. He states that his instructions from the first respondent are to transfer the funds to the United Kingdom where the first respondent is currently resident. He has no knowledge of whether or not the first respondent or second respondent have other assets in the Republic of South Africa.
- [9] The magistrate held that he was not satisfied that the requirements for an interim interdict had been established. On a consideration of the facts he concluded that he was not satisfied that it had been established that the appellant had a well-grounded apprehension of irreparable harm or that he had no other alternative remedy. He further concluded that the balance of convenience favoured the respondents.
- [10] Interdicts pendente lite in contract cases, which the present case is, are usually brought in order to maintain the status quo by preventing a continuing or threatened breach which, if persisted in, would deprive the applicant of the fruits of the action which he intends to bring. In these circumstances it has long been accepted that the court is entitled to ensure that the subject matter of the intended litigation be preserved until the dispute is finally decided. (See Tindall J in *Mathews v Mathews* 1936 TPD 124 at 128). By contrast, however, an interdict pendente lite will normally not be granted to prevent a respondent disposing of

property generally unless it can be shown that he is doing so, or is likely to do so, mala fide with the intention of preventing execution in respect of the applicant's claim. (See *Knox D'Arcy Ltd v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (AD) at 372F-I.)

- [11] In argument in the appeal Mr Cole, who appeared on behalf of the appellant, disavowed any reliance on an interdict of the latter kind.
- [12] In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) 691C-G, it was said:

“The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at p. 227. In general the requisites are -

- (a) a right which, 'though prima facie established, is open to some doubt';
- (b) a well grounded apprehension of irreparable injury;
- (c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater

the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing

considerations, according to the facts and probabilities ...”

- [13] Where the interim interdict seeks to protect the property forming the subject matter of the main action in cases of a vindicatory or quasi-vindicatory claim irreparable harm is presumed and there is no onus on the applicant to make out a case in this regard (compare *Milne J in Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (WLD) 813B-C; *Barry AJ in Mulligan v Mulligan* 1925 WLD 178 at 181; and *Ettlinger AJ in Ndauti v Kgami and Others* 1948 (3) SA 27 (WLD) 34). In the appeal before us the appellant's main argument is that the plaintiff seeks, in the main action, payment of money from the first respondent and the first respondent's funds are being held by the third respondent. In these

circumstances it is alleged that what is sought is to attach the money in the possession of the third respondent pending a quasi-vindicatory claim for that money.

- [14] I think that the argument is fallacious. Actions have been categorised as “quasi-vindictory” when delivery of specific property is claimed under some legal right to obtain possession thereof (see *Stern Ruskin NO supra* at 810-811; and *UDC Bank Ltd v Seacat Leasing and Finance Co. (Pty) Ltd and Another 1979 (4) SA 682 (T)* at 688G-H; and *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others 2003 (3) SA 268 (WLD)* at 278C-D).
- [15] Generally, the quasi-vindictory claim is in respect of some object, however, in certain limited and circumscribed circumstances money too can be interdicted. This is so if the money to be interdicted is identifiable with or is earmarked as a particular fund to which the plaintiff claims to be entitled. (See *Stern and Ruskin supra* at 811G, *Hawkins Trustee v Corio Saw and Planing Mills Limited and Others 1923 (WLD) 125* and *Hilman Brothers (West Rand) (Proprietary) Limited v Van den Heuvel 1937 (WLD) 41*; and *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd and Others supra* at 278I.) This, however, is not such a case. The appellant’s claim is for commission payable in respect of the sale of shares. The money held by the third respondent emanates from the sale of the sable antelope and there are no averments in the papers upon which it might be suggested that the appellant has some legal right to obtain possession of that specific sum of money which is not the subject matter of the action. The fund held by the third respondent has not been earmarked for the payment of the commission claimed nor is it identifiable with the transaction relating to the sale of the shares.
- [16] Money has also been interdicted in cases of misappropriation of funds where the money has indeed been mixed with other monies and moved from one account to another. In such circumstances where an interdict is sought to preserve the money held in a given account pending a trial *Schutz JA in First National Bank of South Africa Ltd v Perry NO and Others 2001 (3) SA 960 (SCA)* at 968E stated:
- “What an applicant must do in such a case is to trace the money back to the stolen money, to identify it as a ‘fund’ of stolen money in the defendant’s hands.”*
- [17] In *Fedsure Life Assurance, supra*, at 285I-J Cloete J found in this respect:
- “It is simply not the law as it presently stands that a person whose money has been misappropriated and who seeks an interdict to preserve that money only has to show that the money went into the estate of the respondent.”*
- [18] What emerges from these authorities is that the particular fund which it is sought to interdict must have been earmarked for the payment of (or must at least be identifiable with) the debt which is the subject of the main claim, or in the case of misappropriation must be traceable back to the source from which it was taken. I think that the appellant’s claim is clearly not a quasi-vindictory claim, the claim is not directed at the recovery of the particular funds held in trust to which the appellant has shown no prima facie right and no basis has been laid for the order claimed. For this reason I think that the appeal must fail.

[19] As recorded earlier, Mr Cole, correctly in my view, conceded that no case had been made out on the founding papers for an interdict preventing the first or second respondents from dealing with their property generally. He argues, nevertheless, that appellant was entitled to the relief it sought on the ground that it should be inferred that the first respondent has acted in bad faith in that he openly reduced an agreement to pay 7% of the purchase price of the shares to a fraction of that amount and thereafter moved assets from South Africa to the United Kingdom. On this basis it is argued that the moving of monies from South Africa “flowed from an unlawful reduction of monies owed to the appellant”. Whether the appellant is entitled to receive any further commission is a matter in dispute in the action proceedings. The appellant’s claim in the action is for commission payable in terms of a contract. He can claim no legal right to the specific fund held by third respondent in trust. Once it is found, in these circumstances, as I have found, that the money which is sought to be interdicted is not identifiable with nor earmarked for payment of the debt which is sought to be recovered in the action, I do not think that the state of mind of the respondents

is material. The reason for this is that the appellant has not made out a prima facie right to the money held in trust.

[20] In any event, I have recorded earlier that it is the appellant’s case that he received a mandate to sell the property (it appears that the mandate was in fact for the sale of shares in the company). He does not state whether he conducts business as an estate agent or whether he gives himself out as an estate agent. The third respondent contends that the appellant acted in conflict with the provisions of the Estate Agency Affairs Act No. 112 of 1976 and accordingly that he is not entitled to recover any commission. In response the appellant states merely that the Estate Agency Affairs Act does not apply to the transaction. He does not give any indication of the factual basis for this contention. The Particulars of Claim in the main action are not annexed to the application and the first and second respondents have not pleaded thereto. I do not think that on the papers as they stand before me that I can draw any conclusion as to the entitlement of the appellant to estate agent’s commission. In these circumstances there can be no basis upon which I could infer that the first respondent acted in bad faith in paying a lesser sum to the appellant.

[21] It is further argued that in the absence of any affidavit from the first and second respondent to the effect that they were not disposing of or concealing assets or that they had any other assets in South Africa or in the United Kingdom the magistrate erred in finding that the first and second respondents were not in fact disposing of or concealing assets. The fundamental difficulty with this argument is that it was not alleged in the founding papers that they were disposing of or concealing assets. They were therefore not called upon to refute such an assertion. The fact that they have no additional assets in South Africa, could hardly be construed as an indication of them disposing of or concealing assets in circumstances where they have returned to their home in the United Kingdom and have openly repatriated their assets to that country in the ordinary course of their business. In all the circumstances I think that the magistrate correctly held that the rule should be discharged as against all

three of the respondents.

- [22] In any event, in respect of the second respondent there are no averments at all in the founding papers of any conduct which could possibly have justified an order against the second respondent. Her only wrong, it seems, is that she returned to her home in England. In the circumstances, whatever the merits of the appeal in respect of the first and third respondents may have been I think that the magistrate was correct to discharge the rule in respect of the second respondent.
- [23] I turn to consider the appeal against the costs order made by the magistrate.
- [24] The appellant obtained the rule nisi on 18 January 2013, ex parte, as earlier recorded. The rule nisi called upon the respondents to show cause, if any, why a final order should not be made on the return day which was stipulated as 12 February 2013. No obligation was placed upon the respondents to show cause prior to the return day and they were not put to terms in respect of the filing of affidavits.
- [25] On the 12 February 2013 the matter was postponed and the rule extended by agreement between the parties to 15 February 2013. The judgment in respect of a subsequent postponement, to which I shall refer below, records that on 12 February 2013 Mr Mvulana, an attorney acting on behalf of the appellant at the time, approached the magistrate and placed on record that there had been an understanding between the attorneys representing the parties that he should approach the court and request a postponement of the matter to 15 February 2013. I am advised from the Bar during argument of the appeal that 12 February had been erroneously stipulated in the rule nisi and that the Regional Court did not on the 12 February 2013 deal with matters of this nature. It was therefore necessary to postpone the matter to 15 February 2013 when the Regional Court did deal with matters of this nature. On 13 February 2013, two days prior to the extended return day the third respondent, as it was entitled to do, filed answering papers. When the matter was called on 15 February the appellant's representatives requested a further postponement in order to prepare replying papers. The postponement was granted and the costs were reserved. The judgment on the merits was ultimately delivered and the magistrate ordered the appellant to pay the costs occasioned by the postponement on 15 February 2013.
- [26] The appellant appeals against this order.
- [27] In argument before us, Mr Cole submits that the magistrate ought to have ordered that the costs occasioned by the postponements on both 12 February 2013 and 15 February 2013 should be costs in the cause. Mr de la Harpe, on behalf of the third respondent, did not argue the contrary. Whereas I have held earlier that the appeal on the merits cannot succeed I think that this argument renders the appeal against the costs order of academic interest only. In these circumstances I do not intend to deal with this issue in any detail. Suffice it to say that I do not think that there is any reason to interfere with the order made by the magistrate. As appears from the summary of the facts set out earlier, the third respondent was called upon to show cause on the return day (which was extended on 12 February) why

the rule nisi should not be confirmed. It was entitled to file papers as and when it did in order to show cause on 15 February, which is what appellant had called upon it to do. The appellant then sought a postponement, which was an indulgence. In these circumstances the magistrate's reasoning cannot be faulted.

[28] There remains one further issue. The record in this appeal runs to 303 pages. The parties are agreed that pages 162-183 and pages 200-273 should not have formed part of the record and have no relevance to the issues before us. Moreover, pages 184-199 constitute a duplication of pages 119-134. They too should not have been included in the record. The result is that approximately one third of the record is entirely irrelevant. Mr de la Harpe accordingly urged that I should order the appellant to pay the costs occasioned by the reading of these portions of the record on a scale as between attorney and client. He has referred me to *Van Aardt v Galway* 2012 (2) SA 312 (SCA) at 328 and *Wessels NO v De Jager NO en 'n ander NNO* [2000] ZASCA 132; 2000 (4) SA 924 (SCA) in support of this submission. I consider that had the appeal been successful it would have been fair to disallow the costs which were occasioned by the preparation and perusal of this portion of the record, however, whereas the appeal is unsuccessful I do not think that an order of this nature would be appropriate. It would, in my view, be appropriate, however, to order that the appellant's attorneys are precluded from recovering any costs from the appellant which may be attributed to the inclusion of pages 162-273 of the record.

[29] In the result, the appeal is dismissed with costs and it is ordered that the appellant's attorneys are precluded from recovering any costs from the appellant which may be attributed to the inclusion in the record of pages 162-273 thereof.

J W EKSTEEN

JUDGE OF THE HIGH COURT

DUNYWA AJ:

I agree.

M S DUNYWA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv Cole instructed by Leon Keyter Attorneys, Grahamstown

For Respondent: Adv de la Harpe instructed by Netteltons Attorneys, Grahamstown

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