

SOUTH AFRICA / JUDGMENT

Shanmugam v Peter N.O and Others (11638/2015) [2016]

ZAKZDHC 16 (20 April 2016)

[2016] ZAKZDHC 16

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Ploos van Amstel

CASE / FILE NUMBER

11638/2015

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: 11638/2015

DATE: 20 APRIL 2016

In the matter between:

KRIVESHAN SHANMUGAM.....APPLICANT

And

LUNGA COSMO PETER N.O.....FIRST RESPONDENT

C B ST CLAIR COOPER N.O.....SECOND RESPONDENT

LEBONGANG MICHEAL MOLOTO N.O.....THIRD RESPONDENT

NICOLA CRONJE.....FOURTH RESPONDENT

PETER MASKEL AUCTIONEERS.....FIFTH RESPONDENT

STRAUSS DALY ATTORNEYS.....SIXTH RESPONDENT

Judgment

Order:

The rule nisi is discharged with costs, including those reserved on 23 November and 8 December 2015 and those occasioned by the employment of senior counsel.

Ploos van Amstel J

- [1] The applicant seeks an order interdicting the liquidators of CKT Express CC (in liquidation) from selling or transferring an immovable property to a third party purchaser pending the determination of an action which he has instituted and in which he seeks transfer of the property to him.
- [2] The basis of the applicant's claim is that he purchased the property from the liquidators in June 2012, that the agreement is still valid and that they are precluded from selling the property to someone else.
- [3] The liquidators contend that the agreement relied on by the applicant was invalid ab initio, that it was in any event cancelled by reason of a breach by him and, further, that his claim for transfer of the property has become prescribed.
- [4] The facts are briefly as follows. The close corporation owns the property in question, which is described as Portion 6 of Erf [2.....] [L.....] [E.....] [1....] and is situated at [5.....] [A.....] [D.....], [L.....]. It was placed in final liquidation in February 2012 and the first and second respondents were appointed as liquidators on 21 February 2012. They decided to sell the property to the applicant and signed a written agreement of sale on 5 June 2012. The agreement was not signed by the third respondent, who was appointed as the third liquidator on 4 June 2012. On 2 July 2012 a firm of attorneys gave the applicant written notice that he was in breach of the agreement in that he had not made certain payments and on 16 August 2012 they notified him of the cancellation of the agreement. Most of the money which he had paid towards the purchase price was refunded to him, which he says he accepted under protest. The property was sold by public auction nearly three years later, on 18 June 2015. The successful bidders were the applicant's sister and one Ryan Naidoo, whose wife was the sole member of the close corporation in liquidation. That agreement was cancelled on 16 September 2015 due to a failure by the purchasers to comply with their obligations. On 3 November 2015 the property was again sold by public auction. During the confirmation period a higher offer was accepted by the liquidators and the property was sold by private treaty. On 3 November 2015 the applicant instituted an action in this court in which he seeks an order for the transfer of the property to him, against a tender to perform all his obligations as purchaser in terms of the agreement of 5 June 2012. On 23 November 2015 he launched an

application to interdict the transfer of the property pending the final determination of the action to which I have referred, and a rule nisi together with an interim interdict was granted on that day. The matter then came before me on the opposed roll, with the applicant seeking confirmation of the rule nisi and the respondents its discharge.

- [5] Counsel for the applicant submitted that because he seeks an interdict pendente lite the test is whether the applicant has shown a prima facie right, though open to some doubt, and whether the balance of convenience favours him. There are no material disputes of fact on the papers and the matter is essentially one of law. I deal firstly with the issue relating to the validity of the agreement.
- [6] In terms of section 2(1) of the Alienation of Land Act[1] no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority. It is by now trite that corporate entities, being unable to act other than through natural persons, cannot give written authority to their representatives, and that therefore the written-authority requirement does not apply when a functionary of a company signs a contract for the sale of land.[2] It was held in Northview
- [3] that the principle also applies to close corporations and that a member, authorised as such to sign, does not require written authority to sign such a contract. Where a member however authorises a third person to enter into such a contract the authorisation must be in writing.[4]
- [7] In the present matter the agreement was not signed by a member of the close corporation, but by two of the three liquidators. Counsel submitted that section 2(1) nevertheless finds no application as the liquidators were not agents as contemplated in the section and their actions were those of the close corporation. This seems to me to be correct. It has been held that when a liquidator performs the functions of the former board of directors his acts are the acts of the company.[5] And in AMS Marketing[6] the court referred with approval to Gower[7]who says when a liquidator concludes a contract he does so on behalf of the company. It follows that when there is only one liquidator he does not need written authority to sign a contract for the sale of land as he is in the same position as a duly authorised functionary

of the company. If one of several liquidators signs such a contract the only question is whether he was authorised to do so, as in the case of a functionary of a company.

- [8] In terms of section 282 of the Companies Act of 1973 liquidators are required to act jointly in performing their functions. The third respondent was appointed as a joint liquidator the day before the other two signed the agreement. It is not disputed that he had not authorised them to do so. Counsel for the applicant submitted that as a matter of probability he must have become aware of the agreement and ratified it. But there is no evidence that he did. And if he became aware of the agreement there is no evidence that he knew it required to be ratified. It would appear that none of the liquidators realised at the time that when the first and second respondents signed the agreement the third respondent had already been appointed. In any event, the effect of the third respondent's affidavit, read with the answering affidavit deposed to by the fourth respondent, is that he did not authorise the conclusion of the agreement, nor did he ratify it. There is nothing on the papers to gainsay

this, and it must of course be born in mind that the agreement was not in existence for long as it was cancelled on 16 August 2012. It follows in my view that the agreement of 5 June 2012 was invalid as the two liquidators who signed it could not bind the close corporation without the authority of the third liquidator.

- [9] I deal briefly with the two alternative points relied on by the liquidators. The first is that even if the agreement was validly

concluded it was later cancelled as a result of a breach by the applicant of his obligations. Counsel for the applicant accepted in argument that the applicant was in breach and that the cancellation would have been proper if it was duly authorised. It appears from the papers that it was only authorised by the two liquidators who had signed the agreement, and not by the third respondent. Their answer to this is that the cancellation was ratified by the third respondent, who signed the subsequent sale agreement together with the other liquidators. Counsel for the applicant contested this on the basis that he may not even have known of the cancellation. This is a double-edged sword for the applicant. If the sale to the applicant did not come to the notice of the third respondent then he could not have ratified it. If it did come to his notice then it is inherently improbable that he would have co-signed a new agreement without knowledge of the cancellation of the first agreement. And if he signed the new agreement with knowledge of the cancellation of the first one then he ratified the cancellation. It seems to me that if the agreement on which the applicant relies was validly concluded then its subsequent cancellation was valid.

- [10] The second alternative point relates to prescription. The liquidators contend that any claim that the applicant may have had for transfer was extinguished by prescription. They say the letter of cancellation was sent to him on 16 August 2012, and any claim he may have had for transfer arose not later than the date on which he received that letter. His summons was issued on 3 November

2015. He does not dispute that this was more than three years after his claim arose. The only basis on which he contends that his claim has not prescribed is that the fourth respondent told him that the liquidators would not rely on the breach notice and acknowledged their obligation to transfer the property to him. She disputes this and says she in any event had no authority to speak for the liquidators as she was only asked to perform certain administrative tasks. It is true that in his affidavit the applicant refers to the fourth respondent as the agent of the liquidators. That does not constitute evidence that she was their agent or authorised to bind them, and there is no other evidence that she was. It follows in my view that any claim which the applicant may have had for transfer of the property was extinguished by prescription.

- [11] The applicant has in my view not made out a prima facie case, not even one open to some doubt. It seems plain that the agreement on which he relies was invalid for want of authority, was in any event cancelled because he failed to comply with his obligations, and he waited longer than the prescriptive period to try and enforce his claim for transfer.

[12] The rule nisi is discharged with costs, including those reserved on 23 November and 8 December 2015 and those occasioned by the employment of senior counsel.

PLOOS VAN AMSTEL J

Appearances:

For the Applicant : Adv. M Pillemer SC

Instructed by : Franke and Associates Attorneys

Durban

For the Respondents : Adv. A Stokes SC

Instructed by : Johnston and Partners

Date of Hearing :22 March 2016

Date of Judgment : 20 April 2016

[1] Alienation of Land Act 68 of 1981.

[2] Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC And Another 2010 (3) SA 630 (SCA) para 6.

[3] Para 11.

[4] Para 25.

[5] Barclays Zimbabwe Nominees (PVT) Ltd v Black 1980 (4) SA 720 (AD) at 726B; Howat Motors (Pty) Ltd v Waterson 1963 (3) SA 669 (TPD) at 672H-673C;

[6] AMS Marketing Co v Holzman And Another 1983 (3) SA 263 (WLD) at 268E.

[7] Gower, Principles of Modern Company Law 4th ed at 726.

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