

SOUTH AFRICA / JUDGMENT

Sidwell N.O. v du Buisson N.O. and Others (4944/2014) [2016] ZAFSHC 82 (13 May 2016)

[2016] ZAFSHC 82

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

4944/2014

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case No. 4944/2014

In

the matter between:

THAKELI
THUBAKA SIDWELL
N.O.
Applicant
and
PHILLIPUS
MARTINUS DU BUISSON N.O.
1st
Respondent
SANET
DU BUISSON N.O.
2nd
Respondent
N.O.
OELOFSE ATTORNEYS
3rd
Respondent
STANDARD
BANK OF SOUTH AFRICA
4th
Respondent

TSHEPO
PAULOS BOTSANE N.O.
5th
Respondent
TSHEPO
BENEDICT SEBUTSOE N.O.
6th
Respondent
REGISTRAR
OF DEEDS, BLOEMFONTEIN
7th
Respondent
MASTER
OF THE HIGH COURT, BLOEMFONTEIN
8th
Respondent
RURAL DEVELOPMENT
AND LAND REFORM DEPARTMENT,
BLOEMFONTEIN
9th
Respondent

JUDGEMENT

BY: VAN ZYL, J

DELIVERED ON: 13 MAY 2016

- [1] This is an application for leave to appeal against an order in terms of which I cancelled and set aside the transfer to and the registration of ownership in the name of the trustees of Doringboom Trust, IT1797/2004, of the farm Guarriekop 330, Senekal, Free State Province. I also granted further consequential relief in favour of the applicant in the main application.
- [2] I will refer to the parties as in the main application. I pause to mention that in the main application, the application was opposed by the first, second, third, fifth and sixth respondents. In my judgment in the main application I referred to them collectively as “the respondents”. For the sake of expediency, I will again refer to them as such when referring to or dealing with allegations made in the main application papers. However, only the third respondent is now seeking leave to appeal. It is evident from the papers filed in the application for leave to appeal that the first, second, fifth and sixth respondents are now being represented by a different firm of attorneys, who have received notice of the current application. Therefore, when need be, I will also refer to the respective respondents individually.
- [3] Mr Griessel, appearing on behalf of the third respondent in the application for leave to appeal, indicated that the third respondent

is not disputing the correctness of the approach I followed in my judgment by basing the determination of the validity of the real

agreement upon a consideration of the validity of the resolution attached to the additional affidavit as Annexure “A”. The third respondent similarly concedes that I correctly found that in this particular instance, the validity of the resolution was to be determined by the question whether Mr Ettiene Stone still was a trustee of the TBS Family Trust, IT1156/05 on the date of the passing of the resolution, hence 20 November 2012, or not. He however submitted that my conclusion that Mr Stone indeed still held office as a trustee of the TBS Trust on the said date, is incorrect.

- [3] In support of his submission, Mr Griessel referred to the fact, as stated in my judgment, p. 13 para [17], that the applicant himself alleged in his founding affidavit that Mr Stone had resigned as trustee on 10 June 1999. Mr Griessel consequently contended that I should have considered this fact to be common cause between the parties, in which instance there was no necessity for the respondents to have made any allegations regarding Mr Stone’s compliance with the required formalities pertaining to his resignation. He further submitted that in the circumstances I should then have found that because it was common cause between the parties that Mr Stone had resigned on 10 June 2009, the only reasonable inference is that the formalities prescribed by the Trust deed had been complied with. In addition he submitted that compliance with Section 21 of the Trust Property Control Act, 57 of 1988, is not necessary in an instance where the resignation complied with the requirements set out in the Trust deed. Such compliance with the requirements contained in the Trust deed, according to Mr Griessel’s argument, would then have had the result that Mr Stone’s resignation on 10 June 2009 was in fact valid. In support of his argument he referred to Honore’s South African Law of Trusts, E Cameron et al, 5th edition, at p. 229.
- [4] Me Khoe, appearing on behalf of the applicant in the application for leave to appeal, referred to paragraphs 19 and 20 of the answering affidavit, more specifically the part where it is stated that during the phone call to Mr Stone on 20 November 2013 “Mr Stone informed us that he had resigned as a trustee of the TBS Farming Trust”. She submitted that from the aforesaid it is evident that that was the first time the other trustees heard about Mr Stone’s alleged or purported resignation. She therefore contended that this supports my finding that his resignation had not been done in accordance with the provisions of clause 5.6.3 of the Trust deed. Me Khoe therefore submitted that even if it is to be accepted, as contended on behalf of the third respondent, that a trustee who resigns need not comply with section 21 of the Trust Property Control Act, 57 of 1988, as long as the resignation is in accordance with the terms of the provisions of the relevant Trust deed, Mr Stone’s resignation still did not constitute a valid resignation.
- [5] In reply Mr Griessel submitted that one should be mindful of the fact that Mr Steyn, an attorney practising at the third respondent, was the deponent to the answering affidavit and not the fifth and sixth respondents themselves. This argument, in my view, does however not hold water, as the deponent specifically stated that Mr Stone informed “us”, hence

including the fifth and sixth respondents, and furthermore the fifth and sixth respondents deposed to confirmatory affidavits in which they (especially the fifth respondent in paragraph [20] of his confirmatory affidavit) stated the same.

- [6] The second ground for the application for leave to appeal turns on my finding regarding the invalidity of the power of attorney. Mr Griessel submitted that the incorrect entry on the power of attorney, namely that the fifth respondent is the sole trustee of the TBS Trust and that it is in that capacity that he authorised the transfer of the farm, constitutes a formal defect which does not invalidate the transfer. He contended that the substance is the fact that the fifth respondent had indeed been authorised in terms of the resolution and he duly signed the transfer documents. The fact that the method of authorisation was wrongly recorded only relates to form and not to substance and can merely be rectified. Mr Griessel relied on sections 4(1)(b) and 100 of the Deed Registries Act, 47 of 1937, for purposes of his argument in this regard.
- [7] Me Khoe, however, submitted that the defect in fact goes to the substance of the power of attorney and does not constitute a mere formal defect. She furthermore contended that during the hearing of the main application, the respondents only relied on section 4(1)(b) of the Deed Registries Act and no mention was made or reliance placed upon section 100 of the said Act.
- [8] I have to remark that the last mentioned contention of Me Khoe, is indeed correct – the applicability of section 100 was never raised during the argument presented on behalf of the respondents during the hearing of the main application. However, should it be considered to be a point of law and certain other conditions are met, it may well be advanced for the first time on appeal.
- [9] In terms of section 17(1)(a) of the Superior Courts Act, 10 of 2013, leave to appeal may be granted, inter alia, when a judge hearing the application, is of opinion that the appeal would have a reasonable prospect of success. After having considered the arguments presented to me, I am of the view that I have to conclude that the proposed appeal does have a reasonable prospect of success. I therefore feel myself compelled to grant leave to appeal.
- [10] Subject to section 15(1) of the Superior Courts Act, the Constitution and any other law, section 16(1)(a) of the said Act determines that an appeal in an instance like this where the main application was heard by a single judge, lies, upon leave having been granted, either to the Supreme Court of Appeal or to a full Court of this Division, depending on the direction issued in terms of section 17(6). In terms of section 17(6)(a)(i), the judge granting leave must direct the appeal be heard by a full Court of that Division, unless the judge considers “that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion”.

- [11] Mr Griessel requested and submitted that should leave to appeal be granted, such leave should be to the Supreme Court of Appeal and not to a full court of this Division. In support of the said submission, he referred to the judgment of Meijer NO and Another v FirstRand Bank Limited (Formerly Known as First National Bank of Southern Africa) and Another: in re FirstRand Bank Limited (Formerly Known as First National Bank of Southern Africa) v Meijer NO and Others
- [2013] JOL 30560 (WCC) (to which judgment I also referred in my judgment in the main application) and submitted that the question raised in paragraph 11 thereof, namely whether a trustee who resigns need to comply with section 21 or whether he/she may resign in terms the manner prescribed in the relevant Trust deed, involves an important question of law in respect of which clarity is to be provided by the Supreme Court of Appeal.
- [12] Although I realise that the proposed appeal will entail certain factual findings, I am of the view that the respective questions of law raised, referred to and/or decided upon in paragraphs [10] to
- [12] of the aforesaid Meijer-judgment, or at least some of them depending on the relevant factual findings made, will be applicable to and essential in the determination of the outcome of the appeal. Those are not only important questions of law because of their general application, but also on which there currently exist different opinions with the consequent need for a decision by the Supreme Court of Appeal for purposes of legal certainty.
- [13] With regards to the costs of the application for leave to appeal, there is no reason why the usual order as to costs should not be made in this specific instance.
- [14] The following order is made:
1. The third respondent is granted leave to appeal to the Supreme Court of Appeal against the whole judgment given and the orders made in this matter on 18 August 2015.
 2. The costs of the application for leave to appeal are costs in the appeal.

C. VAN ZYL, J

On behalf of the applicant: Adv. J. S. Griessel

Instructed by:

Symington & De Kok

BLOEMFONTEIN

On behalf of the third

Respondent:

Adv. N. J. Khoee

Ngwane and Associates Attorneys

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Prepared on 11 October 2026 · Esheria