
SOUTH AFRICA / JUDGMENT

Strauss and Others v Van der Walt N.O and Others (87126/2019) [2020] ZAGPPHC 767 (21 December 2020) [2020] ZAGPPHC 767

COURT

North Gauteng High Court, Pretoria

BEFORE

N P Mngqibisa-Thusi

CASE / FILE NUMBER

87126/2019

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PETORIA

CASE NO: 87126/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

DATE: 21/12/2020

In the matter between:

ZELMA STRAUSS N.O

(in her capacity as executor of the estate late

Encasn Strauss) 1st Applicant

ZELMA STRAUSS

2nd Applicant

SONJA GERICKE

3rd Applicant

and

WILLIAM ALBERT BROWN VAN DER WALT N.O

(in his capacity as executor of the late Jan-Hendrix

Strauss and surviving spouse of Encasn Strauss) 1st

Respondent

THE PURCHASER OF ERF 2079 KLERKSDORP X

29 IP 2nd Respondent

THE REGISTRAR OF DEEDS, PRETORIA 3rd Respondent

THE MASTER OF THE HIGH COURT, MAFIKENG 4th Respondent

THE MASTER OF THE HIGH COURT, PRETORIA 5th Respondent

WILLEM FRANCOIS BOUWER N.O

(in his capacity as curator bonis of the estate

Encasn Strauss under curatorship)

6th Respondent

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] The applicants seek on an urgent basis the following relief:

1.1 an interim order interdicting the first and third respondents from proceeding with the registration of the transfer of the property known and described as Erf 2079 extension 29, Registration I.P, North-West also known as 17 Jacklin Street, Irene Park, Klerksdorp (“the immovable property”), pending the final determination of Part B of this application.

1.2 That the applicant be permitted to file such further affidavits as may be necessary in support of this application with due notice to the relevant respondents for purposes of finalisation of Part B of this application.

1.3 That the first respondent furnishes the first applicant with a copy of the sale agreement between the first respondent and the second respondent as well as the full contact details of the second respondent within 24 hours.

1.4 Costs of the application of Part A against the first respondent de bonis propriis on a scale as between attorney and own client.

[2] In part B of the application, the applicants to seek an order for the cancellation of the agreement for the sale of the immovable property by the first respondent to the second respondent.

- [3] The second applicant is bringing this application in a representative capacity as an executor of the deceased estate of the late Encasn Strauss and in her capacity as a beneficiary in terms of her deceased parents' joint will and Encasn's deceased estate.
- [4] The second and the third applicants, together with one Hein Strauss ("Hein") were the children of the late Mr Hendrik Johannes Strauss ("Mr Strauss) and Mrs Encasn Strauss ("Mrs Strauss").
- [5] The first respondent is a duly appointed executor of deceased estate of the late Mr Strauss. On 20 September 2019 the second applicant was appointed as an executor of Mrs Strauss' deceased estate.
- [6] At the hearing of this matter there was no appearance on behalf of the first respondent even though service was effected on him.
- [7] The second respondent's legal representative was present but indicated that he only has a watching brief and was not going to make any submissions.
- [8] Although Hein has an interest in the disputed immovable property, he was not cited as a party. On inquiring about this, the court was informed that he was given notice of the application and that the reason for not joining him was primarily because this application is not concerned with the interpretation of the will but was merely intended to stop the pending transfer of the property to the second respondent as the preceding transaction to the transfer was invalid, until the relief sought in Part B of this application is determined. This court having reconsidered the view it expressed during the hearing, I am of the view that under the circumstances it was not necessary to join Hein.
- [9] No relief is sought against the fourth, fifth and sixth respondents.
- [10] The purpose of this application is to stop the first, second and third respondents from proceeding with the registration of the transfer of the property to the second respondent.
- [11] Mr Strauss and Mrs Strauss were married in community of property. Before Mr and Mrs Strauss passed on they had drawn a joint will which provided, inter alia, that:
- 11.1 In the event of either dying first, the surviving spouse would be appointed as the executor and sole beneficiary of their joint estate (clause 3).
- 11.2 In the event of them dying within three months of each other's death and the last dying without a will, Henie would inherit three immovable properties which formed part of the joint estate; and the residue of the joint estate would devolve on the second and third applicants (clauses 4 and 5).
- [12] Mr Strauss passed away on 15 July 2015.

- [13] On 1 December 2015 the fifth respondent placed Mrs Strauss under curatorship and issued the sixth respondent with letters of authority after appointing him as Mrs Strauss' curator bonis. At the time Mrs Strauss was placed under curatorship, she was the executor of Mr Strauss' deceased estate. She was replaced as executor by the first respondent.
- [14] On 1 November 2018, when Mrs Strauss was still alive, the second respondent purchased the immovable property at an auction arranged by the first respondent. Transfer of the immovable property into the name of the second respondent has not been processed, hence the relief sought in this application.
- [15] Mrs Strauss passed away on 20 November 2018.
- [16] From the founding affidavit it appears that Hennie had brought an application in the Mahikeng High Court seeking an interdict against the first respondent, stopping him from putting the immovable property on sale. From the submissions made by counsel, it would appear that the application was struck off the roll for lack of urgency. From submission made by counsel for the applicants, it appears that Hein did not further pursue his application.
- [17] The events leading to the sale of the immovable property are as follows. On 18 March 2019, the second respondent sent an email to the sixth respondent, attached to it was an amended liquidation and distribution account of Mr Strauss' deceased estate. The first respondent also copied Hein, the second and third respondents. In the email, the first respondent intimated that there

was a short-fall of R297, 547.60 which he demanded that the second and third applicants should pay, failing which he would sell the property on auction. The third applicant made an offer to purchase the property, which offer was rejected, resulting in the property being sold on auction to the second respondent on 1 November 2018 for an amount of R 800,000.

- [18] The following submissions were correctly made by counsel for the applicant and are accepted by this court. It was submitted on behalf

of the applicants that the sale of the property at the auction was irregular and unlawful in that before the first respondent sold the property, he had failed to obtain the consent of the sixth respondent or from the court. It was further submitted that besides the sale being approved by the sixth respondent, the sale was subject to the provisions of s 80[1] of the Administration of Deceased Estates Act[2] which provides that the property of a person under curatorship can only be alienated with the approval of either the Master or the court. At the time the first respondent sold the property on auction, Mrs Strauss was still alive and neither the approval of the Master or the Court was obtained.

- [19] In order for an interim interdict to be granted, the onus is on the applicant to establish the following requirements[3]:

19.1 a right that, though prima facie established, is open to some doubt;

19.2 a well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted;

19.3 that the balance of convenience is in favour of the granting of the interim relief; and

19.4 that there is an absence of any other satisfactory remedy.

[20] In terms of the joint will, both the second and third applicants are residual heirs of their deceased parents' joint estate. They therefore have an interest in the property sought to be transferred to the second respondent. I am therefore of the view that the applicants have shown a *prima facie* right to the disputed property.

[21] Secondly, the joint estate of Mr and Mrs Strauss has not as yet been distributed. By virtue of their status as residual heirs, besides the written consent of either the curator or the Master/court being obtained for the alienation of the immovable property, or notice being given to the second applicant as executor of Mrs Strauss's deceased estate, there is a risk that if the property is transferred to a third party before the devolution of the joint estate is made, the applicants risk suffering irreparable harm should interim relief not be granted and the ultimate relief is eventually granted. Furthermore, I am of the view that the balance of convenience favours the granting of the interim relief, pending further steps to be taken by the applicant and that there is no other satisfactory remedy available to the applicants once the property is transferred to the second respondent, by virtue of the fact that once the first respondent has full title to the immovable property, he can dispose of the property. The second respondent will not be prejudiced if an interim interdict is granted and the relief sought in Part B of this application is not granted.

[22] I am therefore satisfied that the applicants have satisfied the requirements for an interim interdict to be granted pending the finalisation of Part B of the application.

[23] Although the applicants have sought a punitive cost order against the first respondent, I am of the view, in light of the fact that the first respondent was not represented, that the issue of costs should be determined at the finalisation of Part B of the application.

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

1.1 an interim order is granted interdicting the first and third respondents from proceeding with the registration of the transfer of the property known and described as Erf 2079 extension 29, Registration I.P, North-West also known as 17 Jacklin Street, Irene Park, Klerksdorp ("the immovable property"), pending the final determination of Part B of this application.

1.2 That the applicant be permitted to file such further affidavits as may be necessary in support of this application with due notice to the relevant respondents for purposes of finalisation of Part B of this application.

1.3 That the first respondent furnishes the first applicant with a copy of the sale agreement between the first respondent and the second respondent as well as the full contact details of the second respondent within 24 hours.

1.4 Costs to be costs in the application or action to be instituted.

N P MNGQIBISA-THUS

Judge of the High Court

Date of hearing: 4 December 2019

Date of judgement: 21 December 2020

For applicants: Adv J Moller (instructed by Moller & Pienaar Attorneys)

[1] Section 80(1) of the Administration of Deceased Estates Act provides that: “No natural guardian shall alienate or mortgage any immovable property belonging to his minor child, and no tutor or curator shall alienate or mortgage any immovable property which he has been appointed to administer, unless he is authorized thereto by the Court or by the Master under this section or, in the case of a tutor or curator, by any will or written instrument by which he has been nominated”.

[2]Act 66 of 1965 (as amended).

[3]See in this regard Setlogelo v Setlogelo 1974 AD221 at 227.

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