

SOUTH AFRICA / JUDGMENT

Van As No and Others v Jacobs NO and Others (65652/17) [2017] ZAGPPHC 1162 (23 October 2017) [2017] ZAGPPHC 1162

COURT

North Gauteng High Court, Pretoria

BEFORE

Tuchten

CASE / FILE NUMBER

65652/17

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 65652/17

In

the matter between:

FREDERIK
JOHANNES VAN AS NO
First
Applicant
CHANTELL
VAN
AS Second
Applicant
FERDINAND
SMARTENRYK DEVENIER
NO
Third Applicant
in
their capacities as trustees of the
FRIKKIE
VAN AS FAMILY TRUST
and
GERTRUIDA
SUSANNA JACOBS NO
First

Respondent
DAWID
MATTHEE
NO
Second Respondent
KAREL
JOHANNES VAN AS NO
Third Respondent
FERDINAND
SMARTENRYK DEVENIER
NO Fourth
Respondent
DEELKRAAL
BEHUISING TRUST
STAR
STONE CRUSHERS CC
Fifth
respondent
KAREL
JOHANNES VAN
AS
Sixth Respondent
MASTER
OF THE HIGH COURT
PRETORIA Seventh
Respondent

JUDGMENT

Tuchten J:

1 This is a fight between two (at this stage) factions of a family over a housing development worth many millions of rands. The dispute has been complicated by the fact that the main disputing parties have used trusts as the vehicles for their commercial ventures and have embodied what are in effect shareholders' or partners' agreements in what are, or purport to be, resolutions of a trust. The third applicant has, apparently quite deliberately, while acting in one capacity, sued himself in another capacity. The first applicant (Frikkie)[1] is married to the second applicant (Chantell). But Frikkie and Chantell are, presently estranged.

2 The third applicant (Mrs Jacobs) is the matriarch of the Van As family.

By a trust deed executed at Fochville on 19 November 2008, she founded a trust called the Deelkraal Behuising Trust (the DST). The DST was intended to function, and did function as a vehicle to hold three pieces of agricultural land in the Fochville district which the DBT bought from Harmony Gold Mining Company Limited and Randfontein Estates Limited by agreement of sale dated 26 March 2009 and the letting enterprise conducted on the farms. The purchase price was 1 43 million.

3 The properties were, although agricultural land, not used for agricultural purposes. I was told from the bar that they were developed under the former mining legislation as housing for the employees of the mining companies operating in the area. The minerals so mined had been depleted and the housing development was no longer needed for purposes associated with mining. It seems that at the time of the sale, there were tenants in some or all of the houses constituting the development and the DBT took over the leases when it bought the land.

4 The land was never subdivided pursuant to permissions granted by the authorities vested with powers to deal with such matters. Because the land was developed for a purpose incidental to mining, no such permissions were, so I was told, needed. In the case before me, particular emphasis fell on the provisions of the Subdivision of Agricultural Land Act, 70 of 1970, under which the permission of the Minister of Agriculture is required before any agricultural land (as defined) may be subdivided[2] and no such agricultural land may be sold or advertised for sale.[3]

5 The DBT trust deed provided in terms for the appointment of the first, second and fourth respondents as trustees of the DBT. They all received letters of authority from the seventh respondent (the Master). But the sixth respondent (Karel), pursuant to certain transactions claimed the right to appoint himself as trustee in the place of the fourth respondent. Karel also received a letter of appointment But the appointment of Karel and termination of the office of the fourth respondent are in dispute.

6 The essence of the dispute between the parties can be reduced to the following. The Deefkraaf trust deed made provision for three "groups": the Sebenza Trust Group (Sebenza), the Star Stone Crushers CC Group (Star Stone) and the Rucinda Trust Group (Rucinda). Each of these groups was allocated a "percentage interest"

and had appointed to it a "group representative". These group representatives were declared in the Deelkraal trust deed to be Mrs Jacobs, Frikkie and Dawid Matthee. The same three persons were also declared to be the DBT's first trustees,

7 The DBT trust deed conferred on the DBT trustees powers to administer the trust assets for the benefit of the beneficiaries of the

t.rust, defined to be certain persons who were entitled to receive

benefits by virtue of the membership of one or the other "groups" to which I have referred. The beneficiaries were entitled to receive the nett income of DBT in each book year in accordance with the percentages in question, ie 45% to each of Sebenza and Star Stone and 10% to Rucinda.

8 According to a minute of the DBT, Mrs Jacobs, Frikkie and Matthee attended a special meeting of the trustees of Deelkraal on 24 March 2009 and unanimously came to a decision which was recorded and signed by them. In terms of the 24 March 2009 decision, Star Stone Crushers CC was removed as beneficiary and replaced by Frikkie in his capacity

as founder of the family trust which Frikkie intended to establish, to be known as the Frikkie Family Trust (the FFT).

9 On 21 August 2009, the FFT was created by a trust deed which reflects Frikkie as its founder and Frikkie, Chantell and the third applicant as its first trustees. For present purposes, they are obliged to take

decisions by majority vote and Frikkie must always be one of the majority.

10 On an unidentified day in September 2011, the three trustees of the DBT whom I have identified held a meeting pursuant to which they recorded a written decision of the trustees of the DBT. This decision was fundamental to the case of the DBT. In paragraph 1, they resolved to divide the property of the DBT and hold it for the benefit of each such beneficiary. The record of the decision records the FFT as a beneficiary in the place of Star Stone.

11 Paragraph 2 of the record of the decision then proceeds to "consolidate" the three agricultural properties and to "subdivide" the "consolidated" land in accordance with a written plan.

Paragraph 3.6 then renders the consolidation and subdivision subject to various governmental approvals. But the second unnumbered paragraph in paragraph 4 gives each of the beneficiaries the responsibility to manage and maintain the area allocated to it with effect from 1 October 2011. These allocations are contained in paragraph 3.9, pursuant to which each of the three "groups"

(with the FFT in the place of Star Stone) is allocated one of these areas within the development.

12 It is common cause that no such governmental approvals have been given. So the "consolidation" and "subdivision" do not operate, even inter partes. The commercial essence of the dispute in this case is whether the powers conferred to manage and maintain carry with it the right to each beneficiary group to exercise these powers for itself alone and not for the DBT.

13 That is however how the parties interpreted the effect of the various transactions they had concluded, at any rate when times, and the relationships between the various family members, were good. I was told by counsel that Frikkie received in the order of R300 000 per month from the administration of "his" area.

14 But Frikkie had doubts about the validity of the September 2011 decision. In a document styled as a sale agreement, Frikkie, in his personal capacity, sold the whole of the members' interest in Star Stone to Chantell for ten rands. The purchase price is not mentioned in this document. But it expressly provides that Chantell is to receive a "dividend" of R15 000 per month subject to escalation. In his replying affidavit, Frikkie put up a written agreement with Chantell dated 1 October 2013, in terms of which Chantell is reflected as conferring firstly on the FFT and secondly

on Frikkie a right of preemption if she ever wishes to sell her member's interest in Star Stone.

15 it appears that Chantell in fact concluded such a sale of her member's interest to the Pivotal Family Trust (PFT), of which Karel and Christine van As are the trustees, under a written sale agreement dated 15 June 2017. Chantell's member's interest was transferred to the PFT pursuant to this sale agreement. On the strength of his control of Star Stone, Karel procured his appointment as a trustee of the DBT.

16 No doubt believing the FFT to be entitled to rent out houses in "its"

area for its own account, the FFT entered into leases with tenants in these houses. Other houses in the same area were leased out by Stone Star and Ash Bash (Pty) limited, both of which were at the relevant times controlled by Frikkie.

17 On 15 September 2017, Karel started distributing a notice to the tenants on the development. In this notice, Karel asserted that the DBT had decided to take back "full control" over the development (dorp). Karel declared all leases concluded with any other party to be void and asked tenants to conclude new leases with the DBT. In all other respects, said Karel in effect, it would be business as usual.

18 This seemingly outrageous act of Karel, involving as it did an attempt to interfere with the contractual rights of the FFT, moved Frikkie to go to court to protect what he regarded as his rights. Unfortunately, as I shall show, the way Frikkie presented his case gives rise to criticism.

19 By notice of motion and founding affidavit deposed to by Frikkie, both on 20 September 2017, the FFT purported to bring an ex parte application against the respondents for various interdicts, described as interim to an action which the FFT intended to bring in

due course and to operate immediately and before the respondents had been given any chance at all to put their cases before the court.

20 The court has the power to entertain applications ex parte for such relief. It is a power which is used very sparingly and because of the prejudice, indeed injustice, which can befall a respondent in such a case, the court must and will interrogate very closely any attempt to deny a party affected by the order sought a hearing. In this regard it is no answer whatsoever that the relief sought is "only interim relief". A party whose rights are affected has the right to protect those rights at every stage of the proceedings. So, in *Schlesinger v Schlesinger*[4] which has become the locus classicus in this Division, it was held in that a duty rests on an ex parte applicant to disclose all material

facts

to the court it seeks to move ex parte. If there is a failure to disclose or a misstatement of material facts, the court has a discretion to reverse any order so granted ex parte. Indeed, *Schlesinger* held[5] that unless there are very cogent reasons to do otherwise, the court will set aside an order granted ex parte on incomplete information.

21 In *Somnium Holdings (Pty) Ltd v Vodacom Service Provider(Pty) Ltd and Others*, case no 33399/2010, a case in which I gave judgment in this court on 17 September 2010, I said this:

I would add this: in this division, a most pernicious practice has become prevalent. Counsel frequently move for rules nisi, without service, which contain far reaching provisions for interim relief, operative immediately. The grounds on which the applicant asks the court to dispense with service are often flimsy at best and buttressed with the assertion from the bar that what is being sought is "only a rule nisi", as if what was being sought was some trivial, formal relief which, if found to have been incorrectly granted, could easily be remedied at a hearing in due course. That is in many cases not so. The present is a case in point. The harm which was caused to Vodacom may, if Gogga is unable to pay what it owes, be irreversible. This is bad enough but at least Vodacom, with its financial power, was able to stay the course and right the wrong that was done to it or at least limit the damage done to it. In many cases, respondents with slender means are faced with a choice of failing to comply with a court order or fighting a long, uphill battle to reverse the order already made against them. We do not see the cases that such respondents have to settle or concede because of the injustice that denied them a fair hearing at the outset. In my view, the courts should take condign action not only against applicants who violate this most fundamental of the rules of fair litigation but against the legal representatives who put them up to it as well. Lay litigants may not understand the nicer points of the application of the principle of *audi alteram partem* to motion proceedings. Their representatives however do or, if they do not, they are not fit to practise in our courts.

I remain of this view.

22 Clause 18 of the FFT trust deed empowers the FFT trustees to conduct their business as such at meetings. As the trustees are obliged to act jointly, one can understand why this is so. But the trustees of the FFT did not have such a meeting^[6]. Frikkie alleged in his founding affidavit that he had been authorised by resolution of the trustees of the FFT to bring and prosecute the application. In support of this allegation, Frikkie put up a document which made provision for signature by the three trustees of the FFT. I shall call this document the FFT trustees' resolution, even though it is, as I shall show, no such thing.

23 Although neither the affidavit nor the FFT trustees' resolution makes mention of a meeting, the contents of this document, read together with clause 18 of the FFT trust deed which was attached to the

founding affidavit, are calculated to convey the impression that a considered decision was made to institute these extremely urgent *ex parte* proceedings.

24 But, I learnt from the papers and was told from the bar, no such meeting was ever intended to take place. What was intended was that Chantell would be asked to come to the office of the FFT's attorney,

Mr Scheepers on 21 September 2017 at 08h00 to sign the FFT trustees' resolution. This, according to Mr Scheepers, was after he had had a telephone conversation with Chantell at 17h30 on the day before, during which she is alleged to have "verbally authorised the present application".

25 But when Frikkie signed the founding affidavit on 20 September 2017, Chantell had not signed the FFT trustees' resolution. (Whether she ever did so is in dispute, as I shall show.) Nevertheless, Frikkie told the court that Chantell had signed the document. At the time he made this allegation, it was on any version untrue.

26 Mr Scheepers goes on in an affidavit he signed on 21 September 2017 and filed before the hearing of the ex parte application to say that Chantell did not keep the appointment with him. He says he thought that she might have failed to keep the appointment because of her actions referred to in the founding affidavit and a fear of the possible consequences of those actions.

27 But according to the statement of counsel for the FFT, made from the Bar, which I accept, counsel was handed what he regarded as the signed resolution at about 12h30 on 21 September 2017. He proceeded to court with this signed resolution and handed it up to the presiding judge, Tlhapi J, and told the learned judge that the papers before her contained an unsigned copy. The impression thus communicated to the presiding judge was that the position had been regularised and that the trustees had held a meeting and resolved to institute the application after the founding affidavit had been signed.

28 But the papers presented to me, all copies, contained only a copy of the alleged signed resolution. What has happened to the unsigned copy, and how the court file came to be changed in this fashion, no one could tell me.

29 On 21 September 2017, Tlhapi J granted the ex parte order. It provided for a rule nisi, returnable on 20 November 2017, in terms of which the DBT trustees for the time being were interdicted from implementing a decision to amend, revoke or rescind, a decision taken on 5 September 2011; from "proclaiming" that the lease agreements between the FFT and tenants were void; from interfering with such lease agreements; from entering into new lease agreements with such tenants in respect of houses in the FFT's "area"; from collecting any rentals from existing or prospective tenants of houses in the FFT's area; from alienating or encumbering any of the houses in the FFT's area; from interfering with the FFT's right to manage and control its area. The ex parte order also directed the DBT trustees to restore to the FFT possession to the administration offices used by the FFT on the land of the DBT; and to restore to the possession of the FFT "all documents which may have been removed from these offices by or at the behest of the trustees of the DBT.

30 We now know from Frikkie's replying affidavit that Frikkie had quite a different version, which could not possibly have been communicated to his lawyers before the hearing before Tlhapi J and therefore could not have been conveyed to the learned judge, about how the FFT trustees resolution came to be signed by Chantell.

31 Frikkie admits that no meeting of the trustees of the FFT was held on 20 September 2017. He says that he met Chantell at a building site at Vyfhoek Potchefstroom on 20 September 2017 and informed her of the resolution that "had to be taken" by the trustees of the FFT. He proceeds:[7]

She informed me that she wanted to fix what she had done ... and indicated to me that she was willing to sign the resolution. I handed her the resolution ... and requested her to sign the resolution. The resolution had by that time already been signed by myself and the other trustee [of the FFT], Mr Devenier. Chantell ... informed me that she was at that stage busy with the preparations for our son, James' school concert and that she wanted to read the resolution before signing it. She undertook to hand me the resolution back later during the day. What happened thereafter is apparent from the affidavit ... [of] ... Mr Michiel Scheepers. Mr Scheepers was at the time of the signing of the resolution not aware of the signing of the resolution by Chantell

32 Frikkie's version is further that Chantell did not hand the signed document back to Frikkie. He says:

The resolution was signed by Chantell and left on the table in a storage container at the site where I am building a house. ... I found the signed resolution at the site on the morning of Thursday, 21 September 2017 and delivered same to the offices of the Applicant's attorneys in Potchefstroom. There solution was then forwarded to counsel by e-mail. A copy of the signed resolution was handed to ... Judge Tlhapi at the hearing of the ex parte application.

33 This version presents considerable factual difficulties for the FFT. Why did Frikkie not tell Mr Scheepers that Chantell had undertaken to sign the resolution? Why, did Mr Scheepers telephone Chantell during

the late afternoon of 20 September 2017 at all? Surely the attorney had arranged with Frikkie to ask Chantell to sign the resolution.

Why, did Mr Scheepers present his affidavit to the court after he was given a document apparently signed by Chantell?

34 Chantell's version, given in an affidavit annexed to the answering affidavits, is that she in fact had two conversations with Mr Scheepers. Apart from confirming a bald allegation that Chantell's version was a fabrication, Mr Scheepers does not deny that he had two telephone conversations with Chantell. She says that in the later conversation she told Mr Scheepers that she would come to his office the following day at 08h00 to read the affidavits and the resolution to put her in a position to decide whether to sign the resolution.

35 That raises further problems for the FFT. Why did Mr Scheepers need to telephone Chantell a second time? Why did he not tell Frikkie what had transpired between Mr Scheepers and Frikkie's estranged wife? How did it come about that Chantell and Frikkie allegedly met at the building site? And once Chantell had, on Frikkie's version, decided

to sign the resolution, why did she not take it to Mr Scheepers or tell Frikkie or Mr Scheepers that she had signed it and invite him to collect it? If, on Frikkie's version Chantell's delay in signing arose because of their son's concert, why did Chantell go to all the trouble of going back to the building site?

36 Frikkie obtained the services of a handwriting expert, Colonel Landman, who made an affidavit which was put up in reply. Col Landman formed the view, on the strength of a copy of the resolution and a

comparison with Chantell's signature on copies of other documents not only that Chantell signed the resolution, but that she did not do so under duress! Col Landman does not appear to have even considered the possibility that the signature on the copy of the resolution was "photoshopped" or traced. I can place no reliance on Col Landman's opinion in this case for these reasons and because the respondents had no opportunity to meet the case he presented.

37 There are so many difficulties with the version of how Chantell allegedly came to sign the resolution that I would be justified, in my view, in rejecting the version on the papers. But I need not go that far. Because this was an ex parte application, the full version of how Frikkie alleged the document had been signed should have been put before Tlhapi J. It was obviously material.

38 Another deficiency in the case presented for ex parte adjudication was that the notice distributed by Karel did not come out of the blue. It was the culmination of a long standing dispute about how much Frikkie, through the FFT, should contribute to the expenses of the DBT. This was not mentioned in the founding affidavit. Nor was it mentioned that Chantell and Frikkie were not only estranged but that she had actively taken sides with the faction of which Karel was a member.

39 The conclusion, therefore is that I have a discretion whether to discharge the rule nisi, I should do so unless there are cogent grounds for not doing so.

40 Although the interim order is many faceted, its nub is that it was designed to perpetuate the situation under which Frikkie collected rentals, applied them for his own account and not that of the DBT and did not account in any way to the DBT for what he had pocketed. In that, crucial, sense, the order sought was for final rather than interim relief.

41 The relief is said in the notice of motion to be pending the adjudication of an action to determine the very interdictory relief granted ex parte on a final basis. But even if the interdictory relief were not confirmed, the DBT would have no right to recover moneys paid to to the FFT under the authority of the ex parte order. Counsel for the FFT suggested that the DBT would have an action for damages. But this cannot be correct because by acting under an order of court, the conduct of the FFT in appropriating the money received would not be unlawful and the FFT did not waive its right to rely on the existence of the court order as a defence. Accordingly, the ex parte order to that extent irreparably anticipates or precludes some of the relief which would or might have been given at the anticipated trial and is therefore to that extent final in substance although interim in form.[8]

42 This matter, after the rule was extended by Moosa AJ on 3 October 2017, came before me for reconsideration under rule 6(8). It seems to me that none of the relief sought and granted justified the approach to the court ex parte. There was simply no risk that any of the things which the DBT was interdicted from doing would be done so quickly that the DBT could not be given at least a couple of days to marshal its defences to the orders sought. There was no need for the representatives of the FFT to access their offices and files which was so pressing that notice could not be given. The alleged fear that documents could be removed was expressed without reference to any specific document. As it happened, the FFT was given access to the office premises through its attorney. There is no suggestion that any document was found to be missing.

43 Counsel for the FFT submitted that a factor to be weighed in favour of the FFT was that the DBT was in contempt of the ex parte order. Perhaps it was. I come to no conclusion one way or the other on this score. But it is common cause that any contempt which was committed has been purged.

44 It was accepted by both counsel at the hearing before me that the dispute between the parties has raised very complex questions. The trust structure favoured by the parties adds to the complexity, as does the fact that this is a family dispute. The relevance of the latter is that juristic acts relied upon are not always what they seem at face value to be and motives and shifting allegiances might bear significantly on

credibility.

45 So, while the FFT has established a prima facie right to some kind of relief arising from what was put before me, it has not shown a clear right, conclusively

proved. That alone is enough to doom the application to failure. But if I am wrong, and the relief sought is all truly of an interim nature and the balance of convenience comes into play,

I would still not find for the FFT.

46 This is because I am not convinced that there are cogent reasons for condoning the improper ex parte application. It is true that the application was precipitated by what seems to me to be an attempt by Karel in the name of the DBT to interfere with Frikkie's contractual relationships. But that act of fraternal treachery, if that is what it was, did not justify the over-reaction I have found to have taken place.

47 The grounds on which the application was brought ex parte relied upon by the FFT were that documents might be destroyed, rentals collected, unauthorised expenses incurred and properties dealt with in a manner prejudicial to the FFT and that the matter was extremely urgent. There is no justification in any of this for the approach ex parte. I have explained why some notice could have been given without prejudice to the FFT. There was no risk that rentals could be collected until the end of the month. Properties were at no risk of being transferred because the land had not been subdivided. The alleged fear that documents would be done away with was too vague to justify a hearing without notice.

48 Counsel for the FFT submitted that the approach ex parte had not prejudiced the respondents. I think it did. People should not without just cause have restrictions placed on their capacity to run their affairs as they see fit. They should not have courts impose those restrictions without hearing them except in the clearest cases. But counsel's argument overlooks the prejudice to the administration of justice. A case which should have been resolved in a short time in the urgent court required on reconsideration a hearing lasting a day, with the added complexities arising because an order was granted ex parte; and it took me the better part of two days to prepare a written judgment which would not have been necessary at all, had the case been brought, as it should have been on notice. So judicial resources, which high authority has declared to be in short supply in

this country, have been squandered. My judgment, whether right, wrong, good or bad will not address any of the real issues between

the parties. They are no nearer the resolution of their dispute and much money has already been spent.

49 For all these reasons, I am not prepared to overlook the improper approach to the court ex parte. Ordinarily, such a conclusion would carry with it a punitive costs order and counsel for the respondents asked for one. But I take into account that the ex parte approach was precipitated by Karel's pre-emptive notice. Frikkie might with justification have thought that he was just responding in kind to an invasion without prior notice of his, Frikkie's, rights. I shall therefore not impose a punitive costs order. But costs must follow the result.

50 I make the following order:

1 The rule nisi granted by Tlhapi Jon 19 September 2017 and extended by Moosa AJ on 17 October 2017 is discharged.

2 The Frikkie van As Family Trust must pay the costs of the Deelkraal

Behuising Trust and of the fifth and sixth respondents. Including the costs of the hearings before both judges named in paragraph 1 of this order.

NB Tuchten

Judge of the High Court

23 October 2017

FrikkieVanAs0eelkraal6S652.17

[1] I shall not distinguish except where necessary between any one of the named parties acting personally and acting in his or her

capacity as trustee. I do not use the parties given names out of discourtesy but because I think that would be the best way to

distinguish between them.

[2] Section 3(a)

[3] Section 3(e)(i), subject to an exception not presently relevant.

[4] 1979 4 SA 342 W 348E-350C

[5] 348d

[6] I shall assume for present purposes that such a meeting can take place by electronic means. But even that did not happen.

[7] Paragraph 21.2 of his replying affidavit

[8] Compare *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 2 SA 38 A 48, where a passage from *Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa*, 2nd ed 631 is cited with approval.

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