IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

21/04/2016

Case Number: 8949/16

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

20/4/2016
DATE

SIGNATURE

In the matter between:

JACOBSON MARTHINUS OELOFSEN N.O	FIRST APPLICANT
LEBOGANG MICHAEL MOLOTO	SECOND APPLICANT

In re: In the matter between:

JACOBSON MARTHINUS OELOFSEN N.O	FIRST APPLICANT
LEBOGANG MICHAEL MOLOTO	SECOND APPLICANT

and

BAMBOO ROCK 1215 CC	FIRST RESPONDENT
REGISTRAR OF DEEDS, PRETORIA	SECOND RESPONDENT
MASTER OF THE HIGH COURT, JOHANNESBURG	THIRD RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] This is an opposed urgent application brought by the first respondent, being the applicant in this application, to rescind and set aside an ex parte order granted by Louw J on 9 February 2016 in terms of Rule 6(12)(c) of the Uniform Rules of Court. The first respondent further seeks a cost order on an attorney and client scale *de bonis propriis* such costs to include the employment of two counsel one of which being senior counsel.

[2] For easy reference the parties will be referred as cited in this application as appears above. Consequently, the first respondent, Bamboo Rock 1215 CC (Bamboo Rock), is the applicant, though cited as the first respondent and the applicants are the respondent's in the application.

[3] The applicants are joint provisional liquidators of the insolvent estate, Tradewell Investments (Pty) Ltd (Tradewell). About 26 days before the liquidation of Tradewell four immovable properties were transferred from Tradewell estate to Bamboo Rock. This was the catalyst of the liquidator's *ex parte* application who sought a *caveat* be registered over all four properties and instituted an action to set aside the said dispositions.

[4] It is contended by the liquidators that no exchange of funds took place for the disposition of the properties. However, the first respondent states that the disposition was conducted in terms of a contract that was concluded between it and Tradewell even though no bonds were registered over the properties.

[5] The first respondent submits that on 28 October 2013 it sold two properties to Tradewell for R7 000 000.00 (seven million) excluding vat. Tradewell developed a Sectional Title Complex known as River View on these properties purchased. According to the sale agreement, between the first respondent and Tradewell, provision was made for the purchase price to be paid by means of the transfer of selected units, in River View, to the seller, the first respondent.

[6] The first respondent submits that to the best of its knowledge this sale agreement was transmitted to the first applicant on 27 January 2016 by the attorneys responsible for the transfer of the properties, Van Den Berg Attorneys. That being

the case the first respondent contends that the sale agreement was in the hands of the applicant's when the ex parte order was sought. It is further contended, that the transfer of the units, in terms of the sale agreement, took place on 6 November 2015.

[7] It is common cause that at the time that the applicant's launched their ex parte application they were well aware of the sale agreement and its contents.

[8] The first respondent argues that when the ex parte application was heard, the applicant's failed to disclose the contents of the sale agreement to the presiding officer. On the other hand the applicant's argue that they did not attach the sale agreement to their ex parte application papers as the contents thereof were to be disputed in an action they intended to launch. In their defence they submitted that they did in fact make mention of the *'claim'* by one of the directors of Tradewell, Paul Moolman, that there had been a purchase of the immovable properties concerned.

[9] The first respondent argued that the sale of the immovable property was fashioned in the form of an instalment payment or a delayed payment. It also had to be dealt with in terms of the Alienation of Land Act 68 of 1981 and was to be adjudicated in line with the liquidator's right of election in relation to the sale agreement under the Alienation of Land Act where the company in liquidation was the seller.

[10] Another argument advanced by the first respondent is that the sectional title register was only opened on 6 November 2015. Consequently, the units concerned could only be transferred on 6 November 2015.

[11] On the other hand the applicants make out a case that there was a 'claim' of a purchase by Paul Moolman, which resulted in the transfer alluded to. The applicant's contend that the transaction would be voidable as this transaction goes contrary to sections 29, 30 and 31 of the Insolvency Act 24 of 1936. In addition the applicant's set out that they were investigating a possible case of collusion which would have resulted in the disposition of the properties concerned and the fact that no money changed hands in respect of this property transaction.

[12] In addition, the case of applicants is that the applications needed the application to be ex parte as there was a likelihood that the respondent's would either sell the property or register a bond over the property.

[13] The first respondent has persisted with the submission that the sale and transfer was in the ordinary course of business. Further, when the applicant's brought their ex parte application they had the duty of *uberrimae fides* in presenting all the material facts, the terms of the sale agreement and together with a copy thereof before the court, as these were essential to consider for the decision to grant or not to grant the order sought.

[14] There is one crisp issue before me and I am guided by the dictum in *National Director of Public Prosecutions v Basson (2002) 2 All SA 255 at para [21]*:

"[21] Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influence a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non-disclosure or suppression was not wilful or *mala fide* (*Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E – 349B)."

[15] I take cognisance of the fact that the sale agreement was concluded as far back as 28 October 2013 and I especially take into account the terms of the agreement with regards to Price and Payment in paragraph 1 of the sale agreement.

[16] The aforesaid paragraph makes provision for either a cash payment on registration of transfer (para 1.1), or the seller (first respondent) shall have a choice of units from the sectional title development River View to the value of the purchase price (para 1.2) and the Seller (first respondent) shall take transfer of the units on registration and simultaneous transfer of the units (para 1.3).

[17] I also take into account the submissions as at paragraphs 13, 14, 15 and 16 of the applicant's founding affidavit which make mention of the factors supra. I do not intend to repeat them.

[18] In addition to these paragraphs is the applicant's reply to the first respondent's contention that material facts were not placed before the presiding officer who heard the *ex parte* application, this the sale agreement was received by the applicants, that it was '*evident*' that more than the purchase price was paid for sale, in that over and above the transfer of the units, an amount of R2 703 000.00 was '*allegedly*' paid as '*a partial payment*'.

[19] I am mindful of the applicant's averments that they do not have uberrimae fides to this court and that they did not mislead the presiding officer when they failed to attach the sale agreement and that they advised the court of the *'claim'* made by Paul Moolman, a director of Tradewell.

[20] Further, that in their replying affidavit they allege that the contents of the agreement were brought to the attention of the presiding officer and '*disclose (d) the contents thereof to the above Honourable Court, in my founding affidavit'.* That the contents of the sale agreement will be in dispute and this was the reason why a copy was not attached for the ex parte application.

[21] In dealing with this matter, I am of the view that the applicants have conceded that they did not attach the sale agreement in the ex parte application as the contents thereof were going to be in dispute in an action to be instituted and as such was not provided to the presiding officer at the ex parte application.

[22] Was it a material document that the presiding officer required to make an informed decision in granting of the order that was made? From the first applicant's own averments the contract was alluded to in the form of what Paul Moolman claimed and it was also stated that the contents of the agreement were brought to the attention of the presiding officer at the hearing. What I am not able to discern from the papers, is the applicant's disclosure on the papers of the contents of the agreement in the founding affidavit as submitted by the applicants in their replying affidavit, especially so in respect of the manner of the payment of the purchase price.

[23] On an examination of the facts, the date of sale, the terms of the sale agreement, especially as regards the manner of the payment of the purchase price, the date of the opening of the sectional title and the date of transfer of the units, all

these point towards, to my view, an ordinary sale agreement in the course of the business of the first respondent.

[24] The applicants themselves found it relevant to make a cursory mention of the 'claim' of the sale agreement and when called out on the said sale agreement, in this current application, they saw it fit to put up the sale agreement which was in their possession and they saw it fit to advise the court of its contents.

[25] The aforesaid, to me, is an indication that the sale agreement and the contents thereof were recognised by the applicants as being material. The applicant's saw it fit to suppress and not disclose this material information when they moved the ex parte application. This amounts to the violation warned of in *Schlesinger* supra when moving an ex parte application.

[26] The reason advanced for the suppression of the material fact of the sale agreement, that is, the contents were to be contested in an action to be instituted, is evident that the applicant acted in a mala fide manner in the non-disclosure. The presiding officer should have been apprised of all the facts in order to make an informed decision. As the matter stands before me the likelihood is that a different result would have emerged and the order sought by the applicants might not have been granted.

[27] In the circumstances I conclude that in this instance an order setting aside the order granted by Louw J on 9 February 2016 is warranted.

[28] The fact that the applicants are liquidators, owing a duty to the estate that is being liquidated (Tradewell), does not give them carte blanch to flaunt the law and act in a mala fide fashion, all in the name of protecting the estate. All litigants have a duty to ensure they litigate in good faith, *uberrimae fides*. If the applicant's suspected that this amounted to a dispossession and they had the necessary factors to back this up and refute the first respondent case, then what was wrong with being honest and upfront with the court?

[29] The case raised by the applicants that this sale transaction did not occur in the normal course of business and was specifically engineered with the intention of

preferring one creditor over another does not hold credence. As I stated above the sale agreement was concluded in 2013 and para1 of the sale agreement makes provision for a situation of part payment and transfer of units in lieu of payment, this together with the fact that the transfer took place on the opening of the sectional title register and the sale being subject to the Alienation of Land Act collectively, in my view, is an indication that there would have had to be compliance by the trustee with the insolvents obligations to the first respondent.

[30] In the circumstances set out in the preceding paragraph it cannot be said that a right even at the least a prime facie right existed for the grant of the interim order duly granted by Louw J.

[31] Rule 6 (12)(a),(b) and (c) states:

"(12) *(a)* In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.
(b) In every affidavit or petition filed in support of any application under paragraph *(a)* of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.
(c) A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order."

[32] The first respondent brought this application in terms of 6(12) (c). The applicants take issue with the fact that the first respondent had used the wrong rule to launch this application as the urgency had dissipated once the ex parte order was granted. It is to me clear that the reconsideration alluded to in 6(12)(c) is of that order granted on an urgent basis and as such there is nothing in this rule that precluded a party from having the said order reconsidered in terms of 6(12) which incidentally deals with urgent applications. I find no merit in this argument of the applicants.

[33] Turning to the issue of costs, the first respondent seeks costs on an attorney and client scale and de bonis propriis, including the costs of two counsels, one being senior counsel. The first respondent seeks the said costs order, arguing that the applicants could have obtained an undertaking from them prior to proceeding to court on an ex parte basis. It further argues, that the situation that prevailed at the

time that the order was sought, was not such, that there was an apprehension of harm which warranted an ex parte application and the interim interdict sought.

[34] The general rule is that the costs are paid by the unsuccessful party. In this instance I do not see the need to deviate from the general rule. The circumstances are such that the estate does not have sufficient funds to pay for the expense incurred by opposing this reconsideration. In addition the conduct of the trustee and liquidators in not disclosing material facts in the ex parte application is a course of concern as it is clear that the applicants were mala fide in their actions. In the circumstances it is only appropriate for the applicant's to pay the costs in their personal capacity.

[35] I am of the view that the scale of such costs should be the party and party.

[36] Consequently I make the following order :

[a] The order of Louw J of 9 February 2016 is reconsidered and set aside.

[b] The applicant's, Jacobson Marthinus Oelofsen N.O and Lebogang Michael Moloto N.O, are ordered to pay the costs de bonis propriis on a party a party scale the one paying the other to be absolved.

[c] Such costs are to include the employment of two counsels, one being senior counsel.

W. Hughes

Judge of the High Court Gauteng, Pretoria

Delivered : 20 April 2016

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