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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO. 663/2023

In the matter between:

WERNER VAN DER MERWE

First Applicant

ELEANORE VAN DER MERWE

Second Applicant

DOROTHEA ANNA VAN DER MERWE

Third Applicant

JACO VAN DER MERWE

Fourth Applicant

ANDREA GREYLING

Fifth Applicant

and

ILZE DALEEN NEL, *NOMINE OFFICIO*

First Respondent

MAGDA CHRISTINE PELSER

Second Respondent

ANITA JACOLINE GREEF

Third Respondent

VIVIAN STEPHEN VAN DER MERWE

Fourth Respondent

THE MASTER OF THE HIGH COURT, MAKHANDA

Fifth Respondent

ANDRIES KEUN

Sixth Respondent

THE REGISTRAR OF DEEDS, KIMBERLY

Seventh Respondent

JUDGMENT

LAING J

[1] This is an urgent application for, *inter alia*, a rule *nisi*, interdicting the first respondent from taking further steps to transfer three farms in the Northern Cape to any prospective purchaser. The applicant required the first respondent to list the farms with estate agents, advertise the sale thereof by public auction, and indicate that wind turbines were being constructed on the land, which promised substantial passive income.

Applicants' case

[2] The late Mrs Vivien van der Merwe was the owner of farm no. 1[...] and remainder of farm no. 1[...] ('the W[...] farms'), as well farm no. 1[...] ('L[...]'), in the district of Hanover. She passed away on 30 June 2019.

[3] Shortly afterwards, the first respondent, in her capacity as executrix of the estate, received written offers from the sixth respondent to purchase the land. The parties concluded deeds of sale, stipulating a purchase price of R 10,700,000 for the W[...] farms, and R 9,300,000 for L[...]. The sales were, however, subject to the consent of the fifth respondent and the heirs.

[4] In the meanwhile, the distribution of the estate had become problematic. The applicants had instituted action proceedings to challenge the validity of Mrs van der Merwe's final will, alleging that she had been unduly influenced to change her will while suffering from Alzheimer's disease. The proceedings culminated in a settlement agreement which, say the applicants, amounted to a redistribution. They allege that they became entitled to inherit a portion of the estate, together with the second, third, and fourth respondents. The settlement agreement was made an order of court on 28 November 2022.

[5] The applicants argue that the true heirs to the estate only became apparent after the conclusion of the settlement agreement. They have not provided their joint consent to the sale of the land.

[6] Since the conclusion of the deeds of sale, significant renewable energy contracts have been allocated to the W[...] farms and L[...]. The construction of wind turbines is imminent, which would significantly increase the value of the land. The applicants refer to an informal valuation, prepared by a valuer and appraiser, Mr André Crouse, that estimated that the W[...] farms would be worth R 19,039,700 and L[...] would be worth R 13,904,658 if the renewable energy project was properly considered. The market price for the land was significantly higher than the amounts contemplated in the deeds of sale concluded with the sixth respondent.

[7] Immediately after the conclusion of the settlement agreement, the applicants' attorney, Mr André van der Lingen, wrote to the first respondent on 29 November 2022. He pointed out that it was in everyone's interest that the land be sold for the best possible price and asked for details of the marketing plan (especially in light of the renewable energy project), how the land would be sold, and what terms would apply. The first respondent did not respond. Mr van der Lingen assumed that she would revert in the new year.

[8] On 3 February 2023, the first respondent's personal assistant, Ms Carina Jordaan, informed various parties about the administration of the estate and the marketing of the land. She indicated that L[...] had been sold to the sixth respondent with the consent of the fifth respondent and the heirs for R 9,300,000. The W[...] farms had been sold to the sixth respondent with the consent of the heirs, too, for R 10,700,000; admittedly the fifth respondent's consent remained outstanding. Further offers had been received for the W[...] farms, pending receipt of the outstanding consent. These had prompted the sixth respondent to increase his original offer to R 13,000,000. Ms Jordaan stated the first respondent's intention to proceed with the sale in terms of the sixth respondent's offer but requested comment from the various parties to whom her correspondence had been addressed.

[9] Consequently, Mr van der Lingen wrote to the first respondent on 6 February 2023. He expressed the applicants' concern about the lack of a transparent process in obtaining the best possible market price for the land and referred to his earlier unanswered request for details of the first respondent's marketing plan. Mr van der Lingen conveyed, too, his opinion that the consent of the fifth respondent would need to be obtained afresh, together with the consent of all the parties to the settlement agreement by reason of their interest in the sale. Of immediate importance to the present matter was Mr van der Lingen's threat to institute legal proceedings if the first respondent did not provide an undertaking to halt the process until the applicants' concerns had been addressed. The relevant portion of his correspondence reads as follows:

'I urge your undertaking not to proceed with the transfer or acceptance of any purchase agreements or registration of transfer before the questions highlighted above have been addressed. I require this undertaking within 48 hours failing which my clients will consider the bringing of the necessary interdict application to stop you, pending the outcome of a request that the properties are correctly and transparently marketed.'¹

[10] The first respondent provided no response, much to the irritation and puzzlement of the applicants.

[11] Dealing with the question of urgency, the applicants argue that the first respondent has simply ignored Mr van der Lingen's correspondence. They assert that she has elected not to divulge the details of any marketing plan and has decided merely to proceed with the sale of the significantly undervalued land.

Respondents' case

[12] The first respondent refers, in her answering affidavit, to Mrs van der Merwe's last will, to which she attested on 9 May 2015. In terms thereof, she nominated the first respondent as executrix and directed that the assets of the estate be sold and that the proceeds be distributed equally amongst her four remaining children, viz. Mr Chris van der Merwe, and the second, third, and fourth respondents.² The last will of Mrs van der Merwe, alleges the first respondent, was accepted by the fifth respondent. It has not been set aside.

[13] Subsequent to Mrs van der Merwe's passing, the first and sixth respondents entered into negotiations about the possible purchase of the land. On 15 August 2019, however, Mr van der Lingen challenged the validity of the last will and requested an

¹ Own translation.

² The first respondent states that Mr Chris van der Merwe predeceased Mrs van der Merwe, with the implication that the estate was to be distributed equally amongst the surviving heirs.

undertaking that the sale of the land would not proceed, failing which the applicants would apply for an interdict. The deeds of sale were signed on the following day, 16 August 2019. The first respondent subsequently wrote to Mr van der Lingen on 27 August 2019, defending the authenticity of Mrs van der Merwe's last will and indicating that the deeds of sale had already been signed. She undertook, however, to proceed no further until 13 September 2019, pending the applicants' institution of legal proceedings. These did not materialise. Consequently, the first respondent obtained the requisite consent from the heirs and sought the approval of the fifth respondent. The latter endorsed the sale of L[...] but stipulated further requirements before the sale of the W[...] farms could be approved.

[14] On or about 18 November 2019, the applicants caused summons to be issued in relation to the validity of Mrs van der Merwe's last will. During the proceedings, on 13 May 2021, the first respondent furnished Mr van der Lingen, pursuant to his request, with a complete copy of the files pertaining to the administration of the estate. It is common cause that the proceedings culminated in a settlement agreement that was made an order of court on 28 November 2022.

[15] The settlement agreement, asserts the first respondent, does not amount to a redistribution agreement. The applicants cannot claim to be heirs of the estate. In any event, the sale of the W[...] farms cannot proceed without the fifth respondent's consent; the sale of L[...] has already been concluded. This was the position at the time of Ms Jordaan's communication to various parties on 3 February 2023 and it remains the position. The applicants, contends the first respondent, have been aware of this.

In reply

[16] The applicants contend in reply that the first respondent never went so far as to say, on 27 August 2019, that the deeds of sale had been signed. If she had, then the applicants would have launched interdict proceedings at that stage. Moreover, assert the applicants, the prospect of a significant increase in the value of the land had directly informed the terms of the settlement agreement. The first respondent has already

granted an option to the renewable energy project developer to register a long-term lease or a servitude over the land.

[17] Furthermore, the applicants point out that the first respondent simply failed to apprise the fifth respondent of the applicants' challenge to the validity of the late Mrs van der Merwe's will. She was supposed to have done so at the time that she had sought the fifth respondent's consent to the sale of the land. At the least, she ought to have added a suspensive condition to the deeds of sale to accommodate the challenge.

Issues to be decided

[18] The applicants seek, chiefly, a rule *nisi* against the respondents. This will entail a determination of whether they have met the usual requirements for interim relief, the foremost of which being the existence or otherwise of a *prima facie* right.

[19] The most immediate issue for consideration, however, is whether the applicants have established a basis for urgency or whether the matter ought to be removed from the roll, as urged by the respondents. This aspect will be considered below.

Urgency

[20] The applicants placed a certificate of urgency before this court (in chambers) on Tuesday, 28 February 2023. This was done in accordance with the provisions of rule 12(d) of the practice directions for the Eastern Cape.³ In terms thereof, the applicants sought to enrol the matter for hearing on Friday, 3 March 2023, which was not a day normally reserved for the hearing of motion court matters. They indicated that they would seek a rule *nisi* and set out a timeframe for the filing of papers. To that effect, they proposed that the respondents be required to give notice of their intention to oppose by Wednesday, 8 March 2023; answering affidavits be filed by Wednesday, 15 March 2023;

³ Joint Rules of Practice for the High Courts of the Eastern Cape Province, published under Notice 357, in GG 41733, 25 June 2018.

and replying affidavits be filed by Wednesday, 22 March 2023. The applicants further proposed that the return date for the rule *nisi* be stipulated as Tuesday, 28 March 2023.

Rule 2(d) directions

[21] The court issued directions for the further conduct of the matter. The applicants were directed to ensure service of the application by 13h00, Wednesday, 1 March 2023; the respondents were required to deliver answering affidavits, if any, by close of business, Thursday, 2 March 2023; and permission was given for the matter to be enrolled for hearing at 09h30 on Friday, 3 March 2023. Importantly, the court expressly indicated that no finding was made on the alleged urgency.

[22] In a recent decision handed down in this division, *Voigt NO v EGH IP (Pty) Ltd*,⁴ Lowe J pointed out that a court's directions did not finally dispose of the issue of urgency. This had to be determined in due course after a court had heard all relevant facts and circumstances, including those put forward by the respondent.⁵

[23] The directions issued by a court under the provisions of rule 12(d) of the practice directions are intended to serve the objectives of proper case flow management. They are designed to ensure, *inter alia*, that there is no unnecessary delay and that cases can be finalised as expeditiously as possible. In *Bobotyana v Dyantyi*,⁶ Mbenenge JP held that there was no reason why case flow management should not apply to motion proceedings.⁷ In issuing directions within such a context, a court will rely purely on the certificate of urgency to make a *prima facie* determination as to whether the application appears to be sufficiently urgent to be heard outside a normal motion court day. This requires a great deal of trust to be placed in the submissions made by applicant's counsel, without the benefit of insight into the respondent's position. Consequently,

⁴ Unreported, ECG case no 1076/2021, dated 4 May 2021.

⁵ At paragraph [6].

⁶ 2021 (1) SA 386 (ECG).

⁷ At paragraphs [17] to [20].

there is a need for a court to strike a balance between ensuring effective case flow management while not permitting the abuse of the urgency provisions in either the Uniform Rules of Court ('URC') or the practice directions, to the prejudice of the respondent.

[24] As it so happened, the first respondent in the present matter delivered an answering affidavit that ran to some 39 pages (excluding annexures), notwithstanding the very limited time available. The applicants, in turn, delivered a replying affidavit of 29 pages (excluding annexures). On the day of the hearing, Friday, 3 March 2023, the court invited argument in relation to both urgency and merits before reserving judgment.

[25] It is necessary at this point to emphasise that, despite having heard submissions in relation to the merits, the court is still required to decide whether the matter was properly enrolled. In other words, the court must decide whether there was, in fact, sufficient urgency to have justified a departure from the timeframes prescribed under rule 6(5) of the URC.

Nature of the application

[26] In *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)*,⁸ Coetzee J listed the degrees of urgency that a court would usually encounter. The least urgent is a departure from the rule 6(5) timeframes such that the application is set down for hearing on a motion court date less than ten days after service. The most urgent is where the applicant cannot possibly wait until the next court day and the application is set down at any reasonably convenient time, even if that be at night or during a weekend.⁹ Of particular relevance to the present matter is the distinction that Coetzee J made between urgent applications and *ex parte* applications

⁸ 1977 (4) SA 135 (W).

⁹ At 137A-E.

that fell under rule 6(4).¹⁰ The latter comprise a type of application *sui generis*, resorted to when there is a threat of immediate harm.

[27] Despite not being described as such, the present application is *ex parte* in nature. It is apparent that the applicants intended that no notice be given to the respondents before seeking a rule *nisi*.

[28] The provisions of rule 6(4) indeed permit such an approach but only in limited circumstances.¹¹ In *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC*,¹² Henney J had this to say about *ex parte* applications:

‘...Courts are loathe to grant orders on an *ex parte* basis. It would usually discourage litigation by stealth or ambush unless there are compelling reasons to do so. In only a limited number of situations can matters be brought *ex parte*. One of those would be where immediate relief is sought, even though temporary in nature, because of imminent harm that would ensue should the relief not be granted.’¹³

[29] Whether the applicants intended to bring the application on an *ex parte* basis or whether the practical effect of the court’s directions was that the application was brought on notice, an onus rested on the applicants to demonstrate the urgent nature of the matter. It remains to be seen whether they have done so successfully.

Grounds of urgency

¹⁰ At 136H.

¹¹ *Turquoise River Incorporated v McMenamin* 1992 (3) SA 653 (D), at 657D. See, too, the discussion in Van Loggerenberg, *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 20, 2022), at D1-59 to D1-60.

¹² 2018 (3) SA 604 (WCC).

¹³ At paragraph [198].

[30] The applicants have relied on the following grounds of urgency: the first respondent had ignored the correspondence sent by the applicants' attorneys, had not divulged any marketing plan, and had seemed intent on selling the land at a value considerably less than what it was worth. This had given rise to suspicion and disquiet on the part of the applicants, who then decided to adopt a proactive approach to protect their interests.

[31] The difficulty with the applicants' argument is that the risk of the first respondent's acting to their possible prejudice has existed since 29 November 2022. This was when Mr van der Lingen requested details of the first respondent's intentions and received no response. Until Ms Jordaan's subsequent communication, there was nothing to have suggested that the first respondent was not going to finalise the administration of the estate unhindered¹⁴ and that she would sell the land in accordance with Mrs van der Merwe's will. There was, moreover, no express term in the settlement agreement that obligated her to adopt a marketing plan or to indicate how the land would be sold and what terms would apply. When Ms Jordaan indicated, on 3 February 2023, that L[...] had already been sold and that the first respondent intended to proceed with the sale of the W[...] farms to the sixth respondent, the applicants ought to have seen the writing on the wall, so to speak. Any remaining doubt would have been entirely removed upon the expiry of the 48-hour deadline that Mr van der Lingen imposed in his correspondence of 6 February 2023. Why the applicants waited until 28 February 2023 before launching an *ex parte* application was never satisfactorily revealed either in the papers or in argument. It is difficult not to dispel the impression that such urgency as may have existed was self-created.

[32] The other difficulty with the applicants' argument is the premise upon which the application is based, i.e. that they will suffer immediate harm if the relief is not granted. At the heart of it all is the applicants' reliance on the allocation of significant renewable energy projects to the land, giving rise to the contention that the land is worth

¹⁴ This was the expression used in clause 6.1 of the settlement agreement.

considerably more than what the respondents are prepared to accept. Upon closer examination of the applicants' argument, however, several weaknesses come to light.

[33] On the applicants' own version, the developer merely enjoys preferred bidder status in relation to the national government's renewable energy procurement programme. It has not actually exercised the option to register either a long-term lease or a servitude over the land, pending the conclusion of the procurement process. The developer, in other words, has yet to be appointed. Furthermore, the applicants aver that the developer has already started with construction activities and that 'groundwork is underway'. What exactly this means is far from evident. This may simply mean that preliminary preparations have been carried out, as would usually be the case, in anticipation of the possible award of the tender to the developer. Mr Crouse's valuation, moreover, is based merely on his preliminary findings. These constitute, in his words, a 'broad brush approach'. His valuation was carried out as a 'desktop exercise which requires detailed investigation and [the] refinement of data to achieve further reliability'. The respondents have pertinently called into question Mr Crouse's valuation, contending that little value can be ascribed to the renewable energy project until the finalisation of contracts in that regard.

[34] Overall, the applicants' argument that the land is significantly undervalued seems to be based upon a vague set of facts, obscured by a great deal of speculation and uncertainty. The upshot of this is that the court finds it difficult to be persuaded that harm is indeed imminent, warranting an *ex parte* application, on no notice at all to the respondents.

Whether to deal with the merits

[35] A court, at this stage, may be inclined to finalise the matter. Papers have been filed and submissions have been made on the merits. In *Caledon Street Restaurants CC v D'Aviera*,¹⁵ however, Kroon J made the following observation:

¹⁵ [1998] JOL 1832 (SE).

'It is to be emphasised that the fact that, in the result, and after a postponement of the matter, the papers are complete by a particular date and the matter is in that sense ripe for hearing, must not be allowed to cloud the issue whether the applicant's modification of the rules on the grounds of urgency was unacceptable. Thus, for example, if *in casu*, it was wrong for the applicant to stipulate that the matter would be heard at 3 pm on 22 October 1997, but on the other hand, it would have been in order had the applicant given notice to the respondent on 21 October 1997 that the matter would be heard on 24 October 1997, the temptation is to brush the wrong handling of the matter and the applicant's presentation thereof as urgent beyond what was justified, under the mat. The papers had to be read to adjudicate the argument about urgency and it could come across as such a waste not to decide the merits. A refusal to do so would entail all the work having to be done *de novo*. The temptation is enhanced by the circumstance that an appropriate order for costs against the applicant can be resorted to. The fact that I had been obliged to read the papers on the evening of 21 October 1997- I was to preside in the motion court on 22 October 1997- and the difficulties and pressure which the respondent, and the applicant as well for that matter, and their legal representatives experienced in the completion of the papers, could easily be allowed to fade into the background. However, the attractiveness of finally disposing of the litigation should not be allowed to govern. The approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not.'¹⁶

¹⁶ At pp 10-11.

[36] Here, the applicants have had just short of three weeks to decide upon a strategy, consult with their legal team, and prepare papers. In the end, less than two days' notice was given to the respondents. If the timeframe that had been proposed in the certificate of urgency had been adopted, then no notice at all would have been given and the matter would have proceeded on an *ex parte* basis. The applicants' self-created urgency and failure to have demonstrated proper grounds of urgency have created considerable prejudice for the respondents. The court cannot simply turn a blind eye to this aspect. The merits cannot be decided at this stage.

Relief and order

[37] In the circumstances, the court is satisfied that the matter was not properly enrolled. There was insufficient urgency for the applicants either to have launched an *ex parte* application to obtain the relief sought without notice or to have truncated the rule 6(5) timeframes with such severity as to have prejudiced the respondents in the preparation of their answering papers.

[38] Overall, the matter cannot be said to be ripe for determination. Both sets of parties have intimated, in their papers, the need for further affidavits. The determination of the matter would also benefit from heads of argument, which were not available at the time that the matter was originally heard.

[39] In relation to costs, there is no reason why the usual principle should not apply. The respondents are entitled to recover their expenses. An adverse costs order against the applicants would also serve to mark the court's displeasure with the way the application has been managed.

[40] Consequently, the following order is made:

- (a) the matter is removed from the roll; and

- (b) the applicants are liable for the respondents' wasted costs, jointly and severally, in the event of one paying the others to be absolved.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

For the applicants: Adv Cole SC, instructed by Whitesides Attorneys, Makhanda.

For the respondents: Adv Brown, instructed by Nolte Smit Inc., Makhanda

Date of hearing: 03 March 2023.

Date of delivery of judgment: 22 March 2023.