

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **628/2020**

Heard: **21/10/2021**

Made available: **28/12/2021**

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

HENRIETTA CORNELIA MOORE

1st Applicant

CHRISTOPHER LEY MOORE

2nd Applicant

ROBERT JORGE MENDONCA VELOSA

3rd Applicant

THE CM PROPERTY TRUST

4th Applicant

IPROTECT TRUSTEES

5th Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Mamosebo J

[1] This is an application for leave to appeal to the Supreme Court of Appeal (SCA), alternatively, the Full Bench of the Northern Cape Division, against the whole of my judgment and orders granted on 30 July 2021 in terms of s 50(1)(b) of the Prevention of Organised Crime Act¹ (POCA), in terms of which two immovable properties, namely, Erf [...] Barkley West, also known as 14 S[...] Street and Erf [...] Barkley West, also known as 16 S[...] Street, Barkley West (the properties), were declared forfeit to the State. The application is opposed by the Director of Public Prosecutions, Northern Cape.

[2] The applicants filed the Notice of Application for Leave to Appeal with the Registrar of this Court on 23 August 2021. Whereas it is settled that the grounds of appeal must be clearly outlined and succinct, the applicants' grounds of appeal were presented in a form of argument. This is impermissible. See *Songono v Minister of Law and order*².

[3] The applicants essentially rely on the following grounds of appeal. They contend that the Court erred:

- 3.1 In its finding that the statement of Mr Michael Bareng Raadt should be admitted as evidence;
- 3.2 In its finding that the disputes of fact raised by them are not genuine;
- 3.3 In finding that Mrs Moore had no right in selling the A[...] property without the involvement of the executrix; and
- 3.4 In not having due regard to the approach regarding the interpretation of contracts and documents.

[4] Applications for leave to appeal, such as the present, are governed by section 17(1) of the Superior Courts Act 10 of 2013, which provides that an applicant must demonstrate to the Court that there are reasonable prospects that the appeal would succeed. Our courts have already interpreted the word "would", found in section 17(1)(a)(i) of the Act, as indicative of some form of certainty or realistic chance of

¹ 121 of 1998

² 1996 (4) SA 384 (E) at 385C – E

success³. The applicants brought this application in terms of s 17(1)(a)(i) alleging reasonable prospects of success.

Statement of Raadt: Hearsay evidence

[5] The main judgment has, in my view, sufficiently disposed of the contention that Mr Raadt's statement obtained on 06 May 2016 does not constitute hearsay evidence. The statement is annexed to the NDPP's preservation application and contains the following averments which were admitted by Ms Moore or not seriously disputed:

- 5.1 Mr Raadt leased 24 A[...] Way, Royldene, Kimberley;
- 5.2 He laid criminal charges against Ms Moore with the Commercial Crime Unit;
- 5.3 Mr Raadt attended Toshiba offices, where he met Ms Moore who offered to sell the A[...] property to him for R4.7 million on 13 January 2014; upon his visit to the property he made a counter offer of R3.9 million which she accepted. They orally agreed on rent-to-buy terms and he paid a deposit of R20,000.00 before taking occupation of the property and continued to pay a monthly rental fee of R20,000.00;
- 5.4 On that same day, 13 January 2014, he paid a deposit of R20,000.00.
- 5.5 Mr Raadt suggested that Ms Moore consults an attorney to draw up a contract for them;
- 5.6 The contract was drawn by a Mr Rudolph Van Niekerk, her partner;
- 5.7 Ms Moore sold Mr Raadt R10,000.00 pre-paid electricity coupons;
- 5.8 All the amounts and dates of payment to Ms Moore's bank account are captured in para 8 of the affidavit. The amounts were confirmed by Mr Jacobus Smit, a Senior Financial Investigator attached to the Asset Forfeiture Unit and were conceded by Ms Moore.
- 5.9 Ms Moore used the cash paid by Mr Raadt to purchase the two properties. Smit considered the deposits in her bank statement and confirmed that the amounts comprised solely of Mr Raadt's payments.

³ The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para 6; MEC for Health, Eastern Cape v Mkhitha and Another[2016] ZASCA 176 (25 November 2016) at paras 16-17 and Notshokovu v S [2016] ZASCA 112 (7 September 2016) at para 2

5.10 Mr Raadt intimated that he discovered for the first time, when he attended the municipality offices to purchase electricity coupons, that Ms Moore was not the owner of the properties and that the electricity has been blocked for a period of over five years;

5.11 Mr Raadt has paid R1,480,000.00, which is not disputed;

5.12 Mr Raadt has approached the deceased's children and has telephonically been in contact with the Administrators of the Estate at Sanlam in Cape Town, and one Ms Wanda Visser who advised him not to make any further payments to Ms Moore.

[6] Ms Van Dyk, counsel for the NDPP, correctly argued, in my view, that the averments contained in Raadt's affidavit are mainly not disputed by the applicants. The real dispute is whether Ms Moore was entitled to sell the property. Ms Van Dyk submitted that the genesis of the NDPP's application is the money that was paid by Mr Raadt to Ms Moore that consequently enabled her to purchase the two properties. It is the entire capital that the NDPP contended was proceeds of her unlawful activities. What manifested into a POCA investigation was Mr Raadt's complaint to the police by way of affidavit.

[7] Mr Pienaar, counsel for the applicants, argued that the affidavit by Mr Raadt ought not to have been admitted. I disagree. Sec 34(1)(a)(i) of the Civil Proceedings Evidence Act 25 of 1965 stipulates:

“(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of the fact, provided –

(a) The person who made the statement either –

(i) had personal knowledge of the matters dealt with in the statement.”

This section, supports my admission of Mr Raadts' statement because he had personal knowledge of the transactions between himself and Ms Moore.

[8] Mr Pienaar further relied on s 34(3) of the Civil Proceedings Evidence Act which provides:

“(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.”

[9] At the risk of repetition, Mr Raadt made the contentious statement to the police after discovering that Ms Moore is not the owner of the property he was buying, having already paid a huge sum of money to her. The statement was admitted in evidence in the interests of justice. It follows that this ground of appeal must fail.

Disputes of fact not genuine

[10] Para 15 of the main judgment dealt not only with the question of whether or not disputes of fact existed but also whether the interpretation of the 2013 redistribution agreement against the backdrop of the argument made on behalf of Ms Moore that the 2013 redistribution agreement entitled Ms Moore to deal with the property as she deemed fit. Which was not the case.

[11] Mr Pienaar argued that the Court erred in finding that the disputes of fact raised by the applicants were not genuine and in rejecting Ms Moore's version regarding the interpretation of the redistribution agreement. Paras 15, 20, 21 and 22 of the main judgment addresses not only the interpretative question of the last Will and Testament but also of the redistribution agreement. At para 19 of the judgment reference is also made to the submission by Mr Pienaar, relying on *Loomcraft Fabrics CC v Nedbank Ltd*⁴, where he contended that Ms Moore had made an error in interpreting the provisions of the redistribution agreement but that that did not

⁴ 1996 (1) SA 812 (A0 at 822G

mean she had the intention to defraud Raadt. Consequently, the purported disputes of fact were not genuine and were indeed soluble on the papers as they stand. I am unpersuaded that I erred on this score.

Sale of property without the involvement of the executrix

[12] Mr Pienaar repeated the argument that was made during the main hearing that Ms Moore was entitled to sell 24 A[...] Way to Mr Raadt. The argument ignores the following pertinent issues. First, that Mr Diedericks, the testator and Ms Moore's life partner, left his Last Will and Testament expressing his wishes about how the same property was to be dealt with⁵ and in these terms:

"1.3 aan my vriendin, Henrietta Cornelia Moore, die volgende:

1.3.1 My aandeel in die woonhuis geleë te Appianweg24, Royldene, Kimberley.

1.3.2 My aandeel in die woonhuis geleë te Merlin Close 7, Camelot.

Die bemakings kragtens klousules 1.3.1 en 1.3.2 is onderhewig aan die voorwaarde dat my gemelde vriendin, 'n bemaaksom aan my boedel sal betaal gelykstaande aan die geswore waardasie van my aandeel in die gemelde woonhuise, soos bepaal vir boedelberedderingsdoeleindes. Indien my gemelde vriendin nie die voorwaarde soos hierbo uiteengesit aanvaar nie, sal die bemakings kragtens klousules 1.3.1 en 1.3.2 aan haar verval en bemaak ek die gemelde bates aan my kinders, Jacob Le Roux Diedericks (gebore 18.10.1984) en Christelle Diedericks (gebore 04.04.1979) onderhewig aan die lewenslange vruggebruik van my vriendin, Henrietta Cornelia Moore."

[13] Secondly, Ms Moore was removed by the Master as executrix based on complaints received by the Master against her. On 13 January 2014, when she

⁵ See para 5 of the main judgment.

offered to sell 24 A[...] Way, not only was she no longer the executrix but the bequest was subject to this condition: “*n bemaaksom aan my boedel sal betaal gelykstaande aan die geswore waardasie van my aandeel in die gemelde woonhuise, soos bepaal vir boedelberedderingsdoeleindes.*” (Ms Moore will pay a bequest to the deceased’s estate equal to the sworn valuation of his share in the said dwellings, as determined for administration for estate administration purposes). This was not the case.

[14] The main judgment has already dealt with the 2013 redistribution agreement to the extent that Ms Moore was, according to Clause 3 of the said agreement, permitted to rent or market the properties whilst the sale of the properties was to take effect either after or simultaneously with the transfer of the property.⁶ Transfer of the A[...] property only occurred in 2018.

[16] Having considered each of the grounds raised by the applicant, I am of the view that there are no reasonable prospects that another court would come to a different conclusion. In the result, the application for leave to appeal stands to fail.

[17] The following order is made:

The application for leave to appeal is dismissed with costs.

M.C.MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicants: Adv. C D Pienaar
Instructed by: Jacobs Fourie Inc
Mervyn Joel Smith

⁶ See paras 12, 13 and 14 of the main judgment.

For the Respondent:

Instructed by:

Adv. L Van Dyk

The State Attorney

Kimberley