IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

13/02/2015

Case Number: 36878/2013

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
DATE .... SIGNATURE

In the matter between:

RUPERT INVESTMENTS (PTY) LTD	**APPLICANT**

And

J. H. PETZER INC	**FIRST RESPONDENT**
THE QUAESTOR TRUST	**SECOND RESPONDENT**
HUGH MUIRHEAD ROBB BECKER N.O	**THIRD RESPONDENT**
THE FISANTKRAAL TRUST	**FOURTH RESPONDENT**
THE REGISTRAR OF DEEDS	**FIFTH RESPONDENT**

JUDGMENT

Fabricius J,

1.

The Applicant seeks the cancellation of existing bonds registered in favour of the Trustees of the Quaestor Trust and the Trustees of the Fisantkraal Trust over two immovable properties of the Applicant. The properties for present purposes are Portion 15 of the farm Tarentaalkraal and the farm Fisantkraal.

2.

The abovementioned immovable properties were owned by the Trustees of the Quaestor Trust and the Fisantkraal Trust and were sold to the Applicant in terms of a written Deed of Sale dated 28 June 2013. Mortgage bonds are for the balance of the purchase price. The Third Respondent as a duly authorised Trustee by the

Trustees of the Quaestor Trust and Fisantkraal Trust concluded the sales agreements in respect of the two immovable properties.

3.

The purchase agreements provided that the purchase price would be secured by means of a bank guarantee from a financial institution. This was the subject matter of clause 2.5, which however is not applicable in the present debate before me inasmuch as a loan was not applied for. Rather, clause 2.6 became applicable and does not at all refer to a bank guarantee. It is clear that having regard to the applicability of the two mentioned clauses that the immovable properties were bonded in favour of the sellers for the balance of the purchase price payable over 30 months. Applicant has been paying off the balance of the purchase price by means of monthly instalments as envisaged by the aforesaid purchase agreements and the terms of the registered bonds. The Applicant has apparently obtained financing from a new financier and seeks the cancellation of the existing bonds and the substitution thereof with a bond in favour of the new financier.

4.

The Applicant initially sought the relief set out in the Notice of Motion, but when the Respondents pointed out certain defects inherent therein, the Applicant requested amended relief as set out in a Draft Order. Respondents say that this amended relief also suffers from fundamental defects which I will deal with hereunder. The Applicant seeks cancellation of the bonds based on the payment guarantee issued by SUIDWES LANDBOU (Pty) Ltd, a private company and the Respondents do not accept the guarantee.

5.

The Respondents say that this litigation is unnecessary inasmuch if a proper bank guarantee for payment of the balance of the purchase price is received, the existing bonds may be cancelled. The argument was also that Applicant failed to properly cite the Trustees of the Quaestor Trust and the Trustees of the Fisantkraal Trust by citation of the individual Trustees who held office in those trusts. If the Trusts are found not to be properly before Court, the application cannot proceed at all, and should be dismissed. It was also argued that the amended relief was not competent in law as the conveyancing Attorney, the First Respondent, is not responsible for the acts of registration envisaged. Such acts of registration are effected by the Registrar of Deeds. This objection must be seen in context of the Draft Order that Applicants seek where in prayer 1 reads as follows: "The First Respondent is asked and ordered to cancel the restrictive conditions against the title deeds of ... properties." There are also objections against other paragraphs of the Draft Order which I will deal with.

6.

Non-joinder of Trustees

It is trite law that a Trust lacks legal capacity, and that it can act only through its Trustees. It has no legal standing in litigation.

See: ***Braun vs Blann and Botha NNO and Another 1984 (2) SA 850 (A)***. The Applicant cited the Trust as if they were legal personae merely represented by the Third Respondent as Trustee. Third Respondent pointed out this defective citation of the Trustees, and the Applicant was provided with the names of the Trustees who should have been cited, but nevertheless failed to join them. This was the Respondents objection. On behalf of Applicant it was contended that this objection was difficult to understand on the facts. The Third Respondent gave instructions on behalf of all the trustees to the First Respondent. The Third Respondent as a duly authorised Trustee by the Trustees of Quaestor and the Fisantkraal Trusts, concluded a written sales agreement in respect of the two immovable properties. The First Respondent filed a Notice of Intention to Oppose, which not only confirmed the citation of the Second and Fourth Respondents but which specifically spelled out the names of all the Trustees. The Third Respondent also filed a resolution of the Trustees of the Trusts. It was stated that the Third Respondent was authorized by all of the Trustees to oppose the application. The Applicant accordingly submitted that it was clear that all seven Trustees had notice of the application, that there was no prejudice, and that there was therefore no factual basis for relying on the non-joinder. It relied on ***Brenner's Service Station and Garage (Pty) Ltd vs Mill and Another 1983 (4) SA 233 (W) at 237 G - H,*** where the following was said: "I think it emerges from the passage quoted that, in appropriate cases, the Court is entitled to refuse to take heed of a technical irregularity in a procedure that does not cause prejudice to the opposing party." In my view, the answer could be found in Honoré in ***South African Law of Trusts 4th Edition at 266*** where the author said the following: "All the Trustees must join in suing and all must be sued though it is sufficient for one Trustee, if properly authorised by the remaining Trustees to sign the power of attorney on their behalf. There appears moreover to be no requirement of formality regarding how the remaining Trustees should signify their association with the action so long as adequate proof is produced that the litigating Trustee is properly authorized to act on behalf of all the other Trustees." I agree with Ngwenya J in ***Desai-Chilwan N.O vs Ross and Another 2003 (2) SA 644*** where he said at 650 par. 21 that: "If it is permissible that Trustees can delegate or authorize one of them to sign power of attorney for all of them to institute legal proceedings, then surely it must be correct to authorize one of them to consult with a lawyer and to depose to an affidavit and bring an action to Court on their behalf. If this is correct, then what is the magic in the citation of all the Trustees in the legal proceedings. Though it is preferable and ideally all the Trustees must be cited in legal proceedings, I do not think where one of the Trustees has not been properly cited that this omission should non-suit the Trust where there was clear authority to bring the proceedings to Court."

This was said in the context of the decision in ***Mariola and Others vs Kaye-Eddie N.O and Others 1995 (2) SA 728 (W) at 731 C to D*** and ***Van der Westhuizen vs Van Sandwyk 1996 (2) SA 490 (W).*** It is clear from the judgment of Ngwenya J and his reasoning that he found the relevant *dicta* in these two decisions not to be supported by Honoré, and in any event by being too dogmatic. The Court also retained a discretion to condone a defect in a citation if regard is had to the facts of any particular case and any possible prejudice.

In my view, on the facts of the case it is clear that the Third Respondent was given authority to file the opposing affidavits herein, and it is clear that all the Trustees were aware of the application and what was sought to be achieved thereby. I agree with Applicant's Counsel that there is no prejudice on the present facts and the objection to the non-joinder is not upheld. The Respondents must bear the costs of this part of the litigation.

Is the guarantee an acceptable guarantee?

The question rather ought to be in the relevant context, what was asked for and what was provided? The First Respondent did not file an opposing affidavit. In the absence of his explanation for his objections, one needs to look at the whole matter contextually and objectively. Respondents' Counsel agreed with this approach.

On 12 September 2014 the First Respondent, acting on behalf of the two Trusts, wrote to Applicant's Attorney saying that the copies of the two relevant Deeds were annexed, and that the cancellation figure for the two bonds amounted to R 2 851 348 as at 30 September 2014 and required the following guarantee to be able to cancel them. A guarantee in favour of his firm payable at ABSA Bank Sinoville for the mentioned amount, together with interest at 11.25% per year on the same amount from October 2014 date of payment. The guarantee had to be payable after cancellation of the bonds over the two relevant properties and any payment made by their client in the interim which would be an over-payment, would be refunded to him.

7.

The relevant guarantee issued, reflects the following on the face of it: It was issued by "SUIDWES" but this entity is not described in the heading of the document. A guarantee number is given. Reference is made to the ABSA Bank Sinoville referred to by the First Respondent, and the guarantee is dated 22 September 2014. A membership number is given, and it is stated that "our client" was the Applicant. In the body of the guarantee reference is made to SUIDWES LANDBOU (Pty) Ltd with a given registration number, and it is said that this entity "holds at your disposal the under-mentioned sum, which will become payable to you upon receipt by us, of written advice from PSN of the dual registration of the matter referred to hereunder. SUIDWES LANDBOU (Pty) Ltd (registration number) reserves to itself the right to cancel this instrument at any time prior to its registration, by giving a written notice to that effect. ... this instrument is neither negotiable nor transferable and must be surrendered to the bank against payment on the said sum." The amount payable is then given as First Respondent had stated. Although the two different properties are referred to, the size of each individual entity is not given, but merely the size of the two properties combined. The guarantee is then signed by the Chief Executive: SUIDWESFIN.

8.

Respondents raised a number of objections in the context of this purported guarantee. With reference to clause 2.5 of the purchase agreement it was said that it was expressly required in the purchase agreement that the guarantee had to be that of a bank. The document tendered however seemed to be a guarantee SUIDWES LANDBOU (Pty) Ltd, which was unacceptable to the First Respondent as conveyancing Attorney for sound commercial reasons. The objections were the following:

8.1

The guarantee was by a private company not a bank. It is however clear from the facts of this case that 2.5 of the purchase agreement is not applicable inasmuch as no loan was applied for. Clause 2.6, which is applicable, does not refer to a guarantee by a bank.

8.2

The guarantee is revocable. The risk of revocation by a private company due to a lack of funds is higher than the risk of such revocation by a commercial bank. Applicants in turn argued that though the guarantee is revocable, the Third Respondent was not contractually entitled to insist on an irrevocable guarantee. Neither did he ask for such. The guarantee also provides that written notice must be given the instrument could be cancelled. In addition grounds would have to be stated for justifying its withdrawal, and the construction adopted by the Respondent in this instance unjustifiably exaggerated characterization of risk.

8.3

The guarantee was also deficient in that it was purportedly signed by SUIDWESFIN, but this entity is not defined in the guarantee itself and guarantor is reflected as SUIDWES LANDBOU (Pty) Ltd. In the replying affidavit it is stated that

SUIDWESFIN was not a different entity but the financial division of SUIDWES LANDBOU (Pty) Ltd. This obviously does not appear *ex facie* the guarantee.

8.4

Reference is made to an entity referred to as "PSN" without this person or entity being defined or describedin the guarantee. This is of correct, but in reply it is stated that "PSN" is a firm of Attorneys tasked with the registration of the new restrictive conditions.

8.5

The identity of the bank is unknown and it is not stated. As a matter of proper interpretation it is a reference to SUIDWES LANDBOU (Pty) Ltd, but this company is not a bank. In reply it was stated that the reference to the bank, is obviously the bank that First Respondent eluded to in the request for a guarantee.

8.6

There is an objection as to the non-accuracy of the size of the properties whereas it is clear that their total size was stated.

8.7

The guarantee also does not define the mortgagee in whose favour the mortgage bond of R 5.1 million must be registered. The bonds which are sought to be cancelled contained provisions relevant to the payment of the balance of the purchase price before the conclusion of the 30 month payment schedule. Where advanced settlement of the balance of the purchase price is sought written notice has to be given by the bond holder to make such payment. The Applicant gave no such notice but tendered to effect payment in this regard only in the replying affidavit.

In general, it was contended that the conveyancing Attorney, representing the bond holders, had to act *arbitrio boni viri,* and in this context the following had to be considered:

i. The intention of the parties at the time of the conclusion of the agreement;

ii. The commercial rationality of the First Respondent's decision not to accept the guarantee, and

iii. The reasons for which the guarantee could be withdrawn.

I have already said that it is not required that the guarantee had to be issued by a bank. Respondents' Counsel however argued that in any event the guarantee had to be acceptable on reasonable and commercial grounds. There had to be a commercial rationality for the refusal to accept the guarantee. In this context there were two considerations which had formed the rationality required:

8.7.1

The Trustees have a statutory and a Common Law duty of utmost good faith to the beneficiaries of the Trust in dealing with the property of the Trust. If their security was placed at risk, and a loss occurred, the Trustees would be personally liable.

8.7.2

It is the duty of the conveyancing Attorney to execute his duties towards the Trusts with the greatest care. Conveyancers must be fastidious in their work and take great care in the preparation of their documents. The First Respondent, so it was contended, in determining whether the guarantee was acceptable, must act *arbitrio boni viri.* Where a discretion is given in the present context, so it was contended by

Respondents' Counsel, the First Respondent had to exercise such discretion *arbitrio boni viri,* i.e. as a reasonable man would under all these circumstances.

See: ***Machanick vs Simon 1920 CPD 333 at 335 and further.***

The relevant principle also appears in ***NBS Boland Bank Ltd vs 1 Berg River Drive CC and Others 1999 (4) SA 928 SCA*** where it was said at 937 that it is a rule of our Common Law that unless a contractual discretionary power was clearly intended to be completely unfettered, the exercise of such a discretion must be made *arbitrio boni viri.* In modern law by having regard to the concept of the role of public policy, *bona fides* and factual equity, an analogous conclusion could well be reached. Mr Labuscagne SC on behalf of the Respondents submitted that this was a duty upon the First Respondent, but it could of course only be, if there was an agreement between the parties in the relevant context. Relying on this, Mr De Villiers on behalf of the Applicant said that the guarantee contained word for word what was asked for by First Respondent. There was therefore an agreement in place which governed the terms of the guarantee and Applicant had complied therewith. Respondents' objections were only raised in the answering affidavit. Respondents' Counsel submitted that it was not unreasonable for the First Respondent to insist upon a guarantee by a bank in any event, as the ability to pay the guarantee could safely be assumed. The same reasoning did not apply to a private company.

9.

I would say that it depends on the facts of each particular case and any generalisation in this context should be avoided.

I agree with Applicant's Counsel that the meaning/purpose of the word "guarantee" has to be ascertained in relation to the context in which it was used.

See: ***Mouton vs Mynwerkers Unie 1977 (1) SA 119 (A) at 136 B to C***. In my view it is correct to say that the Applicant supplied the guarantee as requested by the First Respondent, inasmuch as he did not ask for a guarantee payable at the same time as cancellation. The other issues concerning the guarantee in that are in my view however of a more substantial nature. One does not know the number of important considerations having regard to the document itself, and in my view there is merit in the complaint that such deficiencies, if I can call them that for present purposes, that cannot simply be cleared up by way of a replying affidavit. The guarantee must be in order on the face of it, at least in the context of certainty of what exactly is being intended, on which grounds, when and by whom. The further difficulty is that First Respondent did not make an affidavit explaining what he had required and why, having regard to his duties, the document did not comply with the request. If I apply an objective approach to the matter, I am of the view that Respondents' complaints relating to the actual guarantee itself, apart from it not being a bank guarantee, are of merit. The guarantee has been badly drafted and provides more uncertainty than certainty.

10.

I have also considered the Draft Order which sets out the amended relief required. Respondents have a number of objections in this regard and it is clear that in respect of prayer 1, the relief sought is aimed at the wrong party. The relevant mortgage bonds are also not identified in the prayers. Prayers 3 and 5 are also not formulated in the form of a tender by the Applicant. Also, no case has been made out for an interdict, even against the Applicant. Prayer 4 should also not be meant against the Third Respondent alone. And prayer 6 is not competent if prayers 1 and 2 are not competent. No relief has been sought against the Registrar of the Deeds. As far as the last prayer is concerned, a Judge is *functus officio* after granting an order, unless it concerns certain procedural matters, and the relief sought in this context is not competent. Prayer 7 seeks an order against the Third Respondent alone. No basis has been advanced why this is appropriate.

11.

Having regard to all the above mentioned considerations, and even taking into account that this issue could easily have been resolved by the parties themselves, I am obliged to make an order that is in line with the facts and the relevant legal principles.

Accordingly the following order is made:

The application is dismissed with costs, save of these determined by the Taxing Master to have been related to the objection of the non-joinder of the individual Trustees.

JUDGE H.J FABRICIUS

JUDGE OF THE NORTH GAUTENG HIGH COURT

Case no.: 36878/13

Counsel for the Applicant: Adv R. F. De Villiers

Instructed by: Rama Annandale Munonde Inc.

Counsel for the Respondents: AdvE. Labuscagne SC

Instructed by: J. H. Petzer Inc

Heard on: 09/02/2015

Date of Judgment: 13/02/2015 at 09:30