

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 5278/2014

In the matter between:

CHRISTIAAN GEORGE FREDERICK RICHTER

Applicant

and

ELMINE RICHTER N.O.

1st Respondent

JACOBUS FRANCOIS DU PLESSIS N.O.

2nd Respondent

ELMINE RICHTER

3rd Respondent

ELRI RICHTER

4th Respondent

CORAM:

LEKALE, J

JUDGEMENT:

LEKALE, J

HEARD ON:

21 MAY 2015

DELIVERED ON:

28 MAY 2015

INTRODUCTION AND BACKGROUND

[1] On the 28th November 2014 the applicant secured, on an urgent basis, an order that:

“1. Die respondente opgeroep word om redes aan te toon, indien enige, by genoemde Agbare Hof op Donderdag, 12

Februarie 2015 om 09h30, waarom die volgende bevel nie verleen sal word nie:

1.1 Dat eerste en tweede respondente gelas word om:

1.1.1 Nie met die bates van die Leeukop Trust (IT 1495/95); Verlaat Trust (voorheen Kareetrust)(IT1496/95); Leeukop Boerdery Trust (IT464/04); Ecer Eiendomstrust (IT 1079/12) en Jece Testamentêre Trust (MT 2941/99) te handel, te beswaar of te vervreem nie;

1.1.2 Fondse uit die rekening van die Verlaat Trust te Nedbank met rekeningnommer [.....] of enige ander bankrekening van die Verlaat Trust te onttrek of daarmee te handel nie;

1.1.3 Nie met die bankrekenings soos genommer as 1, 2,3,4,6, en 7 op Bylae “CR18” te handel of daarteen te onttrek nie sonder 12 ure vooraf skriftelike kennis aan applikant;

2.2 Dat die bevel verleen in paragrafe 1.1 (1.1, 1.1.1, 1.1.2 en 1.1.3 soos gewysig) sal dien as tussentydse interdik met onmiddellike werking hangende die bring van ‘n aansoek ter verwydering van eerste en tweede respondente as trustees van die trusts soos verwys in paragraaf 2.1.1 en welke gebring te word binne ses weke na die verlening van bevel hierin;

2.3 Dat die bevel hierin verleen persoonlik beteken sal word.”

- [2] On the 12th February 2015 the interim order and the return day were extended to the 21st May 2015. The applicant, on his part, eventually filed an application for the removal of first and second respondents from office as trustees of various trusts referred to in 1.1.1 of the order and in which he is the beneficiary on the 21st May 2015.

- [3] The first and third respondent is the applicant's mother and also a beneficiary in most, if not all, of the trusts involved and so is the fourth respondent who is the applicant's sister. The second respondent is the applicant's uncle and husband to the third respondent's sister. No papers have been filed by and for the second and fourth respondents and they, as such, effectively abide the order of the court.
- [4] The matter now serves before me on the extended return day of the rule *nisi* and the first and third respondents (the respondents) oppose the same *in limine* on, *inter alia*, the ground that the interim interdict lapsed when the applicant failed to launch the application for the removal of the trustees within six weeks calculated from the date of the above order viz. the 28th November 2014. The applicant, on his part, denies that he failed to comply with the prescribed time period and maintains that he was only required to bring such an application within six weeks calculated from the date of a final order which is yet to be made. In the alternative he contends in argument and from the bar that cause exists for condonation by the court of the delay in launching the application in question and, further, seeks extension of the life of the interim interdict until finalisation of such application. At the end of the hearing the parties effectively requested judgment on the issue but I deferred the same until I had considered the merits.

DISPUTE

- [5] The parties are *ante omnia* at variance over whether or not the applicant failed to comply with the condition attaching to the order to the effect that he shall bring an application for the removal of the trustees of the relevant trusts within six weeks after the making of orders in the matter with Mr Burger, for the applicant, submitting that the prescribed six week period will only start running after confirmation of the orders. On behalf of the respondents Mr Dorfling contends that the relevant period clearly started to run immediately after the interim order was issued on the 28th November 2014.
- [6] The parties are, further, in dispute over whether or not the applicant was and still is entitled to the orders sought regard being had to the purpose of the application as set out in the founding affidavit as well as the onus on the applicant of establishing his *prima facie* right to the relief sought by showing, on a balance of probabilities, that on available facts he should obtain the relief he seeks in the removal application.

APPLICANT'S CONTENTIONS

- [7] Mr Burger submits that the intention of the applicant was to apply for the six week period to start running from the date of the final order and not from the date of the interim order. In his view it was just a mistake that the word “**finale**” was omitted as a qualification to the word “**bevele**” in paragraph 2.2 of the notice of motion. In the alternative he submits that

the appropriate course to follow in the circumstances is for the court to condone the delay in launching the relevant application and to extend the lifespan of the interim interdict so that it operates until finalisation of the application for the removal of the trustees.

- [8] On behalf of the applicant it is further painstakingly and elaborately contended that the conduct of the trustees, particularly the first respondent, clearly warrants their removal from office in that they are not impartial in their treatment of beneficiaries, they conceal information from the applicant as a beneficiary, there exists irretrievable breakdown of trust between the applicant and the trustees, the respondents do not exhibit care, diligence and skill in their dealings with the applicant in so far as they required him to sign away his assets in favour of the fourth respondent and they, further, prejudice the beneficiaries as well as the intentions of the founders of the trusts.

RESPONDENTS' CONTENTIONS

- [9] Mr Dorfling eloquently submits that the principle of clean hands is applicable in the instant matter in so far as the applicant appropriated trust funds without the consent of the trustees and without even first having informed them. He, thus, approaches the court with dirty hands and deserves no assistance whatsoever from the court.
- [10] It is apparent *ex facie* the launching papers that the six week period was intended to run immediately after the interim

orders were issued. The court order is very clear on the issue and there exists no cause to depart from its ordinary words according to the respondents. Failure by the applicant to comply with the compelling resolute condition requiring him to launch the removal application within six weeks of the interim order resulted in the same lapsing. There, thus, exists no interim order to confirm. There, further, exists no good cause for either condonation of the delay in launching the removal application or revival of the rule *nisi* as contemplated by rule 27 on the Uniform Rules of Court. The nature of the interdict *in casu* required maximum expedition on the part of the applicant.

[11] The undisputed facts before the court show that the third respondent did a sterling job of pushing the business of the trusts in the right direction by ensuring growth as opposed to prejudicing beneficiaries and the interests of the relevant trusts. The applicant failed dismally to show that available facts should entitle him to the relief he seeks in the main application according to Mr Dorfling.

[12] The applicant obstinately refused to follow sound advice from his erstwhile attorney and arrogantly elected to pursue confrontational litigation in a family matter which deserves amicable resolution.

APPLICABLE LEGAL PRINCIPLES

[13] The effect of a court order is ascertained from reading the order as a whole by giving words their natural and ordinary

meaning as the case is when interpreting other documents such as contracts. As the court in **Firestone South Africa (Pty) Ltd v Genticuro A G** 1977 (4) SA 298 AD pointed out at page 304D – H:

“...The basic principles applicable to the construction of documents also apply to the construction of a court's judgment or order. The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules.”

- [14] Failure to press on with the main action where an interdict has been issued *pendente lite* may provide cause for questioning the *bona fides* and genuineness of the applicant's claim and may lead to the same being regarded as an abuse of the procedure for obtaining relief *pendent lite*. (See **Chopra v Avalon Cinemas SA (Pty) Ltd and Another** 1974(1) SA 469 (D) 472E)

- [15] Rule 27 of the Uniform Rules of Court authorises and regulates extension of time limits, removal of bar and condonation on substantive applications and good cause shown. It further specifically authorises revival by the court or a judge in chambers of rules *nisi* discharged by default of appearance by applicants.

- [16] The court has no power to revive a rule *nisi* which has lapsed because of the fulfilment of a resolute condition such as failure to take a prescribed step timeously. (See **Williams v Landmark Properties SA and Another** 1998 (2) SA 582 (W) at 588C.)

[17] An applicant for interim interdict must, *inter alia*, prove that he has a *prima facie* right to the relief he seeks by showing that on the facts before the court he should obtain the relief he seeks in the main action or application. (See Webster v Mitchell 1948 (1) SA 1186 (W) and Gool v Minister of Justice 1955 (2) SA 682 (C) at 688D – E.)

[18] Trustees may be removed from office in terms of either section 20(1) of Trust Property Control Act, No 57 of 1988 if the court is satisfied that such removal is in the interests of the trust and its beneficiaries or the common law if the welfare of the beneficiaries warrants such a move by the court. (See Sackville West v Nourse and Another 1925 AD 516.)

APPLICATION OF THE LAW TO THE FACTS AND FINDINGS

[19] The purpose of the instant application when it served before the court on the 28th November 2014 and as set out in the founding affidavit was:

“...om die bevoegdhede en die magte van eerste en tweede respondente te beperk hangende die bring van ‘n aansoek vir die vervanging van die trustees (eerste en tweede respondent).”

(See paragraph 7.1 of the Founding Affidavit at p13 of indexed bundle).

- [20] The court order was granted in the language of and the terms set out in the notice of motion and is clear insofar as paragraph 2.2 thereof reads:

“Dat die bevele sal dien as tussentydse interdik met onmiddellike werking hangende die bring van ‘n aansoek ter verwydering van Eerste en Tweede respondente as trustees van die trusts soos verwys in paragraaf 2.1.1 en welke gebring te word binne 6 weke na die verlening van bevele hierin.”

That much was not disputed by Mr Burger who was quick to point out that the qualification **“finale”** was erroneously left out in the notice of motion.

- [21] In my view **“bevele hierin”** mentioned in both the order and the notice of motion clearly refers to the order itself and not to any final orders that may be issued in the future on return day. In the circumstances of the present matter the court would not, in my opinion, reasonably possibly have premised the operation of an interim order on some future uncertain event falling totally outside its control such as a final order the making of which depends on the facts that would serve before a court entertaining the matter on return day and which may or may not be issued.

- [22] A reading of the order against the motion which precipitated it leaves no doubt that the six week period was intended by both the applicant and the court to run from the 28th November 2014. The filing of an application for the removal of the first and second respondents from office as trustees within that prescribed time period was a condition on which

the life of the interim interdict which was adjunct to the rule *nisi* depended. It is possible that the delay, on the part of the applicant, to bring the relevant application had its genesis in the realisation by the applicant that the life of the interdict, which was obviously to his advantage and to the concomitant prejudice of the respondents as trustees, was in his hands. The longer he delayed in launching the application the longer the interdict operates with first and second respondents *prima facie* remaining restrained in their powers and activities as trustees for much longer.

[23] The order, however, did not leave the matter entirely in the discretion of the applicant because it obliged him to launch the relevant application within a specified time period after its issue. Failure on his part to comply with the order had negative consequences and did not *per se* extend the life of the interdict at all because the order included an implicit preservative and compelling resolute condition to the rule regard being had to the explicit purpose of the rule as set out in the motion. Failure to comply with the prescribed time period amounts to abuse of process and effectively deprives the rule of its *raison d'être* as opposed to preserving the same so as to sustain the rule. Such a dilatory attitude on the part of the applicant effectively fulfils the resolute part of the condition and triggers the lapse of the rule *nisi* regard further being had to the maxim *cessante ratione legis cessant lex ipsa*.

[24] There is no application contemplated by rule 27 of the Uniform Rules of Court before me for condonation of the late

filing of the removal application and/or for the extension of the life of the interim interdict.

[25] The rule *nisi*, thus, lapsed at the end of the prescribed six week period calculated from the 28th November 2014 without the applicant having launched the removal application. There is, as such, nothing to confirm.

[26] Even if I am wrong in the preceding finding, I am persuaded by the facts that the applicant has failed to discharge the onus on him of establishing a *prima facie* right to restraining orders against first and second respondents regard being had to *inter alia* the fact that the first respondent indisputably took the affairs of the trusts to greater heights as opposed to prejudicing the trusts and their general bodies of beneficiaries. The applicant simply did not manage to show that he has reasonable prospects of success in the main application launched.

COSTS

[27] There exists no cause before me for departing from the general practice of allowing costs to follow the event regard being had to the fact that the applicant had ample opportunity to reflect on the merits of the matter and to stop the process in favour of amicable settlement of the dispute, which essentially strikes at the heart of the Richter family of which the parties are members.

ORDER

[28] The order of the 28th November 2014 has lapsed alternatively same is hereby discharged.

[29] The applicant shall pay first and third respondents' costs inclusive of reserved costs.

L. J. LEKALE, J

On behalf of the applicant: Adv. A. H. Burger SC
Instructed by:
W J Botha Attorneys
BLOEMFONTEIN

On behalf of the first and
third respondents: Adv.D.F Dorfling SC
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