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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN**

CASE NO.: 4450/2008

In the matter between:

**VIJAYAKUMARIE NAIDOO
SELVAN NAICKER
VASANTHAKUMARIE MANIKAM
PRABASHNIE NAICKER
ROVANDRIE NAICKER
KUBENDRAN NAICKER
LOSHNI NAICKER
PRAGASEN NAIDOO
SAMANTHA NAIDOO
KELVIN NAIDOO
KARTHIGASEN NAIDOO
DELASHNE MANIKAM
YUGANDRIE MANIKAM
NIVENDRAN MANIKAM**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT
SIXTH APPLICANT
SEVENTH APPLICANT
EIGHTH APPLICANT
NINETH APPLICANT
TENTH APPLICANT
ELEVENTH APPLICANT
TWELFTH APPLICANT
THIRTEENTH APPLICANT
FOURTEENTH APPLICANT**

And

**PHILLIP PARIS ARUNACHALLAM
THE MASTER OF HIGH COURT,
(NATAL PROVINCIAL DIVISION)
MOHAMED YAHYA BAIGA N.O**

**FIRST RESPONDENT
SECOND RESPONDENT

THIRD RESPONDENT**

JUDGMENT

Delivered on.

CHILI. J

[1] The relief sought by the applicants is the rescission of the order granted by Van Heerden AJ on 16 July 2010 in the following terms:

1. That the Deed of Sale concluded between the Applicant and the First Respondent, annexure "D" to the founding affidavit, is a true copy of the written agreement of purchase and sale and a such is deemed to be a sale that is valid and enforceable in respect of the immovable property described as Portion [5.....]71 (of 255) of Erf [1.....]06 [C.....]hatsworth, in extend [2.....]49 (two hundred and forty nine) square metres with physical address [1.....]5 [G.....]reenvale [A.....]venue, [W.....]esteliffe, [C.....]hatsworth of the terms and conditions set out therein.
2. That the Fourth Respondent do all things necessary, and take all steps necessary, and sign all documents necessary, to enable transfer of the immovable property to be effected into the name of the Applicant in terms thereof.
3. That should the Fourth Respondent fail and/ or refuse to comply with paragraph 2 hereof within two (2) days of the grant of this order, the Sheriff or his Deputy be and is authorized and directed to do so in place of the 4th Respondent.
4. That the Third Respondent be and is hereby authorized and directed, subject to the provisions of section 42 (2) of Act 66 of 1965, to transfer the immovable property into the name of the Applicant in accordance therewith.
5. That the costs of this application be paid from the Estate of the late PURSURAMA NAICKER (Estate number 8.....101/01), such costs to include the costs occasioned

by the employment of Senior Counsel (in respect of the Applicant), and the cost occasioned by the employment of two Counsel (in respect of the First and Fourth Respondent.

THE PARTIES

[2] The First to Third Applicants are children of the late Pursurama Naicker (the deceased). The Fourth to the Fourteenth Applicants are the deceased's grandchildren. The deceased died testate having bequeathed 50 per cent of the proceeds of the sale of his fixed property situate at 1.....5 G.....reenvale Avenue, W.....Westcliffe in C.....hatsworth (hereinafter 'the property') to the First, Second and Third Applicants and the remaining 50 per cent to his grandchildren, the Fourth to the Fourteenth Applicants. The deceased appointed Raman Naicker as the Executor of his estate. He was later substituted by Mohamed Yahya Baig, the Third Respondent. The First Respondent Phillip Paris Arunchallam was the applicant in the matter that served before Van Heerden AJ. No relief is sought against the Second Respondent.

BRIEF BACKGROUND

[3] In an attempt to give effect to the order granted by Van Heerden AJ, the Third respondent sought written consent from the First to Third Applicants (heirs to the deceased estate) in order to facilitate transfer of the property to the First Respondent, but they refused. On 19 April 2011 the First Respondent then approached the court for an order compelling the First to Third Applicants to sign a consent document in compliance with paragraph e of section 42 (2) of the questionnaire in accordance with the administration of estates Act 66 of 1965 and also to transfer the immovable property to the First Respondent in compliance with Van Heerden's order. That application was opposed and affidavits in support thereof were filed by the First, Second and the Third

Applicants. On the 24th May 2013 the First respondent withdrew the application as advised by Counsel.

[4] On 6 August 2013 the applicants brought an application couched as 'semi agent', seeking an order staying the transfer of the property to the First Respondent's name pending joinder of the applicants to the proceedings that served before Van Heerden AJ and a subsequent application for the rescission of Van Heerden AJ's order of 16 July 2010. That application was withdrawn and the present application which was served on the First and Third respondents on the 18th and the 30th of September 2013 respectively, was instituted.

CONDONATION

[5] It appears to be common cause that the present application was only launched approximately three years after the reasons for the order granted on 16 July 2010 were served on the applicants' attorneys.¹ For that reason, I was requested to deal first with condonation for late filling of the application papers. I pause to mention that the founding affidavit relied upon is deposed to by the First Applicant and confirmed by the Second to the Fourth and the Seventh to the Fourteenth Applicants. It is important to refer to the paragraphs in the founding affidavit that deal with condonation. In paragraph 50 at page 21 of the indexed papers the First Applicant states:

"I submit that we have not delayed in launching this application as the 1st respondent's attorney had only withdrawn the application under case no. 4788/2011 (the application to compel us to sign and an application to join) on the 24th May 2013. We thereafter only became aware of the 1st respondent's intention to transfer the property into his name by way of annexure 'K'". (My emphasis.)

¹ Van Heerden AJ's judgment is dated 8 October 2010 and appears to have been handed down by no later than 12 October 2010.

Simply put, the applicants submit that there has been no delay in bringing the rescission application because it was brought shortly after they received a letter annexure 'K'.

[6] Annexure 'K' referred to above, is a letter from the first respondent's attorneys dated 17 July 2013, addressed to the applicants' attorneys, to the following effect:

'In respect of the above matter, we advise that the Master of the High Court has endorsed the Power of Attorney to Transfer giving effect to the order of court dated 16 July 2010 in terms of which transfer is to be passed from Estate late P Naicker to PP Arunachallam.

We are proceeding with the transfer of the above property.'

A suggestion that the applicants first became aware of the First Respondent's intention to transfer the property into his name by way of a letter dated 17 July 2013 cannot be true. The First respondent made his intention to have the property transferred into his name very clearly in the application dated 11 April 2011, an application to compel the First to Third applicants to sign transfer documents. A letter dated 17 July 2013 was a continuation of the process that had commenced as way back as April 2011.

[7] At page 21 paragraph 51 of the indexed papers, the First applicant states:

'We then instructed our attorney to launch an urgent application in this honourable court to stay transfer of the property, pending the outcome of this application.'

The so called 'urgent application' the applicants refer to *supra*, was only made on 06 August 2013, approximately three weeks after the applicants' attorneys received a letter informing them about the transfer of the property.² On 08 August 2013 the matter was removed from the roll and the applicant tendered wasted costs occasioned by the urgent application. For some strange reason, the applicants seem to be adopting a

²Without any supporting document I am unable to find, as the applicants allege in their founding affidavit, that they only became aware one week after the 17th of July 2013 that the first respondent's intention was to cause the property to be transferred to his name.

view that before bringing the present application, they first had to 'await the outcome of all the applications made subsequent to the order sought to be rescinded, dated 16 July 2010'. I am unable to make any sense of that view.

[8] When Raman Naicker and the Third Respondent opposed the bill of costs served on them by the First Respondent, they advanced as their primary reason to do so, the fact that their intention was to appeal the order granted on 16 July 2010. They stated in no uncertain terms, that an appeal against Van Heerden AJ's order was 'inevitable'.³ I cannot imagine a situation where Raman Naicker and the Third Respondent would even begin to attend to the bill of costs without having received instructions to do so from the First to the Third applicants.⁴ There therefore is no merit in a suggestion that the applicants (in particular the First to the Third applicants) only became aware of the existence of the order sought to be rescinded and reasons thereof after they received a letter annexure 'K' some time in 2013.

[9] I conclude by dealing briefly with an attempt by the applicants to bring this application under R42 of the Uniform Rules of this court. The applicants seemed to be suggesting that when the Third Respondent filed the opposing affidavit he did so without their knowledge and consent. To that end they submitted, that the order sought to be rescinded was granted in error in that **'they did not participate in the said proceedings'**. It is worth noting that at the initial stages of the application before Van Heerden AJ the Third Respondent was not cited as a party. He was only joined in at a later stage when it was brought to the attention of the First Respondent that the Third respondent had substituted Raman Naicker as an executor of the deceased's estate. That issue alone, suggests that the question of representation of the relevant parties to the proceedings was carefully scrutinized by Senior Counsel who appeared on behalf of Raman Naicker and the Third Respondent in their representative capacity.

³ See para 5 at page 119 of the papers.

⁴It is worth noting that the bill of costs was signed by the attorneys representing Raman Naicker and the third 3rd respondent on 17 September 2010.

[10] When the Third Respondent filed the opposing affidavit he clearly did not proceed on his own accord, but in consultation with Raman Naicker and the First to the Third Applicants. The Third Respondent is not the only person who filed an opposing affidavit. In support of his (the Third Respondent's) affidavit, the First to the Third Applicants themselves filed confirmatory affidavits. There is no merit in the First to Third Applicants averment that they simply signed confirmatory affidavits without knowing what documents they placed their signatures on, or without knowledge of the contents of the opposing affidavit and supporting documents attached thereto. A suggestion therefore that they did not participate in the proceedings before Van Heerden AJ, is rejected as false. It is clear in my view, that what the applicants seek to do is to delay giving effect to the order granted by Van Heerden AJ on 16 July 2010.

COSTS

[11] As already pointed out herein before, the only applicants who filed confirmatory affidavits in the present application are the Second to the Fourth and the Seventh to the Fourteenth. For that reason there is no justification in burdening the Fifth and the Sixth Applicants with costs. I am satisfied that a punitive costs order is justified in the circumstances, given in particular, the inexplicable delay on the part of the applicants in bringing this application and the deliberate misrepresentations made by applicants.

In the circumstances, the following order shall issue:

Order:

1. The application under notice of motion issued 13/10/2014 is dismissed with costs on an attorney and client scale basis, such costs to include the costs of senior counsel.

2. Costs shall also include the perusal and consideration of
 - 2.1. the application papers issued under case 4450/2008 on 04 April 2008;
 - 2.2. the application papers issued under case no. 4788/2011 on 19 April 2011;
and
 - 2.3. the application papers issued under case no. 4450/2008 on 06 August 2013.
3. The First to the Fourth and the Seventh to the Fourteenth applicants are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

Chili. J

Appearances

Counsel for the Applicants:

Adv. Naidoo

Instructed by:

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Counsel for the Respondents:

Adv. Julien SC

Instructed by:

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Date of hearing:

16 March 2015

Date of judgment:

27 August 2015