

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

Case No.: 2180/2013

In the matter between:

NICOLAAS PETRUS UYS N.O. First Applicant

STEPHANUS SOLOMON WEYERS N.O. Second Applicant
(In their capacity as trustees of the N & J Trust,
IT[...])

NICOLAAS PETRUS UYS Third Applicant

and

VKB LANDBOU LIMITED First Respondent

THOMAS AUCTIONEERS Second Respondent

In re:

VKB LANDBOU LIMITED Applicant

and

NICOLAAS PETRUS UYS First Respondent

STEPHANUS SOLOMON WEYERS N.O. Second Respondent

(In their capacity as trustees of the N & J Trust,
IT [...])

HEARD ON: 18 NOVEMBER 2013

JUDGMENT BY: RAMPAL, AJP

DELIVERED ON: 5 DECEMBER 2013

- [1] The applicants apply for leave to appeal against the whole of the judgment and the order I granted on the 18th June 2013 with reasons I furnished on the 27th August 2013.
- [2] The applicants' main application to interdict the selling of the farms of the first and the second respondents, in other words, the trust, was dismissed with costs. On the same papers I then granted the first respondent's conditional counter-application for, among others, judgment for the payment of the two claims and I declared the farms executable. I then ordered the applicants to pay the costs of the proceedings.
- [3] In my view this application for leave to appeal is but yet another *mala fide* ploy to delay payment. As I have pointed out in the judgment the trust has virtually no defence against the claims of the first respondent. The trust consented to judgment. In good faith I granted the trust a further indulgence of ten weeks until the 31st August 2013 to raise

funds in order to pay the claims of the first respondent. That indulgence was a futile exercise.

- [4] Since the 31st August 2013 a further three months period has subsequently lapsed. The delay was occasioned by this further application for leave to appeal filed by the applicants. To date hereof no payment whatsoever has been made by the applicants to settle the amounts owing to the first respondent.

- [5] In **Rutherford v Ferguson and Another (Standard Bank of SA Bpk intervening)** 1998 (4) SA 90 (OPD) at 92I – 93A this court held per Pretorius AJ:

“Die vraag of verlof om te appelleer toegestaan behoort te word moet judisieel benader word en is nie 'n geval van 'n blote formaliteit nie. Vereistes waaraan onder andere voldoen moet word is die volgende:

- (a) Applikant moes die Hof tevrede stel dat hy redelike vooruitsigte van sukses het op appèl.
- (b) Die aangeleentheid van wesenlike belang is vir die appellant of vir beide die applikant en die respondent.

Vide *R v Baloi* 1949 (1) SA 523 (A) te 524; *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) te 343F--G; *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) te 720E--G.

Die volgende opmerking in die *United Plant Hire*-saak (te 720F--G) is ook relevant in die onderhawige aangeleentheid, naamlik:
 ‘These factors are not individually decisive but are interrelated and must be weighed one against the other;. . . .’”

See also **Van Heerden v Cronwright and Others** 1985 (2)

SA 342 (TPD) at 343C – J.

- [6] I do not propose to deal comprehensively with the grounds of appeal on which the applicants rely. My views as regards this matter are fully set out in my judgment.
- [7] This application, just as the main application, is an abortive attempt to delay the inevitable. The crux of the matter is that the trust is unable to pay its debts. It is so that the trust was facing liquidation proceedings at the time it consented to judgment. It may well be so that there were certain procedural blemishes leading up to the declaration of the trust property as executable. There may also be some procedural defects in the manner I dealt with the matter on the way leading up to the judgment I granted. All these discrepancies notwithstanding, in the final analysis a debtor consenting to judgment should by virtue of such consent be precluded from escaping the agreed consequences thereof.
- [8] Even if the first respondent were to abandon this judgment, rewind the clock and institute action afresh against the applicants, the ultimate fate of the applicants would still remain the same as it is now. Nothing change, however perfect the procedure may be in my view the procedural defects complained of are totally eclipsed by the substantive merits of the case against the trust. No procedure, however clean and regular, can salvage the trust from its indebtedness.

[9] Now I turn to the alleged lack of judicial supervision of the sale of immovable trust property. The trust had unconditionally consented to such sale and confirmed that such sale would not in any way infringe any rights to adequate housing. Such consent served in an open court on the 14th February 2013 before my brother Kruger J. Therefore the trust had ample opportunity to raise the issue of the adverse impact of the sale on anyone's rise to adequate housing in an open court. On behalf of the trust the applicants did the very opposite. They informed Kruger J that the question of rights to adequate housing was a non-issue which required no further judicial supervision. On that day the trust had the golden opportunity to protect itself against the respondents' claim to sell the farm(s) on which they reside. Since the question of adequate rights was not an issue, judicial supervision was uncalled for. The applicants themselves deleted the item from the agenda. Therefore, they no longer have any reason to complain about lack of judicial oversight anymore.

[00] As I pointed out in my judgment the third applicant had been a signatory to those consent orders. He is likewise precluded from raising any issue of rights to adequate housing. The argument of Mr Grobler before me to the effect that the issue was not properly ventilated, failed to impress me. The hard facts of the matter clearly show that the applicants cannot have a second bite of the cherry. Neither before Kruger J nor before me did they make any

attempt to ventilate the issue in order to persuade any one of us to exercise judicial supervision otherwise than we did. In this instance proper judicial supervision was exercised not once but twice with the express consent of the applicants. They assumed the two of us, on two separate occasions, that there would be no adverse impact on such

- [9] The contention of the applicants, as regards urgency, was neither here nor there. The auction had been arranged. The sale of the farms had been extensively advertised. The application of the trust to stay the sale was urgent. Therefore the counter-application was also urgent for the very same reasons on which the applicants relief was based for the urgency of the main application. The applicants have, on behalf of the trust, been playing games for a considerable period of time knowing fully well that they have no valid defence. The applicants are clearly clutching onto straws. To grant this application would encourage the serious and lamentable abuse of the court processes. The first respondent believed, and in my view correctly so, that it was time to put an end to the abuse. It is now time the matter is put to rest once and for all.

- [10] As regards the applicability of Rule 46, it must be borne in mind that the intended sale by private auction had been agreed upon by the parties and made an order of court by agreement *inter partes*. Such an agreement to a private auction, contained in a settlement agreement and made an order of the court, is binding, valid, enforceable and not

contrary to public policy. It was certainly not *parate executie* without recourse to the court processes – *vide* **Citibank NA v Thandroyen Fruit Wholesalers CC and Others** 2007 (6) SA 110 (SCA) par [13] at 115H – 116E.

[12] Indeed Mr Pretorius, counsel for the first respondent, was correct when he said the counter-application was the death-knell of the application for leave to appeal. The truth of the matter is that the trust has no prospects of success, as regards the main application. Absent such prospects of success, any success concerning this application for leave to appeal would be of no consequences. The merits of the counter application are formidable. The trust and its trustees simply cannot run away from the truth of this matter. Let me put this point differently. Even if the applicants should successfully appeal against my decision, whereby I dismissed the main application, the force of the counter-application would still be fatally powerful for the applicants to survive. In my judgment I found that all the requirements for such an order were convincing established.

[13] In the circumstances I am not persuaded that any reasonable prospect exists that another court would, on the facts, not have granted such a judgment for the payment and for the declaration of the farms as executable property.

[14] A similar counter-application was lodged in **Citibank**, *supra*. In that case the counter application was granted. Probably the same outcome can be expected should the applicants apply for rescission of the judgment. In this instance the

counter-application would probably be granted due to the refusal of the trust to abide by the order of Kruger J without any need to make reference to an appeal or review. I fail to understand how any court could possibly decline to grant judgment in favour of the first respondent merely because the trust consented to judgment during the course of liquidation proceedings. In my view the context in which the consent was given, has in no way tainted the due process leading up to the declaration of the trust property as executable and the allowing agreed sale by private auction.

[15] I have to stress that the first respondent has been struggling to enforce payment of a substantial claim for more than three years. If leave to appeal were to be granted to the trust in these circumstances, it would be tantamount to a serious abuse of our civil justice system. The trust owes the first respondent a substantial amount of money. The trust, by its own admission, has put up no defence to such a claim. In these circumstances I am indeed persuaded by Mr Pretorius' argument that the trust should be denied leave to appeal. To do otherwise, would certainly tarnish the integrity of the processes, procedures and practices of our system.

[16] As I say it, there are no reasonable prospects of another court coming to a different conclusion. It is now high time that the trust no longer be allowed to avoid its contractual obligations as it has done so far.

[17] Accordingly I make the following order:

17.1 The application of the trust for leave to appeal is dismissed.

17.2 The applicants are directed to pay the costs of this application on the special scale of costs as between attorney and client.

M.H.RAMPAL, AJP

On behalf of applicants:

Adv S. Grobler
Instructed by:
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On behalf of respondents:

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