

LOM Business Solutions t/a Set LK Transcribers/

IN GAUTENG SOUTH HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 28623/09

DATE:21/07/2009

In the matter between

RICO BERNERT

Applicant

and

K W J SWANEPOEL

1st Respondent

JACO ROOS ATTORNEYS

2ND Respondent

TUTOR TRUST (PTY) LTD

3RD Respondent

VENDITOR AUCTIONEERS

4TH Respondent

VAN HEERDEN VAN STADEN ATTORNEYS

5TH Respondent

DR FRANS GERBER

6TH Respondent

THE REGISTRAR OF DEEDS

7TH Respondent

THE BODY CORPORATE RIVER GLADES ESTATE **8th Respondent**

J U D G M E N T

VAN OOSTEN J: This is an application which comes before me by way of urgency. The applicant appears in person. The application is opposed by the

first and second respondents only. The relief sought by the applicant in essence is aimed at preventing the sale and transfer of an immovable property known as Unit 98, Riverglades (the property). A number of issues, including the urgency of this matter and the *locus standi* of the applicant to bring this application, were dealt with in argument before me. In view of the long and chequered history of the litigation between the parties all essentially in one way or another concerning the ownership of the property, I have decided in the interests of justice to confine this judgment to the issue which in my view is decisive of the application.

The applicant and his former wife were the only members of a close corporation known as Unit 98 Riverglades CC (the CC). The CC is the registered owner of the property. The saga of litigation I have referred to, has its genesis in the voluntarily liquidation of the CC obtained by the applicant some seven years ago. Thereafter litigation ensued in a number of applications both in this court, as well as in the North Gauteng Division of this court. In the view I take of this matter it is not necessary to fully deal with all these applications. Time constraints further do not allow me to venture beyond the issue which I propose to determine.

The relief sought by the applicant is predicated upon an order granted in this court by Mathopo J, on 11 March 2009. The order was sought in an application brought by the applicant against the present first respondent (as second respondent), and the Master of the High Court (as first respondent). Regrettably for the reasons that I will presently deal with, the terms of the order have become shrouded in uncertainty and controversy.

I shall begin with the proceedings before Mathopo J, when the

order was sought by the applicant. A transcript of those proceedings is before me. According to the transcript Mathopo J granted the following order:

In this matter I give the following order. The second respondent (ie KWJ Swanepoel NO) is removed as a provisional liquidator with retrospective effect to 26 March 2002.

Swanepoel, I interpose to mention, was the duly appointed liquidator of the CC in liquidation. The date of his appointment is 26 March 2002. Although the order refers to a provisional liquidator I should point out that no provisional liquidator was appointed at any stage. Be that as it may, two official court orders duly signed and stamped by the Registrar of this Court, were subsequently issued containing orders quite different from that ordered by Mathopo J. The first order (with date stamp 19/03/2009) reads as follows:-

- 1. The Close Corporation, Unit 98 Riverglades CC, Registration Number CK1996/044294/23 is in business and out of liquidation.*

Subsequently (on 31/03/2009 so it appears from an indistinct date stamp) the following order was issued:-

- 1. The Close Corporation, Unit 98 Riverglades CC, Registration Number CK1996/044294/23 is in business and out of liquidation.*
- 2. That Kareel (sic) JW Swanepoel NO (liquidator) be and hereby removed as "liquidator" of the Close Corporation, Unit 98 Riverglades CC, under voluntary liquidation Master's Reference Number T1039/2002 with effect 26th March 2002.*

It now appears that the applicant after the order was made on 11 March 2009, approached Mathopo J, probably with the view of clarifying the terms of the order. In response thereto a letter by the "Clerk to Mathopo J"

dated 26 March 2009 and unsigned, was addressed to the applicant, which reads as follows:-

1. Kindly be advised that your court order has been rectified. You can lift up the correct court order with prayers 1 and 2.

The “rectification” of the court order, accepting that it was affected, was done without notice to the respondents. That brings into question the propriety of the “procedure” that was followed. The uncertainty that has now arisen concerning the terms of the order in my view is of such a serious nature that I would not have been inclined to accept it on face value for purposes of this application. But, I do not consider it necessary to deal any further with this aspect as the matter can and in my view should be decided on a different basis, which brings me to the relief sought by the first and second respondents in a counter application.

In the counter application the respondents seek a rescission of Mathopo J’s order. The contents of the court file in that matter has, as I was informed and as it moreover appears from the papers before me, gone missing. When the matter was argued before me the applicant, somewhat surprisingly, informed me that he was in possession of copies of the file contents. I ordered the applicant to hand his file containing those copies to respondent’s counsel for his perusal. Having done so counsel informed me that a great number of original court documents that should have been in the court file, formed part of the applicant’s file. In order to prevent further confusion I ordered that the file be admitted as Exhibit “A” in these proceedings.

A negative inference concerning the applicant’s conduct

immediately comes to mind, but in the absence of the applicant having been afforded the opportunity to deal with it, I refrain from commenting any further. Suffice to say that for the reason to follow Mathopo J's order cannot be allowed to stand. On 1 September 2008 an order concerning the liquidation of the CC and the power of Swanepoel to continue with the liquidation was made by Nthai AJ in the Transvaal Provisional Division of this court. The order reads as follows:-

- 1. Dat verklaar word dat die applikant (ie the CC in liquidation) in likwidasie is.*
- 2. Dat verklaar word dat geen beletsel bestaan wat die likwidateur (ie Swanepoel NO) verbied om die proses van likwidasie van die applikant in die normale loop van sake voort te sit nie.*
- 3. Die tweede respondent (ie the Registrar of Deeds) verbied word om die eiendom oor te dra, te beswaar daarmee of in verband daarmee te handel sonder skriftelike toestemming van die likwidateur.*
- 4. 'n Bevel tot terug transporterings van die deeltitel eenheid, bekend as Eenheid 98 in die deeltitelskema Riverglades Estate, Gauteng, tesame met die onverdeelde aandeel in die gemeenskaplike eiendom soos in die tersaaklike deelplan aangetoon, vanaf die vierde respondent (ie Marcell Matthysen) na die applikant.*
- 5. 'n Bevel tot rojering van enige verband oor bovermelde eiendom geregistreer ten gunste van die vyfde respondent (Standard Bank of South African Limited).*
- 6. Dat koste van die aansoek in die administrasie van die applikant (sic) sal wees.*
- 7. That the counter application ("interlokutoriese aansoek") is dismissed.*

Mathopo J's order is in direct conflict with and in fact squarely the opposite of Nthai AJ's order. That being the situation the applicant (who was the third respondent in the application before Nthai AJ) in the face of Nthai AJ's order was obviously not entitled to seek a contrary order in another Division of this Court before another Judge without mentioning in the last

mentioned application the existence of Nthai AJ's order. That however is exactly what the applicant has done.

It is common cause that no mention at all was made in the application before Mathopo J of Nthai AJ's order. More than sufficient grounds, including possible fraud and the erroneous granting of the order by Mathopo J, accordingly exist warranting the rescission of Mathopo J's order. Upon rescission of the order the basis upon which the relief is sought in the present application ceases to exist and the application for this reason alone falls to be dismissed.

Counsel for the respondents urged me to grant costs against the applicant on a punitive scale. In my view the request is well founded. The applicant's conduct in these proceedings has been anything but courteous and civilised. He has availed himself of dubious tactics, unfounded, scurrilous allegations and derogative language all deserving as a mark of this Court's disapproval thereof, a punitive costs order. He has moreover withheld material information concerning the order of Nthai AJ from Mathopo J which, had it been disclosed, would most certainly have resulted in a different order. Mathopo J was undoubtedly misled by the applicant's conduct. In these circumstances it is just and fair that the respondents should not be out of pocket concerning the costs of this application, which clearly was misconceived right from the outset.

In the result I make the following order.

1. The application is dismissed.
2. The order including all subsequent additions and/or amendments thereto and/or rectification thereof granted by

Mathopo J on 11 March 2009 in case number 23127/05 is set aside.

3. The applicant is ordered to pay the first and second respondent's costs of this application, including the costs of the respondents' counter application on the scale as between attorney and client.

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