IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case Number: 5196/2022

In the matter between:

ELMASDAL BOERDERY (PTY) LTD First Applicant

(Registration No.: 1975/004577/07)

PETRUS PAULUS SCOTT N.O. Second Applicant

(In his capacity as a Trustee for the
Die PP SCOTT FAMILIE TRUST,
IT 1890/99)

and

ALBERTUS JOHANNES ERAMUS First Respondent

OSHER LANDBOU (PTY) LTD Second Respondent

THE REGISTRAR OF DEEDS, BLOEMFONTEIN Third Respondent

ETIENNE VISSER ATTORNEYS Fourth Respondent

HEARD ON: 03 NOVEMBER 2022

CORAM: MATHEBULA, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII on 15 FEBRUARY 2023. The date and time for hand-down is deemed to be 15 FEBRUARY 2023 at 12H00.

Introduction and Relief Sought

[1] On 19 October 2022, the applicants brought an application, as a matter of urgency and on an *ex parte* basis which was granted when the following order was made: -

> "1. The Applicants non-adherence to this court's rules related to time periods and service is condoned and the application is heard as an urgent application in terms of Rule 6(12).
>
> 2. A rule nisi is hereby issued calling on the Respondents to show cause on 17 November 2022 why, pending the final determination of an action referred to in paragraph 3 below, an order should not be made:
>
> 2.1. Interdicting the Third Respondent from transferring ownership of the immovable property being, Farm Kotzee's Rust 197, District Wesselbron, Free State Province, being 270,2494 hectares under Title Deed T17744/2007 to the Second Respondent, or anyone else, pending the outcome of this application alternatively the action referred to in paragraph 3 herein under.
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> 2.2. Directing that the costs of this application shall form part of the costs of the action referred to in paragraph 3 below.
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> 3. Directing the Applicants to institute an action within 30 days of the granting of this order.
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> 4. Directing that pending the said return date the provisions of paragraph 2.1 above shall have interim effect.
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> 5. The Applicants to serve this order on the Respondents within 5 days from date of this order."

[2] Subsequent to that, the second respondent set down this application for reconsideration of the *ex parte* order in terms of Rule 6(12)(c) of the Uniform Rules of Court. The order sought is couched in the following terms: -

> "1. That the Judgment and Order that was granted by Opperman J on 19 October 2022, under case number 5196/2022, on an *ex parte* basis, in the absence without the knowledge of the Second Respondent, be re-considered in terms of Rule 6(12)(c);
> 2. That the Judgment and Order that was granted by Opperman J on 19 October 2022 be set aside as part of the reconsideration process;
> 3. That the Applicants' application under case number 5196/2022 be dismissed with costs, inclusive the cost of two counsels, if applicable."

The course of the Proceedings

[3] The applicants issued the application on 19 October 2022. It is common cause that the papers were not served on any of the respondents before it came before the duty Judge. On the said day probably well after business hours, Opperman J granted the order in the absence of the respondents. Now aware of it, the second respondent has re-enrolled it so that this court can have the benefit of its version. This is in keeping with an important principle of our legal system to wit *audi alteram partem*.

Approach to the Adjudication of a Reconsideration Application

[4] That this application is properly placed before court is not in dispute. Rule 6(12)(c) provides that a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order. This Rule is only restated to reconfirm that indeed this is the case in this matter. The dominant purpose of the Rule is to assist the aggrieved party against whom an order was obtained.

[5] The question is how should the court adjudicate the matter seeing that the applicants in this application were the respondents when the *ex parte* order was granted. Counsel for the second respondent placed heavy premium on the decision of **Oosthuizen v Mijs**.[1] In that matter the court held that in

[1] 2009 (6) SA 266 (W) at 270A.

reconsideration matters the court is not limited to reconsider the original application, but should also have regard to the facts placed before it on affidavit. The whole matter that led to the granting of the *ex parte* application is considered afresh. This is a sensible approach fit for purpose. There is no other manner to afford redress against any imbalances or unfairness to the party who was not there. It is to allow such a party to put his version across to be adjudicated in the normal way. This is the approach that will be followed in this matter.

[6] A party who launches any application does so supported by a founding affidavit which must disclose the material facts constituting a cause of action. In an application of this nature, it is the respondents who are bringing it. The question is whether the applicant is confined to the case originally made out or not. Also whether such can be supplemented or not.

[7] In **Basil Read (Pty) Ltd v Nedbank Ltd and Another**[2] the court held that in the reconsideration application the applicant is not permitted to file a "supplementary affidavit to bolster its original application". Plainly, the cause of action cannot be substituted nor supplemented. This makes sense because otherwise the respondents will be chasing a moving target. This absurdity will lead to unfairness. The respondent is entitled to seek a reconsideration on the original application.

[8] The applicants having chosen to proceed by way of an *ex parte* application, they were duty bound to make full disclosure of all material facts. These are those facts which might have an influence on the court to grant or refuse the relief sought. It is trite law that suppression of the information need not be wilful or *mala fide*. Even negligence will qualify. Therefore, a misinformation cannot serve as a basis of the case for the applicant. The contention on behalf of the second respondent is that if the true facts were before Opperman J, she would not have granted the order. The point made is that she was misled.

[2] 2012 (6) SA 514 (GSJ) at para 25.

Background

[9] This matter concerns a dispute about a sale of portions or the entire farm known as Kotzee's Rust 197 situated in the district of Wesselsbron. The farm in question is owned by the first respondent. The first respondent set in motion the process to subdivide the farm. Permission was granted by the Minister of Agriculture, Land Reform and Rural Development ("Minister") on 4 August 2022. There is a dispute between the parties as to what prompted this subdivision. According to the applicants it was for the purposes of selling portions A and C to them. This aspect is denied by the second respondent.

[10] Applicants averred that as a temporary measure, the parties entered into a written lease agreement in July 2021. The agreement between the first applicant and first respondent was not signed on behalf of the former. Coming to the second applicant, the lease agreement was comprehensively signed on 18 July 2021. It seems that after the application for subdivision was granted, the first respondent signed the sale agreement with the first applicant dated 8 September 2022. The document purporting to be an agreement between the second applicant and the first respondent is unsigned.

[11] It transpired that the first and second respondent entered into a composite agreement on/or about 13 June 2022. The parties further signed an Addendum on 24 June 2022. The transaction was processed by the transferring attorneys and the deed was due to be registered on/or about 19 October 2022. All that came to naught because the applicants obtained the order which is the subject of this application for reconsideration.

Arguments

[12] Counsel for the second applicant put forward numerous grounds contending that the order should be set aside. He pointed out that the urgency alleged was self-created. There was no convincing reason why the order was taken without notification to the second respondent. He argued that the applicants could have served the papers in any other conceivable manner. Formal service could have been dispensed with in appropriate circumstances. He added that in extreme

cases it could be done, but this was not such deserving matter. This matter was not sufficiently urgent to dispense with the requirement of service.

[13] Counsel also referred to what he considered to be misrepresentation of the facts in the papers. The point made is that the true facts were withheld with the sole purpose to mislead the court. The applicants were aware that the first respondent had withdrawn the matter where he was challenging the validity and enforceability of the agreement with the second respondent. In their papers they alleged the matter was removed which was not the case. This information could not have served as the basis for their case.

[14] On the maxim *prior tempore potior jure*, he argued that it finds application in this matter. The agreement between the first and second respondents stands. All other agreements were either voidable or they were entered into and signed after the valid and enforceable agreement was signed. A useful submission made centred around the agreements entered into by the parties. The cardinal point is that the property referred to in the lease agreements was not in existence at the time the applicants and the first respondent entered into them. Plainly, the first respondent was incapable of transferring more rights than he had in the circumstances.

[15] Mr Hefer appearing for the applicants contended that Opperman J granted the order after she was satisfied that the requirements for urgency and non-service to the respondents were met. He was in agreement with the position advanced by his opponent regarding the filing of affidavits in applications of this nature. He extended his point that in any event the second respondent did not need to file an affidavit. However, now that the second respondent has elected to do so, then the applicants were entitled to file the reply thereto.

[16] He emphasized that the applicants did not mislead the court. Indeed, the matter was removed from the roll. According to him urgency was argued before Opperman J and it was fruitless to reargue it. Counsel conceded that the application challenging validity and enforceability of the agreements was not proceeded with. However, those rights of the parties ie between the applicants

and the first respondent are still to be ascertained. He pointed out that the applicants had a *prima facie* right in the form of a pre-emptive right.

[17] Insofar as the existence of the portion as an entity is concerned, he agreed that it did not. However, operational steps were taken after pre-emptive rights were granted. He referred to the maps which were attached to the lease agreements as an indication that positive steps were taken to bring their transaction into fruition. All the parties strictly adhered to it as evidenced in the application made to the relevant Minister for subdivision of the farm.

Discussion

[18] A party who brings an *ex parte* application ought to realise that it must be done under extraordinary circumstances. Therefore, a disclosure of the material facts is of utmost importance. That is why there is such an onerous responsibility that failure to do so is not only intentional, but even through negligence it will suffice. The purpose of the application was to prevent the transfer of the property from the first respondent to the second respondent. It is worth mentioning that the applicants were not party to the aforementioned agreement.

[19] The applicants were aware that the first respondent had launched an application against the second respondent challenging the validity and enforceability of the agreement between them. Certainly as interested parties they should have been appraised of the correct information pertaining to the outcome on 18 October 2022. The matter was not removed from the roll, but withdrawn by the first respondent. These are two (2) different concepts, each with its own meaning and result.

[20] When the applicants alleged removal of the matter from the roll, they gave an impression that there was still a live dispute between the parties. The truth is there was none. There could never be any talk about the validity and enforceability of the agreement between the respondents. As a consequence, there was no basis to allege the existence of any pending action for clarity of any rights whatsoever. The view expressed in this judgment is that surely if this

information was put before Opperman J, she would not have granted the order sought. On this ground alone the aforesaid order stands to be set aside.

[21] There is consensus that the portions the applicants lay claim on did not exist as separate entities before the application for subdivision was granted. Logic dictates that there could not be any agreement to transfer any right on something that was not in existence at the time. Such rights, if any, cannot be transferred *ex post facto*. Any undivided share not already held by any person shall vest in any person unless the relevant Minister consent in writing. The law states that no portion of agricultural land shall be sold or advertised for sale unless the relevant Minister has consented in writing.[3]

[22] At issue is several agreements that were entered into by the parties. The common denominator in all these agreements is the first respondent. The lease agreement with the first applicant was not signed by the latter. The sale agreement was only signed by the parties on 8 September 2022. The lease agreement with the second applicant was properly signed. However, both parties did not sign the sale agreement. The latter agreement does not comply with the provisions of the Alienation of Land Act 68 of 1981 (the Act). This means that there is no proper sale agreement between them.

[23] The case for the applicants, it seems, relies on the lease agreements in particular the rights of first refusal. Both counsel debated at length the judgment of the Supreme Court of Appeal in **Four Arrows Investment 68 (Pty) Ltd v Abigail Construction CC and Another**[4]. In paragraphs 10 and 11 the court said the following: -

> "[10] That the legislature has prohibited the advertisement of a portion of agricultural land for sale in the absence of ministerial consent, clearly indicates that the object of the legislation was not only to prohibit concluded sale agreements, but also preliminary steps which may be a precursor to the conclusion of a prohibited agreement of sale. In this context the grant of an option would clearly be a precursor to the conclusion of a prohibited agreement of sale, at the election of the option holder.

[3] Section 3(e)(i) of the Subdivision of Agricultural Land Act 70 of 1970.
[4] 2016 (1) SA 257 (SCA).

> [11] That an option falls within the ambit of the prohibition contained in the Act becomes clear when its true nature is considered:
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> > 'The essence of an option is that it is binding on the option grantor. It is an offer, in this case to sell property, which cannot be revoked. It is the option holder that has the choice whether to exercise its right.'
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> In the present context the option grantor purports to be bound to sell a portion of agricultural land without ministerial consent, on the election of the option holder, contrary to the provisions of the Act. The fact that the option may provide, as in the present case, that the option holder may only exercise the option after the consent of the Minister has been obtained, matters not. In the interim the option grantor purports to be bound to sell a portion of agricultural land without ministerial consent, which remains contrary to the provisions of the Act."

[24] That, in my view, simply means that the transgression of the Act results in a nullity of a contract relied upon. Coupled with other reasons enunciated in the preceding paragraphs, the agreements relied upon were void *ab initio* and of no force and effect. It must also be added that the case for the applicants do not meet the requirements of the interdict. There is no *prima facie* right as the dates of the agreements demonstrate.

[25] The other requirement of a temporary interdict is a reasonable apprehension of injury. This must be established on a balance of probabilities that injury will result. There are no objective facts gleaned from the papers that such injury will result on the applicants. Similarly, the balance of convenience favours the second respondent. The transfer of the properties in a composite agreement is stalled because of parties whose rights, if any, still have to be ascertained. Clearly if a transaction was ripe to be registered, it means that the parties to an agreement have complied with all requirements.

[26] The last requirement is that of an alternative remedy. The applicants if aggrieved that the first respondent has breached the agreement, can sue for damages. In that way the applicants can obtain adequate redress in damages.

In their papers, the applicants refer to an action still to be launched to clarify their rights. There is no such cause of action in our law.

Joinder Application

[27] The last aspect which should not detain us is the application to join Wilhelmina Jacobs Scott as a party to the proceedings. This application is unopposed by any of the parties. The reason why she was not cited in the proceedings is well explained. In the exercise of the discretion of the court, this application is granted.

Costs

[28] The second respondent has been successful and there is no reason to depart from the rule that the losing party must pay the costs.

Order

[29] The following order is issued: -

29.1. The *ex parte* order dated 19 October 2022 is set aside with costs.

29.2. The main application under case number 5196/2022 is dismissed with costs.

29.3. The application for joinder is granted.

M.A. MATHEBULA, J

APPEARANCES:

Counsel on behalf of the Applicants:	Advs J.J.F. Hefer SC assisted by M.C.M. Pieterse
Instructed by:	Pieter Skein Attorneys and Preller Incorporated C/O McIntyre Van Der Post Attorneys **BLOEMFONTEIN**
Counsel on behalf of the First Respondent:	No appearance.
Counsel on behalf of the Second Respondent:	Adv. T Strydom SC
Instructed by:	Burden Swart & Botha Attorneys C/O Honey Attorneys **BLOEMFONTEIN**
Counsel on behalf of the Third Respondent:	No appearance.
Counsel on behalf of the Fourth Respondent:	No appearance.

/TKwapa