



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 174/2012

In the matter between:

1.1.1.1. **CHRISTINA CATHERINA ESTERHUIZEN**
APPLICANT

and

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|--|----------------------------------|
| LINDSAY SIX INVESTMENT CC | 1ST RESPONDENT |
| HERMAN CHRISTOPHER JAN VAN RENSBURG | 2ND RESPONDENT |
| VAN RENSBURG & ASSOCIATES | 3RD RESPONDENT |
| REGISTRAR OF DEEDS | 4TH RESPONDENT |

Neutral citation: Esterhuizen v Lindsay Six Investment CC & Others (A 174/2012) [2013] NAHCMD 196 (17 July 2013)

Coram: SMUTS, J
Heard: 11 June 2013
Delivered: 17 July 2013

Flynote: Application for declaratory order that a usufruct registered in favour of the first respondent was of no force and effect and certain

consequential relief – Disputes of fact raised on the papers. The applicant did not apply for a referral to oral evidence or for trial. Disputed facts approached in accordance with the principles set out in *Plascon Evans Paints v Riebeeck Paints* – Applicant failed to make out a case for relief. Application dismissed.

ORDER

- a) That the applicant's application is dismissed with costs
 - b) These costs include those of one instructing and two instructed counsel.
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JUDGMENT

SMUTS, J

(b) The applicant is the owner of the bare *dominium* of the remainder of the Usakos West, no: 65 in the Erongo Region (the farm). The second respondent is a legal practitioner of this court. The third respondent cited is his firm and the first respondent is a close corporation in which the second respondent is a sole member. The Registrar of Deeds is as cited as fourth respondent in these proceedings.

(c)

(d) In October 2012 the applicant brought an application, seeking the following relief against the respondents:

- '1. Declaring that the usufruct registered on behalf of first respondent in respect of farm "**Remaining Extend of the Farm Usakos West, No. 65, Erongo Region, measuring 5389, 4179 hectares**" in the district of Usakos, Republic of Namibia is of no force of law and/or effect;
2. Directing fourth respondent to cancel the aforementioned notarial deed of usufruct and/or any other deed or burden imposed on "**Remaining Extend of the Farm Usakos West, No. 65, Erongo Region, measuring 5389,4179 hectares**" in the district of Usakos, Republic of Namibia by the respondents;

3. Evicting first respondent and second respondent from “**Remaining Extend of the Farm Usakos West, No. 65, Erongo Region, measuring 5389, 4179 hectares**” the district of Usakos, Republic of Namibia by the respondents;
4. Ordering that the first respondent and second respondent pay the costs of this application on a scale of attorney and own client, jointly and severally the one paying the other(s) to be absolved;
5. Granting such further and/or alternative relief as the above Honourable Court may deem fit.’

(e) The application is opposed by the first to third respondents whom I refer to as the respondents. The Registrar of Deeds does not oppose the application.

(f) At the hearing of the application, Mr Botes, who, together with Mr A.B. Small, appeared for the respondents, asked that the application be dismissed with costs because of the wide ranging factual disputes which emerged on the papers. He submitted that these factual disputes were foreseeable by the applicant and that application proceedings were inappropriate and that the application should be dismissed with costs for that reason.

(g) Mr Phatela who appeared for the applicant submitted that the applicant had established her entitlement to the relief claimed on the papers. When I pointed out to him that there were disputes of fact on the papers and on more than one occasion enquired from him whether the applicant would ask in the alternative for a referral to oral evidence or to trial, Mr Phatela was adamant that the applicant did not seek that form of relief and only sought an order in terms of the notice of motion. The question which then arises is confined to whether the applicant is entitled to the relief sought on the papers.

(h) In addressing this issue, I first refer to the factual background which led to this application and then turn to the disputes which emerged on the papers. The approach to factual disputes in motion proceedings is then referred to and applied to the this application.

Background facts

(i) The applicant states in her founding affidavit that she and her former husband, Karel Andries Esterhuizen, had purchased the farm (and became owners in April 2003). It was purchased with the assistance of Agribank which had provided loan financing to the applicant and her erstwhile husband to do so.

(j) It soon became apparent that the applicant and her former husband were not able to keep up with the instalments to Agribank in respect of their loan. The applicant's former husband at that stage had sought and obtained employment in South Africa during the period 2004-2006 while the applicant remained on the farm with their children. The applicant and her husband ran a butchery on the farm.

(k) During 2005 when the applicant realised that they were not able to keep up their instalments and with Agribank placing them under pressure to service the loan, the applicant stated that she made an appointment to see the second respondent as she was concerned that they would 'lose the farm'. She stated that her appointment with the second respondent was towards the end of 2005 and that he had been approached as a legal practitioner to assist her in arranging easier payment terms with Agribank so that she could continue to stay on the farm. The applicant states that at the consultation she explained their predicament and referred to a letter of demand from Agribank. She states that the second respondent undertook to assist her and take up the matter with Agribank and negotiate a more favourable arrangement for repayment of the loan.

(l)

(m) The applicant further states that a week or two later she received a telephone call from the second respondent to meet her at a coffee shop in Usakos. At that meeting, the applicant states that she signed a document but that the second respondent deprived her of the opportunity to read it as, she says, he was in a hurry. She further states that the second respondent did not explain the contents or effect of the document to her. But, she says, she trusted

him as her lawyer and that he would look after her interests.

(n)

(o) The applicant states that she would never have signed a document which would deprive her the ownership of the farm and that she only saw the document signed by her for the first time during 2011 when she consulted lawyers about a divorce action against her ex-husband. The document in question turned out to be special power of attorney signed on 24 January 2006 authorising the registration of a usufruct in favour of the first respondent against the title deed of the farm. The applicant states that she had heard from her previous legal practitioner in Walvis Bay in April 2010 (when her ex-husband had instituted divorce predeceasing against her) that she had signed a document which had deprived her in possession of the farm, namely being the usufruct registered over the farm for the period of 99 years in favour of the first respondent. The applicant states that she was under the impression that her ex-husband had serviced the Agribank loan and did not comprehend why she would then have to pay rental to stay on the farm but had agreed to do so in order not to lose possession of the farm.

(p) The applicant states that she was never notified by anybody that the indebtedness to Agribank had been settled. This had occurred without her consent.

(q) The applicant submits that the first respondent abused his position as a legal practitioner to negotiate on behalf of the first respondent and to secure rights in respect of the farm at her expense. She submits that the second respondent had 'deliberately devised' a scheme to evict her from the farm and that subsequently issued summons for her eviction which had resulted in a judgment and court order to that effect granted against her on 15 June 2012. The applicant contended that the second fraudulently alternatively by way of coercion secured her signature to the special power of attorney to effect the usufruct. She submits that it should be set aside and that the further relief sought in the notice of motion should be granted.

(r)

(s) The respondent filed a detailed answering affidavit. He states that he had

been approached by the applicant on 24 May 2005 with regard to the sale of the farm. He states that the applicant had informed him that another purchaser was interested but could not provide security. The second respondent states that he assumed that the applicant had approached him because he had previously expressed an interest in purchasing a farm in that area but accepts that he had previously acted for the applicant with regard to collections on behalf of the butchery business. But he states that the meeting with the applicant on that date related to the sale of the farm – and not in an attorney-client relationship.

(t) The respondent states that a deed of sale was entered into between himself and the applicant and her ex-husband on 13 June 2005 in respect of the farm. At the same time as the deed of sale was signed, the applicant and her husband both signed an affidavit to apply for a copy of title deed to the farm.

(u) The second respondent also referred to the fact that the applicant and her then husband applied in writing for a waiver from the Minister of Lands, Resettlement and Rehabilitation in September 2005 which application has had prepared. These documents were attached to the second respondent's answering affidavit.

(v)

(w) The second respondent further states that the applicant and her then husband withdrew the application for waiver on 18 November 2005 in writing after the ministry had expressed an interest in acquiring their farm. The second respondent also points out that the Deputy Sheriff attached the farm pursuant to judicial process on 6 November 2005. He points out that these facts were not disclosed by the applicant in the founding affidavit.

(x) The second respondent further states that on 24 January 2006 the applicant signed a special power of attorney authorising him to register a notarial deed of usufruct over the farm in favour of the first respondent, a close corporation in which he is the sole member. In the meantime the second respondent had obtained settlement figures from Agribank – in the sum of N\$749 149, 69 and on 16 February 2006 paid part of the arrears to Agribank in the amount of N\$266 212, 21.

(y) The second respondent states that he and the first respondent took occupation of the farm during January 2006 and immediately started with commercial farming operations but that he had agreed to permit the applicant and her husband a three months grace period to occupy the residence on the farm without charge whereafter a rental would be agreed upon.

(z) The second respondent also states that the applicant's former husband on 27 March 2006 signed a similar power of attorney authorising the second respondent to register a notarial deed of usufruct over the farm in favour of the first respondent. The first and second respondents thereafter paid all land tax in respect of the farm and on 6 June 2006 the first respondent paid the outstanding loan to Agribank.

(aa) A notarial deed usufruct was registered over the farm in favour of the first respondent on 8 November 2006 simultaneously with the cancellation of the Agribank bond. The second respondent further states that the applicant and her husband paid rent to the respondents to lease the farm homestead until the applicant was finally evicted from the farm during July 2012 after failing to pay outstanding rental to the respondents.

(bb)

(cc) The applicant's former husband made an affidavit supporting the version provided by the second respondent.

(dd)

(ee) The second respondent thus denies the allegations that he had fraudulently or by way of coercion induced the applicant to sign documentation to her own detriment thus abusing his position of trust as her legal practitioner. He furthermore denied that this was part of a scheme to eventually evict the applicant from the farm.

(ff) The applicant file a replying affidavit reiterating her position as set out in the founding affidavit and denied the respondents' contrary version largely by resort to bald denials not substantiated by any evidence.

(gg) Although the applicant in the founding papers contended that a usufruct could only be concluded for the benefit of a natural person and not a juristic person in the form of a close corporation like the first respondent, this point was correctly not persisted with in argument. Mr Phatela argued that I should grant relief on the basis of the fraudulent alternative coercive inducement of the applicant to sign the special power of attorney and on the basis of an abuse of the second respondent's position as a legal practitioner and thus of a position of trust in the circumstances.

(hh)

(ii) The second respondent denies that a relationship of attorney and client had arisen in relation to the initial attempted sale of the farm and thereafter the usufruct. Certain further defences were also raised.

Approach to disputed facts

(jj) It is well settled that once there is a dispute of fact raised on the papers and in the absence of an application for a referral to oral evidence or to trial, the approach set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹ is to be followed. It follows that once a genuine dispute of fact has been raised in motion proceedings, as is apparent in these papers, and when it is not referred to evidence or trial, this court is bound to accept the version of the respondents and the facts in the applicant's founding affidavit which are not disputed by the respondents. As I have already stressed, Mr Phatela who appeared to the applicant, expressly stated that the applicant did not seek a referral to evidence or to trial.

(kk) In applying the approach to disputed facts in motion proceedings to the papers before me, I am obliged to determine the matter on the basis on the facts put forward by the second respondent and those facts in the founding affidavit which he admits or does not dispute. In applying this approach, it would seem I would be obliged to accept the second respondent's denial that he was acting in an attorney/client basis in relation to the applicant's approach to him concerning

¹1984 (3) SA 623 (A) at 634E-635C as has been consistently followed in this court and in Supreme Court See *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21G-I.

the farm, given the fact that the denial is not a bare one and is supported by further evidence including documentary evidence. The applicant in any event states this occurred towards the end of 2005. The second respondent states with reference to contemporaneous documentation signed by the applicant that the first consultation was held on 24 May 2005 concerning the sale of the farm. The applicant and her husband thereafter entered into the deed of sale with the second respondent on 13 June 2005 in respect of the farm. They did so in writing. On the same day they signed an affidavit applying for a copy of a title deed. These facts are supported by the applicant's erstwhile husband. These facts are also not referred to in the founding affidavit. Nor were they properly dealt with in reply.

(ll) The applicant and her husband also signed an application for waiver on 22 September 2005 and, after the ministry expressed an interest in purchasing the farm. They then again signed a letter to the ministry withdrawing the application for waiver. This occurred on 18 November 2005. That fact was not referred in the founding affidavit. Nor was it properly dealt with in reply.

(mm)

(nn) It was then in this context that the applicant and her then husband each subsequently signed special powers of attorney authorising the registration of a notarial deed of usufruct over the farm. A further relevant factual issue relates to the rental of the farm house by the applicant and her then husband. It was glibly referred to in the founding affidavit. The lease arrangement was thereafter far more fully set out in the answering affidavit together with references to communications between the applicant and second respondent from which that relationship would appear to have been accepted.

(oo)

(pp) It follows that the applicant's assertion of a fiduciary relationship coming to an existence between herself and the second respondent towards the end of 2005 by reason of her approach to him to act as her legal representative is thus to be rejected on the papers, by applying approach to disputed facts in motion proceedings. So too the allegations of coercion and misrepresentation and fraudulently inducing the applicant to sign the power of attorney to her detriment. It would also seem to me in any event on the probabilities which arise from the

versions before me that a fraud or coercion were not established. Nor had the applicant established a mandate based on an attorney client relationship when the applicant approached the second respondent about the farm. The signing of these crucial documents over a period of months and the documents themselves were not referred to in the founding affidavit and when raised, were then only met with bald denials in reply. These facts are in my view devastating to the applicant's case.

(qq) The further conduct of the second respondent with regard to the payments made to Agribank and the further relationship between the parties, being one of lease in respect of the farm house, are also consistent with the second respondent's version.

(rr) Mr Botes further argued that it would in any event be inappropriate to refer the matter to evidence or to trial, given the improbability of the applicant's version which he argued comprises largely of unsubstantiated bald allegations without documentary evidence in its support or any other witnesses corroborating it. He submitted that even if an application were to be made for a referral to oral evidence or to trial, it should in any event be refused on the basis that a dispute of fact should have been anticipated and furthermore and in any event on the basis that the preponderance of probabilities on the affidavits favour the respondent.² But seeing that the applicant has through her counsel made it clear that neither a referral to evidence or to trial is sought, it is not necessary for me to express a view as to how I would have exercised my discretion in considering such application. It is also not necessary for me consider the further defences of issue estoppel, the reliance upon the Marriage Equality Act, 1 of 1996, caveat subscriptor, issue prescription and the relief not being competent by reason of the failure to tender payment made by the respondents to Agribank. Nor is it necessary to consider whether the usufruct was in *fraudem legis* of the Land Reform (Commercial) Act, 6 of 1995 as this was not raised by either party or argued before me.

²*Pressma Services (Pty) Ltd v Schuttler and Another* 1990 (2) SA 411 (C) at 419 – 420; *Bocimar NV v Kator Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 587.

(ss) In short, the applicant has not established her entitlement to the relief claimed in approaching the disputed facts in accordance with the established approach in motion proceedings.

(tt)

(uu) It follows that the application is to be dismissed with costs. The respondents sought the costs of two instructed counsel. In view of the issues raised in the application. I am inclined in the exercise of my discretion to consider that the engagement of two instructed counsel was warranted in this matter.

(vv) I accordingly make the following order:

- a) The applicant's application is dismissed with costs
- b) These costs include those of one instructing and two instructed counsel.

D SMUTS

Judge

APPEARANCES

APPLICANT:

T.C. Phatela

Instructed by Conradie & Damaseb.

FIRST, SECOND AND THIRD

RESPONDENTS:

L.C. Botes (with him A.B. Small)

Instructed by Etzold-Duvenhage