IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 14501/23P

In the matter between:

BUZTRADE 102 CC **Applicant**
(Registration No: 2001/076438/23)

and

ROOKMONEY CHETTY **First Respondent**

ROOKMONEY CHETTY N.O. **Second Respondent**
(In her capacity as Executrix for the
Estate Late Raymond Perumal Chetty
PMB Master's Ref: 5183/2002)

ESSOP OSMAN **Third Respondent**

AYESHA BIBI KHAN **Fourth Respondent**

AYESHA BIBI KHAN N.O. **Fifth Respondent**
(In her capacity as Executrix for the
Estate Late Vasudevan Chetty
Durban Master's Ref: 12962/2022)

THE REGISTRAR OF DEEDS: **Sixth Respondent**
PIETERMARITZBURG

MASTER OF THE HIGH COURT: PIETERMARITZBURG **Seventh Respondent**

MASTER OF THE HIGH COURT: DURBAN **Eighth Respondent**

SHERIFF OF THE HIGH COURT: PIETERMARITZBURG **Ninth Respondent**

Coram: Nicholson AJ
Heard: 11 October 2024
Delivered: 31 January 2025

ORDER

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1. That the order of the Honourable Court dated 16 and 24 April 2007 under Case No: 3297/2007, granting and confirming the rule *nisi*, that the first and second respondents be interdicted and restrained from alienating, encumbering or any way, manner or form disposing of their rights, title and interest in the property described as Portion 85, Shortts Retreat, Registration Division FT, Province of KwaZulu-Natal also known as 18 Walter Hall Road, Shortts Retreat, Mkondeni, Pietermaritzburg, KwaZulu-Natal ('the property') to any other person and/or entity, be and is hereby set aside.
2. The sixth respondent and/or the ninth respondent is ordered to remove the interdict registered against the property under case no: 3297/2007 and interdict number: I-1193/2007I.
3. The fourth and fifth respondents are directed to sign all transfer documentation in their totality, if necessary, to effect transfer of the property into the name of the applicant.

4. If the fourth and fifth respondents fail to comply with paragraph 3 above, the sheriff of this court, be and is hereby authorised to sign all transfer documents for and behalf of the fourth and fifth respondents in order to affect the transfer of the property into the name of the applicant.
5. That the costs of this application be paid by the third and fifth respondents on scale C of the high court tariff, and such costs to include the costs of senior counsel.

JUDGMENT

Nicholson AJ:

[1] The matter that serves before me has three competing purchase and sale agreements for the same property. Two of the agreements were signed by the same seller to two different purchasers. A purchaser to one of the sale agreements, the third respondent, obtained a final interdict, under case No: 3297/2007, dated 16 and 24 April 2007, that interdicts and restrains the first and second respondents from alienating, encumbering or disposing of their rights, title and interest in the property described as Portion 85 Shortts Retreat, Registration Division FT, Province of KwaZulu-Natal also known as 18 Walter Hall Road, Shortts Retreat, Mkondeni, Pietermaritzburg ('the property') to any other person or entity ('the interdict').

[2] On 9 September 2008, after the interdict was granted, Mr V Chetty (represented by the fifth respondent herein) brought an application, which was decided in his favour, that found that the sale agreement between the first and second respondent on the one hand, and the fifth respondent on the other hand, is valid.

[3] In the circumstances, before me is an application where the applicant seeks an order setting aside the interdict, together with further relief for the property to be transferred into its name (for convenience, I shall refer to this as 'auxiliary relief').

Background and chronology

[4] Given the various parties and role players in this application, for context, it is necessary to provide a background and chronology of events, to navigate the facts of this application.

[5] On or about 30 June 2002, the first respondent ('the first respondent' or 'Ms R Chetty'), in her personal capacity and in her capacity as executrix (second respondent), entered a purchase and sale agreement with Mr Vasudevan Chetty ('Mr V Chetty' or 'Vasi'), wherein the property was sold to Mr V Chetty.

[6] On 1 April 2006, notwithstanding having signed a purchase and sale agreement with Mr V Chetty, the second respondent signed a second purchase and sale agreement with Mr Essop Osman, the third respondent herein, for the same property.

[7] On 11 November 2006, Mr V Chetty, without taking transfer of the property, signed a purchase and sale agreement selling the property to Buztrade 102 CC, the applicant herein.

[8] On 16 April 2007, the third respondent obtained an interdict under case No: 3297/2007 ('the interdict') against the second respondent, interdicting the transfer of the property. The interdict was confirmed on 24 April 2007.

[9] On 21 May 2007, Mr V Chetty, filed an application seeking a declarator that the purchase and sale agreement between himself and the first and second respondents, dated 1 April 2006, be declared valid.

[10] On 9 September 2007, judgement was entered in favour of Mr V Chetty, concluding that, the purchase and sale agreement between himself and the first and second respondents, dated 1 April 2006, is valid.

[11] In or about May 2009, the third respondent applied for leave to appeal and that was dismissed. Accordingly, the legal situation is that the purchase and sale

agreement, dated 1 April 2006, between Mr V Chetty and the first and second respondents is valid.

Applicant's case

[12] Applicant's case is that, since the purchase and sale agreement between Mr V Chetty and the first and second respondents, dated 1 April 2006 is valid, the purchase and sale agreement for the property between the third respondent and second respondent is therefore invalid; accordingly, the third respondent has no right to the interdict, which accordingly, should be set aside; and the applicant, therefore, is entitled to the auxiliary relief.

Case of the third respondent

[13] Notwithstanding the lapse of time of approximately 15 years between the granting of the interdict and the finding that the sale agreement between Mr V Chetty and the fourth respondent is valid; and having failed in its application to obtain leave to appeal against the judgement, the third respondent opposes the setting aside of the interdict and the property being registered in the name of the applicant.

[14] I have carefully perused the answering affidavit of the third respondent, its heads of argument, and I have carefully listened to Ms Singh, who appeared on behalf of the third respondent. Various allegations of fraud and other inappropriate behaviour have been made, which are not pregnant on the papers before me, but argued from the bar; or those allegations amount to speculation and conjecture.

[15] However, the highwater mark of the respondent's opposition appears to be that:

(a) Notwithstanding the September 2007 judgement, the sale agreement between the first respondent and himself is valid; and

(b) Considering the property was never transferred into the name of Mr V Chetty, the purchase and sale agreement between Mr V Chetty and the applicant, is not valid.

[16] In his answering affidavit, opposing the relief sought by the applicant, notwithstanding the fact that in the September 2007 judgement, where it was found that the purchase and sale agreement between the third respondent and the second

respondent being invalid, the third respondent attempts to demonstrate the validity of the said agreement.

[17] In *Economic Freedom Fighters v Speaker of the National Assembly*,[1] the Constitutional Court opined:

'No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help".' (footnote omitted)

[18] In *Department of Transport v Tasima (Pty) Limited*,[2] the Constitutional Court concluded:

'This reading of section 165(5) accepts the Judiciary's fallibilities. As explained in the context of administrative decisions, "administrators may err, and even . . . err grossly." Surely the authors of the Constitution viewed Judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, Judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences.' (footnotes omitted)

[19] In the premises, it is trite that court orders remain operative, valid and enforceable until reviewed or set aside by a court of competent jurisdiction, and until that is done, the court order must be obeyed, even if it is wrong. Accordingly, I am bound by the September 2007 judgement and therefore, cannot disregard the findings therein, or entertain any submissions that suggests, or ask me to hold, that those findings are wrong. Accordingly, the third respondent's submissions that suggests the sale agreement is valid are irrelevant.

[20] In *Tomlinson v Tomlinson NO*,[3] the court found:

'[14] Against that background Mr *Chetty's* argument for proposition (b) is based essentially on paragraph 12 of the judgment in *Booysen*. That paragraph follows the learned judge's exposition of the principle which is Mr *Chetty's* proposition (a). It reads as follows.

> "From the above, it is more than plain that the late Joseph Booysen, in the present matter, did not gain ownership of the whole joint estate upon the death of his wife, Dora Booysen. He therefore had no legal capacity to enter into the disputed sale

[1] *Economic Freedom Fighters v Speaker of the National Assembly and others* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) para 74.
[2] *Department of Transport and others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) para 182.
[3] *Tomlinson and another v Tomlinson NO and others* [2021] ZAKZDHC 8.

> agreement with the first and the second respondents regarding the immovable property. It was the prerogative of the executor, the fourth respondent, to do so. The uncontroverted evidence is that the estate of the late Dora Booysen is not finalised, and the first and final liquidation and distribution account has not been approved, for reasons advanced by the executrix. The sale was invalid ab initio and falls to be set aside."

[15] Given the gaps in my knowledge of the precise terms of the agreement under consideration in *Booysen*, I cannot comment on the ultimate conclusion reached in that case. However if, as appears to be the case, the learned judge intended to convey that solely because Mr Booysen had not yet acquired ownership of the property he lacked the legal capacity to conclude an agreement for its sale, I cannot agree. The point of my departure from the principle stated in paragraph 12 of *Booysen* is simply stated in A J Kerr, *The Law of Sale and Lease* 3 ed (2004) at page 7.

> "Those new to the subject [the subject the learned author is speaking about is the law of sale] are often surprised to learn that someone else can sell their, or anyone else's, property. The tendency is to assume that, apart from questions of agency, only the owner of a thing can sell it. This again overlooks the fact that in entering into a contract one is undertaking an obligation or obligations, not doing what an obligation requires. So if A sells B's property to C the resultant legal position is that A is obliged to make B's property available to C. He will therefore attempt to obtain it. If he succeeds, he can make it available to C and the contract is performed. If B will not let him have it, he (A) fails to perform and is in breach of contract. In such circumstances C has an action against A for damages for breach of contract. It is not so uncommon as may be thought for someone to sell someone else's property." [Footnotes omitted]

. . .

[21] . . . There is no requirement in our law that a deed of sale of immovable property must be signed by the owner or by someone authorised to sign on the owner's behalf as seller.'

[21] In the premises, it is apparent that one does not have to be the owner of the property to enter a valid purchase and sale agreement in order to sell the property. Accordingly, the proposition that the sale agreement between Mr V Chetty and the applicant is invalid because Mr V Chetty could not sell a property that is not in his name, is unsustainable. In the circumstances, on the version of the third respondent, I am neither able to find any reason in law, nor in the facts, that prevents the interdict

from being set aside, nor am I able to find any reason that prevents the auxiliary relief sought by the applicant, being granted.

Case of the fourth and fifth respondents

[22] Mr Tucker, on behalf of the fourth and fifth respondents, admits the interdict should be set aside; but raises the following grounds in opposition to the auxiliary relief:

(a) The fifth respondent is a misjoinder;

(b) There are disputes of fact;

(c) The applicant has taken occupation of the property but has never paid occupational rent; and

(d) While not taking issue with the purchase and sale agreement between Mr V Chetty and the applicant, the fourth respondent denies that a case has been made out in the founding affidavit for the property to be transferred to the applicant; because the founding affidavit neither, alleges or sets out the suspensive conditions contained in the purchase and sale agreement, to either put up security or pay the purchase price, nor does the founding affidavit provide evidence that these suspensive conditions were fulfilled. In the circumstances, the agreement of purchase and sale is now a nullity.

[23] On that basis, Mr Tucker argues, the papers are excipiable, and therefore, the prayer for the auxiliary relief, should be dismissed.

Misjoinder

[24] The point on misjoinder can be dismissed out of hand, because the fifth respondent is not only the executor of the fourth respondent, but also his widow. Accordingly, she has a personal interest in the outcome of this matter. Furthermore, within the file I have come across letters that are written in her personal capacity.

[25] Furthermore, although this matter was raised as a point *in limine*, there were no further applications thereafter to prosecute the misjoinder. The next time it was raised was in answer to the applicant.

[26] In *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another*[4], the court found that:

'The objection on the ground of misjoinder should be taken in limine and if not then taken, cannot ordinarily be raised subsequently. In the present case the first defendant did not take the objection initially and did not make application under Rule 10 (5) for an order that separate trials should be held. In my opinion the first defendant cannot raise the point now after the trial has been concluded except for questions of interest and costs.'

Disputes of fact

[27] In *National Director of Public Prosecutions v Zuma*,[5] Harms DP avows:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.' (footnotes omitted)

[28] It is worth noting that while both the third respondent, and the fourth and fifth respondents have alleged disputes of facts, the disputed facts, but for conjecture, have not been properly articulated or demonstrated in the papers. That being said, in the resolution of a dispute of facts, the starting point is the common cause facts. The common cause facts are: a valid purchase and sale agreement between the first and second respondents and the fifth respondent, and a concession that the purchase and sale agreement between the fifth respondent and the applicant is valid, but for a challenge on the suspensive conditions therein.

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[4] Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another 1980 (3) SA 415 (W) at page 419 E to G

[5] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (4) BCLR 393 (SCA) para 26.

[29] The resolution of the challenge on the suspensive conditions, in my view, is a legal question; and therefore, decipherable on the papers. In the premises, there is no dispute of fact that requires the matter to be dismissed or adjourned, for oral evidence.

[30] In reply, Mr Padayachee brought to my attention lodgement documents, used by the conveyancer to transfer the property, which is an annexure to the founding affidavit, and referred to in the replying affidavit. The effect of this document demonstrates that the conveyancer would not have proceeded with the lodgement of the change of title for the property, without being satisfied that the purchase price had been secured.

[31] While I agree that on perusal of the founding affidavit, it does not appear that a case has been made that the resolutive clause has been activated, however, the applicant's case was supplemented in the replying affidavit. I am mindful that this is not the usual practice in application proceedings, however, the evidence is before me, and it would not be in the interests of justice to ignore same, for the sake of procedure. As such, it is apparent that a case has been made out that the resolutive clause has been activated.

[32] In *Living Hands v Ditz*[6] set out the general principles in exception proceedings as follows:

'(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.

[6] Living Hands v Ditz 2013 (2) SA 368 at 374 G

(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
(f) Pleadings must be read as a whole, and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.'

[33] In the premises, considering *Living Hands* and the fact that the case was supplemented in reply, I do not consider the applicant's case to be excipiable.

[34] For completeness, I must add that the fact that the applicant has not paid occupational rental is not a defence to the relief sought by the applicant. The effected party is free to pursue that issue separate from these proceedings. Accordingly, I dismiss that point out of hand.

[35] On the facts, the interdict does not protect any rights that are protectable in law, and therefore, serves no purpose but to impede the rights of the applicant. Accordingly, the interdict must be set aside.

[36] I find no reason that the normal rule that costs should follow the result be applied in this matter.

Order

[37] In the result, I make the following order:

1. That the order of the Honourable Court dated 16 and 24 April 2007 under Case No: 3297/2007, granting and confirming the rule *nisi*, that the first and second respondents be interdicted and restrained from alienating, encumbering or any way, manner or form disposing of their rights, title and interest in the property described as Portion 85, Shortts Retreat, Registration Division FT, Province of KwaZulu-Natal also known as 18 Walter Hall Road, Shortts Retreat, Mkondeni, Pietermaritzburg, KwaZulu-Natal ('the property') to any other person and/or entity, be and is hereby set aside.

2. The sixth respondent and/or the ninth respondent is ordered to remove the interdict registered against the property under case no: 3297/2007 and interdict number: I-1193/2007I.
3. The fourth and fifth respondents are directed to sign all transfer documentation in their totality, if necessary, to effect transfer of the property into the name of the applicant.
4. If the fourth and fifth respondents fail to comply with paragraph 3 above, the sheriff of this court, be and is hereby authorised to sign all transfer documents for and behalf of the fourth and fifth respondents in order to affect the transfer of the property into the name of the applicant.
5. That the costs of this application be paid by the third and fifth respondents on scale C of the high court tariff, and such costs to include the costs of senior counsel.

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NICHOLSON

Acting Judge of the High Court

KwaZulu-Natal Division, Pietermaritzburg

Date heard	:	11 October 2024
Handed down	:	31 January 2025

APPEARANCES

Counsel for the applicant	Advocate Padayachee SC
Instructed by:	Srish Partab Inc Block B, First Floor, Suite 7B 21 Cascades Crescent Chase Valley Pietermaritzburg Ref: S PARTAB/M00082
For the first and second respondents:	Appeared in person
Counsel for the third respondent:	Advocate Singh
Instructed by:	Ozayr Latiff and Associates 14 Thomas Street Pietermaritzburg KwaZulu-Natal Ref: Ozayr/Essop Osman/31-10-23-mar-as
Counsel for the fourth and fifth respondents:	Advocate Tucker
Instructed by:	Ben Padayachee Attorneys 4 Munn Road Ottawa KwaZulu-Natal Ref: MR B. PADAYACHEE/K71

No appearance for the sixth, seventh, eighth and ninth respondents