**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case No: 567/2019

In the matter between:

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| **RENETTE WHITEHEAD** | **FIRST APPELLANT** |
| **JACOBUS HERCULES DU PREEZ** | **SECOND APPELLANT** |

**and**

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| **TRUSTEES, INSOLVENT ESTATE OF DENNIS CHARLES RIEKERT** | **FIRST RESPONDENT** |
| **ALVIN HENRI FUHRI** | **SECOND RESPINDENT** |
| **DESMEON LOUIEN FUHRI** | **THIRD RESPONDENT** |
| **ABSA BANK LIMITED** | **FOURTH RESPONDENT** |
| **THE REGISTRAR OF DEEDS, MPUMALANGA** | **FIFTH RESPONDENT** |
| **THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES** | **SIXTH RESPONDENT** |
| **THE SHERIFF OF THE HIGH COURT MBOMBELA** | **SEVENTH RESPONDENT** |
| **YOLANDÈ THÊRESA NAIDOO** | **EIGHTH RESPONDENT** |
| **SHAN VISHNU NAIDOO** | **NINTH RESPONDENT** |

**Neutral citation:** *Whitehead and Another v Trustees of the Insolvent Estate of Dennis Charles Riekert and Others* (567/2019) [2020] ZASCA 124 (7 October 2020)

**Coram:** NAVSA, MBHA and MOCUMIE JJA and SUTHERLAND and POYO-DLWATI AJJA

**Heard:** 16 September 2020

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 October 2020.

**Summary:** Civil law and procedure – court proceedings challenging effect of prior court order – no application for rescission or appeal pursued – existing order bar to relief sought – doctrine of peremption also operating against appellant– prior order remains standing.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria (functioning as Mpumalanga Circuit Court, Mbombela) (Masango AJ sitting as court of first instance):

1 The appeal is dismissed.

2 The order of the court a quo is set aside and substituted with the following: 'The application is hereby dismissed with costs on the attorney and client scale, including the costs of one counsel.'

3 The costs of the appeal to be borne by the appellants, jointly and severally, the one paying the other to be absolved.

## JUDGMENT

**Sutherland AJA** (Navsa, Mbha and Mocumie JJA and Poyo-Dlwati AJA concurring):

[1] This case is about a contrived attempt by the appellants to undo, by subsequent proceedings, the effect of an earlier unchallenged court order.

[2] The first appellant, Ms Renette Whitehead, and Mr Charles Riekert were once a couple. In 2007, together, they bought a farm from the second and third respondents, Alvin Henri Fuhri and Desmeon Louien Fuhri (the Fuhris). Thus, they

became joint owners in equal undivided shares. To finance the purchase of the farm, Ms Whitehead and Mr Riekert, jointly, obtained a mortgage bond from the fourth respondent, ABSA Bank Limited (ABSA).

[3] In August 2013, Ms Whitehead and Mr Riekert separated. At that time, payments on the bond were in arrears. Unbeknownst to Ms Whitehead, Mr Riekert, who was responsible to make payments, had not been doing so. From 2014 onwards, Ms Whitehead endeavoured to catch up on the arrears. On 15 September 2015 Mr Riekert was sequestrated. Notwithstanding some payments that Ms Whitehead made on the bond, her efforts to satisfy ABSA did not bear fruit.

[4] Eventually, in June 2015, ABSA sought a judgment on the debt and leave to execute on the bonded property. It got summary judgment on 24 March 2016, including leave to execute on Ms Whitehead's undivided half share in the farm.[1] An application for leave to appeal against that order was refused. The date of that order refusing leave to appeal does not appear in the record. More importantly, there is no indication that there was ever an attempt to procure leave to appeal on petition to this Court or to the Constitutional Court. Plainly, the court order of 24 March 2016 remains standing. This is the critical fact in this case.

[5] Thereafter, several more earnest efforts were pursued by Ms Whitehead to clear the debt and satisfy ABSA. Sadly, all these efforts failed. ABSA then proceeded to put the farm up in a public sale in execution. Yolandé and Shan Naidoo,

[1] Mr Riekert's half share was of course an asset in his insolvent estate and was controlled by the trustees who are collectively cited as the first respondent. It was logically destined for sale to meet the creditor's demands. The record does not address what the position of ABSA was in relation to the claim it logically had against the insolvent estate.

the eighth and ninth respondents (the Naidoos), bid for the farm and bought it on 13 September 2017. The next logical step would therefore be Ms Whitehead's vacation of the farm, by means of eviction, if necessary.

[6] The several respondents, other than ABSA, did not participate in the hearing before the court a quo or in the hearing before this Court.

[7] A fortnight after the sale in execution had occurred, on 28 September 2017, Ms Whitehead and the second appellant, Mr Du Preez, thereupon launched an application.[2] The critical proposition advanced in the application was that the 2007 sale of the farm by the Fuhris to Ms Whitehead and Mr Riekert was null and void, and on that basis to seek several declaratory orders linked to that allegation. The relief sought was articulated thus:

'(1) Declaring the sale of property between the applicant, . . . Riekert (now Insolvent) and the 2nd and 3rd respondents, dated 28 October 2007, in respect of portion 10 (portion of Portion 4) of the farm Hilltop 458 Registration Division JT Mpumalanga Province, (the property) is hereby declared null and void ab intio.

(2) That the Title Deed purporting to transfer ownership of the property to the applicant and . . . Riekert . . . and all bonds registered there against be cancelled by the fifth respondent.

(3) That the warrant of execution issued by the High court of South Africa Gauteng division, Pretoria, under case No 37560/2015 be set aside.

(4) That the sale agreement entered into by the Sheriff of the High Court, Mbombela and the 8th and 9th respondents as a result of the sale in execution of the property on 13 September 2017 be declared null and void ab initio.'

[2] Mr Du Preez is ostensibly Ms Whitehead's life partner, his given address being that of Ms Whitehead on the farm in question. He plays no further role in the relevant events, and his interest is not specifically addressed, save that he and Ms Whitehead claim a lien over the farm.

[8] The contention of invalidity of the 2007 sale of the farm is based on an interpretation of s 3*(b)* of the Subdivision of Agricultural Land Act 70 of 1970 (SALA).[3] In short, it was contended that it was unlawful to have bought the farm in undivided shares without permission from the Minister of Agriculture. It is true that the Minister had not given the requisite permission. It is disputed by ABSA that, upon a proper interpretation of s 3 of SALA, non-observance of the section results in the invalidity of the sale. ABSA also contended that the appellants were bound by the court order it had obtained, referred to above. For reasons which follow, it is unnecessary for this Court to decide which perspective concerning the interpretation of s 3 of SALA is correct.

[9] The only interest in the property expressed by Ms Whitehead and Mr Du Preez is based on the considerable improvements she alleges have been made to the property and an expectation that they could be recovered; essentially, she asserts an improvement lien. To this aspect, I shall revert.

[10] The significance of the alleged contravention of s 3*(b)* of SALA for the case that Ms Whitehead and Mr Du Preez sought to advance lay in the contention that, in

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[3] Section 3 provides:
'**Prohibition of certain actions regarding agricultural land**
Subject to the provisions of section 2 –
*(a)* agricultural land shall not be subdivided;
*(b)* no undivided share in agricultural land not already held by any person, shall vest in any person;
*(c)* no part of any undivided share in agricultural land shall vest in any person, if such part is not already held by any person;
. . .
*(g)* . . . unless the Minister has consented in writing.' (Emphasis added.)
A curious circumstance has enveloped this statute. A subsequent statute which repeals the whole Act has been enacted: the Subdivision of Agricultural Land Act Repeal Act 64 of 1998. Section 2 provides that the repeal will take effect when the President, by Proclamation, determines a date for the Act to become effective. Despite the elapse of 22 years since the Repeal Act was enacted, no date has yet been proclaimed. There does not appear to be a publicly stated explanation.

consequence of such invalidity, there were several material knock-on effects. These effects were a cascade of allegedly invalid juristic acts: ie, (1) that Ms Whitehead and Mr Riekert could not have lawfully become owners of the farm; (2) that no mortgage bond could validly have been sought and granted to them; (3) that the Fuhris were still owners of the farm; (4) that the summary judgment order of 24 March 2016 was 'ineffective'; (5) that the writ of execution pursuant to that order should be set aside by the court; (6) that the sale in execution to the Naidoos should be set aside; and (7) that the transfer of ownership to the Naidoos as registered by the fifth respondent, the Registrar of Deeds, must be set aside.

[11] The application advancing this thesis was dismissed by the court a quo. It is that judgment which is before this Court on appeal.

**The critical issue**

[12] The effect of the relief sought is to override or nullify the effect of the summary judgment order. The critical and determinative question for decision is, thus, whether it is open to the appellants to bring such an application which achieves that end, the order itself having been neither rescinded nor set aside on appeal? A further problem confronting the case advanced by Ms Whitehead is peremption.

***The existing order is a barrier to the relief sought***

[13] The conception of the application is that it is proper, in our law, to seek, through subsequent separate but related proceedings to nullify an existing order of court.

[14] The only means by which an order of a court of first instance is nullified is by either rescinding the order or by setting it aside through a successful appeal.

[15] The authority of *Gainsford NO v Tiffski Property Investments and Another*[4] was summoned up in argument to proffer support for the perspective held by Ms Whitehead and Mr Du Preez. At para 38 of that judgment it was stated that:

'It is trite that no legal consequences flow from a void jural act.'

Ergo, it was contended, once the sale transaction was void, all that was built thereon must also collapse. However, this case is unhelpful to the argument that is advanced. The controversy in *Gainsford* was whether a transaction was a voidable preference for the purposes of insolvency proceedings. The mechanics of the Insolvency Act 24 of 1936 provide for a power vested in a court to reverse improper transactions which occur within six months before the declaration of insolvency, and thus the Insolvency Act prescribes that transactions that occur during this period are voidable, ie susceptible, upon examination, to be set aside if good cause is found to impugn them. The legislative scheme is not comparable to s 3 of SALA and the facts of that matter are far removed from those of the present matter.

[16] In *The Master of the High Court, (North Gauteng High Court, Pretoria) v Motala NO and Others*, the validity of the appointment of provisional judicial managers was disputed.[5] A Judge had made an order appointing one Mr Hendrik Abram Van Vuuren to such office. In ostensible defiance of that order, the Master appointed the respondent. In subsequent contempt proceedings, it was held that a Judge had no competence to make such an appointment because the power to make

[4] [2011] ZASCA 187; [2011] 4 All SA 445 (SCA); 2012 (3) SA 35 (SCA).
[5] [2011] ZASCA 238; 2012 (3) SA 325 (SCA) paras 8 and 14.

such appointment was reserved to the Master. Because of a lack of lawful judicial competence, the order could therefore be ignored because it was a nullity and no contempt could occur. This predicament is to be contrasted with a court order which is made within the scope of a Judge's competence. In such a case, the order stands until it is set aside, assuming there are grounds for doing so.

[17] Plainly, neither of these two cases are usefully comparable to the present matter.

[18] In this matter, the order granting summary judgment and authorising execution against the property was made by a competent court at the conclusion of fully defended proceedings. The effect of the order was that the indebtedness of Ms Whitehead in terms of her liability on the mortgage bond to ABSA was finally determined as was ABSA's right to execute on the property. What this appeal contrives to do is to undo that order. That is impermissible. In *Minister of Home Affairs and Others v Somali Association of South Africa and Another*, Ponnan JA, reiterated the well-established principle:[6]

'In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd* para 17 it was put thus:

"As Froneman J observed in *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B-C:

"An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714)."'

[6] [2015] ZASCA 15; 2015 (3) SA 545 (SCA); [2015] 2 All SA 294 (SCA) para 34.

***Peremption***

[19] It is plain that by reason of the conduct of Ms Whitehead and Mr Du Preez, peremption operates.

[20] The relevant facts demonstrating this result are as follows:

(1) Prior to the court order of 24 March 2016, neither the validity of the title deed nor of the bond were questioned.

(2) During the summary judgment proceedings, the question of invalidity of the deed or bond were not raised.

(3) After a failed application for leave to appeal against the order, no further steps were taken to challenge the order. It was unequivocally, therefore, accepted as a final order.

(4) Moreover, after the order was granted, consistent only with acquiescence in the effect of the order, several further attempts were made to reach an accommodation with ABSA.

(5) Ms Whitehead contemplated a scheme in terms whereof she might subdivide the farm and keep a half portion. On 15 November 2016, she instructed her attorneys to propose to ABSA that she pay up the arrears and obtain the Minister's permission to subdivide the farm. ABSA refused to co-operate, apparently because of the complication of securing relief from the trustees of the insolvent estate of Mr Riekert's Trustee, the first respondent.

(6) Ms Whitehead did not give up. She made enquiries to have Mr Riekert substituted as a debtor. This effort too failed.

(7) Ms Whitehead also put the farm up for sale in the open market in the hope of obtaining a better price than in a sale in execution. As a result, a prospective purchase arose on 30 May 2016 but did not mature.

(8) On 7 June 2017, Ms Whitehead's attorney addressed a letter to ABSA articulating, for the first time, the notion of the invalidity of title and soliciting a settlement. It was claimed that this defect in title had just been noticed. This is odd because in November 2016, Ms Whitehead was aware that a subdivision of the farm required ministerial permission and she must therefore have been aware of s 3 of SALA. On 8 June ABSA rejected the proposal.

(9) On 20 June a further settlement proposal and a payment was made.

(10) On 12 July 2017 ABSA confirmed a sale in execution would be scheduled.

(11) On 25 August 2017 the public notice was published advertising the sale.

(12) On 13 September 2017 the sale in execution took place.

[21] It is plain from these events that, other than protests, no steps were taken to halt the sale in execution. Only afterwards was an application launched, opportunistically.

[22] It is possible to attack a judgment belatedly in circumstances where the interests of justice require it. Obviously, such a judicial intervention is one which is fact-specific. What is necessary to establish is that the aggrieved litigants have not by their conduct demonstrated an acquiescence in the orders granted against them. *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others*[7] held thus:

[7] [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 3.

‘. . . Where, after judgment, a party unequivocally conveys an intention to be bound by the judgment any right of appeal is abandoned. The principle can be traced back to the judgment of this court in *Dabner v South African Railways & Harbours*, where Innes CJ said:

“The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.”

That judgment has been consistently followed in this court.’

[23] At least since shortly before 7 June 2017, the basis upon which the application was brought was known. Ms Whitehead waited until after the sale in execution and on 12 October, at last, launched it. This belated step was too late to be meaningful.

***Does Ms Whitehead, on her own case, have locus standi to challenge title?***

[24] In any event, the application is itself premised on grounds which, paradoxically, destroys its viability. If the contention were to be correct that the initial sale agreement between the Fuhris and Ms Whitehead and Mr Riekert was unlawful and it had the consequences as alleged, Ms Whitehead would have demonstrated, on her own case, that she has no locus standi to seek the relief sought. It was correctly conceded that on the premise of her case, Ms Whitehead can lay no claim, whatsoever, to title over the farm.

[25] Indeed, the interest which Ms Whitehead invokes in her affidavit is a different right: that of a lien-holder.[8] She relates in her founding affidavit that over a period of five years since Mr Riekert left, she and Mr Du Preez have made substantial improvements to the property which she estimates to be worth about R900,000. These allegations can be assumed to be accurate and well-founded for the purposes of the analysis. If a lien is proven, Ms Whitehead's interest can be protected by asserting it against the world. She has no interest in title to the farm.

[26] Were ownership to revert to the Fuhris, they would again own it in undivided shares. This, the crucial invalidity in title, on the case advanced about the effect of an absence of ministerial permission, would manifest again. There is no evidence adduced about the marital status of the Fuhris, save for what appears on the 2007 deed of transfer to Ms Whitehead and to Mr Riekert. That document records them as married in community of property. When they acquired the farm is not recorded. However, it can be safely inferred from the information about their identity numbers, that having been born in 1955 and 1957 they were both still minors in 1970 when SALA was enacted. They could not therefor have acquired the farm prior to its effect and had the benefit of preserved vested rights.

[27] In short, Ms Whitehead's case is self-destructive of her locus standi to seek the relief claimed.

[8] See 15(2) *LAWSA* 2 ed para 49: 'A lien (right of retention, *ius retentionis*) is the right to retain physical control of another's property, whether movable or immovable, as a means of securing payment of a claim relating to expenditure of money or something of monetary value by the possessor (termed the "retentor" or "lien-holder", while exercising his or her lien) on that property until the claim has been satisfied.'

**Conclusion**

[28] For all the reasons set out above it follows that the appeal must be dismissed.

**Costs**

[29] The order by the court a quo erroneously alluded to the costs of three counsel to be allowed. It was a patent error, as pointed out by counsel for the fourth respondent in this hearing. It shall be corrected to provide simply for the costs of one counsel. The costs of the appeal ought to be borne by the appellants.

**The Order**

The following order is accordingly issued:

1 The appeal is dismissed.

2 The order of the court a quo is set aside and substituted with the following: 'The application is hereby dismissed with costs on the attorney and client scale, including the costs of one counsel'.

3 The costs of appeal to be borne by the appellants, jointly and severally, the one paying the other to be absolved.

**ROLAND SUTHERLAND**

**ACTING JUDGE OF APPEAL**

APPEARANCES:

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| For appellant: | T P Kruger SC |
| Instructed by: | Cochrane Attorneys Incorporated, Nelspruit |
| | Phatsoane Henney Incorporated, Bloemfontein |
| For fourth respondent: | A E Bham SC |
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