

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 42379/2012

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

GRAHAME ALLEN JESSOP

Applicant

and

**INDUSTRIAL DEVELOPMENT CORPORATION
OF SOUTH AFRICA**

First Respondent

ECC PROPERTIES (PTY) LTD

Second Respondent

J U D G M E N T

LAMONT, J:

[1] This is an application brought by the applicant against two respondents. The application does not proceed against the second respondent.

[2] On 1 March 2004 an entity known as Zimtile CC (the buyer) concluded a written contract of sale of an undivided half-share of Portion 1 of Erf [...], Duncanville Township Registration Division IQ in terms of which it bought the property at a price of R110 000,00. Portion 1 of Erf [...] and Erf 491 were registered in one title deed in the name of the seller, the second respondent. Before the portion purchased by the buyer could be transferred, there needed to be an adjustment to the title deed holding the two erven jointly so that each erf could be held in its own title deed and transferred. The buyer would then obtain the 50% undivided half-share together with Unie Property Investments CC ("Unie") in Portion 1 of Erf [...].

[3] In due course the suspensive conditions in the contract were fulfilled (18 January 2005) the buyer paid the purchase price to the transferring attorneys and became entitled to transfer.

[4] During April 2005 the seller requested the upliftment of the original title deed from the attorneys who were acting as the conveyancers of the properties. The seller informed the conveyancers that as there was only one title deed in respect of Erf [...] and Erf 491 and as a bond was due to be registered over Erf 491 simultaneously with the registration of the sold property into the name of the buyer and Unie it required the title deed. On 10 May 2005 IDC attorneys wrote to the conveyancing attorneys notifying the conveyancing attorneys that it had received instructions from the seller to attend to the registration of a bond over erven 491 and [...]. It requested that it be provided with a copy of the draft deed, a list of simultaneous transactions

and confirmed that “*we are also attending to the registration of a simultaneous notarial general covering bond [by the debtor] in favour of IDC ...*”. On 11 May 2005 the conveyancing attorneys wrote to IDC attorneys referring to that letter and enclosing a copy of the title deed and a list of simultaneous registrations. The list of simultaneous registrations included the following: the registration of a first bond by the owner in favour of IDC over Erf 491 (the attorneys dealing with the matter were IDC attorneys); a transfer of Portion 1 of Erf [...] from the seller to the buyer (the attorneys were Van Zyl Le Roux and Hurter); a transfer from the seller to Unie of the remaining extent of Erf [...] (the attorneys were Van Zyl Le Roux and Hurter). It appears from the letter that the instructions in relation to Erf [...] were to emanate from Van Zyl Le Roux and Hurter.

[5] The history between IDC and its debtor reveals that on 9 May 2005 IDC recognising that it was possible for the security it required to be provided in two ways suggested to its debtor that there could be the registration of a mortgage bond by the owner of the properties held in terms of the title deed alternatively another option was for the owner to transfer the properties to the debtor. The debtor opted to structure the security required by way of providing a bond rather than by way of transfer of ownership of the properties to the debtor.

[6] On 9 May 2005 IDC proposed to its debtor that the loan and security contract between it and its debtor be restructured to reflect that as security for the obligations of the debtor under the contract a first surety mortgage bond would be registered over erven 491 and [...] in favour of IDC by the owner of

erven 491 and [...]. The IDC letter addressed to its debtor required its debtor to arrange for signature by all parties to the term it proposed. The letter was duly signed by IDC debtor. It accordingly became a term of the contract between IDC and its debtor on 12 May 2005 (when the document was signed by the IDC debtor) that a mortgage bond be registered over the property (erven 491 and [...]) owned by the seller.

[7] This term requiring the IDC debtor to register the bond was not a requirement of the contract until 12 May 2005 a date later than the date of the letter sent by the conveyancing attorneys on 11 May 2005. Accordingly at the date of the amendment to the contract IDC knew of the contractual rights of the buyer and Unie against the seller.

[8] As at 12 May 2005 it was the contractual obligation of the IDC debtor to ensure the registration the mortgage bond required by the contract over both erven 491 and [...] as it had undertaken to do. IDC acquired only rights against its debtor in this regard.

[9] It is the owner of the property that registers the mortgage bond over it; the owner unilaterally takes the necessary steps to put up the security. That act is outside the control of the person seeking the security (IDC). The fact, that IDC required its attorneys to act for the seller and deal with the matter in no way changes that state of affairs. IDC was not entitled to; neither did it, itself give instructions relating to the registration.

[10] In due course the seller registered a mortgage bond over erven 491 and [...]. This occurred on 31 May 2005.

[11] During December 2005 the present applicant recognising a tax advantage and being the sole member of the buyer concluded a contract with the seller in terms whereof the contract between the seller and the buyer set out previously was cancelled and a fresh contract was concluded on the same terms and conditions between the applicant and the seller. The two contracts were entered into at the same time.

[12] The submission of the applicant is that the effect of the cancellation and conclusion of the fresh contract is that he was substituted for the buyer and that there is no impact on the present proceedings by reason of the change of party.

[13] During 2008 the applicant sought delivery of the property from the seller as the seller had failed to deliver the property to him. He brought an application to compel the seller to deliver the property. IDC was not cited as a party to that application. During or about July 2009 an order was made directing the seller to deliver the property to the applicant. It was impossible for the seller to deliver the property to the applicant until such time as it had obtained the release of the property from the mortgage bond in favour of IDC. IDC was not prepared to release the property from the mortgage bond until the debt of the debtor had been paid.

[14] The matter seems to have lain dormant for some time after that.

[15] IDC in due course took steps against its debtor and the seller. It obtained a judgment permitting execution against the mortgaged property on 10 July 2012. Pursuant to that judgment the property was sold in execution on 25 October 2012.

[16] On 29 January 2013 the applicant alleged that IDC was aware of the fact that there was a personal right vested in the buyer to obtain transfer of the property from the seller prior to the time when the mortgage over the property was registered. IDC accepted for purposes of this application that notice to its attorneys on 11 May 2005 constituted notice to it in relation to the position of the buyer not the applicant. As far as the applicant's personal rights to obtain transfer, they arose after the registration of the bond.

[17] The submission of the applicant was that as IDC had knowledge of the obligation of the seller to transfer the property to the buyer pursuant to the sale contract prior to the time when the mortgage bond was registered it was entitled to force the delivery of the property to it notwithstanding registration of the bond. The applicant relied on *Meridian Bay Restaurant v Mitchell NO 2011 (4) SA 1 (SCA)* paras [12] to [31] as authority for the statement of law in the case of a double sale. The argument was developed to submit that the registration of the bond had rendered the property incapable of transfer.

[18] It was submitted that as delivery of the property had become impossible by reason of the sale in execution the applicant was entitled to

payment of damages. The applicant in the present matter seeks payment of damages in lieu of the delivery of the property.

[19] A mortgage bond is a contract whereby immovable property is provided as security for a debt by the owner. The person who bonds the property is the owner. This appears from the bond itself. The attorneys who acted in the registration of the bond were the attorneys of IDC nonetheless they did not act for IDC in the transaction they acted for the owner and pursuant to the owners' instruction. The knowledge of IDC extends only to the fact that at a point in time a third party (the buyer) claimed to have a personal right against the seller/owner. IDC commits no act in relation to the registration of the bond. It does not frustrate the exercise of the personal right of the buyer against the seller. The inability of the seller to transfer arises not because of the bond but because the seller assumed an obligation to pay a creditor and the seller's subsequent failure to make the necessary payment to obtain the release of the property from the bond.

[20] The IDC debtor on 12 May 2005 indicated to IDC that it was contractually able to obtain the mortgage bond required by IDC. It in fact obtained the mortgage bond. In my view it was not for IDC to search for a reason why the owner was prepared at that stage to register the mortgage bond over the property. The fact that a claim that the property be transferred to the buyer had been raised by the conveyancing attorney in no way infringed the right of the owner who granted the power of attorney for the bond to be registered to do so. In my view IDC was entitled to rely on the fact that the owner of the property had executed authority for the bond to be granted

(subsequent to the letter being sent by the conveyancing attorneys) the owner also had concluded the appropriate surety contained within the bond. It was submitted that IDC should have known that the effect of the registration of the bond was to deprive the owner of any right of transferability. This submission was made based on the large amount of the indebtedness of the debtor undertaken by the owner. I do not agree with submission. As a matter of principle it is always open to the owner to bond his property notwithstanding the existence of the personal right. It is for the owner to put the property in a transferable position so as to effect delivery as and when required. It is not a necessary inference from the fact that the property is bonded that the owner will be unable to subsequently place the property in a transferable position.

[21] The submission was made at a point that the registration of the bond and the fact that it was sold in execution “at the instance of IDC” created a state of affairs which rendered the property un-transferable. A judicial sale is a sale made to compel the debtor to realise assets with which to pay the debt. The sheriff is the seller. The creditor does not disable the debtor by exercising his rights of realisation pursuant to the *pignus judiciale* and to payment. Hence the sale in execution and the disposal of the property is not pursuant to any act by the creditor (IDC). In any event in the present case the sale of the property was by sheriff there being no act performed by IDC in relation to the sale. See also *Dream Supreme Properties 11 CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA)

[24] It is not necessary to determine precisely what constitutes the delict in the light of my findings above. It is for the same reason not necessary to

determine what the date of the delict was (the date of registration of the bond, the date of taking steps to recover the monies, the date when the sale in execution took place or various other dates in between).

[26] It remains to consider whether the position of the applicant and the seller is the same. Assuming the IDC committed a delict in regard to the seller that delict was against the seller and the rights of action vest in the seller not in some subsequent purchaser in the form of the applicant. Hence the application must fail in any event. The reason is that the IDC prior knowledge of the buyers' personal rights is not knowledge of the subsequently acquired personal right of the applicant as also that the applicant's rights were acquired post bond registration.

[27] I am accordingly of the view that:

27.1 IDC committed no delict in relation to the seller.

27.2 IDC committed no delict in relation to the applicant.

[28] I was asked, assuming I was in favour of the applicant to separate the issue of the quantum of damages including the date when such damages were suffered from the other issues.

[29] In my view the rules relating to applications require applications to be brought and proceeded with in respect of losses other than damages. The submission was made that originally the claim was for property and only once it became impossible to prosecute that claim was a claim for damages made.

The answer to that submission in my view is that the applicant should have sought a referral to trial and dealt with the matter on a proper basis. Had it been necessary to do so I would have declined the application to separate issues and would have dismissed the application on the basis that the applicant seeks damages by way of a wrong procedure.

[30] In my view an appropriate order is that the application be dismissed with costs.

[31] In the circumstances I make the following order.

Application dismissed with costs.

C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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