



**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 2019/22833**

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

**2 August 2019**

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 SIGNATURE

In the matter between:

**LILAC MOON TRADE & INVESTMENTS 189 (PTY) LTD**

Applicant

And

**131 NORTHRIDING CC**

First Respondent

**WALKER, GORDON HENRY**

Second Respondent

**KASSEL, HILLIARD FRANK**

Third Respondent

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**JUDGMENT**

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**SPILG, J:**

**INTRODUCTION**

1. The applicant ("*Lilac Moon*") brought a semi-urgent application in which it sought a number of orders the effect of which was to;
  - a. interdict the marketing, alienating or encumbering of certain undeveloped immovable property in Northriding which was purchased by the applicant from the first respondent, a close corporation (*131 Northriding CC*) ;
  - b. interdict the second respondent (*Walker*) from transferring or disposing of his 100% members interest in 131 Northriding CC and to the extent that the third responded (*Kassel*) claims to hold the members interest in 131 Northriding CC also interdicting him from doing so;
  - c. require the respondents to immediately give the applicant unfettered possession of the property

The interdicts were sought pending the final outcome of action proceedings that were instituted almost simultaneously for specific performance in respect of the transfer of the property to the applicant. Of relevance is that the agreement with the first respondent, represented by Walker, formed part of a much larger transaction in terms of which the shareholders of the applicant, Curro, bought two schools , the property in question being contiguous to these schools.

2. Walker as the sole member of 131 Northriding CC and acting personally did not oppose the application.

Furthermore at the commencement of the hearing *Adv Bana* on behalf of the applicant informed the court that the applicant was not pursuing the order for immediate occupation. Accordingly the only orders sought were in the form of interim interdicts pending the outcome of the action proceedings.

I should also add that at the commencement of the hearing and because it was evident that both the applicant and Kassel saw the need for the latter to be joined in the trial action I considered, in the interests of the expeditious handling of the matter to effect the joinder by consent so as to avoid unnecessary trial delay and costs.

3. On 16 July Kassel gave an undertaking not to market, alienate or encumber the property or purport to be involved in 131 Northriding CC or deal with the members interest in that entity. However the undertaking was not given pending the outcome of the action but pending the outcome of the application.
4. Prior to the undertaking Kassel threatened to market and sell the property. He contended that Walker had no rights to a member's interest in 131 Northriding CC, no rights to the property and therefore had no rights to dispose of the property or the member's interest in the close corporation.

## THE ISSUES

5. Kassel challenges urgency both on the ground that the applicant knew of his position some time ago and also because of the undertaking which obviated the need for urgency.
6. He also contended that the applicant's did not have a *pima facie* right since it was evident that Walker had no right to sell the property nor did he have a member's interest in the close corporation.

## URGENCY

7. It is clear that Kassel threatened to market the property in a letter written on 20 June. it is also evident that on the allegations made in the founding papers, if true, Walker is attempting to frustrate the agreement from being implemented prior to 31 July 2019 because on that date an alleged condition precedent to the coming into existence of the agreement will have failed.
8. In the action the applicant relies *inter alia* on the clause not amounting to a true condition, alternatively being inserted for its exclusive benefit further alternatively that Walker is estopped by reason of his conduct from contending that the condition has not been fulfilled. However these are all personal rights claimed at this stage and it is evident that the applicant is entitled to thwart either Walker or Kassel (whether personally or



claiming to represent 131 Northriding CC) from purporting to conclude an agreement with a third party either for the member's interest or for the property itself.

In the case of Walker, but for the interdict, he would contend that he is at liberty to sell the property as from 1 August.

Walker does not dispute urgency nor the grant of the interdicts sought pending the outcome of the action.

9. Kassel contends that his undertaking was enough to remove the urgency from the matter and that the application for interim relief can be argued in due course.

I do not share his view. The applicant was entitled to bring its application as one of urgency and it already has succeeded in obtaining Walker and ostensibly 131 Northriding CC's acquiescence to such an order. The court read the papers beforehand, as it was obliged to, and is fully *au fait* with the facts and that the matter is urgent. Accordingly, provided it has capacity to hear the matter and there is no prejudice, either because the matter is clear cut or because there are no additional facts that may be brought to bear despite the relatively short notice, the court should regularise the situation by the grant of the order rather than let the issues limp on in respect of Kassel only or foist on another court the task of re-reading papers that had clearly made out a case for urgency..

10. This is such a case. The undertaking should not frustrate the expeditious disposal of the application or require another judge to read the same papers.

## THE MERITS

11. It is difficult to conceive of the case made out not having some merit. There was a transaction where Walker held out to be the sole member of the close corporation and the register held by CIPC records that Walker is the sole registered member. In terms of s 54 of the Close Corporation Act 69 of 1984 that suffices for purposes of conferring authority and effectively precludes a plea of estoppel for want of authority provided the applicant ought not to reasonably have known that Walker did not have power to bind the

corporation<sup>1</sup>. Section 54 effectively legislates the only circumstances, at least in the case of a sole member whose name remains registered on CIPRO (and possibly absent the situation in *Emcom Communications Tvl (Pty) Ltd v Procourts (Pty) Ltd* 1982 (3) SA 252 (W)), when a corporation can escape liability for the acts of such a person purportedly binding it and is intended to obviate a party having to satisfy the common law requirements of either actual or implied authority, ostensible authority, an estoppel rebuttal or the application of the *Turquand* rule<sup>2</sup>.

12. It is difficult to see, at least on the papers before me, how Kassel can contend that the applicant was not a bona fide purchaser. Thus even in the face of Kassel's claim it cannot be said that the applicant has failed to establish a *prima facie* right. One should also bear in mind that there is little evidence of the enforcement of Kassel's alleged agreement of settlement<sup>3</sup> of Walker's debt by Kassel acquiring the shares in 131 Northriding CC bearing in mind that neither Kassel, his late mother or Walker ever cancelled the notice of attachment in respect of the debt which was endorsed on the title deeds of the property. The attachment was in favour of the mother, Thelma Kassel, in an amount of R597 755.41 plus interest from 31 August 1997 pursuant to a court judgment. Moreover there is no document evidencing the transfer of the members interest nor was there any change of members recorded with CIPC.

The agreement of settlement relied upon by Kassel between Walker and himself on behalf of his mother for the acquisition of shares does no more than raise a dispute at this stage.

13. This would at best for Kassel put the case on the footing of competing *prima facie* rights. On the most elementary test it would be appreciated by Kassel, a practicing attorney, that an interdict pending the outcome of the trial was inevitable; the test being: *Would the applicant suffer greater prejudice if the interdict was not granted and it is ultimately*

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<sup>1</sup> S 54 reads:

Power of members to bind corporation.—

(1) Subject to the provisions of this section, any member of a corporation shall in relation to a person who is not a member and is dealing with the corporation, be an agent of the corporation.

(2) Any act of a member shall bind a corporation, whether or not such act is performed for the carrying on of business of the corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom the member deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.

<sup>2</sup> *Royal British Bank v Turquand* (1856) 5 E&B 248 (119 ER 474)

<sup>3</sup> This is attached as annexure A to Kassel's Rule 35(12) reply.

*successful or would the respondent suffer the greater prejudice if the interdict was granted and the applicant ultimately lost the main case.*

There is no close call when applying the balance of convenience test to the present facts. Adv Kaplan could suggest no prejudice other than speculating the possibility, if the property was put on the market now, of forfeiting a higher price which may not be realized later. That was not raised in the papers at all and on the probabilities highly unlikely. On the other hand the prejudice to the applicant is self-evident and also answers the irreparable harm requirement.

It is for this reason too that there will be a costs order at this stage on ordinary scale.

14. I will however provide in the order protection for Kassel should the applicant delay the trial action.

## **ORDER**

15. On 31 July 2019 I therefore ordered that

1. *The matter is urgent.*

2. **INTERIM INTERDICT**

*Pending the final outcome and finalization of the action instituted by the Applicant (as Plaintiff) against the First Respondent (as Defendant) under case number: 2019/22832 ("the action") the following order is made, such order to operate as an interim interdict in the pending action.*

### **ORDER AS AGAINST THE FIRST RESPONDENT**

- 2.1(a) *The First Respondent, whether represented by the Second Respondent or the Third Respondent or any other person, is interdicted and restrained from alienating or in any way encumbering the immovable property described as Olievenhoutpoort Farm No. 196 and the remaining extent of Portion 168, registration division I.Q Gauteng, measuring 2,3364 hectares, held under deed of transfer no. T19695/1974, situated at 131 President Street, Northriding, Johannesburg, Gauteng (hereinafter "**the property**").*



- 2.1(b) *The order above interdicting and restraining any encumbrance of the property shall, without in any way limiting the operation thereof, include an interdict and restraint against creating any further liabilities in the First Respondent or the granting of any further mortgage bond over the property.*

**ORDER AS AGAINST THE SECOND RESPONDENT**

- 2.2(a) *The Second Respondent shall not act in any manner to frustrate the order in para. 3 above.*
- 2.2(b) *The Second Respondent is interdicted and restrained from alienating or in any other manner disposing of the Second Respondent's 100% members interest in the First Respondent, or any part thereof, or in any way encumbering such members interest.*

**2.3 ORDER AS AGAINST THE THIRD RESPONDENT**

- (a) *The Third Respondent shall not act in any manner to frustrate the order in para. 3 above.*
- (b) *The Third Respondent – insofar as he claims to be entitled to the members interests in the First Respondent – shall not in any manner alienate or in any other way encumber such members interests or any part thereof in the First Respondent.*
- (c) *The Third Respondent is interdicted and restrained from in any manner marketing or attempting to market the property.*

3. *By consent as between the Applicant and the Third Respondent, he is hereby joined as the Second Defendant to the action and furthermore:*

*It is ordered that:*

- 3.1 *the Applicant shall effect and serve the necessary amendments to its claim by no later than 12 August 2019; and*
- 3.2 *in the event that the Applicant does not do so by 12 August 2019 or if the Respondent contends that the Applicant is deliberately delaying the finalization of the action then he may bring an application on ordinarily long form notice on these same papers, duly supplemented, to vary or have reconsidered and have set aside the above interim orders against him.*

4. **ORDER AS AGAINST FIRST, SECOND AND THIRD RESPONDENTS**

- 4.1. *Insofar as the First and Second Respondents did not oppose the application, there shall be no order as to costs against the First and Second Respondents.*
- 4.2. *The Third Respondent shall personally pay the costs of his opposition as Third Respondent to this application on the party and party scale, which costs shall include the costs of the hearing of 23 July and 26 July 2019 as well as the costs of two counsel.*



**SPILG, J**

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DATE OF HEARING	27 July 2019
DATE OF ORDER	31 July 2019
DATE OF JUDGMENT	2 August 2019
FOR APPLICANT	Adv R Bana SC Adv H Rademeyer De Klerk & van Gend Inc (correspondents: Nelson Borman & Ven Ing)
FOR THIRD RESPONDENT	Adv J Kaplan Attorneys Kassel, Sklaar, Cohen & Co