IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO 14897/13

9/5/14

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

9/5/2014
DATE

SIGNATURE

P J SWART	1st Applicant
J H SWART	2nd Applicant
and	
SILVER SOLUTION 688 CC	1st Respondent
D M RUDMAN	2nd Respondent
A S RUDMAN	3rd Respondent
REGISTRAR OF DEED, PRETORIA	4th Respondent

JUDGMENT

MALI AJ

INTRODUCTION

[1] This is an application to interdict the first, second and third respondents from selling, transferring, encumbering, leasing or otherwise allowing two portions of an immovable property to become the subject of right of retention pending the final adjudication of an action instituted by the Applicants regarding the validity of the agreement of sale concluded on 30 June 2009. In addition the Applicants claim the registration of a caveat over the said property.

[2] The application is opposed by the first, second and third respondent except the fourth respondent.

BACKGROUND

[3] The third respondent is the only member of the first respondent. The second respondent is married in community of property to the third respondent. The first and the second applicant are married in community of property to each other.

[4] The first respondent owns the property in dispute which is described as follows:

4.1. A Division A of the remaining extent 166 (a Division of division 85) of the Farm Kafferskraal 400, Registration Division, I.P. North West Province.

4.2. A Division B of the remaining extent of 166 (a Division of division 85) of the Farm Kafferskraal 400, Registration Division, I.P. North West Province.

property. Thereafter the parties entered into a deed of sale for the portions of the farm Kafferskraal 400 Registration Division IP North West Province which were not divide for the amount of R800 000. 00 each. The Deeds of Sale was signed on 30 June 2009.

[6] On 4 August 2011, upon receipt of consent to the sub-division of the property from the City Council of Matlosana the parties concluded two new agreements substituting the initial two agreements in respect of the same portions mentioned in paragraph 5 above. The portions were now identified as Portions 197 and 198 of Portion 166 of the said farm for different amounts each.

[7] It is common cause that the applicants have paid the initial price of R800. 000, 00 constituting the first half of the total purchase price; and that the applicants have also paid the amount of another R800. 000, 00 in respect of the balance of the purchase price into the trust account of their attorney.

[8] A special condition was set out in clause 12 of the agreement of sale to the effect that the transfer of property to the applicants is linked to the transfer of the property from the first respondent to the second and third respondent. It therefore meant that the transfer of property to the applicants would be effected upon the property having been transferred to the second and third respondent. By agreement between the parties, the applicants took occupation of the property before 11 August 2011 and continued to pay the agreed occupational rent.

[9] It is common cause that the property has not been transferred to the applicants since 11 August 2011. The transfer has not been effected due to the decline of the sub-division of the land by the Ministry of Department of Agriculture, Forestry and Fisheries ("the Ministry").The

refusal by the Minister is recorded in a letter addressed to the respondent which reads as follows:

"*In terms of section 4 of the Act this Department does not grant consent for the abovementioned application, as this application will change the agricultural land use to residential zone in an area that is still used for intensive farming. The abovementioned has not been formally excluded from the Subdivision of Agricultural Land Act, Act 70 of 1970 and the farms in the area are all of the same size and this application will set a precedent for similar applications*".

APPLICATION

[10] The counsel for the applicants argued that despite that the suspensive condition, namely first transfer of the property by the first respondent to the second and third respondent have largely not been complied with both parties accepted that the transfer was going to be completed successfully. The rationale to first transfer the property to the second and third respondents and in turn the respondents transfer to the applicants was based on the tax benefit to be acquired by the first respondent.

[11] The counsel for the applicants further argued that subsequent to the registration of servitude in order to ensure that applicants have access to the property there were no problems. The problems transpired when it became clear that the permission was required for subdivision; and the same was refused. What exacerbated the problem further is that the respondent is raising dispute about the validity of the agreements, whether the

agreement is valid if the subject of sale, which is the immovable property in this case requires the consent for subdivision. The dispute regarding the validity of the agreement is the subject of the pending action under case number 41613/13 in the North Gauteng High Court, Pretoria instituted by the applicants.

[12] The counsel for the applicant argued that the applicants have a clear right. He further argued that the immovable property in this case forms *rei litigos,* as the property in dispute is the subject of litigation in the abovementioned case. In the event that respondents sell the farms without the involvement of the applicants, the applicants would be prejudiced. Even third parties would be impacted negatively as the applicants have a claim in the property and the applicants could only prevent the sale by way of litigation.

[13] During the period when the applicants were in occupation of the property they spent a sum of R170, 000.00 (ONE HUNDRED AND SEVENTY THOUSAND RANDS), towards the improvements of the property. They therefore claim a right of retention based on enrichment. The counsel for the applicant argued that the applicant's right of retention must be protected pending the finalization of the main action. There is no bond against the properties and could therefore be easily transferred. Counsel for the applicant further argued that there is no reason that the whole property must serve as security for the first, second and third respondents.

[14] It was applicant's counsel submission that that the harm or threat faced by the applicants is that the respondents have not furnished any security in respect of the monies paid by the applicants. Of importance is that the applicants have fulfilled all the conditions on their part including the payment of R800. 000.00, occupational rent and have made a further deposit of R800. 000, 00 in the attorney's account towards the purchase price.

[15] The applicants pray for a caveat to be registered over the property as they fear transfer or sale by the respondents to the third parties. The subdivisions could not be effected due to the Minister's decision as indicated in the background above. Furthermore the condition that the property must first be sold to the second and third respondents for tax benefit purposes, has not yet been fulfilled.

[16] The applicant's counsel further argued that it is not impossible to challenge the decision of the Ministry of Agriculture and Fisheries if the respondents were willing to resolve the issue of sub-division. In this regard counsel relied on the case of **Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others**[1] which held that *"in granting applications for rezoning or the establishment of townships the development tribunals encroach on the functional area of 'municipal planning'. The form that such encroachment takes matters not".*

[17] The counsel for the respondents referred to the case of **Simon NO v Air Operations Europe AB & others**[2]; regarding the test to be applied in determining the existence of a *prim facie* right, wherein it was stated at page 228:

"the accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed".

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[1] 2010 (6) SA 182
[2] 1999 (1) SA 217 (SCA)

[18] The counsel further argued that the applicants have no right at all because the agreement is unenforceable and there are no prospects of success in the main case to enforce the agreement. In support of the above submission the counsel relied on the Constitutional Court decision of ***Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another***[3],wherein the validity and the enforceability of the sale agreement, on the basis that the consent of the Minister of Agriculture and Environment was lacking was dealt with. The Minister maintained the provisions in the Act to the effect that the land classified as "agricultural land" would retain that classification, whatever development in local government structures had taken place. Having regard to this case the respondent's counsel argued that the transaction cannot be implemented as it cannot be effected due the provisions of Agricultural Land Act 70 of 1970.

[19] The counsel further submitted that the court should weigh the prejudice the applicant will suffer if the order is not granted against the prejudice the respondent will suffer. It is submitted that if the prejudice that the applicant stands to suffer outweighs the prejudice that the respondent stands to suffer, the balance of convenience favours interim relief. The assessment or evaluation (of potential prejudice) will also have regard to the applicant's prospects of success; the stronger the prospects of success, the less the need will be for the balance of convenience.

[20] The respondent also argued that in assessing the requirement of irreparable harm, the test is objective. Actual harm need not be established. The applicant will succeed if it can be established that the reasonable man, confronted by the facts, would apprehend the probability of harm. In general, an applicant will not be entitled to an interdict if he can

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[3] 2009 (1) SA 337 (CC) 2008

obtain satisfactory redress through an ordinary, alternative remedy and, in particular, an award of damages.

[21] The respondent's counsel referred to **Kotze v Min van Landbou**[4]; wherein the honourable van der Westhuizen J considered whether 'agricultural land' as defined in s 1 of the Agricultural Land Act still exists in view of the constitutional changes to the system of local government in the context of category B and C municipalities. The honorable Judge found that the agricultural land is to mean what it meant when the Act was enacted, despite structural changes.

[22] Having regard to the above the respondent's counsel submitted that in respect of prayer A namely; seeking to give transfer of the property if transaction is unenforceable the transfer logically fails. This argument is misplaced, the validity of transaction is before another court in the case I mentioned above. What is before this court is the application for interdict; not the case to determine the enforceability of the transaction and validity of the agreements.

[23] In respect of prayer B, that of payment of R800. 000.00 the respondent argued that the claim of the said amount does not require protection by way of interdict. The respondent's submission is misdirected, the payment of R800 000.00 is not in vacuum; it finds place within the applicant's clear right arising out of a sale agreement, a subject of this application.

[24] The counsel for the respondent further argued that the only time the applicant can be successful in obtaining interdict is when the applicant's right are threatened. In this case the applicant's rights are not under threat as the land may not be transferred,

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[4] 2003(1) SA 445 (T)

consequentially there is no risk of the property in question being transferred. In the event that the respondent's argument is valid I am taken aback by the respondent's action in opposing this application.

[25] The respondent argued that the applicant has not instituted any review application against the Municipality or the Minister. The applicant has failed to display any threat and therefore not making any case for interim interdict. I disagree with the respondent's argument; a threat exists as evidently advanced by the applicant. Furthermore the Minister's directive does not prohibit the sale of the agricultural land. There is a possible threat of the sale of the land in question in its form by the respondent.The respondent's counsel further argued that this court does not possess a wide discretion if there is no right protected by the interdict, therefore the application must be dismissed with costs. As stated above applicant has a clear right subject to protection by law as this will become clear in the discussion below.

THE LAW

[26] It is trite law that for an interim interdict to succeed, an applicant must prove a prima facie right; a reasonable apprehension of irreparable injury or harm, a balance of convenience that favours interim relief; and the absence of a suitable alternative remedy.

[27] In *casu*, it is not in dispute that—there is an agreement between the parties and the applicant has fulfilled all conditions precedent. I find that the applicant has a prima facie and a clear right. I will not deal with the validity of the agreements as it is not necessary to do so.

[28] The law of interdict enjoins this court to consider the prejudice that the applicant stands to suffer and whether it outweighs the prejudice that the respondent stands to suffer. In *casu* the prejudice to be suffered by the applicant if the interdict is not granted far outweighs the prejudice to be suffered by the respondent if the interdict is granted. The respondents may sell and or transfer the land in its form; as nothing inhibits them to do so. However if the interdict is granted in favour of the applicants, the respondents will not suffer any prejudice, because on their own admission the land is not transferrable.

[29] I also find that there is no suitable remedy available to the applicant, this is notwithstanding the respondent's argument that the applicant may be awarded damages. It is not in the interests of justice to deny the applicant the interim relief; having regard that the claim for damages could be a long drawn litigation process. At this stage it is not open to the applicants to sell or do anything about the land except to occupy by agreement; as they are not the registered owners currently.

[30] I am persuaded that the applicant has satisfied the reasonable man test. Would a reasonable man be apprehensive of the situation the applicants find themselves in? The answer is in the affirmative. The facts confronted by the applicant as they are; that the first respondent is the registered owner of the property in question, there is no constraint against the respondent to transfer and or sell the same in its form is enough for the applicant to apprehend harm.

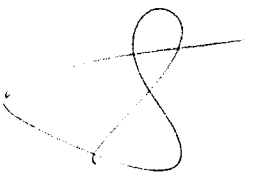
I therefore make the following order:

1. The first to third respondents are interdicted from dealing with the immovable property as described above; in any way whatsoever and amongst others:
   1.1. not to transfer the said property; and/or
   1.2. not to encumber the property with a further mortgage bond; and or
   1.3. not to let any right(s) of retention to be established over the property; and/or
   1.4. not to sell or lease the property

2. The order in terms of paragraph 1 above shall serve as an interim order, pending the final adjudication of the action instituted against the first to third respondents regarding the agreement concluded on 30th June 2009.

3. The fourth respondent is ordered to register a caveat to the extent set out in paragraph 1 and 2 above against the title deed of the aforementioned immovable property.

4. The First to Third Respondents are ordered to pay the costs of this application.



MALI, AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Applicants:	Adv. N Davis SC
Instructed by:	Theron, Jordaan & Smith Incorporated
Counsel for the first to third Respondents:	Adv. J Daniels
Instructed by:	Robert Coetzee Attorneys
Date heard	12 February 2014
Date delivered:	09 May 2014