IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

CASE NO: 66905/14

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

1 OCTOBER 2014

2/10/2014

In the matter between:

VALUECOM TRADING 104 (PTY) LTD **APPLICANT**

and

SEDEBA SAFARIS (PTY) LTD **1ST RESPONDENT**

FRANCO ROSSOUW **2ND RESPONDENT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The applicant in this application seeks an order as follows:

"1. Applicant's non-compliance with the rules of court and the practice manual of this court be condoned and this application be heard as an urgent application.

2.1 First respondent is interdicted from distributing the sum of R2.3 million of the proceeds accruing to it from the sale and transfer of the remaining extent of

portion 28 of the Farm Rietfontein 345 KR Limpopo Province pending finality in the action instituted by applicant against first respondent and others out of the above honourable court under case number 61197/2014.

2.2 The said funds shall be held in trust in an interest bearing account by second respondent and shall be paid out to applicant and/or first respondent according to the final order made in the said action.

3. First respondent is to pay the costs of this application alternatively if same is opposed by second respondent both respondents are to pay the costs of this application jointly and severally he (sic) one paying the other to be absolved.

4. Further or alternative relief."

BRIRF FACTS

[2] On 2 or 3 April 2009 the applicant and the first respondent entered into a written agreement of a sale of land in terms of which the first respondent sold portion 28 of the Farm Rietfontein 345 registration Division KR Limpopo Province (hereinafter referred to as "the farm") to the applicant. On 4 December 2014, my brother, Louw J, for the failure of the agreement to comply with the provisions of section 21 (1) of the Alienation of Land Act, 68 of 1981 found that the agreement was invalid. The applicant who, at the time, occupied the farm was, as a consequence, evicted from the farm. The applicant, at the time of the eviction, had paid R2.3m to the first respondent. The applicant then demanded repayment of the money which the first respondent refused to pay relying on certain defences. This application, brought on urgency, is a result of the dispute between the parties.

THE ISSUES

[3] These are:

1. whether the matter is urgent and, if so,

2. whether the applicant has made out a case for the relief that it seeks.

COMMON CAUSE FACTS

[4] These are:

1. On 2 or 3 April 2009 the parties entered into a written agreement of sale.
2. On 4 December 2013 the agreement was found to be invalid by Louw J.
3. Pursuant to the agreement, an amount of R2.3m was paid to the first respondent by the applicant.
4. The agreement concerned portion 28 of the Farm Rietfontein 345 registration Division KR Limpopo Province.
5. The Farm has now been sold to another buyer and transfer will follow.

[5] On 10 September 2014 I ruled that the matter was urgent.

[6] On 11 September 2014 the matter was argued. Mr B J Shull (Mr Shull) and advocate A M Van Wyk ("Mr Van Wyk") represented the applicant and the first respondent respectively.

[7] Key to the application is section 28 of Alienation of Land Act, 68 of 1981 ("ALA") which provides:

"(1) Subject to the provisions of subsection (2), any person who has performed partially or in full in terms of an alienation of land which is of no force or effect in terms of section 2 (1), or a contract which has been declared void in terms of the provisions of section 24 (1) (c), or has been cancelled under this Act, is entitled to recover from the other party that which he has performed under the alienation or contract, and-

(a) the alienee may in addition recover from the alienator-

(i) interest at the prescribed rate on any payment that he made in terms of the deed of alienation or contract from the date of the payment to the date of recovery;

(ii) a reasonable compensation for-

(aa) necessary expenditure he has incurred, with or without the authority of the owner or alienator of the land, in regard to the preservation of the land or any improvement thereon; or

(bb) any improvement which enhances the market value of the land and was effected by him on the land with the express or implied consent of the said owner or alienator; and

(b) the alienator may in addition recover from the alienee-

(i) a reasonable compensation for the occupation, use or enjoyment the alienee may have had of the land;

(ii) compensation for any damage caused intentionally or negligently to the land by the alienee or any person for the actions of whom the alienee may be liable.

(2) Any alienation which does not comply with the provisions 2 (1) shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee.

[8] That the applicant is entitled to the return of the R2.3m that it paid to the first respondent cannot be gainsaid. This is in terms of section 28 (1) of the Act. The applicant is further entitled to recover interest and reasonable compensation for necessary expenses incurred and improvements effected with the consent of the

respondent which enhance the market value of the land. Similarly, the section protects the rights of the respondent in specified respects. This is common cause.

[9] Having ruled that the matter is urgent the issue whether the applicant has made out a case for the relief that it seeks remains to be determined.

[10] The circumstances that led to this application being brought on urgency are as follows:

> Upon Louw J finding that the agreement was invalid; the applicant being evicted from the farm; the applicant learning that the property had been resold; and that transfer could take place and the purchase price paid to the first respondent, the applicant, through its attorneys attempted to establish the stage reached in the process of passing transfer. Mr Shull, the applicant's attorney, according to annexure FA" to the founding affidavit, which is a letter addressed to Mr Franco Rossouw by Mr Shull, on 20 August 2014, prior to the writing of the letter, had telephone discussion with Mr Rossouw. Mr Shull, having heard nothing from Mr Rossouw, again telephoned Mr Rossouw. Their first telephone discussion, according to Mr Shull had been friendly. The second telephone discussion, according to him revealed a change in attitude. This time Mr Shull was informed that Mr Rossouw had been instructed not to disclose what stage the transfer process had reached. I must pause and mention that Mr Rossouw, in the first telephone discussion with Mr Shull, had advised that he had been and still is the transferring attorney in the process. The applicant could not establish the name of the purchaser and the purchase price.

[11] The applicant, according to evidence, having been advised that transfer could take place within 7 days of lodgement of the documents, sought an undertaking from the first respondent's attorneys that should "it sell the farm before finalisation of our client's claim against it that it will pay the net proceeds of the sale into trust pending such finalisation and further that if not sold it will not otherwise encumber the farm until that time to our client's actual prejudice". The farm, as shown above, has been resold. The undertaking was required by 17:00 on 30 June 2014 which was before the applicant knew of the sale now in question.

[12] No undertaking was provided. Mr Shull, on behalf of the applicant, on 3 September address a letter to Smith and Marais, for the first respondent, informing them that an urgent application would be enrolled for 4 September 2014. The letter is BS4 to the respondent's answering affidavit. On 4 September 2014, advocate Leon Van Scalkwyk, also for the first respondent, addressed a letter (annexure BS5 to the answering affidavit) to Stabin Gross & Shull, Mr Shulls firm. The letter then for the first time disclosed that:

1. The property was sold on 7 August 2014
2. The application was not urgent and if urgent that had been self created.
3. The transferring documents were not ready for lodgement.
4. There were amounts due, owing and payable to Mookgopong Municipality by the applicant.
5. Indeed, it would take 8 to 10 days after lodgement at the Deeds office before a deed was registered.

[13] It must be remembered that the applicant and Mr Shull indicated that the first respondent was not helpful. It was, according to them, not prepared to disclose the

name of the purchaser of the farm and the amount that the farm was bought for. Indeed, the stage reached in the process of registration was never disclosed until 4 September 2014 when annexure BS5 was addressed to Stabin, Gross & Shull. One may ask what the reason was for the first respondent's unwillingness to disclose such simple facts.

The applicant, in my view, may not be blamed for thinking that the first respondent did not want the applicant to know about the registration until registration was complete.

THE INTERDICT

[14] The applicant seeks an interdictory relief which is interim in nature. For the relief to be granted, the applicant must satisfy certain requirements. These are:

1. a right prima facie even though open to some doubt;
2. a well – grounded apprehension of irreparable harm if the interim relief is not granted;
3. a balance of convenience in the applicant's favour; and
4. the lack of another remedy adequate in the circumstances.

See Setlogelo v Setlogelo 1914 AD 221 at 227; Knox D'arcy Ltd and Others v Jameson and Others 1996 (4) SA 348 at 361 D and Hydro Holdings (Edms) Bpk v Minister of Public Works and Another 1977 (2) SA 778 at 785 H.

[15] The applicant's right is conferred by section 28 of the ALA. The right is clear. **McEwan J, in Hydro Holdings** (supra), said:

"Once, however, the applicant has established a clear right not to have a road contractor over whom it has no control on the site then, as I see it, in terms of Setlogelo's case supra, the applicant is entitled to relief without the necessity of

proving an anticipation of irreparable harm". Mr Van Wyk conceded that this requirement was met.

[16] Regarding the second requirement the applicant paid R2.3m to the first respondent. The property (the farm) has now been sold to another purchaser who is to the applicant unknown. The purchase price is also unknown to the applicant. The property is just about to change hands although it is not known when that will be. The applicant contends that the second respondent received instructions not to disclose the stage that the transfer process has reached. This, clearly, has worried the applicant which has come to the conclusion that the first respondent wants transfer to be passed without its knowledge. The first respondent in its answering affidavit denies giving instructions to its attorney, the second respondent. This, however, as Mr Shull correctly argued, does not mean that the fact that the statement was uttered to the applicant's attorney, Mr Shull, is disputed or denied. If instructions were, indeed, given to the second respondent not to disclose the stage reached in the transfer process, who then can blame the applicant for concluding that the proceeds of the sale may not end up in its hands once payment is received by the first respondent.

This, in my view, is sufficient to establish the well-grounded apprehension of irreparable harm if the interim relief is not granted. Furthermore, the undertaking that the applicant thought would break the impasse was not forthcoming. Indeed, it was submitted by Mr Shull that the application would not have been brought had the undertaking been given. Again, who can blame the applicant for adopting the route of urgent application. Indeed, some of the aspects which the applicant ought to have been told about, such as the date of the current sale, were only disclosed in annexure BS5 to the answering affidavit.

[17] Regarding the third requirement, the applicant only asks that R2.3m of the proceeds of the sale accruing to it should not be distributed pending the outcome of the action instituted by it against the first respondent and others in this court under case number 61197/2014. This is not a request which goes with prejudice against the first respondent or the second respondent. The money will be held in trust in an interest bearing account by the second respondent who is not even the applicant's attorney. The requirement too, in my view, has been met.

[18] Mr Shull submitted that the applicant has no other remedy which will assist him secure the safety of the money. The undertaking that could have substituted the interdict was not given by the first respondent. The money is there and unless it is safeguarded it may disappear into thin air. The remedy, other than the undertaking, appears to be this interdictory relief. The applicant has demonstrated why it is difficult to deal with the first respondent, who according to it, did not believe in full disclosure in this case. To bolster the applicant's doubt, regarding the recovery of the money from the first respondent, the applicant demonstrated that the first respondent, through its legal representatives, only in their letter dated 4 September 2014, disclosed that the current agreement was concluded on 7 August 2014. This requirement, in my view, has also been established.

[19] Mr Van Wyk submitted that the applicant failed to establish the requirements which are key to making out the relief that it seeks. It must be borne in mind that it is conceded that the applicant paid the amount of R2.3m to the first respondent. It is further common cause that section 28 of the ALA gives the applicant the right to reclaim the R2.3m in circumstances such as the circumstances of this case. It is also a given that the R2.3m will be safe in trust as explained hereinbefore. It cannot

be gainsaid that the money, once in the trust account, will be very safe for the benefit of both parties. The applicant does not say that its attorney must keep the money. On the contrary, it is the applicant's suggestion and recommendation that the second respondent keep the money in their trust account. The money will, in the meantime, attract interest. The first respondent failed to demonstrate that it will suffer prejudice should the money be kept in an interest bearing account of the second respondent.

[20] I must point out that Mr Shull had intended to amend the notice of motion and attach thereto the calculations which would reflect an amount of R4.3m which would replace the R2.3m in paragraph 2.1 of the notice of motion. The application to amend was correctly abandoned by Mr Shull who, indeed, can bring the application at a later stage. Mr Van Wyk supported this.

[21] That Louw J, in his judgment, found Mr K Naidoo, the deponent of the founding affidavit in this application, to be dishonest and opportunistic, is neither here nor there in this current application. The counter claim, if any, at any rate, will be determined in the main action under case number 61197/2014 which the applicant has instituted.

[22] The first respondent contended that the applicant needed no remedy as it has no claim which, in any event, can be offset by the first respondent's counter claim. This is no bar to the remedy that the applicant needs. It is evident from the correspondence that the applicant did everything to avoid the urgent application. The urgency was indeed not self-created. The conduct of the first respondent left the applicant with no other option than that of following the route of urgency. That

the applicant has failed to prove the requirements necessary to enable it to be entitled to the relief sought cannot be correct. The applicant, in my view, has made out a case for the relief that it seeks. The application, in my view, must succeed.

COSTS

The first respondent in its answering affidavit prayed that the application by the applicant ought to be dismissed with costs on the scale as between attorney and own client de bonis propis. This request, however, was not pursued when the matter was argued by Mr Van Wyk. Mr Van Wyk, instead, implored the court to, in the event that the order was granted, order that costs be costs in the main action. Mr Shull, contrariwise, pleaded that the application be granted with costs. Both, correctly, in my view, agreed that the costs had to be on the scale as between party and party. However, the issues of costs, in my view, need to be finalised together with this application. Costs usually follow the result and there is no reason for me to find otherwise.

[25] I have amended prayer 3 by deleting the sentence which starts with "alternatively" and ending with to be "absolved". Prayer 3, with the amendment, now reads:

"3. First respondent is ordered to pay the costs of this application."

[26] The following order is then made:

An order is granted in terms of prayers 1, 2.1, 2.2 and 3 as amended of notice of motion dated 4 September 2014.

M.W MSIMEKI
JUDGE OF THE NORTH
GAUTENG HIGH COURT, PRETORIA

COUNSEL FOR THE APPLICANT:	**Mr. B J Shull**
INSTRUCTED BY:	Stabin Gross & Shull Attorneys
COUNSEL FOR THE 1st RESPONDENT:	**Advocate A M Van Wyk**
INSTRUCTED BY:	Smit & Marais Attorneys
DATE OF HEARING:	10 September 2014
DATE OF JUDGMENT:	