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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 38416/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED. YES

18 October 2022

In the matter between:

GEORGE FREDERICK MARX KOK N.O.

First Applicant

SARIE MARIA KOK N.O.

Second Applicant

DIMITRIOS ARVANITIS N.O.

Third Applicant

and

**B A DEVELOPMENT COMPANY (PTY) LIMITED
(Previous registered name Wrapex (Pty) Limited)**

First Respondent

MARIUS VAN TONDER N.O.

Second Respondent

ABSA BANK LIMITED

Third Respondent

B&J STEENBERG ENGINEERING AND

CONSTRUCTION (PTY) LIMITED

Fourth Respondent

REGISTRAR OF DEEDS, PRETORIA

Fifth Respondent

JUDGMENT

NEUKIRCHER J

1. This is an application that was originally brought by way of urgency, in which the applicant (the Trust) seeks *inter alia*, that pending the adjudication of the action under case number: 36310/20 the 1st and 2nd respondents be interdicted and prohibited from selling and/or transferring the immovable property described as Portion 11 (a Portion of Portion 10) of the Farm L[....] No 528, Registration Division JQ, Province of Gauteng, in extent 73,4360 hectares (ha) (“the property”), to the 4th respondent or any third party, and that the 1st and 2nd respondents be interdicted and prohibited from in any manner encumbering the property.¹

2. The application is opposed by the 1st Respondent (Wraypex) which is presently in business rescue², as well as by the 2nd Respondent who is its appointed Business Rescue Practitioner (BRP) and the 3rd Respondent (ABSA) who hold 2 bonds over the property.

3. The parties agreed to certain interim relief following the launch of the urgent application pending the finalisation of the merits. That order has remained extant pending this judgment.

THE ISSUE

¹ Known henceforth as “the property”

² Wraypex is now known as BA Development Company (Pty) Ltd, but will be referred to as Wraypex in this judgment

4. The nub of the issue is whether, if the respondents are correct and the Trust has no existing right in the property, an interdict can be granted to preserve it for purposes of the pending action.

THE FACTS

5. The Trust was the registered owner of the property described in Title Deed [...] as Portion 11 (a Portion of Portion 10) of the Farm L[...] No 528, Registration Division JQ, Province of Gauteng, measuring 73,4360 ha.

6. On 29 January 2007 the Trust and Wraypex entered into a Written Deed of Sale in terms of which the property sold was described as:

“Approximately 33 hectares of Portion 147 of the Farm L[...] No 528 JQ registered under title deed number: T49337/1995 in extant of 82,5286 hectares per the subdivision diagram to be annexed hereto as Annexure “A” ...”

7. The purchase price of the above 33 hectares was R3,2 million and the Deed of Sale also made provision that:

7.1 the property *“shall be sub-divided as is agreed between the parties to give the Purchaser the portion of the property as indicated on Annexure ‘A’ hereto”*; and

7.2 the deed of sale was subject to the sub-division of the property;

7.3 the property would be transferred *“as soon as possible after the subdivision of the property is complete”*.

8. It bears mentioning that there was no Annexure ‘A’ attached to the agreement.

9. As the property is subject to both the Alienation of Land Act 68 of 1981 (ALA) and the Subdivision of Land Act 70 of 1970 (SLA) it became apparent when attempting to register the 33 ha into Wraypex’s name, that this could not be achieved as:

- 9.1 the property description in the Deed of Sale was incorrect; and
- 9.2 subdivision had not taken place.

10. As a result, the parties then concluded an Addendum to the Deed of Sale (the addendum) on 2 September 2008 in an attempt to cure these issues. According to the Addendum:

“The parties as set out above, entered into a sales agreement on 29 JANUARY 2007 at FOURWAYS (“the Agreement”).

WHEREAS the purchaser purchased the property described above on the Standard terms and conditions as set out in the Agreement,

AND WHEREAS Portion 147 of the Farm L[...] No 528 does not exist due to the property not having been Consolidated, it is now mutually agreed that the property description will be amended to read as PORTION 11 (a portion of Portion 10) OF THE FARM L[...] NO 528.

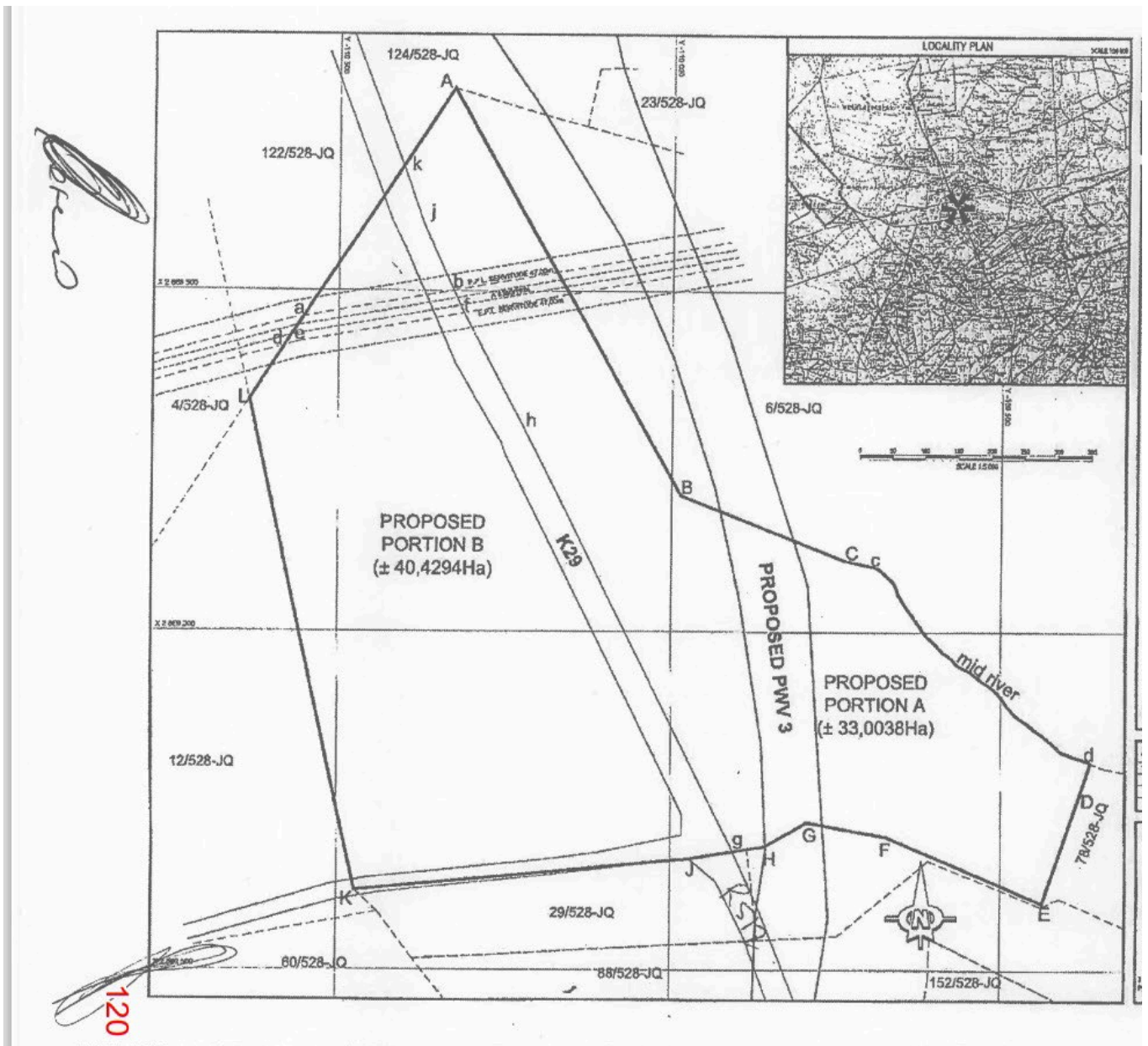
FURTHERMORE the parties agree that clause 4 and clause 8.1 be deleted in its entirety to ensure that the Agreement is non suspensive in regard to the sub-division, and agree to the substitution of clause 4 with the following:

The Purchaser agrees and undertakes to transfer A PTN OF PTN 11 OF THE FARM L[...] NO 528 back to the Seller after date of transfer and upon finalisation of the Sub-Divisional Diagrams.

The parties record and agree that they will remain bound by the remainder of the terms and conditions of the agreement save only for the amendments dealt with above.”

11. But Wraypex was busy with Blair Athol Golf Estate Development and it could therefore not wait for the subdivision process to be completed - it urgently required immediate transfer of the property for this development. It thus proposed to the Trust that the entire immovable property be transferred to it and that the 40,4360 ha would be transferred back to the Trust once the subdivision was completed.

12. The subdivision is depicted below:



13. The above diagram shows that the property is divided into 2 portions by the R512 (or K29) which is a Provincial tar road commonly known as the Pelindaba/Lanseria/Malibongwe Road. The portion to the east of the R512 is ± 33 ha, and to the west is ± 40 ha. Thus, says the Trust, the intention was that Wraypex would purchase the 33 ha to the east of the R512 for R3,2 million and the 40 ha to

the west of the R512 would remain that of the Trust and be transferred back once the subdivision had been completed.

14. According to the Trust, the market value of the 40 ha is R14 720 000.

15. On 18 November 2008 the entirety of the 73,4360 ha of the property was transferred to Wraypex under Title Deed T103164/2008 and ABSA Bank registered a mortgage bond over the property in the amount of R3,2 million (plus an additional amount of R640 000) as security for ABSA's loan to Wraypex for the purchase of the property.

16. There seems to be, on the following uncontentious facts placed on record by the parties in their affidavits, no issue taken with the fact that the Trust and Wraypex intended to execute their agreement that Wraypex would transfer the 40 ha back to the Trust upon completion of the subdivision. This is seen from the following:

16.1 in early 2009 the Trust obtained a quotation for the subdivision of the property from Van Brakel Professional Planning and Property Service (Van Brakel), who was instructed by Wraypex³ to commence with the subdivision in January 2009;

16.2 the proposed subdivision diagram was prepared by February 2010 and Wraypex provided a power of attorney to proceed with the subdivision on 18 March 2010;

16.3 on 6 May 2010 ABSA provided Van Brakel with a written consent for the subdivision of the property;

16.4 on 24 August 2010 the Minister of Agriculture, Forestry and Fisheries (the Minister) gave consent to the subdivision of the property in terms of Section 4(2) of the SLA⁴ by consent number 45448. Paragraph 3.3 of the consent states:

³ Who would be liable for the subdivision costs in terms of clause 4 of the Deed of Sale

⁴ Section 4 (2) of the SLA states:

The Minister may in his discretion refuse or—

(a) on such conditions, including conditions as to the purpose for or manner in which the land in question may be used, as he deems fit, grant any such application;

“3.3 Thus Consent is valid for 5 years from date of this Consent.”

16.5 on 19 October 2010 ABSA Bank then registered a further mortgage bond over the property for the amount of R17,8 million, plus an additional amount of R3,56 million;⁵

16.6 during March 2011, PDNA Consulting Engineers (PDNA) was instructed to attend to the Section 7 Traffic Report and in May 2011 the land surveyor was appointed to attend to the sub-divisional diagram;

16.7 on 4 May 2011 Van Brakel received the approval for the sub-division from Mogale City Local Municipality (Mogale City) – this, was conditional and subject to certain conditions being met.

17. It was here that the sub-division met with several stumbling blocks:

17.1 the initial consolidation map had to be withdrawn before the storm water fluid line⁶ could be attended to – this was done on 31 August 2011;

17.2 the land surveyor provided the Trust with a proposed sub-divisional diagram in July 2011⁷. The sub-division diagram was approved on 5 September 2011;

17.3 however, the Section 7 Traffic Assessment Report had yet to receive approval and it was only on 29 August 2012 that the Department of Roads and Transport: Gauteng Provincial Government (the Department) notified PDNA that the report had been referred to BKS Engineers *“for their technical input on access arrangements”* and on 20 September 2012 they informed PDNA that they were referring the applications to the South African National Roads Agency Ltd (SANRAL) for comment;

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- (b) if he is satisfied that the land in question is not to be used for agricultural purposes and after consultation with the Administrator of the province in which such land is situated, on such conditions as such Administrator may determine in regard to the purpose for or manner in which such land may be used, grant any such application.

⁵ According to Wraypex: *“I interpose to mention that the property is adjacent to the Blair Athol Golf Estate and that the Wraypex obtained finance from various financial institutions, including Standard Bank and Absa for the finance of the Blair Athol Golf Estate. The security herein forms part of the security registered in the name of Absa is part of the security granted by Wraypex to Absa for its facilities.”*

This the impression is created that the additional security was provided in respect of the entirety of the Blair Athol Golf Estate development.

⁶ Part of the conditions of Mogale City Local Municipality

⁷ This proposed that the portion of the property to the east of the R512 would be known as Portion 168 (a Portion of Portion 11) of the Farm Lindley, 528, JQ, in extent of 32,6248 hectares and the portion to the west of the R512 would be known as the Remainder of Portion 11 of the Farm Lindley, 528, JQ in extent 40,8112 hectares.

17.4 two more years passed without feedback from the Department. Eventually Van Brakel instructed Chris Brooker to proceed with the 1:50 stormwater floodlines, which was received in March 2014, and Mariteng Consulting Engineers was appointed in 2015 to assist with the sub-division and with obtaining the necessary Departmental consent.

18. Eventually, on 25 September 2016 the Department provided conditional consent to the sub-division application. The conditions related to *inter alia* (a) the determination of road reserve boundaries, plans and declarations, (b) building restrictions, (c) access points/roads and barriers, (d) indemnification of the Premier-in-Executive Council against claims, (e) remote adjacent service roads so that the land owner has access to the access roads; (f) acoustic noise attenuation barriers and (g) construction of storm water drainage within the roads barriers.

19. Paragraph 12 of the Conditional Consent provides the following:

“The applicant shall lodge, in writing, an acceptance of all the above conditions together with revised layout plan portraying the conditions of the Department of Roads and Transport, within six months from date of this letter. Non-compliance of this condition will result in the above permission being rescinded, and the applicant will have to reapply.”

20. The conditions were attended to and consent was received from all, including Eskom, for a s25 clearance by October 2017 and⁸ on 24 October 2017 the Section 25⁹ application was submitted.

21. On 6 December 2018, the Trust received the Mogale City consent to sub-divide the property. The consent states:

“This is to confirm that the application for subdivision of Portion 11 of the farm L[...] 528 JQ was approved by the Mogale City Local Municipality on 04 May 2011 in terms of Ordinance 20 of the Division of Land Ordinance, 1986. This was prior to our promulgation of Mogale City Local Municipality’s Spatial Planning and Landuse Management by-laws 2018.

⁸ Mogale City also gave an extension of its consent on 16 March 2017

⁹ This is section 25 of the Division of Land Ordinance 30 of 1986

The Mogale City Local Municipality has no objections to the registration.

22. The consent was accompanied by a certificate which reads:

“CERTIFICATE WITH REGARD TO APPLICATION IN TERMS OF SECTION 6(1) OF THE DIVISION OF LAND ORDINANCE, 1986

It is hereby certified that the Mogale City Local Municipality has in terms of Section 18(1) of the Division of Land Ordinance, 1986 (Ordinance 20 of 1986) approved the Section 11(2) of the said ordinance have been adhered to.”

23. The proverbial fly landed in the ointment when Wrapex was placed in business rescue on 12 July 2016 and the 2nd respondent appointed as BRP. This effectively halted the registration of the approved sub-division. The BRP’s Business Rescue Plan was adopted by creditors on 13 July 2017. Importantly, ABSA bank was admitted as a secured creditor in the amount of R48 662 878 and R2 113 510. Both the BRP and ABSA were aware of the pending sub-division of the property as is clear from the correspondence:

23.1 on 4 July 2017 an email from Pieter Prinsloo (of the Trust) to Robby Wray (Wraypex) reads:

“Unfortunately the sub-division has not been finalised but we hope that it will happen soon. We are awaiting Section 25 clearance according to Theuns van Brakel.

We will appreciate if to receive a letter from the appointed Business Rescue Practitioner (Marius van Tonder if we remember correctly) acknowledging the attached agreement.

Please inform us if you require any other information from us or whether we should contact the Practitioner directly.”

23.2 on 20 October 2017 the BRP responded as follows:

“Aangehegte kontrak en onderstaande verwys:

Ek verneem van Michael Lenz dat julle gesels het oor die aangeleentheid.

Ek stel voor ons ontmoet en bespreek al die moontlike opsies.

Soos jy weet het ABSA n verband oor die grond en wil dit verkoop.

ABSA is bewus van die situasie rondom die onderverdeling.

Laat weet waneer en waar ons kan ontmoet.”

24. As is apparent, ABSA wanted to sell the property and on 23 November 2017 (with knowledge of the Trust) an auction was held. The offer of R5 million was rejected by both the Trust and ABSA. An email from Prinsloo dated 23 November 2017 states:

“Ek verwys na ons gesprek gister.

’n Aanbod van R5 miljoen is vir bovermelde eiendom op die veiling gemaak wat ’n waarde van ongeveer R67 000 per hektaar gee.

Dit beteken dat Absa ongeveer R2 200 000 sal kry vir die 33 hektaar en ons ongeveer R2 680 000 vir 40 hektaar.

Ons is nie bereid om die R67 000 per hektaar to aanvaar nie.

Ons is wel bereid om die 33 hektaar te koop vir R3 000 000 en benodig ’n verband van Absa. Die totale eiendom kan dan as sekuriteit dien.

Ons het ook ander eiendomme en besigheid wat ons kan bespreek indien hierdie vir julle ’n opsie is.

Ons verneem mettertyd van jou.”

25. But a month prior, on 31 October 2017 Van Brakel had informed the Trust that the subdivision had been approved, that the s25 application had been submitted and would take Mogale City 3-4 months to approve. The Trust then demanded transfer of the 40 ha which was met by the following letter from ABSA on 8 May 2018.

“Your electronic mail dated 25 April refers.

We confirm that we have solicited legal opinion in respect of Portion 11 and more specifically the contract entered into between GFM Kok Family Trust (“the Trust”) and Wraypex and the potential transfer of a portion of portion 11 back to the Trust.

We are of the view (as supported by the legal opinion) that:

- 1. the deed of sale in respect a portion 11 of the Farm L[...] is void;*
- 2. in the absence of compliance of set 3e(i) of the Subdivision of Agricultural Land Act 70 of 1970, which is a pre-requisite for subdividing and/or transfer of agricultural land, the sale of the portion is void;*

3. *In the event that it is found that the ministerial consent has been obtained i.t.o sect 3 (e)(i), the sale is void as the property to be transferred has neither been properly defined nor the location thereof;*
4. *the contract cannot be rectified ex-post facto;*
5. *there is no legal impediment registered against the bond to prevent Absa from either selling the property or in terms of which Absa and/or Wraypex is obliged to transfer a portion thereof to the Trust;*
6. *Absa as legal bond holder of the property and as such is entitled to realise the property;*
7. *Absa is further not liable of any costs incurred by the Trust in respect of any subdivision of the property or any other related costs incurred by the Trust;*
8. *the claim by the Trust against Wraypex has been extinguished by prescription;*
9. *in the event that the Trust is found to have a claim, such claim is to be instituted against Wraypex and to be considered by the Practitioner."*

26. On 31 May 2018 the parties held a meeting and resolved to suspend all legal proceedings until end September 2018 to enable them to secure a purchaser for the property *"in an attempt to maximise value which in turn will enable parties to negotiate a commercial solution in regards of the current impasse pertaining to ownership and sale of the property, or part thereof (sic)"* and that, in the event that their endeavours were unsuccessful *"no party shall be bound by the discussions held on 31 May 2018 and in the position pre the meeting and the '(i)n principal agreement' shall remain unchanged."*

27. Over the following 2 years, various meetings were held by the parties in an attempt to bring about an amicable and commercially viable resolution to their impasse. This however ended when on 3 June 2020 the BRP informed the Trust that ABSA had instructed him to accept an offer of R7 million to purchase the entirety of the property and that he had accepted the offer. The Trust objected and demanded that the sale be postponed until the matter was resolved to the satisfaction of the Trust, or the Court sanctions the sale, failing which the Trust would approach the Court for relief.

28. On 24 July 2020, the Trust was informed that the sale would proceed, that the Deed of Sale and Addendum were void, that the Ministerial consent was void for want of compliance with section 3(e)(i) of the SLA but that, in any event, the Ministerial consent had expired in August 2015 a year before Wraypex went into business rescue. On 24 July 2020 the BRP also informed the Trust that without the consent of ABSA, as holder of the mortgage bond, and given advice that he had received, he was not in a position to transfer any portion of the property to the Trust.

29. In a letter to the BRP and ABSA dated 5 August 2020, the Trust informed them that their decision to continue with the sale constitutes a repudiation of the agreement, which the Trust accepts and therefore cancels the agreement. The Trust then demanded restitution i.e that the property be retransferred to the Trust against payment of the R3,2 million and interest.

30. On 6 August 2020 the Trust issued out summons in the action between the parties under case number 36310/2020.¹⁰ That action is still pending.

31. On 13 August 2020 the present application was launched.

THE RELIEF

32. It is common cause that the relief sought is interim in nature and that the Trust is obliged to satisfy the court that it has met the following requirements:

32.1 a prima facie right, even though open to some doubt.

32.2 that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and it ultimately succeeds in establishing the right;

32.3 the balance of convenience favours the granting of interim relief; and

32.4 the Trust has no other satisfactory remedy.¹¹

¹⁰ It was served as follows: on Wraypex and the BRP on 7 September 2020; on ABSA Bank on 19 August 2020; on the potential purchaser on 26 August 2020 and on the Registrar of Deeds on 17 August 2020. It is opposed by Wraypex, the BRP and ABSA Bank.

33. In **Antares International Ltd and Another v Louw Coetzee and Malan Inc and Another**¹² it was held that a party could apply for an interdict if it could make out a *prima facie* case that it would receive relief in the future from which a right in property would flow.

34. There are 3 important factors which specifically weigh in this case:

34.1 the first is that these considerations “*are not individually decisive, but are interrelated: for example, the stronger the applicant’s prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of “some doubt”, the greater the need for other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities: See **Olympic Passenger Service (Pty) Ltd v Ramlagan** 1957 (2) SA 382 (D) at 383 D-G. viewed in that light, the reference to a right which, ‘though plaintiff established is open to some doubt’ is apt, flexible and practical, and needs no further elaboration.*”¹³

34.2 and in **Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others**¹⁴, Heher J said:

“The quoted extract forms part of the ratio decidendi. There is no reference in the judgment to Webster v Mitchell (supra) or Gool v Minister of Justice (supra). The judgment was concurred in by Ogilvie-Thompson CJ (who had delivered the judgment in Gool’s case), Wessels JA, Jansen JA and Muller JA. I think it is fair to say that, read with its approval of the Olympic Passenger Service case supra, it authoritatively established the following:

¹¹ Setlogelo v Setlogelo 1914 AD 221 at 227

¹² 2014 (1) SA 172 (WCC) at para 45

¹³ Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A) at 691 C-G

¹⁴ 1995 (2) SA 813 (W) at 832 H – 833 B

1. A prima facie right though open to some doubt exists when there is a prospect of success in the claim for the principal relief albeit that such prospect may be assessed as weak by the Judge hearing the interim application.

2. Provided that there is a prospect of success, there is no further threshold which must be crossed before proceeding to a consideration of the other elements of an interim interdict.

3. The strength of one element may make up for the frailty of another.

4. The process of measuring each element requires a holistic approach to the affidavits in the case, examining and balancing the facts and coming to such conclusion as one may as to the probabilities where disputes exist.”

34.3 the second is that, where the applicant establishes a clear right (as opposed to a prima facie right), it is unnecessary to establish irreparable harm¹⁵; and

34.4 the last is that:

“The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on these facts obtain final relief at trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to “some doubt”. But if there is a mere contradiction, or unconvincing explanation, the matter should

¹⁵ Setlogelo supra; LF Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v LF Boshoff Investments (Pty) Ltd 1969 (2) SA 256 (C) at 267 C-D

be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.”¹⁶

35. Bearing this in mind, and bearing in mind that the facts are undisputed, the question is: what arguments have the respondents put up in opposition?

THE DEFENCE

36. The defences raised by the BRP and ABSA are all in the same vein apart from one issue. I will deal with all the defences below, but it is important that the BRP’s view is that, as the Business Rescue Plan was adopted on 13 July 2017 and ABSA is a secured creditor and recognised as one, the BRP owes it a “*multitude of obligations*”¹⁷. The BRP’s defence is that its opposition is informed by its obligations and fiduciary duty towards the recognised creditors of Wraypex which include ABSA.

37. It must be borne in mind that the Trust did not submit a claim as a creditor, whether contingent or otherwise and therefore the BRP’s view is that the Trust is not an “*affected person*” as defined in Section 218 of the Companies Act No 71 of 2008.¹⁸

¹⁶ Per Viljoen AJ in *Rizla International BV and Another v L Suzman Distributors (Pty) Ltd* 1996/2) SA 527 (C) at 530 D –F quoting *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189

¹⁷ Which he says includes those set out in Section 76,77,78,140 and 141 of the Companies Act 71/2008

¹⁸ (a) “*affected person*”, in relation to a company, means—

- (i) a shareholder or creditor of the company;
- (ii) any registered trade union representing employees of the company; and
- (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;”

38. The BRP's position is that, although the Trust maintains that he should merely have remained neutral and abided the decision, he could not do so because of the fiduciary duties and obligations owed to the creditors of Wraypex. This is of a particular relevance as Section 140(1)(d) (11) of the Companies Act states:

“(1) During a company’s business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter –

(a)...

(b)...

(c)...

(d) is responsible to –

(i) ...

(ii) implement any business rescue plan that has been adopted with Part D of this Chapter.”

39. The Business Rescue Plan provides that the property:

39.1 is an investment property asset owned by the 1st respondent;

39.2 that ABSA holds security by way of a first and second mortgage bond;

39.3 included in proposal 1 is the sale of 8 properties encumbered to ABSA in the open market at the best attainable prices;

39.4 that the ABSA encumbered properties are to be sold in the open market at the best attainable prices as soon as market conditions allow therefor after the approval of the plan;

39.5 that the assets encumbered by ABSA were independently valuated by both the BRP and ABSA after which ABSA provided the BRP with reserve prices at which the individual assets may be disposed of. The assets will be sold in the ordinary course of business at amounts equal to or exceeding the reserve prices;

39.6 that this specific property was recorded as an investment property available to be sold to pay the creditors of the 1st respondent; and

39.7 that the proposals envisage the sale of the assets encumbered to ABSA in the ordinary course of business at prices agreed to by the bondholder and or subject to confirmation by the bondholder.

40. Thus, says the BRP, he could not remain supine in the face of litigation more especially when, instead of observing the costs relief sought in the Notice of Motion¹⁹, the Trust states:

“4.6 No costs order is sought against the Third, Fourth and/or Fifth respondents, save in the event that any such Respondents opposes this application, and in which event a cost order will be sought against such a Respondent jointly and severally with the First and Second Respondents”

41. The BRP has interpreted this to mean that the Trust was, despite prayer 3, seeking a costs order against him, and therefore he was obliged to enter the fray. What this argument loses sight of is paragraph 14 of the founding affidavit which states:

“I respectfully submit that a proper case has been made out for the granting of an interim interdict against the First and Second Respondent, as set out in the Notice of Motion, and I respectfully request the Honourable Court to grant the relief as sought in the Notice of Motion.”

(my emphasis)

42. So too in the Replying Affidavit appears the following in paragraph 29

“In light of the aforesaid I respectfully request the Honourable Court to grant the relief as set out in the Notice of Motion.”

(my emphasis)

43. This the argument by the BRP that he was obliged to enter the fray to avert the impending doom of a costs order being sought against Waypex and him is based on an incorrect interpretation of the relief sought.

ABSA BANK

¹⁹ That the costs be reserved for determination in the pending action under case number 36310/2020, unless the 1st and 2nd respondents oppose the application. (Prayer 3 of the Notice of Motion)

44. ABSA's arguments, with which the BRP seems to have aligned himself, are the following:

44.1 the Trust's claim for retransfer of the property, that is premised on the cancellation of the sale and addendum agreements, is not competent in the context of the abstract theory of transfer of ownership in immovable property which prevails in our law²⁰;

44.2 cancellation of the sale agreement is bad in law as the Trust's claim for transfer of an undefined portion of the property is unenforceable for want of compliance with section 21 of ALA and the claim had in any event prescribed;

44.3 ABSA acquired a real right in the property when its mortgage bonds were registered. Transfer of the property, also to the Trust, therefore requires cancellation of the mortgage bonds²¹. This in turn requires Absa's consent. Naturally, Absa will not give such consent unless it is satisfied with the amount tendered in respect of the indebtedness secured by the mortgage bond;

44.4 the Trust is estopped from replying on any state of affairs other than that which was expressed by it in the power of attorney given by it for transfer of the property to Wraypex. In the power of attorney, and the deed of transfer, the Trust renounced all title and interest and to the property and transferred the entire property free of any encumbrances to Wraypex. The transaction was then registered as such in the Deeds Office and acting on this representation, ABSA advanced loans to Wraypex secured by the mortgage bonds over the property.

THE RETRANSFER IS NOT COMPETENT

45. ABSA argues that the "real agreement" between the parties is to be found at paragraph 7.11 of the Founding Affidavit which states:

²⁰ Legator McKenna Inc and Others v Shea and Others 2010 (1) SA 35 (SCA at par 20)

²¹ Based on the appellant's unsuccessful argument on the specific facts in ABSA Bank Limited v Moore and Another 2017 (1) SA 255 (CC)

“7.11 At the same time the First Applicant was approached by Mr Wray, who requested that the suspensive condition in the agreement, namely that the immovable property be sub-divided before transfer of the 33 Hectares of the immovable property takes place, be deleted and replaced by an addendum to the agreement that the whole immovable property be transferred into the name of the First Respondent and that the remaining part of the immovable property, approximately 40 Hectares, will be transferred back to the Kok Trust after finalisation of the sub-division of the immovable property.”

46. The parties' intention was given effect to by a Power of Attorney that then passed full title of the entirety of the 73,4360 ha of the property to Wraypex, which (of course) is reflected in the Deed of Transfer. The latter then specifically provides that the Trust renounces *“all rights and title to Wraypex”* and *“did in consequence also acknowledged them to be entirely dispossessed of, and disentitled to the same...”*.

47. ABSA argues that this is the real agreement between the parties, not the least of which is borne out by the fact that it was legally impossible for the Trust to pass and transfer an undivided portion of the property to Wraypex - it concedes that the intention was that Wraypex would then subdivide the property and, as stated, the correspondence clearly shows an intention to transfer the 40 ha back to the Trust – this was all disrupted by Wraypex being placed in business rescue.

48. This notwithstanding, ABSA argues that it is not competent for the Trust to cancel the agreement as the agreement is unconditional and has been executed – Wraypex paid the R3,2 million purchase price and the transfer was effected. Therefore, the real agreement cannot and has not been cancelled. The agreement is, in any event, valid.

49. This is all premised on the argument that the abstract theory – as opposed to the causal theory – of transfer has been adopted as part of our law. According to the former, the validity of transfer of ownership is not dependent on the validity of the underlying transaction. In **Nuance Investments (Pty) Ltd v Maghilda Investments**

(Pty) Ltd and Others²² (Nuance) any doubt on this issue was laid to rest²³, and the requirements for the passing of ownership were stated thus:

“[22] In accordance with the abstract theory the requirements for the passing of ownership are twofold, namely the delivery which in the case of immovable property, is effected by registration of transfer in the deeds office – coupled with a so-called real agreement or “saaklike ooreenkoms”. The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become owner of the property... Broadly stated, the principles applicable to agreements in general also apply to real agreements. Although the abstract theory does not require a valid underlying contract, eg sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement.”

50. ABSA then argues that, absent a claim for rectification, the matter must be adjudicated on the documents presently before court.²⁴

51. But, in my view, this argument does not defeat the Trust’s claim for two reasons. Firstly, the Addendum clearly evidences the following:

“The Purchaser agrees and undertakes to transfer A PORTION OF PORTION 11 OF THE FARM L[....] NO 528 back to the Seller after date of transfer and upon finalisation of the Sub-Divisional Diagrams

The parties record and agree that they will remain bound by the remainder of the terms and conditions of the amendments save only for the amendments dealt with above”

And one of the suspensive conditions in the agreement is the sub-division of the property.

²² [2017 1 All SA 401 (SCA)]

²³ At para 21

²⁴ Legator McKenna Inc and Others v Shea and Others 2010 (1 SA 35 (SCA) which states that South Africa has an abstract and not a causal system of transfer in which the intention to give and receive ownership and a valid delivery evidence the transfer of ownership. The contract is just the causa, and ownership can still pass even if the contract is invalid (paragraphs 20 -22)

52. Thus it may well be so that the Trust may decide to apply to rectify the agreement in the pending action which would put pay to this portion of ABSA's argument and would, as stated in **Anslares International supra**²⁵, provide it with the requisite *prima facie* right even if open to some doubt.

53. Secondly, it was never the intention of the parties that ownership of the entire 73, 4360 ha would pass to Wrapex – this is according to the documents before me at the very least. This being so, evidence at trial may well demonstrate a “*defect in the real agreement*”.

THE CANCELLATION IS BAD IN LAW

54. ABSA argues that any agreement to re-register the land falls foul of Section 3(e)(i) of the SLA. Section 3(e)(i) provides:

“Subject to the provisions of section 2 -

(e) (i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act 27 of 1956; ...”

55. It argues that, absent a further agreement between the Trust and Wrapex after the subdivision, the claim for retransfer offends Section 3(e)(i). This is because the claim for retransfer amounts to an alienation as Wrapex will alienate the 40 ha for no consideration which also falls foul of Section 2(1) of the ALA which states:

“2 Formalities in respect of alienation of land

²⁵ Paragraph 2 supra

(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

(2) The provisions of subsection (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.

(2A) The deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A.”

56. But in considering this issue, it is important to consider the definition of the word “alienate” in ALA, which is:

*“**alienate**”, in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and “alienation” has a corresponding meaning;”*

57. What this argument loses sight of is 3 issues:

57.1 firstly, if the Trust were indeed to amend its claim to include one of rectification, that may well put an end to this argument;

57.2 secondly, the agreement clearly encompasses the purchase consideration of 33 hectares and not 73 hectares of land and the retransfer of the 40 hectares appears to be a material term of that agreement and was understood to be so at signature of both the agreement and the addendum;

57.3 section 28 of the ALA 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 of section 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.”

57.4 thus section 28(1) of the ALA specifically provides that the Trust would be entitled to recover that which it has performed under the alienation contract in the following circumstances:

57.4.1 if the alienation of land has been cancelled; or

57.4.2 if the alienation of land is of no force or effect in terms of Section 2(1).

58. Bearing in mind that Wraypex has not performed under its obligations to re-transfer the 40 ha to the Trust, the latter argues that there has been no “full performance” as required in section 28(2) which would render the agreement void *ab initio*. In any event, section 25 of ALA simply confirms the common law position that if a contract is void restitution must follow²⁶. The fact that restitution is indeed possible is confirmed by **Nuance** (supra) where the court ordered re-transfer against payment of monetary consideration.

59. ABSA then argues that the agreement is void due to the lack of Ministerial consent²⁷ as required in terms of section 3(e)(i) of the SLA, The Trust argues that as the 40 ha is not subject to a sale, section 3(e)(i) does not apply.

60. ABSA argues that, given that the Ministerial consent was only valid for a period of 5 years, the Trusts claim (such as it may be), prescribed on 4 September 2014. The Trust denies this and argues that this is a dispute that is raised in the pending action and in respect of which oral evidence and expert evidence will be necessary. It states”

“100. It must firstly be noted that the relief claimed by the Kok Trust is premised

on the acceptance of the repudiation of the sale agreement and amendment agreement. Upon such acceptance the right to claim restitution arises, and such a right has a prescription period of 3 years in terms of the Prescription Act. The repudiation by the First Respondent was accepted by the Kok Trust

²⁶ National Credit Regulator v Opperman 2013 (2) SA 1 (CC) at paragraph 18, 76 and 103

²⁷ Geue and Another v Van Der Lith and Another [2003] 4 All SA 553 (SCA)

on 5 August 2020, and the action was issued on 6 August 2020. In such circumstances it is respectfully submitted that no issue of prescription can arise.

101. The Respondents contends that as the Surveyor-General approved the subdivision diagram on 5 September 2011, any claim for transfer of the approximately 40 Hectares arose on such a date, and as such prescription was completed on 4 September 2014.

102. The Kok Trust contends that the right to claim transfer of the approximately 40 Hectares at the earliest possible date only vested on 6 December 2018 when the Mogale City granted its consent to the subdivision. The date advanced by Kok Trust is confirmed by the expert evidence of Mr Schalk Botes, a qualified Town Planner.

103. It is respectfully submitted that the question of prescription could only arise once transfer of the approximately 40 Hectares became possible.

104. The Third Respondent also relies in its prescription defense thereon that the sale agreement and amendment is void, and that any claim by the Kok Trust for transfer of the immovable property would have prescribed three years after the conclusion of the agreement. This contention, with respect, was rejected in Nuance. In the Nuance-matter, dealing with the sale of land where ministerial consent was required but not obtained in terms of the SALA and where it was alleged that the land description fell foul of section (1) of the ALA, the Court found that the period of prescription could only begin to run once the aspect of voidness was raised in circumstances where all the parties were under the impression that the agreements were valid.

105. In this current matter the alleged voidness of the sale agreement and the amendment agreement was, in the best possible scenario for the Respondents, at the earliest raised on 8 May 2018 when the Third Respondent denied that there existed any valid reason for the transfer of the approximately 40 Hectares to the Kok Trust without any reference to the ALA

or SALA. Summons was issued on 6 August 2020, well within the three-year period of prescription.”

61. In any event, Ministerial consent for the subdivision was obtained on 24 August 2010. Whilst it is indeed so that this was valid for 5 years, the Trust states that it sought an extension of that period. Furthermore, the various steps taken to subdivide the property were the following:

- 61.1 the section 4(2) the SLA consent (no 45448) from the then Minister of Agriculture, Forestry and Fisheries was obtained on 24 August 2010;
- 61.2 the Surveyor-General approved the subdivision on 5 September 2011;
- 61.3 the Mogale City consent was received on 6 December 2018.

62. Whilst the respondents state that the prescription set in on 4 September 2014, the Trust argues that at best, the period of prescription only commenced once Mogale City provided their consent on 6 December 2018 and that the summons interrupted prescription as the papers were served on all parties by 26 August 2020.

63. “[19] *The next question is whether Nuance could, by the exercise of reasonable care, have known that the ministerial consent had not been obtained before the agreements were signed. Reasonable care for the purposes of s 12(3) of the Prescription Act is not measured by the objective standard of the hypothetical reasonable or prudent person but by the more subjective standard of a reasonable person with the creditor’s characteristics. (See M M Loubser Extinctive Prescription (1996) at 105-106.) Mr Sandler confirmed that all the parties believed that the agreement was binding at the time it was signed. There was no evidence that subsequent to this, there was anything or any incident that should have warned Nuance that ministerial consent for the sale had not been obtained. It is to my mind inconceivable that Nuance, and its team of experts, would proceed and focus on the future implementation of a development for which they had expended R60 million with knowledge or deemed knowledge that it may not have been above board. The queries sent by Nuance and Plan Practice to the Department, concerning the subdivision of the land suggest to me that they were careful and wished to ensure that the project was above board.*

[20] *It must thus be concluded that there was also no deemed knowledge on their part. Consequently the only probable conclusion is that the first time that the lack of the ministerial consent came to their knowledge was around 23 June 2009, when their attorney conveyed this to Maghilda and Sanjont's attorneys.*"²⁸

64. In my view, the issue of prescription requires evidence not the least of which would involve whether Van Brakel applied for and received the extension as alleged in paragraph 11.3 of the Replying Affidavit to the 3rd respondent's answering affidavit²⁹. The affidavit of Schalk Botes³⁰ also speaks to this issue as he sets out the requirements for the sub-division of the property and the methodology employed for this. In his opinion, the methodology employed by the Trust was correct and the consent of Mogale City was the one final requirement to enable the finalisation of the sub-division and transfer of the sub-divided properties.

65. All of these issues are tied to the question of when the Trust knew or could by the exercise of reasonable care have acquired knowledge of the facts of the alleged invalidity of the sale agreement.³¹ Importantly, in **Nuance**, all these issues were properly ventilated by way of action proceedings and evidence – something which I am of the view is vital in obtaining a true and unvarnished picture.

66. Given this, on these papers, I cannot, on these papers, find that the Trust's claim has prescribed.

67. I am therefore of the view that the Trust has demonstrated a *prima facie* case even if open to some doubt.

ESTOPPEL

²⁸ Nuance supra

²⁹ As stated in the answering affidavit of the Kok Trust: "...having been made aware of the 5-year period by the Second Respondent, I instructed Mr van Brakel to apply for such extension."

³⁰ Attached to the replying affidavit

³¹ Nuance supra

68. To the knowledge of the Trust, the deeds registry reflected Wraypex as unconditional owner of the property since it took transfer of ownership in November 2008. The Trust now contends that it has, nonetheless, retained some right in the property which trumps the real right of ABSA, who took a mortgage bond over the property. ABSA says it did so on the strength of the Trust's representation to the public at large, through the records in the deeds office, that it had no such right. It argues that, by knowingly leaving the Registrar of Deeds to reflect the incorrect position as to ownership, the Trust, by omission, represented to the world in general, and to ABSA in particular, that Wraypex ownership in the property was unconditional.

69. Thus, says ABSA, the Trust stands to be estopped from claiming to be entitled to either:

69.1 claim transfer of a portion of the property; or

69.2 claim cancellation of the sale agreement on the basis of an alleged right to claim transfer of a portion of the property.

70. The Trust claims that ABSA had full knowledge of the agreement and the addendum agreement. An assertion which is simply denied by ABSA.

71. But ABSA has not explained the basis upon which it passed a R3,2 million bond over the property. On its own version that *causa* would have had to have been a Deed of Sale and as the Addendum clearly incorporates the terms of the Deed of Sale, it is puzzling that it asserts a lack of knowledge of its terms. Clearly this is also not so given the very clear events until the letter of 8 May 2018³².

72. It has been stated that the essence of the doctrine of estoppel by representation is that a person is precluded or estopped from denying the truth of a representation previously made by her or him to another person if the latter,

³² Paragraph 25 supra

believing in the truth of the representation, acted thereon to her or his detriment³³. The party relaying on estoppel must plead it and prove its essentials³⁴.

73. ABSA says that in the transferring the entirety of the property to Wraypex the Trust represented that the transfer was unconditional. But that is clearly incorrect and, at least *prima facie*, it appears that ABSA was at all times aware of the agreements as it lent Wraypex the funds to purchase the property from the Trust in the first place – it is Wraypex as it was the entity that made any alleged representation. The fact is as stated, that evidence is required to show upon what documents ABSA consented to loan Wraypex the R3,2 million purchase price.

74. Thus, on these papers, this defence cannot succeed.

BALANCE OF CONVENIENCE AND IRREPARABLE HARM

75. I am of the view that, in this matter, these elements are intertwined. The evidence is clear: Wraypex is not possessed of sufficient assets to satisfy any claim that the Trust has were it to claim payment in lieu of the retransfer of the 40 ha. This is made clear by the fact that ABSA is willing to settle for an offer of R7 million in compensation for mortgage bonds of over R21 million passed over the property.

76. Whilst ABSA will remain a secured creditor and be entitled to sell the property if ultimately successful, the Trust will be left with an irrecoverable claim if the property is transferred to the 4th respondent before the action is finalised.³⁵

NO OTHER REMEDY

³³ Amler's Precedents of Pleadings: 7th Edition: page 195

³⁴ Blackie Swart Argitekte v Van Heerden 1986 (1) SA 249 (A) at 260. ABSA Bank Ltd v IW Blumberg and Wilkinson 1993 (3) SA 669 (SCA)

³⁵ The Business Rescue Plan makes it clear that concurrent creditors will at best, receive R0,04c if their claim is successful – the Trust is not a concurrent creditor

77. In my view, given the above, the Trust has no other satisfactory³⁶ remedy available to it.

CONCLUSION

78. Given all the above, the Trust must succeed and an interim interdict must be granted pending finalisation of the instituted action.

COSTS

79. I agree with Mr Horn that, although at this stage unsuccessful ABSA's opposition is not frivolous. In my view it would be appropriate to make the same costs order in respect of it as that sought by the Trust against 1st and 2nd respondents.

80. I am also mindful of the position of the BRP's in placing relevant information before this court.

ORDER

The order I therefore grant is the following:

1. That pending the adjudication of the pending action under case number: 36310/20 in this Honourable Court, the First and Second Respondents are interdicted and prohibited from selling and/or transferring the immovable property described as Portion 11 (a Portion of Portion 10) of the Farm L[....] No 528, Registration Division JQ, Province of Gauteng, in extent 73,4360 hectares, to the Fourth Respondent or any other third party, and that the First and Second Respondents be interdicted and prohibited from in any manner encumbering the said immovable property.

³⁶ Webster v Mitchell 1948 (1) SA 1186 (W)

2. The costs of this application are reserved for the determination in the pending action under case number 36310/20.

B NEUKIRCHER
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 October 2022.

Appearances:

For the Applicants	: Adv NC Hartman
Instructed by	: WJ Moolman Attorneys
For the 1 st & 2 nd Respondents	: Adv WJ Bezuidenhout
Instructed by	: JF Van Deventer Inc
For the 3 rd Respondent	: Adv NJ Horn
Instructed by	: Tim Du Toit & Company Inc
Heard on	: 25 April 2022