

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.:

5322/2008

DATE:

2 JUNE 2008

5 In the matter between:

COIGNE PROPERTIES CC

Applicant

and

JULIE-ANN TINDILL

1st Respondent

JOHN RILEY ATTORNEYS

2nd Respondent

10 REGISTRAR OF DEEDS

3rd Respondent

JUDGMENT

15 FOURIE, J

Applicant applies for an order that first and second respondents be interdicted and prohibited from transferring, alienating, or dealing in any other way with the immovable property known as Erf 171173, Cape Town, situate at Riverstone Road, Wynberg, Western Cape ("the property"), pending the final determination of an action to be instituted by applicant against first respondent within 30 days of the grant of the order, for declaratory relief *inter alia* declaring the deed of sale in respect of the property concluded between applicant and first respondent to be valid and

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of full force and effect and secondly, the final determination of the application for amendment of the sub-division condition in respect of Erf 66437, Cape Town, Wynberg, currently pending before the City of Cape Town, including the determination of all appeals and/or review procedures available in law.

First respondent is the owner of the property, which she sold to applicant in terms of a deed of sale dated the 31st of March 2006. Second respondent is her attorney. The property was originally part of Erf 66437, Cape Town, which was sub-divided during 2005. The conditions of sub-division provide *inter alia* that the dwelling unit to be constructed on the property shall be single storey and that building plans in respect thereof are to be submitted for approval by the Heritage Resources Section of the relevant local authority. Applicant purchased the property with the intention of constructing a pair of double storey houses thereon, which led to the inclusion of a suspensive condition in clause 14 of the deed of sale. It reads as follows;

20 "Special conditions

This sale is subject to the complete approval by the South Peninsula section of the Cape Town City Council of plans for the construction of a pair of double storey houses on the site, such plans to be supplied and submitted by the

purchaser, at his expense, and the seller agrees to give all necessary assistance, authority and signatures to permit such plans to be submitted and approved, under her name. In order to minimise the expense of registration of transfer the seller agrees that the purchaser may nominate the transferring attorneys."

For purposes of determining this application clause 14 should be read in conjunction with clause 5 of the deed of sale which provides as follows;

"Transfer

Transfer shall be effected by the purchaser's conveyancers forthwith on 1st July 2006, subject to compliance with clause 14."

Applicant contends that the deed of sale is still valid and enforceable while respondents aver that same has lapsed as a result of the failure of the suspensive condition in clause 14. First respondent has now resold the property to a third party, one Dr Eloff, but transfer thereof in Dr Eloff's name has not yet taken place. He has not been cited as a party in these proceedings, but has filed an affidavit in which he states that he considers himself joined and abides the decision of the Court.

The relevant facts in this matter are uncontentious and I do not intend traversing same in any detail. I accept that anyone interested in this judgment is conversant with the contents of the affidavits filed on behalf of the parties.

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In summary, applicant contends that as the suspensive condition in clause 14 of the deed of sale contains no time for fulfilment, the law implies that same must be fulfilled within a reasonable time. See Alfred McAlpine and Son (Pty) Limited v Transvaal Provincial Administration 1974(3) SA 506 (A) at 526 F-G and Cardoso v Tuckers Land and Development Corporation 1981(3) SA 54 W at 61 G-H. Applicant further avers, that having regard to the relevant facts, a reasonable time for the fulfilment of this suspensive condition has not yet elapsed, with the result that the deed of sale is of full force and effect.

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Respondents, on the other hand, contend that the agreement of the parties as embodied in the deed of sale, and in particular Clause 14, read with Clause 5 thereof, is that this suspensive condition would be fulfilled by 1 July 2006. As the condition had not been fulfilled by this date, the deed of sale has lapsed and is of no force or effect.

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As I have already mentioned, applicant now seeks a temporary interdict restraining respondents from alienating or transferring

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the property, pending the resolution of legal proceedings for declaratory relief confirming the validity of the deed of sale.

As further indicated earlier, applicant in its notice of motion also asks for the interdict to be operative pending the final determination of an application for the amendment of the subdivision condition that the dwelling units to be constructed on the property, should be single storey buildings.

10 Mr Van der Merwe, for applicant, has, in my view correctly, conceded that this latter part of the relief sought is superfluous and he has not persisted therewith. The granting of such relief would in my view be tantamount to the granting of final and decisive relief on the issue of the validity of the deed of sale and
15 thus result in the granting of a final interdict.

It accordingly has to be determined whether applicant has satisfied the requirements for the granting of the interim interdict which it seeks. The well-known requirements for the grant of an interim interdict are, firstly, a clear right or a right *prima facie* established, though open to some doubt; secondly, a well-grounded apprehension of irreparable harm if interim relief is not granted and applicant succeeds in establishing its right; thirdly, that the balance of convenience favours the granting of interim

relief, and, fourthly, the absence of any other satisfactory remedy.

These factors are not considered separately or in isolation, but in
5 conjunction with one another in the determination of whether a
Court should exercise its overriding discretion in favour of the
grant of interim relief. The proper approach is to take the facts
set out by applicant, together with any facts set out by
respondents, which applicant cannot dispute, and to consider
10 whether having regard to the inherent probabilities, applicant
should, not could, on those facts obtain final relief at the trial.

The requirement of a right *prima facie* established, though open
to some doubt, involves two enquiries. Firstly, the *prima facie*
15 right has to be assessed and once that has been done, a further
enquiry follows in terms of which the Court looks at the facts set
out by respondent in contradiction of applicant's case, in order to
see whether serious doubt is thrown on applicant's case. If there
is a mere contradiction or unconvincing explanation by
20 respondent, then the *prima facie* right will be protected. Where,
however, serious doubt is cast on applicant's case, the applicant
cannot succeed. See Spur Steak Ranches Limited vs Saddles

Steak Ranch 1996(3) SA 706 (C), at 714 G-H.

Applicant's case is that the complete approval by the local authority of plans for the construction of a pair of double storey dwelling units on the property, involves the following: Firstly, the approval of the plans by the Heritage Section of the local authority; secondly, an amendment or removal of the condition of sub-division restricting the construction of dwelling units on the property to single storey only, and thirdly, the approval of the plans by a number of departments of the local authority.

10 It is common cause that subsequent to the conclusion of the deed of sale the plans were approved by the Heritage Section of the local authority on 3 January 2007. It is further common cause that the power of attorney granted by first respondent for the removal or amendment of the aforesaid condition or sub-division, 15 was signed on 4 June 2007. According to Mr Hart, an experienced architect who prepared the application for an amendment of the said condition of sub-division, a reasonable period for consideration of such an application would be twelve to eighteen months, provided that there were no unusual delays 20 occasioned by the conduct of any of the parties to the process. In his opinion the period would furthermore depend on whether objections or subsequent appeals were noted against the local authority's decision.

in view thereof, applicant contends that a reasonable period has not yet elapsed for fulfilment of the suspensive condition in clause 14 of the deed of sale, and that the sale is accordingly still valid and enforceable. Applicant also maintains that in determining whether a reasonable time has elapsed, it should be borne in mind that the delays which have been experienced in the process were as a result of first respondent's conduct. It should be noted that respondents do not contend that the suspensive condition contained in clause 14 of the deed of sale had to be fulfilled within a reasonable time, nor that a reasonable period of time has lapsed; what they do contend is that upon a proper interpretation of the deed of sale, viewed against the background circumstances giving rise to the conclusion thereof, the date for fulfilment of the suspensive condition was 1 July 2006. To this end respondents contend that it was not in the contemplation of the parties that the sub-division condition relating to the property, was required to be removed to enable applicant's building plans to be approved.

In evaluating respondents' case in the process of determining whether it casts serious doubt upon applicant's case it is necessary to interpret the relevant provisions of the deed of sale. As explained in Coopers and Lybrand v Bryant 1995(3) SA 761 (A) at 767 F to 768 F, the intention of the parties to a contract is to be determined by applying the golden rule of interpretation, ie

by giving the language used in the document its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the document.

5 A particular clause, phrase or word should, however, not be interpreted in isolation, but within the context in which it is used in the contract as a whole. The Court should also, broadly speaking, have regard to the background circumstances which explain the genesis and purpose of the contract.

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In my view the language used by the parties in clauses 5 and 14, if interpreted against the backdrop of the deed of sale as a whole, is unambiguous and conveys an unequivocal and clear intention. As was the case in Uitenhage Transitional Local

15 Council v S A Revenue Service 2004(1) SA 292 (SCA) at 304 G, I have difficulty in accepting, given the unequivocal intention which the language used by the parties conveys, that the background facts upon which respondents seek to rely can, in the absence of a claim for rectification, change or supplement the plain meaning of clauses 5 and 14. In my opinion there is no room on the clear wording of the deed of sale for an interpretation that the parties intended the suspensive condition in clause 14 to be fulfilled by the date inserted in clause 5, namely 1 July 2006. This construction is directly contradicted by clause 14 itself, which contains no date for fulfilment. As submitted on behalf of

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applicant, if the parties intended that 1 July 2006 should be the date for fulfilment of clause 14, it would have been a manifestly simple formality to have included the date in express terms, as the date by which the suspensive condition was required to be fulfilled.

First respondent's construction by incorporating the date for transfer, i.e. 1 July 2006 in clause 5, as the date for the fulfilment of the suspensive condition in clause 14, renders the words "subject to compliance with clause 14" in clause 5, entirely superfluous and meaningless.

It is in any event clear to me that upon a proper interpretation of clause 5, seen against the backdrop of clause 14, and within the context of the deed of sale as a whole, the date in clause 5 was only intended to be the envisaged date of transfer. In my view the phrase "subject to compliance with clause 14" inserted in clause 5, means no more than if the complete approval of the plans as envisaged by clause 14, takes place timeously, then transfer of the property, in terms of the deed of sale will be effected on 1 July 2006.

It does not mean, as suggested by respondents, that unless such approval is obtained prior to 1 July 2006, the deed of sale will become ineffective and no transfer will take place. See Premier

Eastern Cape and Another v Sekeleni 2003(4) SA 369 (SCA) at
375 G.

5 The subsequent conduct of first respondent is also irreconcilable
with the interpretation which she now espouses. Nearly a year
after 1 July 2006, ie the date upon which she now suggests that
the deed of sale became inoperative, she wrote the following
letter to applicant's attorneys; it is dated 4 June 2007 and reads
as follows;

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"As requested I attach the signed Power of
Attorney to enable your clients to make the
necessary application to obtain the removal of
the restriction against the construction of a
15 double storey dwelling on the site. I wish to
reiterate that I am against the proposal of the
Sectional Title Scheme. The suspensive
condition in the agreement has no time limit; I
believe a reasonable period in which to obtain
20 approval of plans would be six months. I
accordingly herewith give notice that if the
suspensive condition is not met by 5 December
2007 the agreement will lapse."

The Power of Attorney referred to in the letter was also dated 4 June 2007, and in it first respondent, as the registered owner of the property, authorised the necessary steps to be taken for the removal of restrictions for the construction of two double storey dwellings on the property. If the parties did intend 1 July 2006 to be the date upon which the suspensive condition in clause 14 had to be fulfilled, it is inconceivable that first respondent would not have relied on the non-fulfilment thereof when requested to sign this power of attorney.

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In the ultimate paragraph of her said letter, first respondent in fact contends that the suspensive condition had to be fulfilled within a reasonable time, and that a reasonable time would lapse within six months of 4 June 2007. This is a unilateral and entirely subjective determination of the period which would be reasonable for fulfilment of the suspensive condition in clause 14 of the deed of sale. No objective grounds or evidence are put forward to justify her unsubstantiated statement in this regard.

20 In any event, as I have already indicated, first respondent's case as set forth in the opposing affidavit, is not that the deed of sale failed by virtue of the suspensive condition not having been fulfilled within a reasonable time. It follows, in my view, that the deed of sale is clear and unambiguous, namely that the suspensive condition in clause 14 had to be fulfilled within a

reasonable time. I am also satisfied that applicant has convincingly demonstrated that a reasonable time for the fulfilment thereof has not yet lapsed.

5 In view of my aforesaid findings, I do not consider it to be necessary to deal with the application to strike out certain portions of first respondent's answering affidavit. It may be that certain averments are liable to be struck out, but even if these allegations are to be retained as part of the background
10 circumstances, same do not, in my opinion, change or supplement the plain meaning of clause 14, read with clause 5 and the rest of the relevant provisions of the deed of sale.

It follows, in my view, that applicant has clearly established the
15 right which it seeks to protect by means of the order sought. Even if it may be said that this right has only *prima facie* been established, I am satisfied that the facts set out by first respondent do not throw serious doubt on applicant's case. Insofar as it may be necessary for applicant to show a well
20 grounded apprehension of irreparable harm, the insistence of respondents to proceed with the sale and transfer of the property to Eloff, will obviously cause applicant irreparable harm if interim relief is not granted.

This brings me to the requirement of balance of convenience. It involves the exercise of a discretion which usually resolves itself into a consideration of the prospects of success of an applicant in the main case. The stronger the prospects of success, the less the need for such balance to favour the applicant. The weaker the prospects of success, the greater the need for it to favour the applicant. See Erikson Motors Limited v Protea

Motors and Another 1973(3) SA 685 (A) at 691 F.

10 Without attempting to prejudge the issues which will be debated in future litigation between the parties, I hold the view, particularly on the clear wording of the deed of sale, that applicant should obtain final relief at the trial. It accordingly follows that the balance of convenience favours the granting of
15 interim relief. I am also of the opinion that in view of first respondent's declared intention to transfer the property to Dr Eloff, applicant will effectively be left without a suitable alternative remedy if interim relief is refused. First respondent's alleged impecuniosity would also render any future claim for
20 damages rather ineffective.

In the circumstances I am satisfied that applicant should be granted interim relief. As to costs, I intend following the usual practice in this regard, namely that costs are to stand over for

determination by the trial court. I should add that no costs order is made in regard to the striking out application of applicant.

In the result the following order is made:

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- i. First respondent is interdicted and prohibited from transferring or alienating the immovable property, Erf 171173, Cape Town, situate at Riverstone Road, Wynberg, Western Cape, pending the final determination of an action to be instituted by applicant against first respondent within 20 court days of the grant of this order, for declaratory relief, *inter alia* declaring the deed of sale in respect of the property concluded between applicant and first respondent on 31 March 2006, to be valid and of full force and effect;

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- ii. Second respondent is interdicted and prohibited from passing transfer of the property, pending the final determination of the action referred to in paragraph (i) above.

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- iii. The costs of this application are to stand over for determination in the action referred to in paragraph (i) above.

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FOURIE, J