

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

DATE:

4 SEPTEMBER 2008

5 In the matter between:

CASE NUMBER:

3983/2008

MILPROPS 462 CC

Applicant

versus

10 SEVENSTONE INVESTMENTS 118 (PTY) LTD

Respondent

And

CASE NUMBER:

3982/2008

15 ALBERTUS JOHANNES LUBBE

Applicant

versus

SEVENSTONE INVESTMENTS 118 (PTY) LTD

Respondent

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JUDGMENT

BOZALEK, J.:

/ds

On 1 September 2008, by way of the semi-urgent roll, two applications came before me for temporary interdictory relief pending the outcome of actions still to be instituted for specific performance. The causes of action in both cases are very similar, namely agreements to purchase fixed property in a Sectional Title development alongside the Breede River near Fort Beaufort.

The agreements were in each case concluded with Sevenstone Investments 118 (Pty) Limited, the respondent in the applications and the owner and developer of the properties.

In one case the applicants are the trustees of the Albert Lubbe Trust and the property in question is Section 65 in the Scheme, whilst in the other matter the applicant is Millprops 462 CC and the property is unit 64. The sections in question are now either completed or largely completed. The applicants purchased the properties in terms of written agreements of sale concluded in January and July 2006, one of the respondent's obligations in terms thereof being to build the residential units in question within a stipulated period.

According to both applicants respondent encountered financial problems and was unable to complete the building timeously. This led to each applicant concluding a fresh agreement to purchase the respective properties for reduced sums, but with the obligation to complete the remainder of the building work devolving upon the purchaser. These agreements, the applicants aver, were concluded with respondent in the period May to July 2007. It is common cause that with effect from the end of July 2007 the respondent was taken over by its present directors, Messrs Loubser and Greyling. Prior to this the sole director was a Mr Derek Erasmus who was provisionally sequestered on the 21st of February 2007 and which order was made final on the 28th of November 2007. Prior to his provisional sequestration Erasmus emigrated to the United Arab Emirates and remains resident there.

In or about August 2007 respondent instructed the attorneys, whom it had apparently mandated to pass transfer to the properties to the applicants, not to do so and shortly thereafter terminated that firm's mandate. Correspondence ensued between the applicants' and the respondent's legal representatives and the aforementioned firm of attorneys. From this correspondence it appeared *inter alia* that respondent took the view that the

relevant agreements of sale were “*ab initio* invalid and of no force or effect” notwithstanding that the applicants had performed in terms of the agreements in the form of the payment of deposits and the furnishing of letters of guarantee. Strangely, beyond the
5 assertion that the agreements were invalid, and despite requests from the applicants for its grounds for so asserting, respondent refused to furnish the reasons why it took the view which it did.

In March this year applicants learnt that the properties in question were being marketed for sale by a new estate agent.
10 Upon the respondent refusing to furnish an undertaking not to alienate the properties pending the outcome of actions to enforce the sale agreements applicants launched these urgent applications for a rule *nisi* in the following terms; that pending
15 the finalisation of the action for specific performance to be instituted against the respondent by the applicants pursuant to the agreements of sale of Sections 64 and 65 of the Breede River Lodge Sectional Title Scheme, concluded between the parties and the respondent in June 2007, alternatively, the earlier
20 agreements of sale, the respondent be interdicted and restrained from alienating, encumbering, or dealing with Sections 64 and 65 in any way prejudicial to the rights of the applicants in terms of the either of the aforementioned agreements of sale. Costs

orders were also sought.

In each case the respondent filed what was styled a preliminary opposing affidavit. By agreement the applications were postponed to a date on the semi-urgent roll, the order making provision *inter alia* for applicants and respondents to supplement their founding papers or opposing affidavit. In the event neither did so, applicants contenting themselves with filing a replying affidavit. In each case the content of the preliminary opposing affidavit was much the same. Respondent attacked the validity of each of the initial agreements on a number of grounds. In relation to the trust it was contended that trustee who represented the trust in concluding the initial agreement had no authority to do so for want of a letter of authority from the Master of the High Court. This was later admitted by the trustee who contended nevertheless that this was not a fatal defect to the conclusion of the agreement.

In the case of Millprops, respondent contends that the 2006 agreement was discharged by the 2007 agreement and could not be revived. On different grounds however it contends that the 2007 agreement was invalid, thereby raising the somewhat curious notion of the 2007 agreement being valid for one

purpose, but invalid for another.

In the case of both 2007 agreements respondent contends that a certain Mr Hebbert, a one time financial director of respondent
5 who purported to sign and conclude these agreements on behalf of respondent, was not authorised to do so. However, this defence is not unequivocally or fully raised by respondent, which points out that its records are incomplete and that the present directors have no direct knowledge of these matters since they
10 appear to have taken place before or around the time when they took control of the respondent company.

To compound matters, respondent explains, the previous sole director, Erasmus, has emigrated and contact with him has been
15 minimal. To further complicate matters respondent introduced a company resolution purporting to give the necessary authority to Hebbert, but which appears not to tie up, date-wise, with the conclusion of the second agreement with Millprops. Respondent contended that for various reasons the resolution's authenticity
20 was suspect. In reply the applicants produced an earlier, but identical, company resolution, which appears to resolve the question of timing but the applicants did not contextually explain from where this second resolution emanates.

In short, there are on these papers a number of serious questions regarding the ultimate validity of the agreements relied on, as well as both Erasmus's and Hebbert's authority to conclude such agreements on behalf of the respondent. Not only are there
5 factual questions which cannot be answered on these papers but a number of potentially difficult legal questions are likewise raised but which cannot be dealt with in a factual vacuum. It seems clear that only the hearing of evidence will clear the path to the answers to these questions.

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In the face of this situation applicants contend that they have established a *prima facie* right to the relief to be eventually sought, although open to some doubt. They contend furthermore that without the interim interdict relief, they have a well grounded
15 apprehension of irreparable harm, that the balance of convenience favours the granting of the interdict and they have no other satisfactory remedy. In this regard the applicants contend that without the interdictory relief respondent will sell the properties to *bona fide* purchasers and they will be left with
20 nothing more than an action for damages.

For its part the respondent contends that the additional three requirements for the interdictory relief need not even be

considered because serious doubt is cast on the basic right being claimed by the applicants and therefore applicants have failed to meet the threshold test of establishing a *prima facie* right.

5 The respondent's submissions in this regard turn largely around what it argues is the unsatisfactory late raising and treatment by applicants of the authority of Hebbert to represent respondent, and, in particular, the lack of any explanation for the production, at a late stage furthermore, of the company resolutions allegedly
10 evincing Hebbert's authority.

There are unsatisfactory aspects to the applicants' handling of this question, including their failure to supplement their founding papers, as they were entitled to do after receipt of respondent's
15 preliminary opposing affidavit, in which Hebbert's allege lack of authority was raised for the first time. However, what must also be taken into account in this regard is that prior to launching the applications respondent had, despite being requested, failed to set out on precisely what basis it alleged the sale agreements
20 were invalid and void *ab initio*.

In these circumstances the applicants could not be faulted for initially relying solely on the written agreements and, although

this is more arguable, only dealing with the question of Hebbert's authority in reply.

5 Taking these various factors into account I have come to the conclusion that applicants have established a *prima facie* right, namely to specific performance in terms of the sale agreements, albeit open to some doubt. In these circumstances the remainder of the requirements for temporary interdictory relief play an important role. To my mind the applicants' case for irreparable harm and on the question of another satisfactory remedy is by no means watertight. If the properties are, in the absence of an interdict, sold to a third party, as seems quite likely, although applicants will forego the properties they should, without much difficulty, obtain satisfaction for their losses through an appropriate damages award.

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In these circumstances the final requirement the balance of convenience assumes a particular importance. Mr Howie, for the applicants, initially contended that an interdict would cause limited, if any, prejudice to the respondent. That patently is not so. An interdict cast in the wide terms sought by applicant could freeze the properties as economically productive assets for at least two years, if not longer, given that the actions have yet to

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be commenced and the state of this Court's rolls. It takes little imagination to realise the financial prejudice which the respondent might suffer should its opposition to the actions eventually prove successful. A compensatory damages order in this scenario may well also be problematic since applicant's could raise the defence that they were armed with a court interdict and therefore their actions in freezing the properties should attract no liability.

10 However, perhaps in recognition that the balance of convenience was more evenly balanced than he initially contended, Mr Howie amended the relief which he sought in two material respects. Firstly, he narrowed the scope of the interdict by restricting it solely to an alienation of the properties or dwellings, as opposed
15 to the much wider concept of a restriction on "encumbering or dealing with" the unit "in any way prejudicial to the rights of the applicants". Secondly, the applicants made an open tender that the disputes could, at the election of the respondent, be arbitrated and not simply determined in High Court actions. This
20 tender opens up the possibility of the factual and legal disputes being determined within a timeframe of as little as six months, rather than the years which High Court actions might entail.

In these circumstances the balance of convenience is in my view tilted towards the applicants. Taking all the circumstances into account, therefore, I have concluded that the Court is justified in exercising its ultimate discretion in favour of granting the interim interdictory relief sought, subject to the amended relief now being sought by Mr Howie on behalf of the applicants.

There remains the question of costs. Two possible cost orders suggest themselves. Firstly, in the light of the uncertainty concerning the merits of the applicant's actions the costs thereof, the cost of these proceedings, could be further reserved for determination in the actions or the arbitrations. Alternatively, costs should follow the result of these applications and be awarded at this stage. In choosing between these alternatives I take into account that the applicants had little alternative, given the respondent's steps to re-market the properties and its refusal to give any undertakings not to dispose of the properties pending the outcome of actions, but to institute the two interdict applications. They have moreover, ie the applicants, been substantially successful in these applications.

In the circumstances I have come to the conclusion that it would be appropriate and equitable to grant applicants their costs to

date.

In the result the following order is made in case number 3987/2008;

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1. Pending the finalisation of the action for specific performance, the action to be instituted against the respondent by the Albert Lubbe Trust pursuant to;

10 1.1 the agreement of sale of Section 65 of the Breede River Lodge Sectional Title Scheme concluded between the trust and the respondent in June or July 2007, alternatively;

15 1.2 the agreement of sale of Section 65 of the Scheme concluded between the trust and respondent on 25 January 2006.

20 the respondent is interdicted and restrained from alienating Section 65.

2. The action shall be determined by way of High Court proceedings or by way of arbitration, with the applicant

openly tendering to resolve the dispute by way of arbitration, which tender the respondent is obliged to accept or reject by way of formal written notice within 15 (fifteen) days of the date of this order.

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3. The action shall be instituted within 15 (fifteen) court days of applicant exercising its choice in terms of paragraph 2 above.

- 10 4. The respondent shall pay the costs of this application.

A similar order is made in case 3983/2008, with the appropriate changes to cater for the different circumstances. These orders are available from my registrar.

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BOZALEK, J