

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

CASE NO: 4007/2008

DATE: 24 OCTOBER 2008

5 In the matter between:

DR JUTTA PABST APPLICANT

and

DR GUNTER PABST 1ST RESPONDENT

THE REGISTRAR OF DEEDS,

10 CAPE TOWN 2ND RESPONDENT

JUDGMENT

15 NGEWU, A J

Applicant had brought an application on an urgent basis in which he sought an order in the following terms: interdicting and restraining the first respondent from alienating the
20 immovable property, situated 9 Avon Drive, Constantia, Western Cape, referred to herein as the property, pending the finalisation of an action to be instituted for the setting aside of the transfer of the property into the name of first respondent.

25 I must mention that there are two respondents, Dr Gunter

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Pabst and the Registrar of Deeds. For purposes of this application, relief was sought against both. The only relief pertaining to the second respondent was paragraph 1.2 of the application, which read as follows, directing the second
5 respondent to enter the caveat against the title deed of the property in the Deeds Office in the following terms:-

“This property is currently subject to proceedings in which Jutta Pabst is claiming as against Gunter
10 Pabst an order interdicting and restraining Gunter Pabst from alienating and encumbering the property situated 9 Avon Drive, Constantia, Western Cape, pending finalisation of an action to be instituted for the setting aside of the transfer of the property into
15 the name of Gunter Pabst; or alternatively for an order directing that the property be re-transferred to Jutta Pabst.”

An order was asked for as an alternative to the prayer 1 of the
20 notice of application.

1.3 of the notice of application said:-

“Granting the applicant such further and alternative
25 relief as this Honourable Court may deem fit.”

1.4 Directing applicant to institute the action contemplated in prayer 2 above within 20 court days from the date upon which the order sought in prayers 2 and 3 above are granted.

1.5 Directing first respondent to pay costs of this application."

10 The following became common cause. The parties that are applicant and first respondent were married in Germany on 30 July 1982. In July 1990 they relocated to South Africa. On 7 June 1991, applicant conferred to first respondent a general power of attorney to deal with all her assets. In 1995
15 applicant became the registered owner of immovable property, being 9 Avon Drive, Constantia, Western Cape, the property now subject of dispute, whose current value is now seven million rand. The parties were separated in 1999 or 2000 in Germany. First respondent relocated to South Africa. They
20 ultimately got divorced in Germany on 25 April 2001.

In contemplation of the divorce, on 13 June 2000 the parties entered into a contract, which was recorded in German. The two translations of those contracts were tendered, one by the
25 applicant and one by the respondent. The preamble to the

copy tendered by the applicant read as follows:-

“JP and GP, referring to Jutta Pabst and Gunter Pabst respectively, are dividing the family assets in the context of the divorce of their marriage. The following immovable assets that are situated in South Africa are the sole property of Jutta Pabst or the property of a legal entity in which Jutta Pabst has shares.”

With specific reference to the property now in dispute, the preamble provided thus:-

“9 Avon Drive, Constantia, being erf 8477. JP the sole owner, the immovable property being rented out until the end of August 2000. The immovable property is unencumbered as far as the (indistinct) concerned, but the acquisition was financed by means of a private loan valued at one million rands.”

Paragraph 1 of the contract provided that:-

“JP and GP agree that GP has been the beneficial owner of the immovable property since

20 June 2000. This includes the right to use and the right to sell the property for his own account. JP granted a general power of attorney to GP on 7 June 1991 enabling GP to perform all transactions relating to the assignment of the beneficial property to GP. GP declares that she is not revoking this general power of attorney. GP is obliged only to make use of the general power of attorney beyond the immovable property after having obtained JP's previous consent. GP paid an amount of 900 000 German marks to JP as compensation for transfer of the beneficial property, which is hereby confirmed by JP. GP assumes no obligations for repayment of the loan."

The only differences in the translated versions of the contract supplied by the first respondent in regard to that of the applicant was the clause:-

"The right to use and to alienate for own account",

instead of:-

"The right to use and right to sell the property for his own account",

and also:-

5 "To perform all transactions in connection with the
allocation of ownership of GP"

instead of:-

10 "To perform all transactions relating to assignment
of the beneficial property to GP"

Applicant does not dispute that she was paid the amount of
900 000 German marks, and that she, I mean the first
respondent, took over obligation to repay the loan.

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Applicant premises her claim on the fact that she was the
registered and beneficial owner of the property. In
February 2003 she revoked the general power of attorney she
conferred on first respondent. Despite such revocation, first
20 respondent facilitated transfer of the property in his name
during August to October 2007. She has instituted an action
for an order directing that property be re-transferred into her
own name. Alternatively that the transfer be set aside on
basis that the power of attorney first respondent used in
25 effecting such transfer had been properly cancelled.

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Applicant further maintains that the property was intended to be secured for the benefit of the one child that the parties had during their marriage.

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First respondent thus abused the power of attorney to deprive the applicant of the property, and furthermore he negotiated with the Deeds Office to facilitate transfer. Therefore the doctrine of unclean hands would disentitle the respondent to any defence in the main proceedings applicant had instituted. First respondent's conduct was in flagrant breach of the understanding and agreement between the parties that he would be entitled to be only the commercial owner of the property.

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First respondent disputes that the applicant is entitled to re-transfer of the property into her own name, or to an order setting aside the transfer, or the interdict that she now seeks. The acquired rights of the so-called economical beneficial owner referred to in the agreements to first respondent, which rights included the right to use and alienate for own account. The power of attorney first respondent used was declared not to be revocable. First respondent undertook to obtain applicant's consent if he wanted to use the general power of attorney for purposes other than in respect of the property.

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He paid the applicant 900 000 German marks in consideration for the grant of such rights, and further took over the obligation to repay the loan taken out to acquire the property. For the above reason, first respondent became the real owner
5 of the property and acquired full rights in the property, that is to use alienate or sell same for his own account. He further stated that he engaged the services of a conveyancer who duly facilitated transfer of the property. He did nothing wrong as applicant sought to portray.

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In their papers applicant referred to a series of sham agreements that she concluded with the respondent with a view to facilitate administration of the respondent's affairs. She, however, does not regard the deed of settlement she
15 provided as a sham agreement.

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Applicant further does not dispute that she received 900 000 German marks as consideration of a transfer of the rights he had in the property to the first respondent. She does not even
20 come up with a counter-suggestion as to why she received that substantial amount from the first respondent. What remains clear, from her own translation of the agreement of 13 July 2000 is that she transferred the rights she had in the property to the first respondent. The contract that she entered into
25 with the respondent is fully binding, and she cannot simply

renege therefrom unilaterally.

What further complicates issues for her is the fact that she exchanged her rights in return for the 900 000 German marks, a fact that she failed to divulge in her founding affidavit and even to deal with in her reply. She does not even dispute that first respondent continued repaying the loan pursuant to the agreement.

10 The first respondent discharged his obligations in terms of the contract. The rights of ownership he now claims are intricately linked to the binding agreement which conferred to him such rights. Whatever rights applicant had in the property were eroded through the sale or exchange of rights in return
15 for the money.

The agreement the parties had was in writing and was duly signed by both parties. It remains valid and binding and cannot just be revoked at a whim. When one signs a contract, one is taken to be bound by the ordinary meaning and effect of the words which appears over one's signature. The signature signifies that the writing to which it pertains accords with the intention of the signatory.

25 In the case of White v Barrett and Another, 1964(2) SA 732

(NPD), it was stated that:-

5 "The question whether a power of attorney or authority of an agent howsoever conferred is irrevocable depends, it seems, on an interpretation of the transaction to which the principal has entered with the agent and an application of the general principles of law relating to that transaction. The principal may have bound himself to the agent in terms expressed or implied, which obliged him contractually not to revoke the agent's authority, 10 save on paying of liability in damages."

15 The power of attorney was an agreement between the applicant and the respondent, which was clearly intended to be irrevocable. Applicant could not just withdraw same unilaterally without having had first respondent's agreement or consent thereon. Respondent has a right to ignore such withdrawal.

20 The applicant has approached the Court by way of an interim interdict. For her to succeed, she had to satisfy the following four requirements, which had to exist conjunctively with one another. They are a *prima facie* right, a well-grounded 25 apprehension of irreparable harm if the interim relief is not

granted and the ultimate relief is eventually granted, that the balance of convenience favours the granting of an interim interdict, and that the applicant has no other satisfactory remedy. The duty therefore lies on the Court so to assess the
5 applicant's evidence as to establish the above requirements, if they have been met.

In the case of (Indistinct) Investment (Pty) Limited and South African National Roads Agency Limited and Others, 2001(3)
10 SA 244 (N), the principles governing interim relief were stated thus:-

"The principles established by the cases where an interim interdict is sought where there are
15 conflicting (indistinct) are as follows:-

1. The requirements for a final interdict are well-established and require the applicant to show a clear right and whether an intention of
20 irreparable harm or injury in the absence of any other ordinary remedy. If an applicant can prove the above requirements, he will also obviously be entitled to an interim interdict.

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2. Where the applicant cannot show a clear right, then he has to show a right which, though *prima facie* established, is open to some doubt. In that event, the applicant will have to show that the balance of convenience favours him. The test for the grant of the relief involves a consideration of the prospect of success and the balance of convenience. The stronger the prospects of success, the less the need for such balance to favour the applicant. The weaker the prospect of success, the greater the need for the balance of convenience to favour him. By balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.

3. Even if there are material conflicts of fact, the Court will still grant interim relief. The proper approach is to take the facts as set out by the applicant together with any facts set out by the respondent which applicant cannot dispute and to consider whether, having had regard to the inherent probabilities, the

applicant should, on those facts, obtain final relief at the trial. The facts set out by the respondent in contradiction should then be considered. If serious doubt is shown on the case of the applicant, he should not succeed in obtaining temporary relief, for his right, *prima facie* established may only be open to some doubt.

- 10 In addition, see also Plascon Evans Paints (Pty) Limited v Van Riebeeck Paints (Pty) Limited, 1984(3) SA 623 (A).

In the present case it was argued on behalf of the applicant that the mere fact that she was once registered as an economic owner of the property was sufficient to establish a *prima facie* right. However, the first respondent and also the applicant have provided copies of the agreement relating to the division of their assets on divorce. The wording thereof is clear and unambiguous that the applicant transferred her rights and so the property to the respondent. This clouds whatever *prima facie* right the applicant may have had in respect of the property. In my judgment this alone excludes the possibility of the applicant succeeding in the main action.

- 25 That she failed to divulge in her founding affidavit that she

received the amount in return for the transfer of the rights and that she is not able to state why she received the money, and also that she never tendered the amount back to the respondent or even applies for revocation of the contract she entered into with the respondent, leaves one with an inevitable conclusion that she is the one approaching the Court with unclean hands. Applicant has failed to establish her right that the first respondent invaded.


10 Applicant did not place sufficient evidence before the Court to show existence of her right, even though open to some doubt, and thus failed to discharge the onus resting on her. The Court deems it unnecessary to canvass the further requirements of an interdict as enlisted above.

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In the result, the Court makes the following order:-

The application is DISMISSED WITH COSTS.

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NGEWU, A J