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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 3817/2016

In the matter between:

LUCAS ADRIANA HENRICUS CORNELIA DAVERVELDT
AGNES MARIA ROS

First Applicant
Second Applicant

and

HENRIETTE MARIJKE HUBERS KROMHOF
SMITH TABATA BUCHANAN BOYES

First Respondent
Second Respondent

Court: Canca, AJ
Date of Hearing: 25 August 2016
Date of Judgment: 8 September 2016

JUDGMENT

INTRODUCTION

1. This is an application for an anti-dissipation interdict against the first respondent (“Kromhof”). The effect of the relief sought would prevent Kromhof from dealing with a substantial portion of the proceeds of the sale of her house, transfer of which is due to take place on 1 October 2016.

2. Kromhof is a Dutch national who, together with her husband, have been living in this country as permanent residents, with their three minor children, since 2007.

3. The applicants have instituted an action against Kromhof and now seek an order directing the second respondent, the attorneys attending to the transfer of Kromhof’s house, to retain an amount of R3 190 000,00 in their trust banking account pending finalisation of the action against Kromhof. The action flows, *inter alia*, from alleged latent and patent defects in a property the applicants purchased from Kromhof.

THE APPLICANTS’ CONTENTIONS

4. The applicants contend that, having sold her remaining tangible asset of value in the country, Kromhof will either spirit the funds realised from the sale of her house from South Africa or remove same from their potential grasp, should they succeed in their action. The order prayed for would not only ensure that this Court retained jurisdiction over Kromhof but would also ensure that the Court was able to make an effective order against her if the amount claimed was retained in the second respondent’s trust account, so the contention continued.

5. The first respondent opposes the application for the reasons set out hereunder. There is no opposition by the second respondent nor was there an appearance by it at the hearing of the matter.

THE FIRST RESPONDENT'S CONTENTIONS

6. In brief summary, Kromhof's opposition to this application rests on the following:

- (a) the applicants' averments in the founding affidavit are bald, unsubstantiated, vague, legally suspect and based on unfounded beliefs;
- (b) the hurdle of making a *prima facie* case has not been overcome;
- (c) the requirement of establishing a well-grounded apprehension of irreparable harm should interim relief not be granted and the ultimate relief granted, has not been met; and finally
- (d) Kromhof's rebutting allegations negate any inference of an intention to dissipate or hide her funds so as to defeat the applicants' claim. The rebutting allegations also cast doubt on the prospects of success in the action by the applicants, so the contention continued.

THE LEGAL REGIME

7. There are various threshold requirements an applicant for an anti-dissipation order has to meet. The first of which, given the nature of the order sought, are most of the standard requirements for an interim interdict. The requirements for an interim interdict are trite and include:

- (a) a *prima facie* right albeit open to some doubt,
- (b) a well-grounded fear of irreparable harm to the applicant if the interim relief is refused and the ultimate relief is granted eventually,
- (c) the absence of a satisfactory alternative remedy, and
- (d) The balance of convenience favours the grant of interim relief. See Myflor Investments (Pty) Ltd v Everett NO and Others 2001 (2) SA 1083 (C) at 1088 E-F.

Although Knox D'Arcy Ltd v Jamieson and Others 1996 (4) SA 348 (SCA) at 373D states that the requirement of no alternative remedy (in an application for interim relief) does not apply in the case of an anti-dissipation order, the rest of the requirements do.

8. The second threshold requirement to be met in order to obtain an anti-dissipation order, where the applicant does not have any special claim to the respondent's property, is for the applicant to convince the Court that "*the respondent is wasting or secreting assets with the intention of defeating the claims of creditors*". See the dictum of Harms ADP in Carmel Trading Co Ltd v Commissioner of South African Revenue Services and Others 2008 (2) SA 433 (SCA) at para 3 where the learned Judge states that "*such an order [a preservation and anti-dissipation order], which interdicts a respondent from dissipating assets, is granted in respect of a respondent's property to which the applicant can lay no special claim. To obtain the order the applicant has to satisfy the Court that the respondent is wasting or secreting assets with the intention of*

defeating the claims of creditors. Importantly, the order does not create a preference for the applicant to the property interdicted.”

9. It is common cause that this application is to preserve an asset that is not in issue between the parties. The applicants do not claim any proprietary or quasi-proprietary right to the proceeds of the sale of Kromhof's house.

10. The Courts are loath to grant anti-dissipation orders given the restrictions such orders place on a person's ability to deal with his or her asset as he or she wishes. A key question in this matter is whether the applicants, have on the papers, advanced a *prima facie* case with regard to Kromhof's intention to secrete her assets so as to frustrate or defeat their claim and in regard to their right to the relief claimed in the action?

THE MERITS

11. Ms Davis, for the first respondent, as a preliminary point, argued that the applicants' founding affidavit does not make out a *prima facie* case for the relief sought. Consequently, the application ought to be dismissed on this ground alone without the need to deal with the disputes on the papers, so the argument continued.

12. Before I proceed to consider whether there is merit to the point *in limine*, it is convenient that I briefly deal with Kromhof's application in terms of Rule 6(5)(e) seeking leave to file a supplementary answering affidavit.

13. The purpose of the supplementary answering affidavit, in summary, was to (a) deal with the contents of a supplementary affidavit filed by the applicants' attorney

which Kromhof averred she only had sight of after she had deposed to her answering affidavit; (b) in clear terms set out in whose name the proceeds from the sale of her house would be held and (c) correct a *bona fide* error in her answering affidavit.

14. Ms Ipser, for the applicants, opposed the inclusion of Kromhof's supplementary affidavit as part of the papers arguing that there were no special circumstances set out therein, justifying the departure from the rule that only three sets of affidavits are allowed in motion proceedings.

15. Following argument, I granted the requested relief and allowed the inclusion of Kromhof's supplementary affidavit. I was not persuaded that the supplementary affidavit forming part of the papers would prejudice the applicants. Whilst it is true that departure from the general rule that only three affidavits are allowed in motion proceedings is not granted lightly, it would, in my view, not serve the aims of justice if the contents of such a supplementary affidavit are suppressed when they would assist the Court when considering a matter with such drastic consequences. Having disposed of this aspect of the matter, I now turn to consider the merits of the preliminary point raised by Ms Davis.

16. In advancing her argument that the applicants have failed to establish a *prima facie* case, Ms Davis, relying on the test set out by Corbett J (as he then was) in Bader and Another v Weston and Another 1967 (1) 134 (C) at 143 F-G, argued that, viewed as a whole, the allegations in the founding affidavit were such that a reasonable person would not conclude that (a) Kromhof intended to secrete her funds in order to defeat the

applicants' claim or that (b) the applicants' prospects of success in the action were open to serious doubt.

17. It is appropriate at this stage to give a very brief history of the dispute between the applicants and Kromhof. As already stated, Kromhof and her family are Dutch nationals. Kromhof describes herself as a relocations consultant who provides bespoke services and packages to mainly European clients wishing to relocate or emigrate to South Africa. Part of the services she offers is to identify suitable houses to either purchase or rent to her client. She charges her clients an agreed fee. Having settled in South Africa, she built the family home at 1 K. Lane (which is the one in respect of which relief is sought by the applicants) and subsequently built another house, next to the family home, at 2 K. Lane ("the property").

18. During March 2014 the parties concluded a sale agreement in terms of which the applicants would purchase the property for R12 740 000,00 and that transfer would be effected by no later than 1 November 2014. It is worth pointing out that the property was sold *voetstoots* and that Kromhof warranted that the property's improvements and fixtures were in a good state of repair. The applicants, following an amendment to the sale agreement concluded on 30 August 2014, took early occupation of the property. Annexed to the sale agreement was a list setting out defects the parties agreed needed fixing. Transfer of the property was effected during September 2014.

19. During April 2016 the applicants issued summons out of this Court claiming, *inter alia*, that:

(a) having discovered numerous latent and patent defects in the property, the cost of remedying same amounting to R1 331 805,17, Kromhof, as a buyer and seller of immovable property in the ordinary course of her business, fell within the provisions of the Consumer Protection Act, 68 of 2008 ("the CPA"). Citing sections 55 (2) (b) read with section 55 (5) (a) of the CPA, the applicants contended that as consumers, they were entitled to receive goods that were of good quality, in good working order, free of defects, regardless of whether the product's failure or defect was latent or patent or whether it could have been detected by a consumer before taking delivery thereof. The effect of the aforesaid section of the CPA was to, *inter alia*, exclude the *voetstoots* clause.

(b) in the alternative, and in the event of the CPA not being applicable, the applicants still lay claim to the sum of R1 331 805,17 on the basis that Kromhof had fraudulently and with bad intent concealed the defects or had knowingly misrepresented their absence; and finally, should the Court not find in their favour in respect of the aforementioned claims, then,

(c) the applicants aver that they would have paid only R10 000 000,00 for the property and therefore demand the difference between what they paid for the property and what they would have paid, namely the sum of R2 740 000,00.

20. It is common cause that Kromhof is defending the action instituted against her by the applicants. In her papers in this application and in her Plea in the action, Kromhof denies falling under the definition of an estate agent or being a speculator in property.

The property sold to the applicants was built for occupation by her parent, who subsequently preferred to live elsewhere. Kromhof, further pleads that R250 000,00 of the purchase price paid by the applicants remains in the trust account of their attorneys, which money was to be utilised by them to effect repairs to the defects listed as at 30 August 2014. Kromhof has also instituted counter claims in excess of R220 000,00 against the applicants.

21. It is not necessary for purposes of this judgment to evaluate the respective parties' chances of success in the action. However, this background gives body to the point *in limine* argument raised by Ms Davis, which I now proceed to consider.

22. In attacking the applicants' case with regard to Kromhof's intention to secrete her assets, Ms Davis argued that the mere fact that Kromhof sold her home, replacing one form of asset with another, namely money, is insufficient, without more, to warrant an inference that such a sale was concluded with the purpose of liquidating her assets so as to spirit same from the jurisdiction of this Court and thus defeat the applicants' claim.

23. According to the founding affidavit, the applicants' case was based on, *inter alia*, the sale of the 1 K. Lane property being Kromhof's only tangible asset of any value in South Africa, their belief that, following interactions with Kromhof and her husband, their alleged fraudulent misrepresentations to them (as to the state of the property) and Kromhof's failure to comply with certain contents of their attorney of records' letter dated 16 May 2016. It is convenient that I quote portions of this letter. The relevant paragraphs of the letter addressed to Kromhof's then attorneys' Morkel & De Villiers reads as follows:

*“RE: LUCAS DAVERVELDT & AGNES ROS / HENRIETTE KROMHOF –
CASE NO 3817/16*

We wish to advise that it has come to our client's attention that:

- 1. Your client has sold her house on Monday, 9 May 2016 (despite her repeated contentions that it was not on the market);*
- 2. Your client's oldest child is receiving (or is about to receive) tertiary education in Holland;*
- 3. Your client's youngest child is also to be relocated to Holland for secondary education in the foreseeable future;*
- 4. Your client intends to leave South Africa; and*
- 5. Your client will have no tangible assets in South Africa upon registration of transfer.*

In the circumstances our clients demand that adequate security for the capital and costs be provided in the sum of R3 190 000,00 together with interest to accrue on an interest bearing trust account, by way of an irrevocable undertaking by your firm, alternatively a bank guarantee, to be provided to us within 7 days hereof, failing which our client shall be left with no alternative than to apply for an urgent interdict ...”

24. Kromhof, in dealing specifically with the allegations set out in the above quoted letter states in brief summary that: She and her family have deep roots in South Africa

and regard the Western Cape as their permanent home. They have three children, two boys aged 15 and a girl aged 17, who intends studying at the University of Stellenbosch next year 2017. She and her husband have established businesses in the country and, having an autistic child, set up The Cape Autism Charity Trust of which they are trustees and active fundraisers. Pointedly, she avers that one of their sons only completes his grade 12 in December 2019 and that if they were to consider leaving South Africa, this would only happen after he had completed his schooling here, possibly after 2020.

25. The difficulties with the applicants' averments set out in their founding affidavit are several. As correctly argued by Ms Davis, there is no substantiating evidence that Kromhof sold her house with the purpose of removing the proceeds thereof from South Africa. There is also no such an allegation in the founding affidavit. Mere belief by the applicants, following interaction with Kromhof without furnishing details regarding those interactions, is not sufficient as was contended for on behalf of Kromhof, to meet the requirement of *prima facie* proof in applications of this nature. The vague, bald and unsubstantiated allegations on which the applicants have based their case, simply does not show that Kromhof has the required state of mind that, viewed holistically, there is sufficient evidence before me to grant the relief sought. Even the allegation as to Kromhof's fraudulent misrepresentation lacks a factual foundation as no evidence is put up to show that there are defects in the property from which I can draw an inference that Kromhof was possibly aware of such defects but failed to disclose them. In fact, Kromhof specifically states in her supplementary affidavit that the funds will be invested

in her name with Investec Bank until she requires the funds in order to purchase another property which is to their liking.

26. The applicants have failed to establish a *prima facie* case that Kromhof “is *wasting or secreting assets with the intention of defeating the claims of creditors*” nor that there is a well-grounded fear that she might do so.

27. For all the reasons set out above I come to the conclusion that the point *in limine* is sound and thus, must be upheld.

28. Having found merit in the point *in limine*, there is no need for me to pronounce on the second argument advanced by Ms Davis, namely that the applicants’ claim was legally dubious and open to serious doubt.

29. Ms Davis, during the course of her argument, sought to persuade me that a sufficiently strong case had been made out by Kromhof to warrant a punitive costs order. The foundation for this argument was that the application was vexatious due to it being plainly misconceived and manifestly lacking arguable merit. The fact that the applicants’ replying affidavit, not only contained new matter, argument and allegations impugning Kromhof’s character and reputation was based on inadmissible hearsay, bolstered the need for censure, so the argument continued.

30. Instances where the Courts have mulched a litigant with a punitive costs order are trite and need not be repeated here. The leading authority dealing with the circumstances in which attorney and client costs may be awarded, is *AC Cilliers Law of Costs* published by LexisNexis. See para 4.13 of the updated version of the book,

Service Issue 33 dated April 2016, dealing with vexatious and frivolous proceedings and para 4.15 which lists other kinds of blameworthy conduct.

31. It is clear from the learned author's commentary that the grant of a punitive costs order is only awarded in certain limited instances.

32. It is also manifest from the papers that the relationship between the protagonists in this matter has degenerated from that of friendly neighbours to what Kromhof avers has necessitated her selling her house so as to put distance between her and the applicants. Notwithstanding very able argument by Ms Davis, I am not persuaded that the actions of the applicants, on the facts before me, justify a departure from the general rule.

33. In the result, I order as follows:

The application is dismissed with costs on the party and party scale.

CANCA, AJ

Appearances

For the Applicants : Adv M Ipser
Instructed by:

Schliemann Inc.

For the First Respondent : Adv D Davis
Instructed by:
Korbers Inc.
Cape Town