IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No.: **17614/2016**

In the application between:

PAUL JOSEPH ANTHONY	First Applicant
CORNELIA PETRONELLA ANTHONY	Second Applicant

and

WESSEL JACOBUS JAPIES	First Respondent
SONIA BERLIN JAPIES	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent
VELILE TINTO CAPE INCOPORATED	Fourth Respondent
BARRY NORTJE ATTORNEYS	Fifth Respondent
DESMOND ARTHUR LODEWYK	Sixth Respondent
JOHANNA PETRONELLA LODEWYK	Seventh Respondent

JUDGMENT: 12 SEPTEMBER 2017

MEER J.

Introduction

[1] This is the return day of the following *rule nisi* and order issued on 28 October 2016:

"1.1 That Erf 170 Kleinvlei, in the City of Cape Town, Division of Stellenbosch, Western Cape Province, in extent 490 square meters and held by Deed of Transfer T 42311/1996, also known as 7 Humbolt Avenue, Perm Gardens, Kleinvlei, Eersteriver (hereinafter "the property") be transferred to the Applicants.

1.2 That the said transfer be conducted by the Applicant's nominated transferring attorney(s).

1.3 That the First and Second Respondents be ordered to do all things necessary so as to give effect to paragraph 1.1 *supra*, including (*inter alia*) that they sign the documentation necessary to effect transfer.

1.4 That in the event of the First and/or Second Respondents failing to comply with paragraph 1.3 *supra*, the Sheriff of the Court and/or his/her deputy be authorised and directed to take all steps necessary on the First and Second Respondents' behalf so as to give effect to paragraphs 1.1 and 1.3 *supra*.

1.5 That the First and Second Respondents pay the costs of the application.

1.6 That whoever opposes the application be ordered to pay the costs jointly and severally with the First and Second Respondents.

2. That the Respondents be interdicted from encumbering, selling and/or passing transfer of the property to anybody other than the Applicants pending "the" return date of the *rule nisi*.

3. That the Third Respondent register a caveat against the title deed of the property so as to reflect paragraph 2 *supra*.

4. That the First, Second and Fourth Respondents be ordered to disclose to the Applicants the identities and all relevant contact details of the third party purchasers of the property as referred to in paragraph 20 of the founding affidavit.

5. That a copy of the application be served on the said parties upon receipt of the information contemplated by paragraph 4 *supra*."

[2] The First and Second Applicant ("the Applicants") apply for confirmation of prayers 1.1 to 1.5 of the Rule Nisi. In addition they seek costs against the Fourth Respondent as sought in their amendment notice of motion.

[3] The matter concerns two agreements of sale in respect of a property situated at 7 Humbolt Avenue, Ėersteriver ("the property"), near Cape Town. The First and Second Respondents are the erstwhile owners of the property. They oppose the application. In June 2016 they entered into an agreement for the sale of the property to the First and Second Applicants. In July 2016 they entered into a second agreement of sale in respect of the same property with the Sixth and Seventh Respondents. The Fourth Respondent is the law firm acting as conveyancing attorneys for the First and Second Respondents. It transferred the property to the Sixth and Seventh Respondents pursuant to the second agreement of sale. It opposes the cost order the Applicants seek against it. The Sixth and Seventh Respondents have not opposed the application. The Fifth Respondent is the conveyancing attorney for the Applicants. No relief is sought against him or the Third Respondent, the Registrar of Deeds.

Background Facts

[4] On 8 June 2016 the Applicants and the First and Second Respondents concluded an agreement in terms of which the Applicants purchased the

property. It was a salient term of the agreement that the purchase price was payable within 10 working days of signature.

[5] On 28 June 2016 the Applicants made payment of the entire purchase price into their conveyancer's, (the Fifth Respondent's), trust account.

[6] On 11 July 2016, and unbeknown to the Applicants at the time, the First and Second Respondents concluded a sale agreement in respect of the same property in favour of the Sixth and Seventh Respondents.

[7] On 31 August 2016, the Fourth Respondent revealed to the Applicants' estate agent the existence of the second agreement and also that the Fourth Respondent had been appointed as the conveyancers entrusted with the transfer. Neither the identity of the Sixth and Seventh Respondents nor the agreement itself was revealed at that stage. On the same day the Applicants' conveyancer, the Fifth Respondent, requested an undertaking from attorney Ian Durr, of the Fourth Respondent, that he would not proceed with transfer pending a claim for specific performance in terms of the first agreement.

[8] On 6 September 2016 the Fourth Respondent responded by email, indicating that the deed of sale entered into with the Applicants, dated 8 June 2016, had lapsed because the purchaser could not furnish the necessary guarantees or pay the purchase price into their conveyancer's trust account within the time stipulated in the contract. The Fourth Respondent indicated that it had been instructed to proceed with the transfer of the property.

[9] I pause to mention that the First and Second Respondents do not allege that the agreement was cancelled as a consequence of any breach on the part of

the Applicants. Nor did they give notice of cancellation to the Applicants on account of any breach, as was required by the contract. The founding affidavit states and it is undisputed that far from being in breach, the Applicants paid the purchase price as soon as they were made aware of the banking details by the conveyancers. It is the Applicants' stance therefore that the agreement is still valid and enforceable.

[10] On 30 September 2016 the property was registered in favour of the Sixth and Seventh Respondents. On 4 October 2016, and unbeknown to the Applicants that the property had already been transferred, they issued the current application seeking to interdict the transfer of the property and to compel its transfer to the Applicants. On 7 October 2016 the Fourth Respondent revealed in a letter to the Applicants that the property had already been transferred.

[11] In view of the fact that no answering affidavit was delivered, the Applicants proceeded with the application on an unopposed basis and on 28 October 2016, an order was granted interdicting the transfer of the property and issuing a *rule nisi* to show cause why the property should not be transferred to the Applicants. In addition the order compelled the First, Second and Fourth Respondents to reveal the identities of the purchasers, (the Sixth and Seventh Respondents), who remained undisclosed at that time.

[12] On 2 December 2016 the First and Second Respondents delivered a succinct answering affidavit. The affidavit states that the interim relief obtained should not be made final for the reason that the property had already been transferred and registered to a third party on 30 September 2016. As far back as 7 October 2016 the First and Second Applicants were informed of this state of

affairs, the affidavit states. The First and Second Respondents did not disclose the identity of the purchasers and their affidavit.

[13] The matter was postponed to the semi-urgent roll for hearing on 23 February 2017, and it was only on 30/31 January 2017, that the First and Second Respondents revealed the identities of the Sixth and Seventh Respondents. No response was forthcoming from the Fourth Respondent in spite of the order ordering it to reveal the identities of the purchasers, having been served on it on 11 November 2016. It is the Applicants' contention that the Fourth Respondent was thus in contempt of the court order.

[14] On 23 February 2017 the Applicants issued an application to join the Sixth and Seventh Respondents, together with an application for leave to amend their notice of motion. The amendment sought a costs order against the First, Second, Sixth and Seventh Respondents jointly and severally; alternatively against the First, Second, Fourth, Sixth and Seventh Respondents jointly and severally.

[15] On 8 March 2017 the joinder and amendment order was granted. Thereafter on 11 April 2017 the Fourth Respondent delivered an answering affidavit in the main application. The deponent, Ian Durr, states that the Fourth Respondent was instructed on 18 July 2016 by First and Second Respondents to effect transfer of the property to the Sixth and Seventh Respondents. The Fourth Respondent, he states does not represent the First and Second Respondents in their dispute with the Applicants. He clarifies moreover that the Fourth Respondent has never accepted instructions from the Sixth and Seventh Respondents and has never represented them.

[16] Durr states that, prior to being advised to that effect on 31 August 2016 by the Fifth Respondent, he was not aware that a previous offer to purchase had been concluded between the Applicants and the First and Second Respondents. On learning of this he explained to the First and Second Respondents that proceeding with the transfer could give rise to an interdict. He was, however, instructed by them to proceed with the transfer. He requested and received a signed document confirming this instruction from the First and Second Respondents. In the light of these instructions Durr informed the Fifth Respondent that he would proceed with the transfer. Durr emphasises that the Fifth Respondent was notified of this almost a month before the urgent application was launched.

[17] Durr goes on to state that the Fourth Respondent has never taken any steps to deliberately frustrate the Applicants and that it has no motive or interest in doing so. The Fourth Respondent acted at all times transparently and within the scope of its legal duty and there was nothing underhand about the transfer, he adds.

[18] Durr states that he was surprised when, on 11 November 2016, a copy of the order containing the *rule nisi* was served on the Fourth Respondent. He states the relief in that order having become unenforceable, an interdict could not be granted or enforced in the changed circumstances. In an attempt to explain his non-compliance with the court order requiring him to disclose the identities of the Sixth and Seventh respondents, he states that their details had become a matter of public record because they had been registered as the owners of the property.

[19] On 20 March 2017 the Fourth Respondent learned that the Applicant would be seeking a costs order against it. In the light thereof the Fourth Respondent instructed attorneys to represent it.

Issues to be Determined

[20] Against that background information, two issues are required to be determined by me:

1. Whether the Applicants are entitled to the relief they seek which in effect seeks the transfer of the property to them;
2. Who should be liable for the costs of the application.

[21] The stance of the First and Second Respondents is that the terms of the relief sought, in its current form, are unenforceable against them as the property is no longer registered in their name. Paragraphs 1.3 to 1.5 of the rule nisi (reflected as paragraphs 2.3 to 2.5 of the Notice of Motion), sets out the relief against the First and Second Respondents. In my view the fact that the property is no longer registered in the First and Second Respondents' names is not a bar to their being ordered, at paragraph 1.3, to do all things necessary to give effect to paragraph 1.1, which orders the transfer of the property to the Applicants. Nor is this a bar to the relief at paragraphs 1.4 and 1.5 of the *rule nisi*. The relief sought in its current form is therefore not unenforceable against the First and Second Respondents. I note that the balance of the relief sought is also enforceable. The Sixth and Seventh Respondents have been joined and the notice of motion has been amended to seek costs against them as well as against the Fourth Respondent.

Merits

[22] As the matter before me concerns a "double sale" the *maxim of qui prior est tempore potior est jure* ("he who is earlier in time, is stronger in law") must be considered in relation to the competing rights of the two sets of purchasers.

[23] In accordance with the *maxim* transfer of the property to the Sixth and Seventh Respondents is no bar to the Applicants claiming transfer of the property. In *Bowring NO v Vrededorp Properties CC* 2007(5) SA 391 SCA at paragraphs 15 to 18 it was held that there is no reason in principle why a first purchaser should not be allowed to claim transfer of the property directly from a second purchaser who acquired the property with the knowledge of the first sale. However, as is well established in our case law, in order to do so the first purchaser, in this case the Applicants, would have to show that the second purchasers, the Sixth and Seventh Respondents in this case, foresaw the possibility of the first purchaser's prior right, but persisted with the sale.

[24] In *Meridian Bay Restaurant (Pty) Ltd and Others v Mitchell NO* 2011(4) SA 1 (SCA), at paragraphs 18 and 19, it was held that it is not necessary for the first purchaser to prove fraud or *mala fides* on the part of the second purchaser. It suffices if it is established that the second purchaser subjectively foresaw the possibility of the existence of the first purchaser's personal right, but proceeded with the acquisition regardless. See also *Associated South African Bakeries (Pty) Ltd v Oryx &Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 910 E – H.

[25] The Applicants contend that the following facts illustrate that the Sixth and Seventh Respondents had known about the first sale: On 3 May 2017 the Applicants' attorney telephoned the Sixth Respondent to seek confirmation that

the Sixth and Seventh Respondents had received the "papers" in this matter and to enquire whether they were aware that the matter was proceeding. The Sixth Respondent confirmed that they had received and read the papers and were aware that the matter was proceeding. He said that the Sixth and Seventh Respondents had no intention of opposing the relief sought. According to the Applicant, in electing not to oppose the application and deny the allegation, that they had known about the first agreement, such allegation must be deemed to have been admitted by them. The Applicants contend that from these facts, it is highly likely that the Sixth and Seventh Respondents were aware of the first agreement, or at least foresaw its existence.

[26] Uniform Rule 22(3) holds that every allegation of fact in the combined summons or declaration which is not expressly admitted or denied, shall be deemed to be admitted.

See: FPS Ltd v Trident Construction (Pty) Ltd 1989 (3) SA 537 (A) at 541 I to 542 B; *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) at paragraph 14; *Mahanjana v Webb* 2017 JDR 0179 (GP) at paragraph 14.

It was open to the Sixth and Seventh Respondents to file an affidavit to the effect that they had had no knowledge of the first agreement, but that they would not oppose the application and would abide the Court's decision (this would have shielded them from costs). If they in fact had not known of the first agreement they would have had an unassailable claim. By not responding at all, the unfortunate inference is that they that they had in fact known of the first agreement. I am in the circumstances inclined to agree with the Applicants that knowledge of the first agreement can be attributed to the Sixth and Seventh Respondents.

[27] Regard being had to the above the Applicants are in my view entitled to confirmation of paragraphs 1.1 to 1.4 of the *Rule Nisi*.

Costs

[28] The Applicants initially sought an order that the First, Second, Fourth, Sixth and Seventh Respondents be held jointly and severally liable for costs, including all costs previously reserved. They no longer seek costs against the Sixth and Seventh Respondents. In view of my finding, that the Applicants are entitled to the substantive relief they seek at paragraphs 1.1 to 1.4 of the *Rule Nisi*, they are entitled to costs against the First and Second Respondents.

[29] Costs are sought against the Fourth Respondent firstly on the basis that the conveyancer acted in a manner which is inconsistent with the Cape Law Society Guidelines for Proper Conduct of Property Law Matters. Clause 4.2.1 of the Guidelines states as follows:

> "4.2.1 Having regard to the primary duty to the seller, the conveyancer nevertheless has a duty towards the purchaser who must be dealt with forthrightly and courteously and advised if there is any abuse of rights by the seller. In the event of a dispute between the seller and the purchaser, inform the purchaser that your primary duty lies in protecting the interest of your client, the seller, and, in the event of the dispute not being amicably resolved, the purchaser should consult his/her own attorney/conveyancer."

[30] There is no evidence that the Fourth Respondent informed the second purchaser, the Sixth and Seventh Respondents, of the prior contract of sale, in accordance with the requirement to advise the purchaser of any abuse of rights by the seller. Mr Brown for the Fourth Respondent submitted that there no prejudice to the Applicants was occasioned by this. I am inclined to agree. The

evidence does not reveal any prejudice to the Applicants arising from the Fourth Respondent not informing the purchaser as alleged. In the circumstances the Fourth Respondent does not attract a cost order against it, for this reason, but ought to be ordered to pay its own costs, due to its not having informed the purchasers of the prior contract.

[31] The second reason for which the Applicants seek costs against the Fourth Respondent, is because of its failure to disclose the identities of the Sixth and Seventh Respondents to the Applicants or their legal representatives when asked to do so, as well as its failure to comply with the court order of 28 October 2016, which at Clause 4 expressly compelled it to disclose the Sixth and Seventh Respondents' identities. The Applicants contend that the Fourth Respondent was in contempt of the court order of 28 October 2016 which was served on it on 11 November 2016.

[32] The Fourth Respondent submits that there is insufficient evidence to establish that it acted wilfully and *mala fide*, the requirements for a contempt finding. I am inclined to agree. The Applicant quite correctly describes the approach of the Fourth Respondent to its failure to comply with the Court order, as dismissive. In the answering affidavit Durr refers to the relief sought as "irrelevant and incompetent" and seeks to justify its non-compliance on the basis that the information about the identities of the Sixth and Seventh Respondents was, from the date of transfer, in the "public domain". A further justification for not complying is that the Fourth Respondent liaised with the attorneys representing the First and Second Respondents in the application proceedings and those attorneys indicated that they would supply the information. This can never be a justification for failing to comply with a court order and it ill behoves, especially a firm of attorneys, to rely on such

justification. As was stated in *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E), at 229 B:

> "An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong."

[33] The submission on behalf of the Applicants that it was due to the First, Second and Fourth Respondents' failure to timeously comply with the order that the matter had to be postponed on 23 February 2017 with costs reserved, has not been refuted. I am satisfied that the circumstances warrant the Fourth Respondent to be mulcted with costs, together with the First and Second Respondents, occasioned by the postponement on 23 February 2017.

[34] Thirdly, the Applicants contend, the Fourth Respondent should attract a cost order because it allowed itself to be part of the First and Second Respondents' stratagem of transferring the property, notwithstanding knowledge of the Applicants' stronger right to the property. The Applicants submit that when faced with competing claims by respective purchasers, the correct course of action was for the Fourth Respondent to have approached the Court for a *quasi*-interpleader application so as to protect it from liability. I might have been inclined to agree with this proposition had the Fourth Respondent been served with the interdict proceedings prior to transfer. This however did not happen. Between 6 September, when the Fourth Respondent notified the Applicants that it was proceeding with the transfer, and 30 September when the transfer occurred, the Fourth Respondent heard nothing of any contemplated urgent interdict proceedings and would have been entitled to assume that such was not forthcoming. The Fourth Respondent's conduct in these circumstances should not attract a cost order, but warrants an order that it pay its own costs.

[35] I grant the following order:

1. Paragraphs 1.1, 1.2, 1.3 and 1.4 of the Rule Nisi, as issued on 28 October 2016, is confirmed.
2. The First and Second Respondents shall jointly and severally pay the Applicant's costs including all costs previously reserved.
3. The First, Second and Fourth Respondents shall jointly and severally pay the costs of 23 February 2017.
4. The Fourth Respondent shall pay its own costs.

Y S MEER

Judge of the High Court