IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

Case. No. 835/2024

In the matter between:

MONWABISI VUMAZONKE	First Applicant
SISIPHO NQABISA VUMAZONKE	Second Applicant
and	
SANDRA ANN RHEEDER	First Respondent
JO- ANN PALMER	Second Respondent
THE REGISTRAR OF DEEDS: KING WILLIAM'S TOWN	Third Respondent

JUDGMENT

BODLANI AJ

[1] The applicants challenge, in Part B of this application, the agreement of sale of the property known as Erf No. 1[...] situated at No. 1[...] W[...] Drive, East London ("the property"), concluded by and between the first and second respondents. They also seek an order directing the first respondent to take all the necessary steps to transfer the property to them.

[2] To protect the utility of the relief sought in Part B, they urgently apply for an interdict against the respondents taking steps to effect the registration of transfer of the property. Urgency was not placed in dispute. In any event, I am satisfied that the application is sufficiently urgent as to warrant being heard on truncated timeframes. This judgment therefor, concerns the applicants' entitlement to interdictory relief. To appreciate the basis for this application, a brief exposition of the facts is called for.

[3] In March 2024, the first respondent engaged estate agents Jawitz Properties and Century 21 for the sale of the property. The second respondent offered to purchase the property in the amount of R3 300 000.00 (three million, three hundred thousand rand). Some of the terms of the offer were that for her to pay the purchase price, she would secure a bond of R2 500 000.00 (two million, five hundred thousand rand) from a financial institution and the remainder, in the amount of R800 000.00 (eight hundred thousand rand), would come from the proceeds of the sale of another property ("second property").

[4] The first respondent accepted the second respondent's offer subject to two material suspensive conditions. The first concerned the second respondent obtaining, in her favour, the approval of a loan in the amount of R2 500 000.00 (two million, five hundred thousand rand) from a financial institution, within 30 (thirty) days of acceptance of the offer. The second concerned the sale of the second property. However, in the event of the first respondent receiving an unconditional and acceptable offer for the property prior the fulfilment of the suspensive conditions, she would be entitled to give written notice to the second respondent to waive the suspensive conditions within 72 hours of such written notice being given.

[5] On 06 April 2024, the applicants made an offer to the respondent for the purchase of the property ("the second offer"). The second offer was made subject to a financial institution approving a loan of not less that R3 300 000.00 (three million, three hundred thousand rand) in favour of the applicants before 03 May 2024. This condition was fulfilled on 16 April 2024 so that then, a full and effective unconditional offer by the applicants came into being. The applicants presented this offer to the first respondent.

[6] In possession of an unconditional offer by the applicants, on 18 April 2024 the first respondent gave written notice to the second respondent to waive the suspensive conditions contained in her offer, within 72 hours. Absent that waiver, the first respondent would be entitled to go ahead with the sale of the property to the applicants. By extension, this means the second respondent would have lost the opportunity to purchase the property. The 72-hour period was meant to expire at 12h00 on 19 April 2024. Before 12h00 on 19 April 2024 the second respondent informed the first respondent that she was waiving all the suspensive conditions ("the waiver").

[7] Notwithstanding the waiver, the applicants contend that the second respondent did not, in fact, waive the suspensive conditions. She misled the first respondent into believing she did when in fact she knew that there was no waiver in place, contend the applicants. They base this contention on the allegation that simultaneously with the provision of the waiver she was still communicating with Nedbank with a view to secure and/or finalize the grant, in her favour, of a bond in the amount of R3 300 000.00 (three million, three hundred thousand rand) and/or that certain conditions on which she was to be granted the bond were still being worked on. This, the applicants allege is the fraudulent misrepresentation the second respondent perpetuated to defeat their agreement of sale with the first respondent.

[8] There is indeed correspondence that shows that beyond 12h00 on 19 April 2024, the second respondent was still in communication with Nedbank. The correspondence also shows that the issue concerned in it is the grant, in the second respondent's favour of a bond in the amount of R3 300 000.00 (three million, three hundred thousand rand) and/or that certain conditions on which she was to be granted the bond were still being worked on. This, the applicants say indicates that she was dishonest when she

communicated the waiver because she knew as she was communicating the waiver that she did not have the full purchase price for the property.

[9] The issue, therefore, is not whether the second respondent waived the suspensive conditions or not. It is whether the waiver she communicated to the first respondent was honest and therefore not intended to mislead in view of the correspondence that shows that beyond 12h00 on 19 April 2024 there were ongoing engagements on the issue concerning the grant, to her, of a bond in the amount of R3 300 000.00 (three million, three hundred thousand rand) and/or certain conditions on which she was to be granted the bond were still being worked on.

[10] Upon enquiring as to what right, exactly, were the applicants seeking to protect. Mr. Tshikila who appeared for the applicants argued that the right sought to be protected was the right to acquire property. This right is a subset of the right in section 25(1) of the Constitution, 1996 – the right not to be arbitrarily deprived of property. It is against the backdrop of the above facts that this application falls to be determined.

[11] The requisites to claim an interim interdict are well established, they are:

a) a *prima facie* right;

b) a well-grounded apprehension of harm if the interim relief is not granted and the ultimate relief is eventually granted;

c) absence of an alternative satisfactory remedy; and

d) the balance of convenience favours the grant of the interim interdict.

[12] These requisites should not be considered separately or in isolation but in conjunction with one another to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought.[1] Unlike other civil matters, the requirement of a *prima facie* right does not have to be established on a balance of

[1] *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 (3) SA 685 (A) at 691F; *Olympic Passenger Service (Pty) Ltd Ramalgan* 1957 (2) SA 382 (D) at 383E – F; *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T) at 54

probabilities. Rather, since the application is merely interlocutory and the effect of granting thereof only temporary and not finally decisive of either party's rights, the courts grant interim interdicts upon a degree of proof less exacting than that required for a final interdict. The right to be set up by an applicant for a temporary interdict must be *prima facie* established though open to some doubt.[2]

[13] The *prima facie* right a claimant is required to establish is not the right to approach a court for relief. It is a right to which, if not protected by an interdict, irreparable harm would ensue.[3] The stronger the prospects of success for the applicant, the less the need for the balance of convenience to favour him; the weaker the prospects of success, the greater the need for the balance of convenience to favour him.[4]

[14] Have the applicants been able to show a *prima facie* right, even if open to some doubt? They have. That the right to acquire and dispose of property is protected in terms of s 25 of the Constitution was considered in *Ex Parte Chairperson of the Constitutional Assembly,*[5] in the following terms:

> "[72] Several recognised democracies provide no express protection of property in their constitutions or bills of rights.54 For the remainder, a wide variety of formulations of the right to property exists. Some constitutions formulate the right to property simply in a negative way, restraining state interference with property rights. Other constitutions express the right in a positive way, entrenching the right to acquire and dispose of property. A further formulation frequently used is to state that "private property is inviolable" subject to expropriation in certain circumstances. This survey suggests that no universally recognised formulation of the right to property exists. The provision contained in the NT, which is a negative formulation, appears to be widely accepted as an appropriate

[2] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.
[3] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC), para 50.
[4] *Olympic Passenger Service, supra* at 383D – F. Also see *SA Securitisation (Pty) Ltd v Chesane* 2010 (6) SA 557 (GSJ) at 564D – F.
[5] *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

formulation of the right to property. Protection for the holding of property is implicit in NT 25. We cannot uphold the argument that, because the formulation adopted is expressed in a negative and not a positive form and because it does not contain an express recognition of the right to acquire and dispose of property, it fails to meet the prescription of CP II."

[16] This being the case, the right sought to be protected is a clear right. It vests on everyone. It is impossible to see how the applicants are excluded from the operation of the protections that are accorded everyone in s 25 of the Constitution. There are implications for this insofar as the applicants are required to show that they apprehend irreparable harm if the interdict is not granted. The applicants having established a clear right, as distinct from a *prima facie* right open to some doubt, their apprehension of irreparable harm need not be established.[6]

[17] In determining where the balance of convenience lies, the Court has to weigh the prejudice to the applicants if the interlocutory interdict is not granted against the prejudice to the second respondent if it is. The stronger the prospects of success, the less the need for the balance of convenience to favour the applicant, the weaker the prospects of success, the greater the need for the balance of convenience to favour him.[7] I can conceive of no harm to the second respondent if the interdict is granted. To the applicants, if the interdict is not granted, they will lose to opportunity to purchase the property in issue. It follows that the applicants have not an alternative remedy.

[18] When I consider, as I am required to,[8] the facts put up by the applicant, together with the facts set out by the respondent which the applicant cannot dispute, and consider whether, having regard to the inherent probabilities and the ultimate onus, the applicant should on those facts obtain final relief at the trial – and, having considered the facts set up by the respondent – I am in no position to say serious doubt is thrown

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[6] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267C.
[7] *Olympic Passenger Service, supra* at 383D – G; *Eriksen Motors, supra* at 691F – G; *Knox D'Arcy Ltd v Jamieson* 1966 (4) SA 348 (A) at 361D – F.
[8] *Webster supra* as amplified and qualified by *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688D – E and *Godbold v Tomsom* 1970 (1) SA 61 (D) at 63C – D.

upon the case of the applicant. Thus, I cannot, in these circumstances, no grant interim interdictory relief.

[19] The second respondent applied for the striking out of certain allegations made in the founding affidavit. The bases for the application are that the allegations in issue are scandalous, defamatory and vexatious. She contended further that the various allegations sought to portray her as being dishonest and unethical. When regard is had to the cause of action, it being that the waiver communicated by the second respondent was communicated with the aim deceitfully to defeat the sale between the applicants and the first respondent, it is difficult to conceive of how else without suggesting fraudulent conduct on the part of the second respondent would the applicants have presented their case.

[20] I am not persuaded that the grant of an order striking out certain allegations made in the founding affidavit would be appropriate in these circumstances. That said, as I will with the costs of the application for interdictory relief, I do not grant the costs of the application for the striking out. I intend to reserve them. If the second respondent succeeds in Part B of the relief sought in the notice of motion, it will mean that there was no justification for the applicant to suggest unbecoming conduct on her part. Were such to eventuate, in my view, it would entitle the second respondent to a favourable order as to the costs of the application to strike out. However, I do not decide the issue.

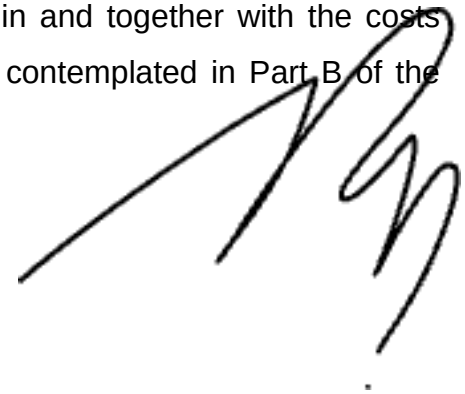
[18] In the result, the following order is made:

1. Leave is granted to the applicants to bring this application on an urgent basis.

2. Pending a final determination of the application contemplated in Part B of the notice of motion dated 13 May 2024, the respondents are interdicted from effecting the transfer of the property known as Erf No. 1[...] situated at No. 1[...] W[...] Drive, East London.

3. The application for the striking out of certain allegations made in the founding affidavit is dismissed.

4. The costs of this application, together with the costs incurred in the application to strike out, shall be payable in and together with the costs consequent upon the hearing of the relief contemplated in Part B of the notice of motion.



A M BODLANI

ACTING JUDGE OF THE HIGH COURT,

EASTERN CAPE DIVISION.

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Heard	**:**	**11 June 2024**
Delivered	**:**	**16 July 2024**