

IN THE HIGH COURT OF SOUTH AFRICA
[TRANSVAAL PROVINCIAL DIVISION]

Case No: 19618/08
Date: 15/05/2008

UNREPORTABLE

In the matter between:

S A WEICHELT
C L WEICHELT
FOOD FOR AFRICA CC
EXIRO TRADING CC

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT

And

TRIPONZA TRADING 276 CC
DIE REGISTRATEUR VAN AKTES

FIRST RESPONDENT
THIRD RESPONDENT

JUDGEMENT

MAKGOKA AJ

[1] The Applicants seeks urgent interim relief interdicting and restraining the First Respondent from transferring certain immovable property, to the Second Respondent, pending the finalization of proceedings by the Applicant for final relief to have a servitude registered against the said immovable property.

[2] THE PARTIES AND BACKGROUND:

[2.1] The Second Applicant was a sole member of the Third Applicant, which was deregistered in 2006. Before such

deregistration, it is alleged that the First Applicant acquired the Second Applicant's member interest in the Third Respondent.

[2.2] The Third Applicant sold certain property, Portion 174 of Hartebeesfontein 324 JR ("the property") on 12 October 2004, to the First Respondent, in terms of a written Purchase Agreement. Annexure "A" signed on 2 November 2004, of the said Agreement which I would name "the first purchase agreement", provided in paragraph 1 thereof as follows:

"Die verkoper sal, sodra daar goedkeuring daarvoor gegee word, 'n serwituut ten opsigte van 'n advertensiebord ten voordeel van die koper geregistreer word. Koste vir die verkoper. "

[2.3] Clause 20.4 of the Purchase Agreement provided that Annexure "A" is an inseparable part thereof.

[3] On 1 September 2006 the City of Tshwane approved the rezoning of the part of the property for Billboard advertising, this paving the way for implementation of the above-mentioned paragraph 1 of the Purchase Agreement. For a reason which is not clear on the papers, the servitude was not registered, despite the fact that the property was

transferred into the name of the First Respondent.

- [4] Subsequently, on 11 October 2007, the First Respondent, in terms of an Offer to Purchase, sold the property to the Second Respondent I would name this "the second purchase agreement" Paragraph 4.3 of the Agreement reads:

"This agreement is subject to the suspensive condition that S A Weichelt has the right to erect one billboard in conjunction with municipal by laws on outdoor advertising as set out in Annexure PPI and site plan PPI 2. The cost of which will be for his account."

- [5] Transfer documents for the registration of the property into the name of the Second Respondent were lodged with the Third Respondent, the Registrar of Deeds, on 16 April 2008. This application was launched on 17 April 2008. On 24 April 2008, by agreement, which was made on order of court, the First Respondent undertook not to effect transfer and registration of the property into the name of the Second Respondent, pending the finalization of this application, but not later than 9 May Upon hearing the matter on 7 May 2008, I reserved judgement and extended the undertaking, pending delivery of this judgement.

- [6] The First Applicant contends that, having acquired the Second Applicant's member interest in the Third Applicant, he should, for all practical purposes, be regarded as the beneficial owner of the interests in the Third Applicant. Consequently, the argument proceeds, the right to register a servitude against the immovable property, accrued to the First Applicant, alternatively to the Third Applicant.
- [7] The First Respondent, on the other hand opposes the granting of the interim relief, mainly on four grounds, first, that the Third Applicant does not have *locus standi* as it has been deregistered, second that the First Applicant was not a party to the first agreement, as a result of which, no rights flowing from the Agreement could accrue to him. Third, that the right to register the servitude has prescribed, and fourth, that first agreement may be vague and unenforceable.
- [8] It would be convenient at this stage to deal with the last two grounds advanced by the First Respondent. With regard to prescription, Annexure "A" to the first purchase agreement provides that the registration of the servitude could only take place after approval. Such approval was promulgated, and came into operation, on 20 December 2006. Consequently prescription began to run from this date. The ground on prescription therefore should fail.

[9] Next I consider whether Annexure "A" to the first purchase agreement could be vague and unenforceable. It is so that Annexure "A" was signed on 2 November 2004, three weeks after conclusion of the agreement. To my mind, the intention of the parties is clear from the simple and plain language of the document: The parties intended a servitude to be registered against the immovable property and that Annexure "A" was to be an inseparable part of the first purchase agreement. I accordingly find no vagueness or ambiguity in this regard. As a result, an objection based on this ground should similarly fail.

[10] Which brings me now to the question whether the First Applicant could derive any rights out of the first purchase agreement. It is clear from the reading of the said agreement, as well as Annexure "A" thereto, that the parties obtaining rights and obligations therein, were the Third Applicant as the seller, and First Respondent, as the purchaser. Mr. Bergenthuin, on behalf of the First Respondent, argued that, a proper interpretation of the documents leaves no doubt that the First Applicant in person is not mentioned as a party to the agreement at all, and no stipulation in First Applicant's favour is contained in any of the documents.

[11] Mr. Leathem, on behalf of the Applicants, contends that the right

created in terms of Annexure "A" to register a servitude, would be that of the First Applicant. This, the argument proceeds, is confirmed in paragraph 4.3 of the second purchase agreement, wherein it is stipulated as a suspensive condition that the First Applicant has the right to erect the billboard. Mr Leathem further points out that Mr. Pretorius, who acted for the First Respondent, at all times informed the First Applicant of the intention to sell the property and assured him that the First Applicant's interests would be protected in whatever sales agreement to be concluded.

- [12] In my view, the two purchase agreements should be read in conjunction with each other. The primary agreement which created the right to register a servitude against the property, is the first purchase agreement, specifically Annexure "A" thereto. Clause 4.3 of the second purchase agreement, on a proper construction, should therefore be a re-statement of the rights and obligations derived by and attendant upon, the parties to the first purchase agreement. And those parties are the Third Applicant and the First Respondent, as seller and purchaser respectively. The First Applicant was not a party thereto and as a result, no right could accrue to him flowing from the first purchase agreement. The fact that he was personally named as having a right in the second purchase agreement, is therefore of no legal consequence. I therefore agree with Mr. Bergenthuin's submissions in this regard.

[13] I turn now to consider the *locus standi* of the Third Applicant. As stated earlier on, the Third Applicant was de-registered in 2006. In the present application the First and Second Applicants have indicated an intention to have the Third Applicant re-registered. Section 26 (6) and (7) of the Close Corporation Act 69 of 1984 reads as follows:

"6" The Registrar may on application by any interested person, if he is satisfied that a corporation was at the time of its deregistration carrying on business or was in operation, or that it is otherwise just that the registration of the corporation be restored, restore the said registration.

"7" The Registrar shall give notice of the restoration of the registration of a corporation in the Gazette, and as from the date of such notice the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.

[14] Mr Bergentuin referred to me to Ex Parte Sengol Investments [Pty] Ltd 1982 3 SA 474 (T), wherein the court, dealing with a similar provision

of the Companies Act 61 of 1973, stated the following at 477 C-D:

"The effect of restoration to the register is that the company is deemed not to have been deregistered at all. This entails that all parties who have by deregistration of the company or thereafter acquired rights to assets which the company had upon deregistration will lose those rights as the assets will revert to the company. This includes assets, which have become *bona vacantia* and as such accrued to the State. Likewise debtors and creditors of the company at time of de registration may upon restoration find their obligations or rights resuscitated."

[15] Now the Applicants, seeking an interim relief, must establish the following:

- (a) a clear right or, if not clear that, they have a prima facie right;
- (b) a well grounded apprehension of irreparable harm if the interim relief is not granted;
- (c) that the balance of convenience favours the granting of an interim relief;

(d) no other satisfactory remedy exists for the Applicants;

[16] I have already dealt with whether or not the First Applicant has acquired any rights flowing from the first purchase agreement. Now the question remains whether the Third Applicant has such a clear right. Clearly, the right to register a servitude against the immovable property vested in the Third Applicant until deregistration. If the application for restoration of the Third Applicant is successful, such right would be resuscitated and enforceable as against both the First and the Second Respondents. To that extent, the Third Applicant has at the very least, a *prima facie* right. If an interim relief is not granted, and the property is transferred into the name of the Second Respondent, and later the restoration of the Third Respondent is successful, and untenable scenario is likely to occur: The First Respondent would be out of the picture and the Second Respondent would be left to face the claim of the Third Applicant on its own.

[17] This is a matter of great importance to all the parties involved. Certainty on the rights of the parties must be brought about as soon as possible. My view is therefore that the balance of convenience favours the granting of the interim order. My impression of what is key to unlocking the dispute between the parties, lies in the possible re-registration of the Third Applicant. As a result, I am of the view that to avoid

arguments in the present application frustrating the proceedings to be instituted by the Applicants for final relief, the order I am about to make should make room for possible re-registration of the Third Applicant.

[18] In the premises the order I make is the following:

[18.1] Pending the finalization of proceedings to be instituted by the Applicants for final relief to have the servitude registered against the remaining extent of portion 174 of the Farm Hartbeesfontein 324, registration division JR Gauteng, the First Respondent is hereby interdicted and restrained from causing to be transferred to the Second Respondent, or to any other person or entity, the said immovable property;

[18.2] The Applicants, if so advised, shall apply for the re-registration of the Third Applicant, within 10 (TEN) days of this order;

[18.3] The proceedings by the Applicants for final relief to have the servitude registered, shall be instituted within 5 (FIVE) days of the finalization of the application for re-registration of the Third Applicant referred to in the preceding paragraph;

[18.4] Should the Applicants fail to make the application for

re-registration of the Third Application within the stipulated period, or having such application being unsuccessful, the time periods regarding institution of the proceedings for final relief, shall come into operation immediately;

[18.5] The costs are reserved for determination in the proceedings for final relief.

T M MAKGOKA
ACTING JUDGE OF THE HIGH COURT