IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

19/11/14

CASE NO: 78599/3014

In the matter between:

PETRONELLA JACOMINA KRUGER Applicant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

18/11/14
DATE

SIGNATURE

K2011136167 (SOUTH AFRICA) PROPRIETARY LIMITED First Respondent

BRIAN RAYMOND ALGAR Second Respondent

JULIAN PATRICK FLATTERY Third Respondent

RHODE DU PLESSIS CC Fourth Respondent

STEPHANUS ENGELBERTUS DU PLESSIS Fifth Respondent

JOSEPH HENRY WALTERS CUNNIFF Sixth Respondent

REGISTRAR OF COMPANIES Seventh Respondent

NATIONAL CREDIT REGULATOR Eighth Respondent

JUDGMENT

Tuchten J:

1 This application came before me in the urgent court. In the notice of motion the applicant asked for wide ranging relief, some of which has been abandoned. Much of the relief sought in the notice of motion is final in nature, directed at having an immovable property, which was reflected in the deeds office as having been transferred away from the applicant, once more registered in her name or restored to her control. The deeds office description of the property is "1/72 part of Portion 3 of the farm Middelfontein 361 Rustenburg registration JQ North West Province".

2 Disputes of fact preclude the granting of any of the relief sought except that aimed at preserving the property pending the finalisation of the matter. I proceed to consider whether that latter category of relief should be granted. The first to sixth respondents oppose the application. The other respondents abide.

3 Because my approach to this case is that only an interim interdict would potentially be competent, my references to facts are necessarily to those put up by the applicant together with those put up by the opposing respondents which the applicant cannot dispute. The applicant's version is that, unbeknown to her until very recently, the property was transferred out of her name on the strength of documents designed to reflect a sale of the property by her to the first

respondent (K20). The applicant says that although she signed the documents, the true nature of the transaction was one under which she was given finance on credit, contrary to law. The issue before me is broadly whether the applicant's version can be rejected on the papers. If not, then, subject to a procedural qualification with which, in the light of my ultimate conclusion, I need not deal, counsel for the opposing respondents accepted that interim interdicts had to issue. I make no final findings of fact or law. My findings are therefore all provisional and made on the material placed before me in this application.

4 During 2012, in about July of that year, the applicant's then husband or ex-husband, Hendrik Jacobs (Jacobs), approached the fifth respondent (Du Plessis). Du Plessis offered to help the applicant and Jacobs by means of bridging finance. The applicant and Jacobs were in financial difficulties. Their business, conducted by Unique Kitchen and Cupboards CC (Unique), had failed. Unique used to be the owner of the property. In 2010, Unique transferred the property to the applicant. The *causa* for the transfer from Unique to the applicant was stated to be that it took place pursuant to the dissolution of the applicant's marriage to Jacobs. It seems that despite the divorce, the applicant and Jacobs remained living together as husband and wife.

5 The only asset available to the applicant on the strength of which she could possibly have obtained finance was the property. The applicant was at that stage trying to sell the property. At the end of July 2012, the applicant went to the offices of a firm of attorneys, Bonthuis Attorneys, where she saw a person identified only as Marie. The applicant says that after she saw Marie, she changed her mind and decided not to sell the property.

6 Du Plessis contacted the applicant again. She signed a number of documents presented to her by Du Plessis for the purpose of obtaining finance. The applicant kept copies of the documents which she signed. The copies are undated and signed only by the applicant. They are, in the order they are attached to the founding affidavit:

6.1 an instruction by the applicant to Bonthuis to pay out an amount of R150 000 plus 2% per month plus a 40% advance fee plus a 0,5% administration fee to Du Plessis and to the fourth respondent, Du Plessis' close corporation.

6.2 a draft bridging finance agreement between the fourth respondent and the applicant. The document provides that the

fourth respondent will lend the applicant R150 000 repayable with interest, advance fee and administration fee as in the consent. The monies were to be paid from the balance of the sale price (in context clearly of the property) or, if the property were not sold or insufficient funds were available from the sale, on demand.

6.3 a draft sale of shares agreement between the second respondent, Algar, and the applicant. The document provides that Algar sells the shares in the first respondent (K20) to the applicant for R423 950. Clause 8.1 confers on Algar an option, valid for 12 months from date of signature, to buy either the property or the shares in K20 for the same amount.

6.4 a draft sale of land agreement between either Algar or K20 and the applicant, pursuant to which the applicant sells the property to one or the other for R423 950.

6.5 a draft authorisation to Bonthuis to pay out, given by the applicant in relation to any amounts payable to her as seller.

6.6 a power of attorney to pass transfer of the property to K20 arising from a sale of the property to K20 for R345 000, given by the applicant to a number of persons.

6.7 a transfer duty declaration in blank save for a selling price reflected as R345 000 and the name of the conveyancing firm reflected as Bonthuis.

6.8 a FICA declaration giving the applicant's email address and cellphone number.

6.9 a statement in which the applicant declared that she was unmarried.

6.10 a statement in which the applicant declared that her estate had never before been sequestrated.

7 The applicant's case as presented to me is that she never at any stage authorised anyone to act on these documents and that she did not at any stage intend to sell the property to Algar or K20. The property was, however, in some unspecified way to be used as security for the bridging finance loan which had been made to her by the fourth respondent. This being so, it was submitted, the applicant

remained the owner of the property despite what is reflected in the deeds office.

8 The case for Algar and K20 is that the property was regularly sold and transferred to K20 by the applicant. They rely in this regard on a sale of land agreement which was put up in the answering affidavit as annexure F, which is how I shall describe it. Annexure F is regular on the face of it and was signed by both the applicant and Algar on behalf of K20 at Rustenburg on 8 August 2012. The applicant's case is that she did not conclude the agreement evidenced by annexure F although she apparently concedes that she signed it as seller and initialled every page. The document provides that the purchase price is R345 000. Clause 8.1 of annexure F confers upon the applicant an option to repurchase the property or buy the shares in K20 within 12 months of date of signature for R425 000.

9 Annexure F also provides in clause 9 that the applicant will continue to occupy the property for twelve months after signature for a rental of R45 000 a year. The rental, annexure F records, was to be paid on date of transfer. At the end of the twelve month period, the applicant had to vacate. However, if the applicant exercised the option, she could stay on in the property if she had delivered guarantees and she payed occupational rental of R6 400 per month.

10 In addition to Annexure F, the opposing respondents claim, the parties also signed a sale of shares agreement and a sale of land agreement to operate, at the election of the applicant, if and when she exercised the option conferred on her by annexure F. The applicant admits her signatures and initiallings on these two documents, which are also formally regular, but says that she had no intention to bind herself to their terms.

11 Algar then decided to sell the shares in K20, which had taken transfer of the property on 20 September 2012, to the third respondent (Flattery). Algar says that the applicant "indicated" that she would not be in a financial position to exercise her option. By sale of shares agreement dated 23 July 2013, Algar sold the shares in K20 to Flattery for R423 950.

12 There is nothing before me to show that the applicant had abandoned her option. Nor is there anything in writing to show that she had indicated that she would not exercise the option.

13 At this stage, the opposing respondents say, the applicant and Jacobs told Du Plessis that they did not even have food on the table. Nevertheless, Flattery did a calculation with the assistance of Du Plessis, the upshot of which was that he was prepared to sell the

property to the applicant for R920 000. The implication is that the applicant was considering this proposal. Du Plessis and Flattery say that out of the goodness of Flattery's heart, Flattery allowed the applicant to remain in the property "subject to payment of rent." But on the respondent's version, the applicant was completely impecunious and it is not suggested that this rent was paid. Nor is it stated what the amount of the rent was to be The idea, they say, was that the applicant would be able to sell the property for more than R920 000 and would be allowed to pocket the difference. They were "bending over backwards", they say, to try to help the applicant. Why they should do so, they do not say.

14 But their alleged largesse did not end there. On the premise that the applicant would repurchase the property for R920 000, Flattery or Du Plessis somehow, on their version, concluded that the amount of R48 865 "would be payable" to the applicant, which one or other of them proceeded to loan to her. While transfer was pending from the applicant to K20, it emerged that the applicant was indebted to a Mr Willemse for R120 000 plus costs. Willemse took judgment and attached the property. To preserve the sale to K20, payment of R164 585 was made (it is not explained by whom) to Willemse.

15 These were not the only amounts paid to the applicant by Du Plessis or Flattery. In total, the opposing respondents paid to the applicant at least, on their version, the sum of R535 850.[1] In addition to the specific amounts I have mentioned, the opposing respondents apparently gave the applicant R13 900 as deposit towards a lease agreement on another property and a total of R22 000 to facilitate the applicant's move from the property to new residential premises.

16 Following the transfer of the property away from the applicant, Bonthuis accounted to the applicant by statement dated 25 September 2012 and despatched the account to the applicant's email address. The applicant, improbably, denies having received the account (or any of the emails sent to her email address) but she must have given Bonthuis her banking details because Bonthuis' statement reflects the amount of R136 500 as having been paid to the applicant *in addition to the R150 000 bridging finance.*

17 The applicant says that she asked Du Plessis why the sum of R136 500 had been paid to her and that Du Plessis said that the payment was "part of the bridging finance". This is most improbable.

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[1] In paragraph 5.11 of the answering affidavit, the amount paid to the applicant is said to be R670 850 but the numbers given for the individual advances only add up to R535 850. I do not know whether there was an error in casting or whether some amounts were omitted from the calculation. This uncertainty is in context of no moment.

The applicant's version is that the bridging finance arrangement was for R150 000, which she received. She must have known that the additional money could only be from the sale of the property and that it was paid to her because the property had been transferred out of her name. Indeed there was no other source from which Bonthuis could have received money on behalf of the applicant. This conclusion is reinforced by the structure of the transaction evidenced by the series of documents put up to me.

18 My conclusion is, I regret to say, entirely destructive of the applicant's general credibility. Her version that she had not intended to transfer the property to K20 must be rejected on the papers. If she had not intended to transfer the property, she would have immediately protested, returned the R136 500 and demanded, as she does now, the re-transfer of the property into her name. She must have known that she could not have her cake and eat it.

19 But that is not the end of the matter. Part of the applicant's case is that the documents she signed were prepared to support a simulated sale of land transaction, designed to conceal the fact that the true underlying transaction was one of loan.

20 A troublesome feature of the opposing respondents' case is the largesse which Du Plessis or Flattery, or both of them, extended to the applicant. In Bonthuis' statement, provision is made for the rental of R45 000, certain fees arising from the bridging finance arrangement and the initial bridging finance advance of R150 000. But no provision at all is made in the statement for the other amounts advanced; in particular I refer in this regard to the sum of R164 585 paid to discharge the applicant's indebtedness to Willemse. It is simply inconceivable that Du Plessis or Algar would have made the applicant a present of the money. The only way in which this advance could be recovered, and then only in part, from the impecunious applicant was by setting it off against the purchase price.

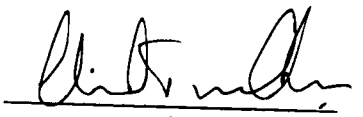
21 Add to this, the extraordinary indulgence of allowing the applicant to remain on the property after her year's lease agreed in the sale of land agreement had expired. No mention seems to have been made from either side regarding payment of the rental which, after the first year, was to be R6 400 per month and then only on certain conditions which the applicant did not, and indeed, to the knowledge of all concerned could not, fulfil. And, even more remarkable: the applicant was paid the amount of R48 865. Why pay this money in *anticipation* of the applicant's finding a purchaser for more than R920 000? Why not set off what on the opposing respondents' version was owed to

them by the applicant? Why in the first place get involved in these tortuous arrangements with a woman of straw from whom you had bought the property at arms' length and for market value?

22 The case reeks of simulated transaction. The probabilities are strong that the applicant, Du Plessis and Flattery were parties to the simulation and that the largesse extended to the applicant was designed to persuade her not to raise the true nature of the transaction against the opposing respondents. But all of this must yield, for present purposes, to my finding that the applicant probably willingly allowed, or acquiesced in, the transfer of the property out of her name. Whatever went before the transfer, when the applicant had to chose between sanctioning or protesting the transfer, she chose to sanction the transfer. She did so by accepting her share of the proceeds of the transfer.

23 The crux of the applicant's case is that the property was transferred away from her without her knowledge and against her will. On the material before me, this cannot be so. Under these circumstances, the requirement for an interim interdict that the applicant must establish a *prima facie* case, even though open to doubt, has not been met. The applicant can therefore not succeed.

24 I make the following order: The application is dismissed with costs.



NB Tuchten
Judge of the High Court
18 November 2014

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