REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 18813/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 3/6/2020 Signature:

LOUIS ADRIAAN DANIEL ROUX	1ST APPLICANT
VEROUX PROPERTIES DEVELOPMENT CC	2ND APPLICANT
and	
CHRISTIAAN JOHANNES PETRUS GROENEWALD	1ST RESPONDENT
COENBOB CONSTRUCTION CC	2ND RESPONDENT
CHARL LOUIS DERCKSEN	3RD RESPONDENT
JACQULENE DERCKSEN	4TH RESPONDENT
REGISTRAR OF DEEDS, PRETORIA	5TH RESPONDENT
E CHAMPION ATTORNEYS	6TH RESPONDENT
HAASBROEK & BOEZAART ATTORNEYS	7TH RESPONDENT
PLANTCON CONTRACT SERVICES CC	8TH RESPONDENT

JUDGMENT

Coram Van der Schyff, J.

Introduction

[1] This application is considered during the National State of Disaster declared by the State President in terms of the Disaster Management Act, No 57 of 2002 and the ensuing extended Covid-19 national lockdown. It was dealt with in accordance with the Urgent Court Directive dated 28 May 2020 issued by the senior Judge of the Urgent Court, Judge D S Fourie. No oral argument was heard. Extensive written submissions were filed and considered.

[2] The applicant does not seek any direct relief against the fifth to the eighth respondents. Interim interdictory relief is sought against the first - and second respondents in relation to immovable property in what shall be referred to as the " Groenewald Property" (GP), and against the third - and fourth respondents in relation to immovable property what shall be referred to as the "Dercksen Property" (DP).

[3] Except for the fact that the two properties are abutting and share a common border, there is no nexus between the first - and second respondents and the third - and fourth respondents, respectively. During March 2016, the applicants entered into a memorandum of agreement with the first - and second respondents regarding the Groenewald Property on the one hand and the third - and fourth respondents regarding the Dercksen Property on the other hand. In terms of these memoranda of agreement the applicants procured the respondents' respective properties, with the aim of further developing it and to open a sectional title register in respect of the properties so procured. The respective memoranda of agreement were subject to various, but different, suspensive conditions.

[4] Despite the applicants' submission that the first four respondents colluded to the detriment of the applicants, the relief sought in relation to the Groenewald Property must be considered separate from the relief sought in relation to the Dercksen Property.

Service

[5] Another aspect that necessitates the separate determination of the relief sought in relation to the respective properties, is the fact that the third - and fourth respondents are represented in this application. An answering affidavit and extensive written submissions were filed on their behalf. The first - and second respondents are, however, not represented in court. In fact, no notice of intention to oppose was filed on their behalf. This immediately begs the question as to whether the application was effectively served on the first – and second respondents to allow this court to come to conclude that the first – and second respondents knew they had to answer a case in court or risk an adverse order being granted against them.

[6] The applicants' case is that good and proper service occurred. In order to serve this application on the first - and second respondents, the application was (i) e-mailed to a firm of attorneys whom the applicants describe as the first respondents' attorneys of record and who previously represented the first - and second respondents; (ii) e-mailed to the first respondent's two last known e-mail addresses as provided by its erstwhile attorney; and (iii) handed to the Sheriff of the Court with the instruction to serve it on the chosen *domicilium* address of the first respondent, which was also the address provided by the respondent's erstwhile attorneys and the second respondent's registered address. It is also submitted in argument that the court should take cognisance of the fact that the application was served on the sixth respondent, being the transfer attorney for the first and second respondents. As a result, it is surmised, that it is reasonable to find that the first and second respondents have knowledge of this application.

[7] It was submitted on behalf of the applicant that the erstwhile attorneys still represented the first – and second respondents as late as March 2020. The first respondent's erstwhile attorneys, however, communicated via e-mail with the applicants' attorney of record and informed the latter in two e-mails respectively dated 15 May 2020 and 18 May 2020, that although they acted for the first respondent in previous matters, they don't hold instruction to act on his behalf in this matter. They also drew the applicants' attorney's attention to the provisions of rule 4 of the Uniform Rules of Court and stated that service on their office would be irregular, even if they acted on behalf of the respondent.

[8] Rule 4(1)(aA) of the Uniform Rules of Court provides that: "Where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings". In *BHP Billiton Energy Coal South Africa v Minister of Mineral resources and Others*[1] the court said that it is apparent that rule 4(1)(aA) applies to proceedings already instituted, so that it applies in effect to ancillary and interlocutory applications. Ploos van Amstel J explained in *ABM Motors v Minister of Minerals and Energy and Others*[2] that in the context of the Uniform Rules of Court, an attorney of record is one who has formally placed himself on record as representing a party in legal proceedings before the court. It is thus evident that although the applicants seek to rely on the e-mail delivery of the notice of motion and founding papers to the first respondent's erstwhile attorney as service of the documents initiating the application, that it did not constitute service as provided for in rule 4.

[9] Although Annexures 'F1' and 'F2' to the service affidavit filed on behalf of the applicants are copies of e-mails sent on 18 May 2020 to the last known e-mail addresses provided by the first respondent's erstwhile attorney, there is no evidence before this court that (i) these are indeed the first respondent's active e-mail addresses, and (ii) that the first respondent received and read these e-mails.

[10] Annexure 'F3' to the service affidavit is an unsigned return of non-service wherein the Deputy Sheriff states that despite three attempts the process could not be served as the first respondent could not be found at the provided address. Rule 4(1)(a) prescribes that service of any document initiating application proceedings shall be effected by the sheriff in any one of a number of prescribed ways. Had the sheriff but left a copy of the documents at the first respondent's chosen *domicilium*, service would have been effected in terms of rule 4(1)(a)(iv).

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[1] 2011 (2) SA 536 (GNP) at 542F-543C. Approved on this point, on appeal in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) at para 29.

[2] 2018 (5) SA 540 (KZP) at para 26.

[11] Consideration must be given to the fact that the issue of service is currently being considered in relation to an urgent application, and in this regard rule 6(12)(a) of the Uniform Rules of Court provides that in urgent applications the court, or a judge, may dispense with the forms and service provided for in the rules. Despite the relaxation of prescriptions in relation to service that may be allowed when the court is approached on an urgent basis, the court still needs to be convinced that effective service occurred. Numerous attempts to serve does not in itself indicate that a respondent is informed of the proceedings instituted against it, and this is the reason for the existence of rule 4(2) of the Uniform Rules of Court. The principle of *audi et alteram partem* is a cornerstone of our judicial system, and with the exception of applications brought *ex parte* an application cannot be decided in the absence of a party where the court is not convinced that such party was apprised of the proceedings.

[12] In the current application, in view of the position set out above, I am not convinced that the applicants proved satisfactory that the first- and second respondents are in default by not opposing or appearing in this application. In the result, no order will be granted against them. As far as the first- and second respondents are concerned the application is removed from the roll.

Urgency

[13] It is trite that an applicant who approaches the court on an urgent basis, needs to convince the court that the relief sought by the applicants seen in context with the facts of the matter merit the case to be dealt with on an urgent basis. This determination is made on a case by case, context specific basis.

[14] The applicants seek interim interdictory relief in that they seek an order directing the fifth respondent to register a *caveat* against the title of the Dercksen Property, prohibiting the registration of transfer of the property pending the final adjudication of an action to be instituted against the third and fourth respondent within a period of 25 days from the date ordered by the court or for the institution of arbitration proceedings instituted within 25 days from the relevant parties agreeing as to the

identity of the arbitrator, the arbitration process, the rules of arbitration, the arbitration venue and the arbitration costs. In the alternative a prayer is sought that the seventh respondent, being the attorney currently overseeing the registration of transfer of the Dercksen property to the eight respondent be ordered to preserve the total sale proceeds of any transaction involving the Dercksen Property pending the final adjudication of an action or arbitration to be instituted as described.

[15] The applicants intend to demand transfer of the Dercksen Property as specific performance in terms of the memorandum of agreement and submit that they will not be afforded substantial redress in due course if the property is transferred to the eighth respondent or any other new purchaser. Having considered the timeline of events as set out in the applicants' founding and replying papers, and highlighted in the written submission, the one e-mail that stands out as far as the question pertaining to the urgency of this application is concerned, is attached as annexure "LAD 13.1" to the applicants' replying affidavit. In this e-mail, dated 24 February 2020 the seventh respondent indicated that the transfer of the property would be held in abeyance until 31 March 2020 for legal proceedings to be instituted. If proceedings were not instituted by then, the transfer would be attended to without delay.

[16] According to the applicants' founding papers they realised by 17 March 2020 that the matter would not be settled and consulted with their attorneys on 23 March 2020 to launch an urgent application. National Lockdown was declared on 23 March 2020 and as a result the immediate urgency abated since the lodgement of documents in the Deeds Office was kept in abeyance until 31 March 2020.

[17] The Respondent's version is that the applicants were "sluggish and their urgency is self-created." They submit that the seventh respondent informed the applicants that the respondents intended to proceed with the sale with the eighth respondent as early as 18 February 2020. On 10 March 2020 they confirmed the instructions to proceed with the transfer, and this would be the date on which the urgency would have arisen. Eight court days lapsed between 10 March 2020 and 23 March 2020.

[18] However, if cognisance is taken of the fact that the seventh respondent agreed that the transfer of the property would be held in abeyance until 31 March 2020, no need

existed for the applicants to seek relief prior to this date. Then the National Lockdown ensued, and the applicants rightfully did not attempt to approach the court before an indication was given that the fifth respondent would again entertain the registration of transfer. The offices of the fifth respondent reopened on 13 May 2020 with a reduced capacity. The application was launched on 14 May 2020 and served on the respective respondents. The applicants provided the respondents with ample time to answer to their claim.

[19] In view of the nature of the relief sought in prayer 3 of the notice of motion, and the timeline preceding the launch of the application as stated by the applicants, I am of the view that the applicants made out a case that they will not receive substantial redress if this matter is to be heard in the normal course laid down by the rules. The application is thus considered as an urgent application.

Nature of the relief sought

[20] The primary relief sought in relation to the third – and fourth respondents is contained in prayer 3 of the notice of motion and reads as follow:

"That the Fifth Respondent is ordered and directed to register a caveat *against the title deed of the property known as Erf 79, Villeria, Gauteng Province held under deed of registration …. Prohibiting the registration and transfer of the property pending the final conclusion of any process set out under order 4,* infra*."*

[21] The respondents submit in their answering affidavit that although the applicants claim to seek interdictory relief, they are in actual fact seeking a final order for the registration of a *caveat.* They submit further that "the *caveat,* constituting a real right in favour of the Applicants, is too broad. The Court can grant an order interdicting the transfer, the *caveat*, however, is an unnecessary vehicle to achieve the Applicant's intention." It is evident that the respondents did not intend this submission to constitute a concession, but that it should rather be taken as an incident of clumsy formulation, because the respondents continue in paragraph 6.3 of the answering affidavit by stating" Apart from the fact that we vehemently deny

that the Applicants are at all entitled to any order against us, we submit that the registration of the *caveat* does not constitute interim relief for the following reasons..". The respondents' argument boils down to the fact that the *caveat* effectively vests the applicant with a limited real right in the property, dispossessing the respondents of the right to dispose the property.

[22] The respondents lost sight of the aim of the relief sought. It is indeed to prevent the transfer of the property into the name of another entity, pending the adjudication of the dispute between the parties. As a result, it is indeed interim interdictory relief sought.

Requirement for interim relief

[23] The requirements for the granting of interdictory interim relief are well established. They are:- (a) a prima facie right, though open to some doubt; (b) a well-grounded apprehension of irreparable harm, if the interim relief is not granted and final relief is granted; (c) the balance of convenience should favour the granting of the interim interdict; and (d) no alternative remedy. These requirements should be considered holistically, and none of it must be considered in isolation.

(i) *Prima facie right*

[24] The applicants submit that they have a claim for specific performance in terms of the memorandum of agreement, alternatively a claim for undue enrichment in the event that the memorandum of agreement is declared null and void.

[25] The respondents conceded that a memorandum of agreement was concluded between the parties but submit that the agreement was made subject to two suspensive conditions (i) Clause 2.1.2 of the agreement which provides that the second applicant had to obtain guarantees from a suitable financial institution within 160 days after the signature of the agreement; (ii) Clause 19 of the agreement which provides that the City of Tshwane must approve the opening of a sectional title register over the Dercksen property.

[26] The second applicant failed to provide the guarantees. As a result, the suspensive condition was not fulfilled and accordingly the contract came to an end and the respondents were entitled to sell their property to the eighth respondent. The second applicant's right to claim specific performance ceased to exist.

[27] The applicants in turn allege a variation of the agreement. They contend that the respondents waived the condition contained in clause 2.1.2. They also submit that clause 19 suspended the whole of the agreement. However, it should be stated from the onset that clause 2.1.2 reads that approved bank guarantees must be delivered for the amount of R 170 000,00 **within 160 days of signing of the contract** "binne 160 dae na ondertekening van die ooreenkoms deur beide partye".

[28] Clause 28 of the agreement contains a standard non-variation clause. As a result, the parties agreed that no amendment of the agreement is valid unless such an amendment is reduced to writing and signed by both parties. The respondents concede that such an amendment was negotiated and suggested in an e-mail dated 24 July 2016, but they insisted on a written amendment from the applicants and the applicants never responded to the request.

[29] The e-mail of 24 July 2016 is attached to the answering affidavit. In the e-mail dated 24 July 2016, at 18h30, it was stated that the applicants were required to pay the remainder of the purchase price over to attorneys within 160 days of the contract being signed, and the respondents were requested to waive the condition that R170 000,00 must be paid in with the attorneys within 160 days of signing the contract. It was contended on behalf of the applicants that they would then use the money to finish the building project to the house. The third respondent replied the same day in the following manner: "Kan jy die dag en tyd (verkieslik na 17h00) gee dat ons bymekaar kan kom om die wysiging aan te bring."

[30] It is common cause that the agreement was not amended in writing. It is however necessary to have regard to the fact that clause 2.1.2 did not in fact require that an amount of R170 000,00 be paid in with the attorneys but provided that the amount be secured by bank guarantees being delivered. The reply of the third respondent

can thus not be regarded as an agreement to vary clause 2.1.2 of the agreement, as submitted by the applicants.

[31] The applicants referred the court to *Brisley v Drotsky*[3] , a case dealing with a contract between a lessor and a lessee, where Cameron JA held- "where a contracting party, strong or weak, seeks to invoke the writing only requirement in deceit or to attain fraud, the courts will not permit it to do so".

[32] It is the applicants argument that this issue must be considered against the background that the second dwelling on the property, which was meant to constitute the sectional title unit that was being sold, was duly completed 16 months after the guarantees were due during December 2017 and that the respondents for the first time stated their legal position that the condition recorded in clause 2.1.2 of the memorandum of agreement has not been fulfilled, as a result whereof the memorandum of agreement is null and void.

[33] The current contract is however not a lease contract. The memorandum of agreement has at its core the alienation of immovable property. Section 2(1) of the Alienation of Land Act, No. 68 of 1981. This section prescribes that the alienation of land needs to be contained in a deed of alienation signed by the parties. In this regard the Supreme Court of Appeal held in *Just Names Properties 11 CC and Another v Fourie*[4] that the whole of the agreement must be in writing and signed by both parties. The SCA likewise held in *Kovacs Investments 724 (Pty) Ltd v Marais,*[5] a case dealing with the exact question before this court namely whether an agreement of sale in respect of a portion of certain fixed property had lapsed due to non-fulfilment of a suspensive condition in the written agreement, "provided the obligations under a written agreement are to be complied with in full, performance of one of the obligations in a manner different than stipulated in the written agreement, and accepted by the other party, would be considered as sufficient, substantial, compliance and the obligation as having been discharged... the fact of

[3] 2002 (4) SA 1 (SCA) at para [90].
[4] 2008 (1) SA 343 (SCA).
[5] 2009 (6) SA 560 (SCA).

such performance may be proved by extrinsic evidence" The court then referred to *Van der Walt v Minnaar*[6] *Horwitz J* held that where the provisions of a written agreement are altered in the sense that a provision therein is deleted and an oral (or tacit) obligation substituted in its place, then no contract exists which covers both the original agreement and the amendment. The amended agreement, therefore, would not comply with the provisions of the legislation which required an agreement for the sale of land to be in writing. The alleged tacit agreement would be contrary to the provisions of s 2(1) of the Alienation of Land Act.

[34] Clause 2.1.2 of the memorandum of agreement constitute a material term of the agreement concluded between the applicants and the respondents.

[35] Clearly, even if the parties agreed to an oral waiver of the suspensive condition of the memorandum of agreement, a position not supported by the evidence before the court, such amendment or alteration would be contrary to the provisions of section 2(1) of the Alienation of Land Act and to the non-variation clause in the agreement, as it is not in writing. It follows that the written agreement lapsed at the expiry of the 160 days provided for the presentation of bank guarantees. As a result, the applicants are not entitled to claim specific performance and the applicants did not succeed in making out a case that they have a *prima facie* right to the relief claimed.

[36] The applicants stated in their founding affidavit that they have a claim for specific performance and a claim for damages against the third- and fourth respondents. In the heads of argument, it is additionally submitted that they have a claim for undue enrichment. It has already been established that the applicants have not evinced a *prima facie* right in regard to a claim for specific performance. Neither a claim for damages nor a claim for unjust enrichment will be adversely affected if the property is transferred to the eighth respondent, or any other purchaser. It would also not be fair and just to, as a matter of speaking, hold the eighth respondent hostage by ordering that a *caveat* be registered over the property. It is thus necessary to consider the alternative relief prayed for by the applicants. In prayer 5 they pray for an order that the seventh respondent be ordered to preserve the total sale proceeds

[6] 1954 (3) SA 932 (O).

of any transaction involving the Dercksen properties pending the final adjudication of an action / or arbitration proceedings instituted by the applicants against the respondents.

Irreparable harm and balance of convenience

[37] If it is accepted, for argument sake, that the applicants will be able to prove a claim for damages and/or a claim for undue enrichment, the obstacle to be successful in this application is that no case is being made out to prove that the applicants will suffer irreparable harm if the interim relief is not granted, and the final relief is ultimately obtained. It is not alleged that the respondents will dissipate or waste the proceeds of a sale, or that they are men of straw who would not be able to meet any order granted in the action to be instituted. This also causes the balance of convenience to favour the respondents.

ORDER

In the result the following order is made:

1. The application is held to be urgent and the applicant's non-compliance with the requirements pertaining to service and time periods is condoned.
2. No order is made in regard to prayers 2, 4 and 5 as far as they refer to the first- and second respondents and the Groenewald property.
3. The application as far as it relates to the first and second respondents and the Groenewald Property is removed from the roll.
4. Prayers 3, 4 and 5 as far as it relates to the third and fourth respondents and the Dercksen Property, are dismissed with costs.

E van der Schyff
Judge of the High Court