

SOUTH AFRICA / JUDGMENT

Fatmols Lodges Proprietary Ltd v Botha and Others (017800/2023) [2024] ZAGPJHC 30 (17 January 2024) [2024] ZAGPJHC 30

COURT

South Gauteng High Court, Johannesburg

BEFORE

B.C. Wanless

CASE / FILE NUMBER

017800/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE NO:

017800/2023

In the matter between

FATMOLS

LODGES PROPRIETARY LTD Applicant

And

JEAN

BOTHA

First Respondent

REGISTRAR

OF DEEDS

Second Respondent

THE STANDARD BANK OF

SOUTH

AFRICA LTD

Third Respondent

JUDGMENT

WANLESS AJ

Introduction

- [1] In this matter, Fatmols Lodges Proprietary Limited (“the Applicant”) seeks certain interdictory relief against one Jean Botha, adult female (“the First Respondent”). The nature of that interdictory relief will be dealt with more clearly at the appropriate stage in this judgment. The Registrar of Deeds is the Second Respondent and the Standard Bank of South Africa is the Third Respondent. Neither the Second nor the Third Respondents opposed the relief sought by the Applicant in the present application.
- [2] It was always the intention of this Court to deliver a written judgment in this matter. In light of, inter alia, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered ex tempore. Once transcribed, it will be “converted”, or more correctly “transformed”, into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an ex tempore basis.

The relief sought by the Applicant

- [3] As will become clear later in this judgment the nature of the interdictory relief sought by the Applicant and the basis therefor is far from straightforward. In the premises, it is worthwhile, at the outset, to avoid any confusion whatsoever, to set out herein, verbatim, the relief sought by the Applicant in its Notice of Motion which reads as follows:
- [1] The purposes of this Application is to put an interdict or caveat on the immovable property at Erf Portion one of Erf 1230 Westdene

Township.

- [2] Restrain the first Respondent from encumbering the property at Erf Portion one of Erf 1230 Westdene Township with mortgage bonds and loans pending finalisation of the outcome of court action under case number 2023/010330.
- [3] Restrain the first Respondent from putting the property at Erf of Erf 1230 Westdene Township on sale, and selling the property at Erf Portion one of Erf 1230 Westdene Township pending finalisation of the High Court action under case number 2023/010330.

- [4] Ordering that should the first Respondent oppose the relief sought herein that he/she pays the costs of this Application at attorney and client scale.
- [5] That the Applicant is grant such other or alternative relief as the Court may deem fit in the circumstances.
- [4] The abovementioned relief was thereafter refined by the handing in of a Draft Order encapsulating paragraphs 2, 3 and 4 of the Notice of Motion, as set out above. On behalf of the First Respondent, an order was sought dismissing the application and ordering the Applicant to pay the costs thereof on a punitive scale.

The facts

- [5] The facts which are either common cause between the parties or which cannot be seriously disputed by either party are the following:

5.1 on 9 December 2020 the Applicant and the First Respondent entered into a written agreement of Purchase and Sale (“the agreement”) in respect of an immovable property situated at Portion One of Erf 1230 Westdene Township (“the property”);

5.2 during or about January 2023 and pursuant to the entering into of the agreement as aforesaid a non-refundable deposit was paid by the Applicant to the First Respondent and a further payment of R700 000.00 was paid in January 2023. However, the balance of the purchase price was not paid timeously in terms of the agreement;

5.3 on 25 January 2023 a letter was addressed by the First Respondent to the Applicant informing the Applicant that it was to remedy its breach within 10 days in terms of clause 13 of the agreement (that is by no later than 7 February 2023);

5.4 on 9 February 2023 a further letter was addressed, by the First Respondent to the Applicant, wherein the Applicant was given a further extension, being to the 13th of February 2023, to pay the balance of the purchase price, failing which the First Respondent would cancel the agreement;

5.5 on the 30th of March 2023, a final letter was addressed to the Applicant’s attorneys of record cancelling the agreement in terms of subclause

13.2 of the agreement;

5.6 the First Respondent is the registered and lawful owner of the property;

5.7 the First Respondent has expressed a wish to take up residence in Australia and to sell the property;

5.8 on or about the 7th of February 2023 the Applicant issued a Combined Summons in this Court under case number 2023/010330 which was served upon the First Respondent on the 9th of February 2023; and

5.9 in terms of the aforesaid Combined Summons (“the action”) the Applicant is claiming payment from the First Respondent in the sum of R806 270.65, together with interest thereon and costs, based on a cause of action of unjust enrichment.

The Applicant’s case

[6] In broad summary, the case for the Applicant may (to the very best of this Court’s ability) be described, in the most sympathetic light as possible and in an attempt to try and dispose of a considerable amount of confusion and legal “clutter”, as being the Applicant seeking an interim interdict, pending the finalisation of the action, based on the premise that it will suffer irreparable harm if the First Respondent does in fact sell the property and/or take up residence in Australia. In other words, the Applicant seeks an interim anti-dissipation interdict.

The first respondent’s case

[7] In the first instance the First Respondent raised two (2) points in limine, namely that the agreement contained both an arbitration and a non-variation clause. The First Respondent also submitted that, insofar as the Applicant purports to rely on section 29A of the Alienation of Land Act 68 of 1981 (“the Act”) this section does not apply in the present matter.

[8] It was further submitted on behalf of the First Respondent that in terms of Section 25 the Constitution the First Respondent should not be deprived of her right to her property in this matter. Finally, it was pointed out, during the course of argument, that not only were there material contradictions in the Applicant’s own affidavits but it was submitted that the Applicant had failed to satisfy the requirements for this Court to grant any type of an interdict.

The merits

[9] With regard to the first point in limine taken by the First Respondent, it is trite that a court has a discretion, to be exercised judicially, whether to enforce the arbitration clause or allow the litigation to proceed before it. In light of, inter alia, the nature of the relief sought; the stage which this application has already reached (with the enormous amount of costs which must have been generated thereby) and the final decision arrived at by this Court in respect of the present matter, this Court declines to exercise its discretion in favour of the Applicant. It must follow that this point in limine is dismissed.

[10] Prima facie the second point in limine raised by the First Respondent, namely that in light of the fact that the agreement contains a standard non-variation clause the entire application, based as it is upon an oral variation of a written agreement, must fail, is a good one and should be upheld. Nonetheless, in order not to burden this judgment unnecessarily and in light (once again) of the decision ultimately reached by this Court, this Court declines to deal herewith but elects rather to deal with the crux of this matter, as set out later in this

judgment.

[11] Aligned hereto, in order to circumvent the fact that the oral agreement relied upon by the Applicant (both in this application and in the action) it was necessary for the Applicant to rely upon, *inter alia*, subsections 28(1); 2(1); 24(1)(c) and section 10 of the Act. As dealt with earlier in this judgment[1] it is submitted by the First Respondent that in light of the fact that the Applicant is a juristic person and the purchase price

exceeds that which is provided for in subsection 29A(5)(a) of the Act that the provisions of subsection 28(1) of the Act are not applicable to the agreement in the present matter. In the premises, *prima facie*, the Applicant cannot rely thereon and has no cause of action either in the action or in respect of the interdictory relief sought arising therefrom. However, once again, simply for practical purposes, this Court declines to deal therewith, thereby not burdening this judgment and, rather, electing to deal with what this Court perceives to be the real crux of this matter.

[12] The real crux of this matter is the nature of the relief sought by the Applicant and whether or not the Applicant has satisfied, both in

fact and in law, the requirements and onus incumbent upon her to enable this Court, in its discretion, to grant that relief. In this regard the Applicant seeks an interdict pending the finalisation of the action instituted by the Applicant against the First Respondent.

[13] As set out at the commencement of this judgment the nature of the relief sought by the Applicant is confusing. From a reading of the Applicant's Notice of Motion it is the opinion of this Court that the nature of the relief sought can only be construed to be that of an interim interdict. However, on behalf of the First Respondent, it was submitted that the relief sought in that Notice of Motion was final. As correctly pointed out by Counsel for the First Respondent the relief sought by the Applicant in her Founding Affidavit deals with an interim interdict but in her Replying Affidavit she clearly states

that she "... meets all the requirements for the final interdict to be granted by this Honourable Court".

[14] Both in his Heads of Argument and during his argument before this Court the legal representative for the Applicant confused the requirements for an interim and final interdict. Further, it was unclear therefrom as to which, or upon what basis, the Applicant sought to convince this Court to exercise its discretion (in the case of an interim interdict). In light thereof (together with the earlier observations of this Court pertaining to the relief sought in the Notice of Motion) and the general trend of this judgment to adopt the most benevolent attitude possible towards the Applicant, this Court will approach the matter on the basis that the Applicant only had to prove the requirements for an interim interdict. In the premises, the threshold for obtaining relief was somewhat lower.

The law

[15] Although trite, it is worth repeating that the requirements for an interim interdict and thus which the Applicant has to satisfy, on the application papers before this Court, are the following[2]:

15.1 a prima facie right, even though it may be open to some doubt;

15.2 a well-grounded apprehension of irreparable harm, if the interim relief is not granted and the ultimate relief is eventually granted;

15.3 the balance of convenience for the granting of the interim relief has to favour the applicant (this is often equated with the question of prejudice); and

15.4 no other satisfactory remedy is available to the Applicant.

[16] It is further trite that the Applicant needs to satisfy all four (4) requirements. Failure to satisfy one requirement will result in the court failing to grant the relief sought.

[17] It is also trite (but relevant in this matter) that in motion proceedings an applicant must make out his or her case in the Founding Affidavit and it is not permitted to do so in reply. This judgment will not be burdened by reference to the countless judgments in respect thereof.

[18] As set out in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[3] in application proceedings where there is a genuine or a bona fide dispute of fact an applicant can only be granted relief when the facts, as averred by the applicant and admitted by a respondent, justify such an order.

[19] The real crux of this matter is the real purpose of the application. In other (far more simple) words, why was the application brought in the first instance and what are the correct principles of law applicable thereto?

[20] The answer to the foregoing is simply that the Applicant seeks an interim interdict preserving an asset of the First Respondent, namely the property, pending the finalisation of the action. In other words, the nature of the interdict sought by the Applicant is what has become known as an “anti-dissipation” interdict. Regrettably, neither of the legal representatives addressed this Court thereon, nor was there any reference to any relevant authorities included in respect thereof in their Heads of Argument.

[21] In the fairly recent matter of *VBP v KMP and Another*[4] the High Court of the Eastern Cape Local Division (Bhisho), on the 30th of August 2022, delivered an extremely useful judgment in respect of the law pertaining to anti-dissipation interdicts.

[22] At paragraph [22] of VBP the learned Acting Judge notes that the requirements that must be satisfied to obtain an anti-dissipation interdict are the same for any other interim interdict, provided that it has been held that the interdict is sui generis[5].

[23] Later in the same judgment it was held that[6]:

“The nature and effect of the anti-dissipation interdict is to establish or show a certain state of mind of the respondent, regarding his assets. The crucial consideration is that the debtor is in some way getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors. Accordingly, the anti-dissipation interdict is available to petitioners who seek to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in those assets. This is not a usual case where the purpose is to preserve an asset which is an issue between the parties.

Here, the petitioners lay no claim to the assets in question.”

The principles as enunciated in this paragraph apply equally to the present matter.

[24] In *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd and Others*[7] the Supreme Court of Appeal (“SCA”) reaffirmed the approach in *Knox D’Arcy Ltd and Others v Jamieson and Others* that the remedy provided by an anti-dissipation interdict is available where an applicant has shown on the established basis for an interim interdict (a) a claim against the respondent; and (b) that the respondent is concealing or dissipating assets with the intent of frustrating the claim[8].

[25] Finally, in this Court, in the matter of *RSA v RD*[9], Adams J provided a synopsis of the locus classicus judgment on anti-dissipation interdicts, namely *Knox D’Arcy*, when the learned judge stated, at paragraphs [10] and [11]:

“[10] The applicant’s case is based on an anti-dissipation interdict, which would require her to show that the first respondent is likely to spirit away the proceeds from his sale of his property. In Knox D’Arcy Ltd and Others v Jamieson and Others, Grosskopf JA discussed the nature and effect of the so-called anti-dissipation interdict and found that what is required is for the applicant to show a certain state of mind of the respondent, ie that the debtor is getting rid of funds or is likely to do so, with the intension of defeating the claims of creditors. Grosskopf JA goes on to say that this interdict is sought-

“By the petitioners ... to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets ... It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. Here, the petitioners lay no claim to the assets in question.”

[11] Grosskopf JA then turns to the effect of the interdict and finds that it is to “prevent the respondent from freely dealing with his own property to which the applicants lay no claim”.

Conclusion

[26] The Applicant’s entire case is based upon an alleged oral agreement in terms of which a total sum of R806 270.65 was paid by the Applicant to the First Respondent and by which amount the First Respondent has been unjustly enriched. In its Founding Affidavit the Applicant provides absolutely no details in respect thereof and provides no basis therefor. Any oral agreement between the parties is clearly denied by the First Respondent. In its Replying Affidavit the Applicant attempts to make out its case for the first time pertaining to the alleged oral agreement by providing a description of the date when the alleged oral

agreement took place; the identity of the parties who were allegedly present; the place where the agreement allegedly took place and by putting up as an annexure thereto a confirmatory affidavit by an employee of the Applicant.

[27] Not only is it incumbent for an applicant to make out its case in its founding papers and not in reply[10] but it is the opinion of this Court that in this matter the Applicant, even in reply, has not gone far enough. No details

whatsoever are set out pertaining to, inter alia, the material terms of the alleged oral agreement.

[28] For the reasons set out above the application would have to be dismissed. It is clear therefrom that the Applicant has not made out even a prima facie case against the First Respondent.

[29] Even if incorrect in this regard (that is the applicability of the principle that the Applicant should not be permitted to make out a case in reply), it is clear that there is a genuine or bona fide dispute of fact, on the application papers before this Court, in respect of the same alleged oral agreement. This being the case the Plascon-Evans test must apply and there is no reason why this Court should not accept the version of the First Respondent that no such oral agreement was ever entered into. In the premises, once again, the application must fail.

[30] In addition to the foregoing, as correctly pointed out by Counsel for the First Respondent, there are material contradictions in the Applicant's Founding Affidavit. Paragraph 19 of the Founding Affidavit contradicts the contents of paragraph 20 thereof. The Applicant alleges in paragraph 19 that "the first payment was R700 000.00" yet, in paragraph 20, it is alleged that "applicant earlier paid an amount of R106 270.65". Also, the "proof of payment" that the Applicant attached as Annexure E to its Founding Affidavit is dated 10 December 2020 which is prior to the date of 28 October 2022 which the Applicant refers to in paragraph 19. In the premises, the Applicant could not have paid the amount of R700 000.00 "first". It was therefore submitted on behalf of the First Respondent that the Applicant is not being truthful as the Applicant changes its version in these paragraphs regarding which payment was allegedly made first.

[31] What is of paramount importance in this matter is that being an anti-dissipation interdict, a sui generis interim interdict, the Applicant has placed no evidence whatsoever before this Court that the First Respondent is getting rid of funds or is likely to do so with the intention of defeating the claims of creditors. The Applicant's founding papers are devoid of any such information whatsoever. In fact, the extent of the allegations are simply that the First Respondent wishes to sell the property and relocate to Australia. It is alleged that the Applicant will have no way to recover its money from the First Respondent. These broad allegations fall well short as to what is required to satisfy the requirement of an anti-dissipation interdict and those of an interim interdict in our law. Once again, the application must be dismissed.

- [32] In conclusion, the Applicant has also failed to satisfy any of the requirements for an interim interdict. Of course, the failure to satisfy even one would have been sufficient for this Court to refuse to grant the relief sought.
- [33] It should be clear from that stated above that the Applicant has failed to prove a *prima facie* right which would enable this Court, in its discretion, to grant the relief sought. Allied thereto, the Applicant has provided no details whatsoever as to why it would suffer irreparable harm if the interim relief was not granted. Clearly the balance of convenience favours not granting the interim interdict. As to an alternative remedy the Applicant may avail itself of the provisions of Rule 47 in respect of security for costs. Of course, should circumstances change and facts present themselves whereby the First Respondent is clearly concealing assets then access to the courts is always available to the Applicant.

Costs

- [34] It is trite that costs fall within the general discretion of the court. Moreover, it is also trite that costs generally follow the result unless unusual circumstances exist. No such circumstances have been brought to the attention of this Court.
- [35] In this matter, it is clear that the application must be dismissed and that the Applicant should be ordered to pay the costs. The only real question for this Court to decide is the scale of those costs.
- [36] Pertaining thereto, the First Respondent has asked this Court to make an order that the Applicant pay the costs of this application on the scale of attorney and client. It must be noted, in the first instance, that the Applicant, in its Notice of Motion (paragraph 4 thereof) sought an order that the First Respondent pay the costs of the application on the scale of attorney and client. Hence, from the very outset, the Applicant had elected to “raise the stakes” in the litigation (despite the hopeless nature of its case, dealt with hereunder).
- [37] Perhaps more relevant, when opposing the relief sought by the Applicant the First Respondent, in her prayer to her Answering Affidavit, seeks an order that the application be dismissed with costs on the attorney and client scale. In the premises, with the filing of the Respondent’s Answering Affidavit (during or about March/April 2023) the Applicant (or more pertinently the Applicant’s attorneys) were well aware not only of the First Respondent’s grounds of opposition to the relief sought by the Applicant but also of the fact that a punitive costs order would be sought against the Applicant.
- [38] Undeterred, the Applicant proceeded to file its Replying Affidavit and set the matter down for hearing on the Opposed Motion Court Roll. All of this resulting in both parties incurring great legal costs.

[39] It is clear from the contents of this judgment that this application was a “non-starter” and had absolutely no prospects of success. Even adopting the most benevolent attitude towards the application papers before it and in respect of the case presented on behalf of the Applicant, this Court could not find for the Applicant on a single point. On the other hand, the First Respondent (other than the point in limine raised in respect of the arbitration clause) was justified in relying upon every point of law and fact she raised in opposition to the relief sought. In addition, thereto, this application has only added to the onerous workload of this Court and taken up the valuable resources thereof.

[40] In the premises (and whilst this Court is acutely aware of the Applicant’s constitutional right to access to the courts) it would not be correct if this Court, taking all of the above factors into account, particularly the fact that the First Respondent should not be out of pocket, did not, in the exercise of its discretion, order the Applicant to pay the costs of this application on the scale of attorney and client.

Order

[41] This Court makes the following order:

1. The application is dismissed.
2. The Applicant is to pay the costs of this application on the scale of attorney and client.

B.C. WANLESS

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

Date of hearing: 30 August 2023

Date of ex tempore judgment: 19 December 2023

Date of revised (written) judgment: 17 January 2024

Appearances

On behalf of the Plaintiff: T. Mukwani (Attorney)

Instructed by:

T Mukwani Attorneys

On behalf of the First Defendant: Adv. P. Van Niekerk

Instructed by:

Phillip Silver Mathura Inc.

- [1] Paragraph
- [7] *ibid*
- [2] Webster v Mitchell 1948 (1) SA 1186 (W)
- [3] 1984
- (3) SA 623 (AD)
- [4] (247/2019)
- [2022] ZAECBHC
- [5] Knox D'Arcy Limited and Others v Jamieson and Others 1995 (2) SA 579 (W) at 600B/C
- [6] At Paragraph [24]
- [7] (835/2020)
- [2021] ZASCA 126 (29 September 2021)
- [8] VBP(*supra*) at paragraph [37]
- [9] Unreported judgment, case number 2980/2007, delivered on 22 March 2022
- [10] Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) 635H-636C
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