

SOUTH AFRICA / JUDGMENT

Fulsome Properties (Pty) Ltd v Selepe and Others (14001/2021) [2021] ZAGPPHC 196 (6 April 2021)

[2021] ZAGPPHC 196

COURT

North Gauteng High Court, Pretoria

BEFORE

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CASE / FILE NUMBER

14001/2021

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NUMBER: 14001/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

DATE: 6

APRIL 2021

In the matter between

FULSOME PROPERTIES

(PTY)

LTD

APPLICANT

(Registration

Number:[...])

and
FIONA GONTSE
SELEPE
FIRST RESPONDENT
LENTSE INVESTMENTS
(PTY) LTD
SECOND RESPONDENT
(Identity Number:[...])
THE REGISTRAR OF
DEEDS, PRETORIA
THIRD RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] This is an urgent application brought by Fulsome Properties (Pty) Ltd (“the applicant”). The application is opposed by Lentse Investments (Pty) Ltd (“the second respondent”). The first and third respondents did not file a notice to oppose.
- [2] The applicant initially sought relief as incorporated in Part A, B and C of the notice of motion, however the applicant has now requested that part B and C be postponed.

The relief sought by the applicant is as follows:

“1.1. Part A – Urgent Interdictory Relief: -

- a) To interdict and restrain the first and second respondents from communicating and interfering in any manner whatsoever with the applicant’s tenant/s residing at the property situated at UNIT [...] (SECTIONAL TITLE SCHEME NUMBER: [...]), which is more commonly known as UNIT [...], [...] & [...] STREETS, MUCKLENEUK (‘unit [...]’), and the tenants situated at the property UNIT [...] (SECTIONAL TITLE SCHEME NUMBER: [...]), which is more commonly known as UNIT [...], [...]STREET, [...], [...] (‘unit [...]’).
- b) An interdict prohibiting the second respondent from taking transfer of the property situated at unit [...] pending the outcome of Part B to the application.
- c) An interdict prohibiting the first respondent from transferring the property situated at unit [...] to any other person pending the outcome of Part B and C to the application.
- d) An interdict restraining the first and second respondents from continuing to deal or to trade with unit [...] or Unit [...] in any respect, pending the outcome of Part B and C to the application.
- e) Compelling the second respondent to return to the applicant a copy of the key set it

had made in respect of the property situated at unit [...]

- f) The first and second respondents be ordered to pay the costs of the urgent application on an attorney and client scale.

1.2. Part B – Declarator: -

- a) To be postponed for the determination of the rights of the parties in relation to the sale and transfer of the property situated at unit [...] in the ordinary cause.

1.3. Part C – Application to compel Specific performance: -

- a) To be postponed for enrolment in the ordinary course.”
- [3] The crisp question is whether the applicant’s right to possession, use and enjoyment of the property situated at unit 23 Jacqmar, trumps the rights of the second respondent in respect to the same property.

BACKGROUND

- [4] The first respondent is the registered owner of the properties situated at unit [...] and at unit [...].

- [5] On 1 October 2020, the applicant entered into a written purchase and sale agreement in respect of unit [...] with the first respondent. The property was sold to the applicant for the purchase

price of R300 000.00. A deposit in the amount of R100 000.00 was paid to the first respondent upon signature of the purchase and sale agreement. The balance of the purchase price, namely R200 000.00, was to be paid to the first respondent against registration of the property into the name of the applicant.

- [6] On 4 October 2020, the applicant entered into a second written purchase and sale agreement with the first respondent in respect of unit [...]. The property was sold to the applicant for the purchase price of R165 000.00. A deposit in the amount of R65 000.00 was paid to the first respondent upon signature of the purchase and

sale agreement. The balance of the purchase price, namely R100 000.00 was to be paid to the first respondent against registration of the property into the name of the applicant.

- [7] In terms of both purchase and sale agreements, it was specifically

agreed that the applicant would be entitled to vacant occupation of the properties as from 31 October 2020, from which date the applicant would be entitled to full beneficial use and enjoyment of the respective properties.

[8] The applicant effected payment of the two respective deposits in the sum of R100 000.00 and R65 000.00 to the first respondent and performed its obligations in full. The applicant then placed a tenant in unit [...] with effect from 1 November 2020 and entered into a written lease agreement with the current tenant on 13 November 2020.

[9] On 18 January 2021 due to the first respondent's failure to

furnish the applicant's attorneys of record with the requested FICA documentation, or to sign the form allowing the release of the bond cancellation figures, the applicant's attorneys wrote a letter of demand to the first respondent, requesting her to remedy her breach of the purchase and sale agreement within a period of 7 (seven) days. On 27 January 2021, the applicant's attorneys wrote a further letter to the first respondent where she was advised that due to her failure to remedy her breach of the purchase and sale agreement, the applicant would institute an application to compel specific performance by the first respondent.

[10] On 11 November 2020, the second respondent entered into an instalment sale agreement with the first respondent in terms of which the first respondent sold the property situated at unit [...] to the

second respondent.

[11] In terms of the instalment sale agreement concluded between the first

respondent and the second respondent, possession, benefits and risks, profit and loss in respect of the property situated at unit [...] would be given to the second respondent from date of registration of the recordal of the agreement at the Deeds office, which occurred on 10 February 2021.

[12] On 1 March 2021, the second respondent's attorneys telephonically contacted the applicant's tenants to advise them to vacate unit [...]. The tenants were further advised by e-mail that the monthly rental was to be paid to the second respondent with effect from 1 March 2021. On 11 March 2021 a representative of the

second respondent went to unit [...] and took the keys from the tenant to make a copy.

[13] On 3 March 2021 the applicant's representative advised the second respondent's attorney that the second respondent was in no position to demand rental from unit [...] as the applicant had purchased the property from the first respondent. On 3 March 2021, the second respondent's attorney in writing informed the applicant that they had concluded an instalment sale agreement with the first respondent on 11 November 2020 and that the instalment sale agreement was registered and recorded in the Pretoria Deed's Registry on 10 February 2021.

[14] On 12 March 2021, the applicant's attorneys wrote a letter to the second respondent's attorneys, demanding that they furnish the applicant's attorneys with a written undertaking by no later than close of business on 16 March 2021, that the second respondent would stop dealing or trading with unit [...] in any respect. Secondly, that the second respondent would

stop interfering or communicating with the applicant's tenant and thirdly, that the second respondent would apply to the Registrar of Deeds to cancel the endorsement registered against the title deed of unit [...] in favour of the second respondent. Fourthly, the second respondent was asked to return the copy of the set of keys in respect to unit [...] to the applicant.

[15] Due to the failure of the second respondent delivering such an undertaking, the applicant then launched this urgent application.

SUBMISSIONS BY THE APPLICANT

[16] The applicant contends that there has been proper compliance with the prerequisites for an interdict as incorporated in Part A of the notice of motion.

Prima facie right

[17] The applicant contends that it concluded a purchase and sale agreement in respect to unit [...] with the first respondent on 1 October 2020, which is more than a month prior to the conclusion of the instalment sale agreement between the first respondent and the second Respondent. The applicant contends that it has placed proof of its performance in terms of the respective purchase and sale agreements by annexing proof of the deposits paid to the first respondent. In contrast, it was argued that the second respondent has failed to annex any such proof of its alleged performance in terms of the instalment sale agreement with the first respondent.

[18] The applicant's legal representative argued that in line with the legal maxim, *qui prior est tempore potior est iure*, the applicant's right to possession, use and enjoyment of the property trumps that of the second respondent, in that the right of possession and vacant occupation was transferred to the applicant on 31 October 2020, whereas the possession and vacant occupation of unit [...] was only transferred to the second respondent on 10 February 2021, which is the date that the instalment sale agreement was registered and recorded in the Pretoria Deed's Registry. Reference was also made to the *nemo plus iuris* rule which stipulates that no person may transfer more rights than they hold, and that due to the fact that the first respondent transferred the right of [...] to the applicant, it could not thereafter transfer the same right to someone else.

Irreparable harm

[19] The applicant contends that the second respondent acted unlawfully in attempting to deprive the applicant's tenants of the use and enjoyment of the property by trying to evict the tenants from unit 23 Jacqmar, thereby exposing the applicant to a breach of its duty to provide undisturbed use and enjoyment of the property to the tenant as required by the Unfair Practice Regulations to the Rental Housing Act no. 50 of 1999. The applicant's legal representative argued that this was exacerbated by the second respondent's refusal to relinquish the set of keys to the applicant.

[20] The applicant contends that unless this Court grants the interdictory relief sought, the second respondent shall continue to attempt to gain access to unit [...] and to threaten the applicant's tenants. The applicant contends that the second respondent attempted to gain occupation of unit [...] as far back as November 2020.

This is notwithstanding that in terms of the instalment sale agreement the second respondent was only entitled to vacant occupation of unit [...] from 10 February 2021, which is the date of the recordal of the instalment sale agreement at the deed's

Office.

[21] Furthermore, as a result of the second respondent's conduct, the tenant has not paid the applicant the rental due for the month of March 2021 and the tenants have given notice to vacate unit [...] at the end of March 2021. The applicant contends that the same protection of a prohibitory interdict should be afforded to any new

tenant placed in occupation of unit [...].

Balance of convenience

[22] The applicant contends that as a result of the fact that the second respondent does not have a right to possession of the property, owing to the right of possession having already passed to the applicant, this Court should not even consider whether harm or the balance of convenience comes into play in respect of the second respondent. The applicant's legal representative contended that the second respondent cannot claim to suffer prejudice where it is not, nor ever was, in possession of the property. By contrast, it was argued that the applicant shall suffer severe prejudice as it has already placed tenants in the property under a valid agreement of lease.

[23] The applicant contends it has suffered greater financial loss than the second respondent as it paid the first respondent a deposit of R100 000.00 in respect of the sale of unit [...], as compared to the second respondent who merely paid a deposit of R65 000.00 to the first respondent. The applicant's legal representative argued that the second respondent cannot contend that it is prejudiced by reason of it being required to pay the monthly bond, levy and rates in respect of unit [...], as the second respondent itself bound itself to this obligation in the instalment sale agreement.

[24] The applicant contends that there is a serious risk and possibility that the second respondent will pay 50% of the purchase price and proceed to take transfer of the property, thereby thwarting the applicant's rights in respect to unit [...], arising from the terms of the purchase and sale agreement entered with the first respondent. As a result, the balance of convenient favours the applicant in interdicting the second respondent from taking transfer of unit [...].

No alternative relief

[25] The applicant states it did everything it could to prevent further interference by the second respondent in respect to unit [...] arising out of the double sale, however, this proved fruitless and the second respondent persists in opposing this matter and to gain access to the unit.

SUBMISSIONS BY THE RESPONDENT

[26] Counsel for the second respondent argued that the second respondent was bona fide in its dealings with the first respondent and that the interdictory relief the applicant claims must be dismissed as the applicant has not met all the necessary requirements.

Prima facie right

[27] The second respondent contends that the contention of the applicant that the existence of the “first” sale renders the “second” sale to the second respondent void is not the case as confirmed in the case of *Gugu and Another v Zongwana and Others* [2014] 1 All SA 203 ECM, (“Gugu v Zongwana”). It was argued further that the second respondent obtained a limited real right to unit [...] by registration taking place in the Deeds Office.

Irreparable harm

[28] Counsel argued the only harm that the applicant would experience would be a loss of rental income and that this can be undone by the award of damages.

Balance of convenience

[29] The respondent’s Counsel contends that the balance of convenience must favour the second respondent because the second respondent will have to continue to pay the bond, rates and taxes, levies as well as lose potential rental income. In addition, should the interdict be granted the second respondent would be in breach of its contract with the first respondent.

[30] Counsel contends that to date the following amounts have been paid, namely, R65 000.00 as a deposit to the first respondent; arrear levies of R4403.00; R20 423.00 to First National bank (“FNB”),

(who is the bondholder and who granted consent to register the recordal with the Deeds office).

In addition, the second respondent

is contractually obliged to pay the bond of R3500 per month.

[31] Counsel argued that if FNB is not paid, there is the real prospect that judgment may be obtained against the first respondent and the property sold on execution to the detriment of all parties. It was argued that it would not be just and equitable to grant the interdict as the second respondent would suffer more prejudice and that the

balance of convenience favours the second respondent.

No alternative remedy

- [32] Counsel argued that the applicant has a legal remedy, namely, a claim for damages that would adequately redress any monetary loss.

EVALUATION

- [33] It is trite that in order for a Court to grant an interdict in favour of an applicant, it must be satisfied that there has been proper compliance with the prerequisites of an interdict, which are, (1) a prima facie right;
- (2) a well-grounded apprehension of irreparable harm if the interim relief is not granted, (3) that the balance of convenience favours the granting of an interim interdict; and (4) that the applicant has no other satisfactory remedy.

- [34] The applicant is in possession and occupation of unit [...], whereas the second respondent contends it has a limited real right by virtue of the fact that it possesses a limited real right in respect of the property, created by the recordal of the instalment sale agreement against the title deed by the Registrar of Deeds.

- [35] The learned Van Zyl ADJP, as he then was, in the case of *Gugu v Zongwana* (supra) stated at paragraph [32]:

“The position is however that the existence of a contract for the sale of a specific property does not effect the validity of a subsequent sale of the same property by the same seller to a different purchaser. In other words, the existence of an agreement for the sale of a specific thing does not prevent the creation of a competing personal right ex-contractu for the delivery or the transfer of the same moveable or immoveable thing. Consequently, ownership is generally not acquired by the purchaser whose contract was the earlier one, but by the purchaser who was the first to obtain delivery or transfer without knowledge of the existence of the prior right of another.” [my emphasis]

- [36] In the matter in casu, the applicant was placed in possession of the premises at unit [...] as from 31 October 2020. At this stage, the second respondent had not yet transacted with the first respondent and accordingly ownership at this stage vested with the applicant, giving the applicant a real right in respect to this property. As at 31 October 2020, there was also no competing purchaser as yet. The Court in *Gugu v Zongwana* (supra) held further at paragraph [32] that where ownership has not yet passed to any of the competing purchasers, the personal right of the purchaser who is first in time is given preference by application of the maxim *qui prior ext tempore potior est jure*. (see *Krauze v van Wyk en Andere* 1986 (1) SA 158 (A) at 171 G-I and 173J).

- [37] As stated by the learned Van Zyl ADJP at paragraph [33]:

“The accepted approach to successive sales and competing rights is that as a point of departure the possessor of the earlier right, in this case the appellants, is entitled to specific performance, unless the second purchaser can show that the balance of fairness is in his favour. “... the priority of the competing claims had to be decided in favour of the appellants according to the qui prior est tempore potior est iure principle unless the respondent had raised special circumstances that would tilt the balance of fairness in his favour...” (Per Brand JA in Wahloo Sand Bk v Trustees, Hambly Parker Trust [2002

(2) SA 776 SCA] at 779A-B and 784F–G).” [my emphasis]

[38] I do not find that the election of the second respondent to take over the instalment sale agreement, or paying towards the rates and taxes and the outstanding levies raises such special circumstances that cannot be addressed in an action for damages against the first respondent.

[39] Even if I am wrong in this regard, the nemo plus iuris rule stipulates that no person may transfer more rights than they hold. The right to possession, use and enjoyment was first transferred to the applicant by the first respondent by virtue of the purchase and sale agreement, which entitled the applicant to possession and occupation of the property from 31 October 2021. In line with the nemo plus iuris rule, because the right of possession had already been transferred to the applicant, the first respondent was therefore incapable of passing the same right of possession to the second respondent.

[40] In the case of Legator McKenna Inc and Another v Shea and Others 2010 (1) SA 35 (SCA) the Court held that the transferor of ownership must be legally competent to transfer the property. It is clear the first

respondent was not legally competent to transfer rights it no longer had after the first sale agreement was concluded.

[41] The effect of the recordal of the instalment sale agreement against the title deed as contemplated in terms of section 20 of the Alienation of Land Act No. 68 of 1981 (“the Alienation of land Act”) will in any event have to be cancelled in terms of s20 (1)(c) of the Alienation of Land Act should the Court determining Part B and C find in favour of the applicant. The limited real right which the second respondent possesses is only in respect of the further sale or encumbrance of unit [...] and not in respect of its right to possession of the property, of which possession currently vests with the applicant.

[42] Even if I am wrong in this regard, and the second respondent does possess a real right in respect of the right to possession of the property, it still cannot take the law into its own hands by forcefully gaining possession of unit [...] where the applicant’s tenants are in peaceful and undisturbed possession of the said property as a result of a valid and lawful transaction entered into in good faith between the applicant and the first respondent.

[43] In determining the reasonable apprehension or the continuation of the alleged irreparable harm, the test is an objective test. As stated by the learned Mogoeng CJ in the matter of City of Tshwane Metropolitan Municipality v Afriforum and Another [2016] ZACC 19 at paragraph [55]:

“Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable

apprehension of irreparable and imminent harm eventuating should the order not be granted.”

[44] The second respondent admits that it attempted to gain vacant occupation of the property since November 2020 and that it attended the property on 11 March 2021 to obtain the keys of unit [...] in order to make a copy. The measure of force, threat and intimidation of the second respondent in doing so is disputed by the parties.

[45] Although Part B and C are to be postponed, the second respondent has failed to make any undertaking that it will not continue to interfere with the applicant’s tenant and it appears that the second

respondent believes it is entitled to possession of the property, and to any rental income emanating from the property. The second

respondent has also not relinquished the set of keys to the applicant. Accordingly, it is clear that the irreparable harm to the

applicant will continue.

[46] In determining the balance of convenience a Court must weigh the prejudice that the applicant will suffer if the interim relief is not granted against the prejudice that the second respondent will suffer

if it is granted. It was stated by the learned Holmes JA in the case of Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 1973 (3) SA 685 (A) page 691C-G that the considerations of a prima facie right, a well-grounded apprehension of irreparable injury and the absence of an ordinary remedy “are not individually decisive, but are interrelated; for example, the stronger the applicant’s prospects of success the less his need to rely on prejudice himself. Conversely, the more the element of “some doubt”, the greater the need for the other factors to favour him.”

[47] The applicant’s right as the purchaser, who is first in time, is given preference by application of the maxim *qui prior est tempore potior est iure*. The applicant has placed tenants in [...] on the basis of the terms of the contract of sale entered into with the first respondent, and is entitled to possession and occupation of the said property, as well as the rental income pending the determination of Part B and C. I find the balance of convenience favours the applicant. Should this interdict not be granted the second respondent will continue to attempt to gain access to [...].

[48] The applicant wrote letters to the second respondent and did all it could to obtain the relief that it now seeks from this Court. The second respondent on the other-hand, makes it clear in its opposition of the matter, that it shall continue to attempt to gain vacant occupation of the property in accordance with its belief that it is entitled to the property, as well as to the rental income and to take transfer and to deal with and trade in the property, in accordance with the instalment sale agreement it entered with the first respondent.

[49] I find that the applicant and its tenants should not have to endure further interference by the second respondent or to surrender possession of the property to it pending the decision in Part B and C of the notice of motion.

[50] In such circumstances, and in line with the decision of *Gugu v Zongwana* (supra), the first purchaser, who in the matter in casu is the applicant, has the right to interdict the seller, namely the first respondent, from passing ownership to the second purchaser, namely the second respondent.

[51] Due to the fact that the first respondent has exhibited a tendency to enter into an additional sale agreement with the second respondent in respect to unit [...], I find it necessary to interdict the

first respondent from doing the same in respect to the property situated at unit [...].

COSTS

[52] The applicant sought costs of this application on an attorney and client scale against both the first and second respondent.

[53] Due to the fact that the first respondent has not opposed this application I find a cost order is inappropriate. As regards the second respondent, even though it opposed this application, it did so because of the belief that it had a rightful claim to unit [....]. I accordingly do not find that punitive costs are warranted in respect

to the second respondent and I order that costs be reserved pending the determination of Part B and C.

ORDER

[54] In the premises the following order is made:

1. Part A – Urgent Interdictory Relief: -

a) The first and second respondents are interdicted and restrained from communicating and interfering in any manner whatsoever with the applicant's tenant/s residing at the property situated at unit [...] (sectional title scheme number:[...]), more commonly known as unit [...], situated at [...] and [...] streets, [...], and the tenants situated at the property unit [...] (sectional title scheme number: [...]), which is more commonly known as unit [...], [...]street, [...], [...].

- b) The first respondent is interdicted from transferring the property situated at unit [...] to the second respondent, or to any other person, pending the outcome of Parts B and C to the application.
- c) The first respondent is interdicted from transferring the property situated at unit [...] to any other person pending the outcome of Part B and C to the application.
- d) The first and second respondents are interdicted from continuing to deal or to trade with unit [...] in any respect, pending the outcome of Part B to the application.
- e) The second respondent is ordered to return to the applicant a copy of the key set it had made in respect of the property situated at Unit within 24 (twenty-four) hours after receiving this judgment.

2. Part B – Declarator: -

Part B is postponed for the determination of the rights of the parties in relation to the sale and transfer of the property situated at Unit [...] in the ordinary cause.

3. Part C – Application to compel Specific performance: -

Part C is postponed for enrolment in the ordinary course.

4. Costs in respect to the second respondent are to be reserved pending the determination of Part B and C of the application.

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ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 6 April 2021.

Appearances:

On behalf of the Applicant Ms.

C.M Laurent

Instructed by: SSLR

Incorporated

On behalf of the Respondent

Adv. C.M Rip

Instructed by: Burden

Swart & Botha Incorporated

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