

SOUTH AFRICA / JUDGMENT

Keystone Development (Pty) Limited v van der Merwe N.O and Others (098502/2023)

[2024] ZAGPPHC 104 (13 February 2024)

[2024] ZAGPPHC 104

COURT

North Gauteng High Court, Pretoria

BEFORE

Retief

CASE / FILE NUMBER

098502/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

Case

No: 098502/2023

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHERS JUDGES: NO

(3)

REVISED

In

the matter between:

KEYSTONE
DEVELOPMENT (PTY) LIMITED
Applicant
and
PETRUS
VAN DER MERWE N.O
(In
his capacity as the executor in the estate of the late Petrus Van
Der Merwe Senior)
First
Respondent
PETRUS
VAN DER MERWE N.O
(In

his capacity as executor in the estate of the late Z.M. Van Der Merwe)

Second

Respondent

PETRUS

VAN DER MERWE

Third

Respondent

PETRO

VAN DER MERWE

Fourth

Respondent

REGISTRAR

OF DEEDS

Fifth

Respondent

This

judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on

CaseLines. The date for handing down is deemed to be 13 February 2024.

JUDGMENT

RETIEF J

INTRODUCTION

- [1] This is an application brought by way of urgency in which the Applicant, a company which concerns itself with land development, seeks interim interdictory relief against the First to Fourth Respondents [Respondents] concerning certain properties earmarked for development on the farm Zwavelpoort located in the Gauteng province [Zwavelpoort].
- [2] The Applicant has couched its relief in a Part A and in Part B, Part A the interim relief for adjudication. Due to the complexity of the matter and its voluminous content, the application has been placed on the special motion roll.
- [3] The properties in Zwavelpoort which make up the subject matter of the application are portions 65, 66 and 67 [collectively “the properties”]. The developments which are to take place on the properties are referred to as phases. The dispute between the parties is confined to phases 2 and phase 5.

- [4] The relationship between the Applicant and Respondents found its origin almost two decades ago in 2005 when the Applicant and the Van Der Merwe family concluded certain purchase agreements relating to the properties.
- [5] During this time, no transfer of ownership in terms of the purchase agreements of the properties took place, nor for that matter, the finalisation of the planned developments. In fact, Mr, and Mrs Van der Merwe Snr, who owned portions 65 and 67 passed away, the executor of their estates, the Third Respondent, has also been cited in these proceedings in such capacity to represent the interest of the estates.
- [6] As can be expected over such a period, relationship fatigue, dashed business expectations and dissatisfaction between the parties has set in. This spilled over into litigation in 2017 which, became settled on the 20 August 2021 when the Applicant and Respondents concluded a settlement agreement [settlement]. The settlement was made an order of Court. Unfortunately, the settlement did not manage to contain nor suppress further disputes arising.
- [7] To compound matters further, both parties share in the cause of the delay of the property development. The respective estates of the late Mr and Mrs Van Der Merwe Snr have still not been finally wound-up and, the Applicant has failed to bring about the consolidation and subdivision of the properties as agreed.

BACKGROUND

FACTS

- [8] Now to the present dispute concerning the phase 2 and 5. According to the plan and diagram attached to the settlement, phase 2 is depicted on portion 66 and, to a lesser extent on portion 65. Simply put, phase 2 overlaps onto both portion 65 and 66. The Applicant has purchased portion 65 (save for portion 2 and portion 3 of portion 65) and portion 1 of portion 66. The Third and Fourth Respondents own and reside on portion 66. A labyrinth of intertwined rights to these properties and alleged rights pertaining to phase 2 emerges.
- [9] Phase 5 is depicted on portion 67 and, to a lesser extent on portion 66. Portion 67 is owned by the First and Second Respondents and portion 66 as indicated above, therefore mostly by the Third and Fourth Respondents save, for portion 1 of portion 66 which is the Applicant has purchased.
- [10] According to the settlement phases 2 and 5 are referred to as additional property [additional property]. The Applicant, in terms of the settlement, was entitlement to purchase additional property by concluding option to purchase agreements [option to purchase] in respect of each phase. The option to purchase agreements were to be concluded by the signature thereof, simultaneously with the settlement. The option to purchase agreements were referred to, and attached to the settlement forming, by reference, an integral part of the settlement. Reference to annexure “E” was in respect of phase 2 and annexure “H” in

respect of phase 5.

- [11] Sometime after the conclusion of the respective option to purchase agreements “E” and “F”, the Respondents in September 2023 warned that they intended to commence with construction on the properties. As a direct result, the Applicant’s allege that the “Respondents are taking the law into their own hands.” This giving rise to the necessity of the pending interim relief and urgency. The application was initiated on the 28 September 2023.
- [12] The Respondents allege that the option to purchase in respect of phase 2 has validly been cancelled and the option to purchase in respect of phase 5 has lapsed. The Respondents contend that as the owners of the remaining portions of portions 66 and portion 67 they are entitled to commence with the development of on such properties, save, the properties to which the Applicant is entitled to in terms of the Settlement. The Respondents deny that interim relief is urgent.
- [13] During argument and in the respective heads of argument both parties have made submissions regarding the aspect of urgency. Without belabouring this point, the following factors were considered: the possibility of the breach of a court order, the pickle the parties have found themselves in yet again because of the complex labyrinth of facts which they themselves have been unable to detangle and move past, the imminent consequences and damage to all the parties and prospective third parties if substantial redress is not attained on an urgent basis. Considering the cumulative effect, this matter is urgent and is dealt with on this basis.
- [14] To enable the Court to detangle the dispute, a proper look at the material clauses of the settlement and the option to purchase is required against, the backdrop of the common cause facts.

APPLICABLE CLAUSES OF THE SETTLEMENT AND THE OPTION TO PURCHASE

CLAUSE OF THE SETTLEMENT

- [15] Clause 2.13 introduces and deals with the option to purchase and specifically at sub-clauses:

“2.13.3 Ten einde die Eerste Respondent[1] op sy genomineerde oordragnemer die geleentheid te bied om die bogenoemde addisionele eiendomme te bekom, kom die partye hiermee

ooreen dat die Applikante en die Eerste Respondent of sy genomineerde oordragnemer die opsie sal verleen om sodanige eiendomme binne die tydperk soos gespesifiseer per Aanhangsels “E” tot “H” aan te koop.

2.13.4 Die partye kom ooreen om teen einde uitvoering te gee aan hierdie paragraaf (opsie om te koop) (own emphasis) van die Skikkingsooreenkoms, vier opsie ooreenkomste ten opsigte van sodanige transaksies gelyktydig hiermee te onderteken en ooreenkomstig die terme en voorwaardes uiteengesit in die Opsies om te koop waarvan afskrifte hierby aangeheg is as Aanhangsel “E”. “F”, “G” en “H” onderskeidelik.

2.13.5 ...

2.13.6 Die vier Opsies om te koop onlosmakend deel van hierdie Skikkingsooreenkoms.”

CLAUSES OF THE OPTION TO PURCHASE

[16] The terms and conditions of the option to purchase of both annexure “E” and “H”, are identical, save of course for the respective description of the respective properties and phases.

[1] Flowing from the understanding of clause 2.13.6 of the settlement, the following material clauses:

“1. AGTERGROND-OPSIE, PERIODE EN UITOEFENING .

1.2-1.6 -

1.7 Die Koper sal die Verkoper van sodanige kennisgewing voorsien ooreenkomstige paragraaf 11[2] van hierdie Opsie om te Koop.

1.8 By die uitoefening van die Opsie om te Koop deur die Koper, kom ‘n Koopkontrak ingevolge die bepalings van paragraaf 14 tussen die partye tot stand, welke Koopkontrak onderworpe sal wees aan die terme en voorwaardes soos hieronder uiteengesit (own emphasis).

3. KOOPPRYS EN WAARBORGE

3.1 -.

3.2 Die partye kom ooreen dat die koopprys waarna in paragraaf 3.1 verwys word, betaalbaar is in kontant teen registrasie van oordrag van Fase 2 in die naam van die Koper, vir welke bedrag die Koper verplig is om goedgekeurde bank of ander waarborge (own -emphasis) aan die Verkopers se prokureurs te lewe, binne 60 (sestig) dae na die uitoefening van die opsie om te koop deur die Koper soos per die bepalings in paragraaf 1.

14. NUWE KOOPPOOREENKOMS EN GENOMINEERDE OORDRAGNEMER

14.1 Die partye kom ooreen dat, in sover dat die nodig mag wees om volledige uitvoering te gee aan die bepalings, terme en voorwaardes van hierdie Opsie om te Koop, die partye hierby instem tot die opstel en die ondertekening van ‘n kooppooreenkoms met dieselfde terme, voorwaardes en bepalings soos in hierdie Opsie om te Koop vervat is (own emphasis).

14.2 Die partye bevestig en kom ooreen dat die ondertekening van 'n koop-ooreenkoms, onder andere, ten doel het om die vaste eiendom wat 'n gevolg paragraaf 2 van hierdie Opsie om te Koop aan die Koper verkoop word, by die finalisering van die konsolidasie en onderverdelings prosesse, in meer volledige detail te kan omskryf ingevolge sodanige goedgekeurde diagramme.

15. VOLLE OOREENKOMS EN REDELIKE STAPPE

15.1 Hierdie Opsie om te Koop stel die hele ooreenkoms tussen die partye daar en geen verwysing of veranderinge daaraan sal geldig wees tensy op skrif gestel en geteken deur beide party hiertoe.[3]

15.2 Die partye onderneem om alle redelike stappe te neem wat hoedanig is of mag wees tot die tydige implementering van die terme en voorwaardes van hierdie Opsie om te Koop.”

THE FOLLOWING MATERIAL COMMON CAUSE FACTS

In respect of phase 2

- [2] A valid and binding option to purchase was concluded in respect of phase 2 on 20 August 2021. Mr AJN Van Niekerk [Nel] represented the Applicant and Mr P Van Der Merwe (Jnr) [Piet] the Respondents.
- [3] The Applicant in compliance of clause 1.5 and 1.6 read with clause 11 of the option agreement exercised its option to purchase on 17 December 2021.
- [4] In terms of clause 3.2 the Applicant was obligated to deliver a n approved bank guarantee or any other guarantee for the purchase price of R 6,750,530.00 by 17 February 2022 to the Respondent's attorney, Estelle Viljoen [Estelle].
- [5] On 11 February 2022, Nel via email, requested confirmation from Estelle regarding the guarantees “Hiervolgens moet ek waarborge vir die koopprys lewer op die 17de Februarie 2022, Piet het reeds toestemming verleen dat ek op 'n later stadium die waarborge kan lewer en jou blykbaar gekontak in hierdie verband. Ek sal dit waardeur as julle die reëling kan bevestig van julle kant af”.
- [6] On 11 February 2022, Estelle confirmed that she had already discussed the proposal with Piet, this is a week prior to the enquiry and haven spoken to Piet again that same morning, confirmed it made perfect sense to rather earn more interest on the investment by keeping it where it was rather than to pay the value over into an article 86(4) trust investment. Nel was asked to send written proof of the investment together with an undertaking that the money would become available and paid over within a week's notice.
- [7] On 12 February 2022, Nel on behalf of the Applicant and via email to Estelle, provided the written undertaking and attached copies of investment statements of Tradecomm Investment Holdings Ltd issued by a R.J. O'Brien traders of investment accounts. Nel requested 2 weeks' notice rather than 1 week as it took 7 (seven) days for the payment to become available.

- [8] The Respondents received and had insight of the statements attached to the email of 11 February 2022, the Respondents attaching a copy of one of the statements to their answering affidavit.
- [9] On 15 February 2022, Nel requested Estelle to confirm that the 2 (two) weeks' notice arrangement was in order.
- [10] Approximately a year and a half later and on the 15 August 2023, the Applicant received a formal demand from UMS Attorneys who, relying on a breach of clause 3.1 and 3.2 of the option to purchase agreement, demanded the delivery of an approved bank guarantee in the amount of R6,750,530.00 within 14 (fourteen) days to remedy the breach. On failure to remedy such breach, UMS Attorneys warned that “-, the Option shall summarily be cancelled. “
- [11] On the 20 August 2023, The Stewart Family Group invoiced Piet for earth works and site clearance in respect of phase 2 in the amount of R 265 000.00 (vat inclusive).
- [12] On 6 September 2023, The Stewart Family Group invoiced Piet for the construction of a boundary wall guardhouse and building a plaster in respect of phase 2 in the amount of R 345 000.00 (vat inclusive).
- [13] On the 6 September 2023, the Applicant received written notice that the Option to purchase was formally cancelled.

In respect of phase 5

- [14] A valid and binding option to purchase was concluded in respect of phase 5 on 20 August 2021.
- [15] The Applicant failed to exercise its option to purchase the proposed phase 5 in terms of clauses 1.5, 1.6 and 11 of annexure “F”.
- [16] No further agreements to purchase have been concluded and the Respondents do not intend to enter into any until such time as the estates have been wound up.
- [17] No written option agreement in respect of phase 5 has been signed by the parties.
- [18] On the 17 December 2022 Piet sent Nel a WhatsApp message in which he stated: “Nel, Callie het my netnou in mooi duidelike Afrikaans meegedeel dat ons op hierdie stadium o.a. hewige boedelbelasting implikasies veroorsaak. Estelle en Albie het ook weer vandag gekonsulteer, hulle sal weldra later aan beide van ons n epos stuur ter verduideliking. As n tussentydse oplossing/maatreel stel ek voor dat ons Keystone n vedere opsie vereleen tot einde Feb 2023. Ek sal ook vir jou n verdere skriftelike onderneeming gee vir Fase 5 vir jou te hou/reserveer totdat Callie die boedels afgehandel het en/of alternatiewelik totdat Plan Practice die onderverdeling gefinaliseer het as voorstel tot tydelike maatreel/oplossing!! Ons moet ongelukkig die raad/ voorstelle van ons regskenners in ag neem...ter wille van beide partye. Kom ons kyk wat is die inhoudelike van hulle epos!”

- [19] On the 28 February 2023 Nel sent an email in which he accepted the new option by stating: “Graag bevestig ek dat ons die Opsie soos verleen per WhatsApp (sien 1ste aanhangsel) - synde ons nog nie die nuwe opsie kon finaliseer nie-(own-emphasis) hiermee uitoeven,” Nel confirmed that he was prepared to change the terms of the agreement as discussed and would send it shortly to Piet. Furthermore, that the purchase agreement would be signed after the estates had been wound up.

DISPUTE IN RESPECT OF PHASE 2 AND PRIMA FACIE RIGHT

- [20] Nel contends that after the Applicant exercised its option to purchase, the Third Respondent had given consent for the delivery of the guarantees at a later stage, namely after the 17 February 2022. As the argument goes, this constituted a variation of paragraph 3.2 of the option agreement via the WhatsApp messages and email exchanges, having taken place between Nel and Estelle during the 14 February 2022 to 11 February 2022 [February emails] [variation]. As far as the cancellation is concerned, the Applicant contends that a reasonable period to cancel had expired and therefore the Respondents waived their right to cancel. The cancellation thus unlawful.
- [21] Estelle did not depose to a confirmatory affidavit but the content of the February emails are not in dispute, however the interpretation and effect thereof are.
- [22] The Respondents contend that although they accept the content of the February emails, Estelle did not have the authority to amend the terms of the option to purchase on their behalf, and in the alternative, even if Estelle had the authority to do so, the statements of investments provided on the 12 February 2022 did not serve as any form of guarantee.
- [23] The Respondents argument on the papers was expanded by Counsel who advanced that no written amendment, as envisaged in terms of the option to purchase was affected to sustain the variation argument.[4] The option to purchase duly cancelled due to non-compliance and the cancellation in the premises lawful.
- [24] The Respondents’ Counsel in his heads questioned veracity of the investment statements, advancing, without evidence, that they had expired and already paid out. Counsel correctly did not pursue this contention in argument for lack of relevance on the papers.
- [25] At this stage, it appears that both parties and their respective Counsels may have missed the material point, this includes the purported cancellation.
- [26] In short, there is little doubt that, applying the terms of the option to purchase to the common cause facts, the variation argument is not supported by the February emails for failure to comply with clause 15.1. of the option to purchase. Furthermore, there is little doubt that the investment statements provided by the Applicant to Estelle on the 12 February 2022, are intended to be an approved bank guarantee.

- [27] But the question to be answered is whether Nel's undertaking on behalf of the Applicant to satisfy its debt, on demand, and in its form, constituted delivery of "any guarantee" by 17 February 2022 to the Respondents' attorney, in compliance of clause 3.2 of the option to purchase.
- [28] If so, the option agreement has not been varied. This outcome dispositive of the necessity of the demand and cancellation invalid. However, if the reverse is true, is the option to purchase lawfully cancelled by the letter of demand in terms of clause 3.2?
- [29] In short, the Court is of the view that there was compliance of clause 3.2 by the Applicant via Nel. On this basis, a prima facie right established in respect of phase 2.
- [30] In amplification, clause 3.2 which sets out the Applicant's obligations in respect of the delivery of a guarantee states "-

vir welke bedrag die Koper verplig is om 'n goedgekeurde bank of ander waarborge aan die Verkopers se prokureurs te lewer (own emphasis), binne 60 (sestig) dae na die uitoefening van die opsie om te koop-." [5]

- [31] What is meant by "-of ander waarborge" in clause 3.2 is not defined in the option agreement and as a result, is not confined to a specific type or form of guarantee. What is clear is that it is a guarantee other than an approved bank guarantee. In consequence, it is helpful to consider what a guarantee is, in general terms. In general terms, a guarantee is an agreement, irrespective of form, in terms of which a person undertakes or promises to satisfy upon demand any obligation for another (the act of giving security to fulfil another's obligation) to ensure the performance will be fulfilled. The same applies with an approved bank guarantee. Only that its form is formal, inter alia, in that, it is a written and signed undertaking in which the bank undertakes to pay the debt of another (the debtor) to a third party when called upon to do so. Of significance, in all cases, the delivery of the guarantee does not involve the immediate and direct payment of the debt by the grantor on the date of the delivery and/or signature of the guarantee but involves the delivery of a form of undertaking that such payment will be affected when called upon to do so.
- [32] Applying the general understanding to the facts: Nel provided a written undertaking to Estelle, as requested, to pay the debt of another, in this case the Applicant, to the Respondents on demand. In so doing, Nel as directed, provided proof of his ability to perform as undertaken by providing proof, he attached copies of an investment account which he could call up when directed. In the replying affidavit Nel confirmed his lis with Tradecom Investment Holdings Limited.

- [33] This served as a form of guarantee catered for in clause 3.2. This fact, Estelle appears to have been aware as is evident in her exchanges and request with Nel. There is no evidence on the papers that Estelle denies receiving nor being dissatisfied with this form of guarantee. The guarantee was provided before the 17 February 2022. No amendment of the terms of clause 3.2 took place in support of the variation argument. The demand premature and the cancellation unlawful.
- [34] However, even if the Court is incorrect and clause 3.2, remains unfulfilled, the demand that followed more than a year and a half later fails to comply with the specific requirements of clause 3.2. According to clause 3.2, the Applicant is not only, contractually obligated to provide a bank approved guarantee to secure fulfilment of its obligations but can, in the alternative, deliver any guarantee instead. Furthermore, if the demand is read with clause 12 which deals with breach, breach in context merely refers to a breach relating to the performance within an agreed time and not of substance.
- [35] The Respondents' letter of demand dated the 10 August 2023 in support of the cancellation of the option to purchase, only relies on the Applicant's failure to deliver an approved bank guarantee within the time frame. This is done, without reference to the delivery of "any guarantee" in any respect whatsoever. The failure to provide an approved bank guarantee, although, a fact, is not sufficient to cancel the agreement relying only that failure. The option to purchase not validly cancelled.
- [36] Therefore, both the Applicant and the Respondents arguments appear misplaced and unhelpful to the Court but, what is not misplaced, is the evidence that if applied, demonstrates that the Applicant possess a prima facie right in respect of phase 2. This can't be ignored for present purposes.

DISPUTE RELATING TO PHASE 5 AND PRIMA FACIE RIGHT

- [37] Bearing the common cause facts in mind, the Applicant contends that the Respondents granted a further option per WhatsApp dated 7 December 2022 and agreed that time to exercise such option would be open till 28 February 2023. The Applicant contends that an option to purchase via the WhatsApp is valid and enforceable, that an option does not constitute "alienation" and therefore does not have to comply with the formalities in terms of the the Alienation of Land Act [Act].[6] The Respondents contend the contrary view relying on the provisions of the Act.
- [38] In support of the Applicant's view, the Applicant's Counsel invited the Court to consider *Mokone v Tassos Properties CC*[7] [Mokone matter] in which the Constitutional Court [CC] dealt with and confirmed that a right of pre-emption can be granted orally. The Applicant's Counsel argued that an option is akin to a right of pre-emption and as such can be concluded orally as contended. In the Mokone matter, Justice Madlanga stated that:

"[47]

- Merely affording someone that right of pre-emption is not an alienation because that is simply not a sale, exchange or donation. In sum, I do not see why section 2(1) of the Alienation of Land Act should apply to a right of pre-emption.
- [50] A right of pre-emption gives the pre-emptor no right to claim transfer of land; it merely gives him a right to enter into an agreement of sale with the grantor should the latter wish to sell. When such an agreement is completed then, and not before, will he have a right to claim transfer of land, so that it is the agreement which must be in writing.”
- [39] The Applicant’s Counsel suggested that the Court need only replace the word “pre-emption” with the word “option”. This is a contention that the Court disagrees with.
- [40] The Respondents on the other hand, rely on Brandt vs Spies[8] [Brandt matter] and argue that the WhatsApp exchanges fall short of requirements for a valid and binding agreement. Expanding the
- contention, it is argued that although an option is a preliminary agreement it must be in writing setting out the terms of the offer itself which the grantor is restrained from revoking within a specific period of time.
- [41] The Court agrees with the Respondents’ contention and does so even by applying the reasoning of the CC in the Mokone matter which affirms that a right of pre-emption does not establish a right to transfer. Conversely a right of transfer is exactly what a grantee wishes to achieve when concluding an option agreement, namely: to acquire an option to a right which, if exercised within the allotted time, brings about a right of transfer. The very acceptance of such offer establishes a right to claim transfer, in consequence “alienation” as defined in terms of the Act.[9] The consequences of the Act inescapable.
- [42] It is for this reason, that the learned Judge in the Brandt matter[10] stated that: “If the offer is not in writing there is nothing which the offeree can accept so as to create *vinculum juris* between himself and the offeror. An undertaking to keep open an offer which is incapable of forming the basis of a valid contract can itself confer no right upon the grantee – for in law there is nothing to keep open.”
- [43] No firm terms were expressed in the 7 December 2022 WhatsApp to keep open. In fact, the content of the preceding WhatsApp’s on 5 December 2022 support a version that the purchase price was still not clear. This version is supported by the Applicant’s own evidence in the email of 28 February 2022 when he stated “-Ons is egter, soos reeds bespreek, bereid om die terme tot ons ooreenkoms te verander. Ek gaan dit deur vir tegniese korrektheid en stuur dit binnekort aan jou”. No evidence that a document was sent exists on the papers. Nor was the new option relied on, itself clear when Nel stated –“synde ons nog nie die nuwe opsie kon finaliseer nie”.

- [44] Lastly, the manner in which the Applicant was afforded a means to acquire additional property, phase 5, is regulated by the settlement. The Applicant's contention based on the new offer falls short of the settlement which, remains an order of Court.
- [45] Having regard to the above, the Applicant has failed to demonstrate a prima facie right in respect of phase 5.
- [46] This however is not the end of the prima facie right enquiry raised and relied on by the Applicant. The Applicant requested the Court to consider its rights established in respect of the environmental authorisation provided to it in terms of the development of the properties.

ENVIROMENTAL AUTHORISATION RIGHTS SUPPORTING OF PRIMA FACIE RIGHT

- [47] The Applicant relies on their environmental authorisation which it obtained from the Agricultural, Conservation and Environment Department dated 29 May 2009 headed 'Authorisation Granted: Proposed Mixed Use Development on Portions of Portions 65, 66 and 67 of the Farm Zwavelpoort 373 JR – Kungwini' [environmental authorisation].
- [48] The environmental authorisation was provided to the Applicant who in terms of the authorisation is entitled to construct several proposed mixed developments on the properties. The Applicant contends that it is the only authorised holder thereof and therefore the only holder that can develop the activities, so authorised. This is states establishes a prima facie right.
- [49] This argument is misplaced. This is because if one reads the authorisation, it indeed provided the Applicant with authorisation however such authorisation was provided on condition that the activity, as defined, commenced within 5 (five) year period from 2009. No evidence has been provided of compliance, in fact, the reverse is true. No new application in terms of the activity by the Applicant appears to be lodged nor relied on.
- [50] In consequence, the Applicant's prima facia right being established with reference to the development of the properties as in respect of such authorisation must fail, this is even in circumstances where the Respondents themselves hold no authorisation as that is not the enquiry vis-à-vis the Applicant's rights.
- [51] Lastly, as a last resort, the Applicants contend that they have acquired other rights in respect of the properties established by the settlement.

PRIMA FACIE RIGHTS ESTABLISHED IN TERMS OF THE SETTLEMENT

- [52] It is common cause that the Respondents have commenced with construction of boundary walls and guard houses relating to phase 1, 2, 3, 4 and 5 and earthworks and clearing site in phase 2 and a construction cost estimate report with regard to a Store to Go storage building on Portion 67.

- [53] Notwithstanding the Respondents' undertaking in its letter of the 7 September 2023, the Applicant argues that if the Respondents continues with the development of phase 2 and phase 5 it will infringe on their other rights, namely: to give effect to clause 2.2.3 to 2.2.6 and in terms of clauses 2.6.1 to 2.6.3 of the settlement. The Applicant has failed to explain its argument on the papers properly nor in argument. This is left for this Court to decipher.
- [54] Clauses 2.2.3 to 2.2.6 mainly sets out the Applicant's obligations in respect of portion 65 save, for 2.2.6 which refers to a right of first refusal in respect of a future event. The Respondents confirming their intention to comply with the settlement.
- [55] Clauses 2.6.1 to 2.6.3 too, appear to find no application with respect to the infringement of the Applicant's rights. The clauses deal in some detail rather with the Applicant's obligations in respect of previous registered bonds and have not explained how they affect the Applicant's rights.
- [56] In the premises, the only prima facie right which is clearly and concisely demonstrated which may be disturbed by the Respondents' actions is in respect of phase 2.
- [57] The remaining requisites to be established for interim relief.

WELL-GROUNDED APPREHENSION OF IRREPARABLE HARM, BALANCE OF CONVENIENCE
AND ABSENCE OF ANY OTHER SATISFACTORY REMEDY

- [58] The remaining requisites for an interim interdict, are not to be seen in isolation from one another and in this matter the following factors are taken into account: the prima facie right already demonstrated in respect of phase 2, the construction and time thereof, in particular the site clearance which occurred prior to the formal cancellation, the fact that the exact location of portion 1 of portion 66 remains a "proposed portion 1" and that phase 2 extends over and onto portion 65, the fact the parties are bound to each in the terms of the settlement which relationship will persist notwithstanding the relief sought.
- [59] The Applicant contends that it will suffer irreparable harm should the construction not be paused pending the outcome of the relief in Part B. The argument extends beyond the Respondents present actions on phase 2 but to that which may still occur should the construction not cease pending the finalisation of the relief in Part B. This is a well-founded apprehension under the circumstances applying the factors.
- [60] Flowing too from irreparable harm and the factors above, the balance of convenience must favour the Applicant in respect of the development of phase 2 pending the finalisation of the dispute arising.
- [61] The Respondents contend that notwithstanding the dispute and the consequences which may flow, if construction on the properties persists, the Applicant possesses damages claim in law to remedy any irreparable harm or loss suffered. Although that is correct, the test to be applied is whether such damages claim will be satisfactory. It is not satisfactory to fail to mitigate loss whether such mitigation is in the interest of all the parties or for any

prospective third party. It is however, in the interest for all that, in the interim, any prospective and/or foreseeable damage is contained for which the purpose of a damages claim is not geared.

- [62] As far as the Applicant's relief is concerned with reference to prayers 2.4 and 2.5, relating to the interim regulation of rights and obligations which flow from private contractual arrangements between the parties and the settlement, the Court is not inclined to interfere in such arrangements as the agreements themselves which either cater sufficiently for such circumstances of breach or are already part of a Court order.

COSTS

- [63] A deviation from the norm that costs should follow the result may, in this matter warrant a deviation. In so doing, the Court should take all the material facts, factors, and outcome of this application into consideration.
- [64] Such material facts include, both parties' actions and inactions from the date of the settlement, the fact that the parties both appear to have created the present situation, both are to blame for the continued inability to finalise the developments and that the Applicant did not succeed with establishing a prima facie right in respect of phase 5. It is for this reason that in exercising a discretion based on these considerations both parties should pay their own costs.

The following order:

1. The application is heard as an urgent application in terms of uniform Rule 6(12) and the Applicant is granted condonation for the non-compliance with rules pertaining to service and time periods of the application.
2. That, pending the final determination of Part B of the notice of motion, the First, Second, Third and Fourth Respondents [Respondents], are hereby interdicted and prohibited from:
 - 2.1. building, constructing, and erecting any structures of any nature or form on the properties making up phase 2 of the development on portion (except portions 2 and 3 of portion 65) [portion 65] and the portion 1 of portion 66 [portion 66] of the Farm Zwavelpoort, No. 373, Registration Division JR, Gauteng ["Zwavelpoort"], as set out in the settlement agreement dated 20 August 2021 ["the settlement"].
 - 2.2. building, constructing, and erecting any structures of any nature or form on the properties of portion 65 and portion 66 situated on Zwavelpoort.
 - 2.3. entering into any agreements pertaining to phase 2 and/or portion 65 and/or portion 66 situated on Zwavelpoort with any third party of any nature, including lease agreements, servitudes and any other agreement of any nature that may affect the properties described herein insofar as the same does not accord with the settlement.

3. Each party bears their own costs.

L.A. RETIEF

Judge of the High Court

Gauteng Division

Appearances:

For the Applicant:

R. Du Plessis SC

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For the Respondents:

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Instructed by attorneys:

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Ref: Mr V.L. Schwartz/THE28/0007

Date of hearing:

22 January 2024

Date judgment delivered:

13 February 2024

[1] The Applicant.

[2] Paragraph 11, domicile address details.

[3] Coincides with paragraph 2.19.1 of the settlement referring to amendments, additions, omissions and cancellation or any part thereof of the settlement.

- [4] Clause 15 of the option to purchase.
- [5] Extract clause 3.2 of the option to purchase as dealt with in paragraph [17] hereof.
- [6] Act 68 of 1981.
- [7] 2017 (5) SA 456 at par [47] and [50].
- [8] Brandt v Spies 1960 (4) SA 14 (E) at pg 16, C-D and pg 17, B-C.
- [9] Section 1, Definition of the ‘alienation’ of the Act, See footnote 6.
- [10] Footnote 8 at par 17.
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