

SOUTH AFRICA / JUDGMENT

Samwol Properties (Pty) Ltd and Another v Nicole Sinovich Attorneys INC and Others (029047/25) [2025] ZAGPJHC 354 (20 March 2025) [2025] ZAGPJHC 354

COURT

South Gauteng High Court, Johannesburg

BEFORE

Manoim

CASE / FILE NUMBER

029047/25

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

Case

Number: 029047/25

(1)

REPORTABLE: No

(2)

OF INTEREST TO OTHER JUDGES: No

(3)

REVISED: No

In

the matter between:

SAMWOL
PROPERTIES (PTY) LTD
(In
Business
Rescue)
First Applicant
JERIFANOS
MASHAMBA N.O.
Second Applicant
(In
his capacity as the duly appointed business
rescue
practitioner of the First Applicant)
and
NICOLE
SINOVICH ATTORNEYS INC
First Respondent
THE
SHERIFF OF THE HIGH COURT,
JOHANNESBURG
NORTH
Second Respondent
THE
AFFECTED PERSONS OF
SAMWOL
PROPERTIES (PTY) LTD
Third Respondent
In

re:

JERIFANOS
MASHAMBA N.O.
Second Applicant
ROBERT
J OSHODIN (SENIOR)
Fourth Respondent

JUDGMENT

MANOIM, J

1. This case concerns a property transaction that has gone sour. The property is an upmarket home in the suburb of Bryanston in Johannesburg, situated at 12A Mount Street (the property) .The seller, which is also the first applicant, Samwol Property (Pty) Ltd (in business rescue)(Samwol) is, as its designation suggests, a company currently in business rescue, represented in these proceedings by the second applicant, Jerifanos Mashamba, its business rescue practitioner (the BRP).

2. The first respondent, Nicole Sinovich Incorporated, is the firm of attorneys appointed as the conveyancers to do the transfer in respect of the sale. I shall refer to them from now on as the conveyancers.
3. The second respondent is the Sherrif. At one stage his services were required to perform an attachment but as I later explain this necessity has fallen away.
4. The third respondent is described by the applicant as the affected persons of Samwol. The deponent says in this category are all persons who are affected persons in terms of section 128(1)(a) of the Companies Act, 71 of 2008.
5. This is a technically correct definition. Affected persons in terms of the Act comprise creditors, shareholders, trade unions and employees. But although the first applicant is a company it is not clear what its business is. It owns two properties – the property that is the subject of this application and a flat. Since the company has no employees only the first two categories of persons are relevant here as affected persons. The creditor is Nedbank which is the only major creditor of the company. Nedbank holds a mortgage over the property. The shareholder is Samantha Pillay also the sole director of the company. But missing from the founding affidavit is any mention of the fact that Pillay and her family presently occupy the property. That fact is central to this dispute.
6. The purchaser is the fourth respondent. He is Robert J Oshdon Snr (Oshdon) an American citizen ordinarily resident in Los Angeles. It is common cause that for the purpose of these proceedings he is to be regarded as a peregrinus.
7. What then is the basis of the dispute? In August 2017 Nedbank obtained an order for special execution against the property. The respondents were Samwol, and Samantha Pillay and her husband Asogren. The record does not show what happened after Nedbank obtained this order.
8. But in February 2023 Samwol voluntarily placed itself in business rescue. Mashamba was appointed as the business rescue practitioner. In December that year a business rescue plan was adopted. One of the provisions of the plan was that the property was to be sold. It was initially put up for auction on 29 January 2024 by auctioneers. The best price they could get was R8 858 900.00. This was not acceptable to Nedbank. Thereafter the property was marketed and the BRP received an offer to purchase from Oshdon. This offer was for R 12 162 000 thus substantially more than that achieved on auction.
9. The offer to purchase (OTP) was accepted by the BRP on 22 August 2024. But then came the dispute. On 24 February 2025, the conveyancer, acting on the instructions of Oshdon, gave notice of breach to the applicants alleging that the property was not vacant despite an undertaking that it would be vacant by the 21 February

2025. The applicants were given 7 days to ensure the property was vacant failing which Oshdon would cancel the contract and seek reimbursement of the money held in trust with Sinovich. The BRP's attorneys wrote back on 27 February to state that there was nothing in the agreement to state that the property would be vacant on date of transfer. Moreover, the attorneys stated that it was 'common cause that the property was occupied as at the date of the agreement.'
10. Oshdon however claims that his local representative was told by the BRP that the occupiers would leave before registration was effected. This is now the nub of the dispute. Oshdon contends this was a representation made to him via his local business partner. This fact is not denied by the applicants. In the founding affidavit the rather extraordinary remark is made that if the applicants gave any unilateral undertakings "they hereby withdraw same." Instead, the applicants focus on the allegation that whatever else may have happened the contract contains the sole memorial of the agreement and makes no mention of the requirement that the property be vacant.
11. The OTP is, like most property sale agreements, a standard form document with information either filled in or deleted. In the relevant clause headed 'occupation' the standard form gives two options and requires the inapplicable option to be deleted. The one option states that occupation will be given to the purchaser on registration. The other option states that the purchaser acknowledges that he has been informed that the property is let to tenants, and that the purchase is subject to the tenants' rights. But this option has been deleted.
12. In the founding affidavit the applicants do not explain who the occupiers are and if they are still there, why this clause was deleted. It is only on reading the answering affidavit that one knows what is now common cause - that the occupiers are Ms Pillay and her family, and that she has been resisting efforts to have her vacate the property. It is not clear when Oshdon learned of the presence of Pillay and more importantly when he became aware that she was reluctant to vacate once the transfer had gone through. Oshdon had done most of the dealings through his local business partner whom he refers to as Prof. It is possible that Prof was aware the property was occupied but under the impression it was going to be vacated. Oshdon says Prof was told by the conveyancer that the property was occupied by a staff member of Nedbank who would vacate on transfer.
13. When he got wind that the property was not going to be transferred to him vacant, Oshdon wrote to the conveyancer giving notice of breach to the seller and in terms of the OTP giving the seller seven days to rectify the breach. In this case rectifying, on Oshdon's version, meant ensuring the property would be vacant on transfer. The applicants' attorney wrote back to state the OTP did not require that the property had to be vacant on transfer.
14. The conveyancer then found herself in the centre of the dispute between the seller and purchaser. This culminated in a letter she wrote to the BRP on 27 February 2025. At this stage, the transfer documents had been lodged with the Deeds Office.

15. In it she expressed the dilemma of being the conveyancer as she was neither the agent of buyer nor the seller. She notes that the BRP had told her that the occupants would have moved out by the time the transfer was ready to be registered. But she says adopting her neutral stance, that she could not express an opinion on the undertaking. But she goes on to state that unless the applicants could ensure vacant possession by 13 March 2025, she would have no alternative but to regard the agreement as cancelled and to refund Oshdon the money held in trust. The applicants reject this purported cancellation as invalid and assert that Oshdon has attempted to repudiate the agreement.
16. This letter then became the trigger for the applicant to bring the present application. The applicants seek an order on the following terms:
 - a. Interdicting Sinovich from disbursing any funds it holds in trust for Oshdon to any person;
 - b. That this interdict operates as an interim order pending finalisation of legal proceedings to be brought by the applicants by no later than 31 March 2025 in which the applicants would claim specific performance of the transfer of the property.
 - c. The Sherrif, who is the second respondent, is authorised to attach the funds.
 - d. The remaining prayers authorise the attachment of the funds to confirm the jurisdiction of the court over Oshdon.
17. However, in the answering affidavit Oshdon agreed to submit to the jurisdiction of the court and appointed his present attorneys as his address for service in South Africa. The applicants have accepted this service as constituting submission to the jurisdiction of this court, and so the only remaining prayer they seek (apart from those relating to urgency and costs) is the one to interdict the conveyancer from disbursing the funds it holds in trust for Oshdon to any person.

The applicant's grounds for an interim interdict

18. What then is the prima facie right the applicants rely on for this relief? The applicants claim that having not breached the OTP they have a prima facie right to specific performance which means getting transfer of the property concluded and hence payment to them of the purchase price. This is why they seek the order on the conveyancer not to disburse the funds.
19. As to irreparable harm they allege that if the sale falls through Nedbank will withdraw from the Business Rescue process and will proceed to liquidate Samwol. Attached to the founding affidavit is an affidavit from a Nedbank official where she says this. The applicants go on to say if the sale falls through, they will lose out on the purchase price obtained. (It was also stated as justification for this form of relief that the attachment was necessary to have jurisdiction over Oshdon since he is a peregrinus and has not submitted to the court's jurisdiction, but this concern has since been overtaken by their acceptance of his undertaking during the hearing of this application)

20. In its written heads of argument the point is made by the applicants' counsel, that Oshdon was not entitled to a warranty that the property was free of occupants but that nevertheless it will be vacant once transfer takes place. It's not clear where this comes from since none was offered to the conveyancer after the breach letter was sent. Instead during the breach period, the attorney for the applicants advised that there was no breach to remedy because Oshdon was not entitled to transfer of a vacant property because the OTP did not provide for this.
21. Oshdon makes much of what he considers a fraud perpetrated on him by the BRP and Pillay referring to their actions as being in breach of the doctrine of clean hands and instead as 'dripping with blood.' But his poetic hyperbole aside, it is difficult to account for the behaviour of the applicants. Why was an undertaking not given when the occupier was not a third party but the sole director of the Samwol. Why is this mystery over the occupant perpetuated in the application such that the Pillay family is never revealed as being the occupiers?
22. What does emerge from an annexure to Oshdon's answering affidavit is a curious letter from Pillay to the BRP dated 25 February 2025, in which she castigates him from selling the property and insists on her family's rights to be afforded their rights in terms of PIE.
23. This letter says Oshdon was given to him by the estate agent. Little wonder then he became anxious of the prospects of him getting vacant occupation any time soon. No mention is made of this in the replying affidavit.
24. In its heads of argument, the then counsel for the applicants contended that Oshdon was not a party to the litigation as he did not have a legal interest in the outcome of the application. This point was not pursued by counsel who appeared in the hearing, correctly so, and I therefore do not need to consider it further.
25. So why do the applicants want the interim interdict? They say this interdict is required pending an action or application they intend to seek against Oshdon for specific performance. They say they need to preserve the purchase payment, which is held in the conveyancer's trust account, so that if they succeed in their claim for specific performance, they can have the transfer effected. They claim they acted expeditiously once the conveyancer had written the letter on 27 February 2025 (they launched this application on 3 March 2025). Furthermore, to deal with the other leg of urgent applications they claim they will not get redress in due course because Oshdon is a peregrinus. If he is repaid Nedbank will run out of patience and apply for the liquidation of Samwol. An affidavit from Nedbank to this effect is attached.

The applicant's basis for meeting the requirements for an interim interdict.

26. The applicants maintain that they have a prima facie right to the funds. Oshdon is only entitled to occupation on transfer. On that date he is entitled to transfer. However, since the OTP does not warrant him vacant occupation the fact that the Pillays may still occupy the property after date of transfer, does not mean the applicants are in breach of the OTP, and they are therefore entitled to enforce it.
27. The irreparable harm apprehended is not any behaviour of Oshdon. It is that Nedbank will withdraw their support for the business rescue and proceed to liquidate Samwol.
28. The balance of convenience and lack of any other remedy are dependent on the same facts from the applicant's point of view. If they succeed in getting an order of specific performance, they will presumably have to sue in the United States to recover the purchase price. Similarly, they argue, this would be the position for any claim for damages. The only security for them is to interdict the conveyancer from transferring the funds back to Oshdon.
29. Whilst acknowledging that Oshdon will not have access to his funds whilst the litigation is pursued, the applicants argue that since he is earning interest on his money and he is a wealthy man, the prejudice to him is outweighed by the prejudice to them if they cannot recover the money.
30. Oshdon opposes the application both on the grounds of urgency and the merits.

Analysis

Urgency

31. The applicants argue that the letter from the conveyancer dated 27 February 2025 was the trigger for urgency in this matter. In that letter the conveyancer indicated that unless Oshdon and the applicants reached some agreement, or she received a court order, she would regard the agreement as having been cancelled, and refund Oshdon. Counsel for Oshdon suggested that the applicants could have acted sooner. I do not agree. This was the final moment when it became apparent that the funds would be returned. It was the correct time for the applicants to bring the application. Nor did they waste any time. The application was brought six days later on 3 March 2025.
32. More controversial is the second aspect of urgency as required by Rule 6(12)(b) of why they could not get relief in due course. The applicants argue that they cannot if the money is repaid to a purchaser who is a peregrinus. Since this issue is factually similar to whether they have no alternative remedy, I discuss this later when I discuss the merits.
 - a. Merits
33. The applicants argue that the terms of the OTP clearly from its text give them a prima facie right. But the occupation paragraph in the OTP has been carelessly completed. There are two option clauses in the standard form contract one of which has been deleted.

34. The clause that has been retained states that occupation will be given on date of transfer. It then has a further sentence which states that should the registration date not coincide with the occupation date, then the party enjoying such occupation, shall pay to the party having registration, occupational rental. There is then a blank space on the form left to insert what this amount is. But on this OTP no amount is inserted here; instead, the letters N/A have been inserted in manuscript. The applicants argue that this simply means that whoever was in occupation after transfer date did not have to pay occupational rental.
35. In the printed form beneath this occupational rental clause, is the second clause, which takes the form of an acknowledgment by the Purchaser that he has been informed that the property has been let to tenants. But this paragraph has been deleted. What then is the combined effect of the insertion of the letters N/A in the occupational rental clause, and the deletion of the tenant clause?
36. It is an equally fair reading of the OTP thus amended, that the parties understood that the purchaser would get vacant possession on transfer and hence the clause about occupational rental as a whole was rendered not applicable by the insertion of the N/A, as opposed to this simply meaning an agreement that no amount had been set for occupational rental. But when combined with the deleted provision concerning an acknowledgement about the tenant, this favours the interpretation of Oshdon, that the property would be vacant on date of occupation which coincided with the date of registration.
37. Nevertheless, I agree with counsel for the applicants, that in terms of modern contractual interpretation, the text enjoys no priority over context and purpose with the latter two not before me in application proceedings.[1] I am therefore willing to allow for the applicants that textually they have established a prima facie right. But given the textual ambiguities, it is a weak one. Consequently, as the case law suggests the other elements required for an interim interdict need to be strong. This is best summarised by Van Der Linde J in Resilient when he stated:

"The approach approved then by these authorities is that 'a prima facie right, though open to some doubt' conveys that the strength of the right is allowed to fluctuate from strong to weak: if it is strong, the other requirements for an interim interdict may be weak; if it is weak, the other requirements for an interim interdict may be strong." [2]

38. The problem for the applicants is that having a weak prima facie right they are not strong on the other requirements. Take the next issue of irreparable harm. It needs to be understood what is at stake here. The applicants are not about to lose the property. What they apprehend is that Nedbank will act on its threat and force the company into liquidation. But even if they do so, what is lost at worst is the difference between the price that Oshdon paid for the property and what might be achieved if it is sold at auction. On the assumption that this price might be lower, which is a possibility rather than a certainty, the loss is that of Nedbank. It can choose to continue the business rescue or induce the process of liquidation. But doubtless Nedbank will do its sums and decide the best way forward. A huge loss or even

a loss at all is not inevitable as the company still owns the property.

39. Nor should one have any sympathy with the BRP who has failed to disclose important facts concerning the continuing occupation of Ms Pillay and her family; facts that only emerged in the answering affidavit. The BRP did not play open cards with the court. Nor if any of the residue of the company is due to Ms Pillay, should one have any sympathy for her. Her failure to move out of the property is the reason the transaction has fallen into jeopardy. She is still clearly unwilling to move as an angry letter from her to the BRP dated 18 February 2025 reveals. This letter was not disclosed by the BRP but by Oshdon who had received it from the estate agent. In it Pillay threatens that if she is evicted, she will bring a spoliation action as well as “associated criminal complaints.” But it is Pillay who initiated the Business rescue process clearly calculated to ensure that it was the BRP, not Nedbank, who would then take charge of the sale of the house. But then when a buyer was found she actively sabotaged a successful transfer by refusing to vacate.
40. Nor does the property represent a business despite being owned by a business in business rescue. This is clear from none other than Pillay herself its sole director who in the same letter to the BRP states:

“This, further, records for court and legal purposes that although the property is owned by Samwol Properties (Pty) Ltd (hereinafter referred to as the company), the company is a holding mechanism since the property houses a family and serves no other purposes.”

41. Thus, the representation that the BRP had made that the property would be vacated by the 21 February was one he must have known at the time was impossible, given Pillay’s recalcitrance.
42. Relying on these facts Oshdon’s counsel suggested that there had been an abuse of process and on that consideration alone, the interdict should be dismissed. I do not need to go as far as this, but I am unconvinced by the case made out on irreparable harm or the balance of convenience.
43. On the latter, the fact that Oshdon is a man of means should not be held against him. If the interim relief is granted, he will be in a situation where he will neither have access to the property nor a large sum of money, for some time. Given these considerations the balance of convenience is about even.
44. Finally, the applicants still have the remedy of a damages claim. If the property has to be sold again the damages will be the differences

between what they sold it for and what they could have got from Oshdon; assuming of course that this amount is lower. If it is, the amount would be readily determinable, and this distinguishes this case from those where damages are not easily determinable.[3] Granted recovery may be expensive to pursue but it is not impossible. Oshdon does state he has other investments in South Africa, and he has submitted to the court’s jurisdiction. The case was originally premised on the assumption that attachment was needed to confirm jurisdiction. Whilst not the only reason for

the interdict, it has now fallen away as part of the justification.

45. In conclusion then whilst I find that the applicants have made out a prima facie right, it is a weak one. Had the applicants made out a strong case on the other elements, irreparable harm, the balance of convenience and no other remedy they might have succeeded. But they have not. The case is weak on all the other elements as I have discussed. The application is for this reason dismissed.
46. As for costs both counsels consider that the case merits costs of counsel on scale C. I would agree. Oshdon was represented by both senior and junior counsel. However, I do not consider that the case warranted either senior counsel or two counsel. It was however sufficiently complex to justify counsel's costs on scale C, which is what I have allowed.

ORDER

1. The application is dismissed.
2. The applicants jointly and severally are liable for the costs of the fourth respondent on a party and party scale with cost of one counsel on scale C.

MANOIM J

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant: Adv L Hollander instructed by Michael Marshall

Attorneys (with heads of argument prepared by Adv. L. Acker).

For the Fourth Respondent: Adv D.C Mpofu and Adv M. Seti-Baza instructed by

KMNS Inc.

Date of hearing: 14 March 2025

Date of Judgement: 20 March 2025

- [1] See for instance the well-known cases of Natal Joint Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paragraph 18, and Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd and Others 2002 (1) SA 100 (SCA) at paragraph 25.
- [2] Resilient Prop (Pty) Ltd v Eskom Holdings SOC Ltd 2019 (2) SA 577 (GJ) at [52].
- [3] See Herbststein and Van Winsen Civil Practice of the High Courts and the Supreme Court of Appeal (Fifth Edition) Jutas, page 1469, footnote 100 and the cases

referred to there.

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