IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: **2296/2019**

In the matter between:

PHILLIP TSHEPISO MOTSIMA	1st Applicant
THANDIWE PATIENCE MOTSIMA	2nd Applicant

and

LIPHAPANG ALBERT KOPA	1st Respondent
NTHABISENG MOSOEU-KOPA	2nd Respondent
THE TRUSTEES OF THE TIME BEING FOR THE C & D INVESTMENT TRUST [Registration number: IT4256/2006]	3rd Respondent
THE REGISTRAR OF DEEDS, FREE STATE PROVINCE	4th Respondent

THE TRUSTEES FOR THE TIME BEING OF
THE VAN DER MERWE FAMILY TRUST 5th Respondent
[Registration number: IT020728/2014(B)]

CORAM: MBHELE, J

HEARD ON: **20 JUNE 2019**

DELIVERED ON: 04 JULY 2019

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[1] On 24 May 2019 the first and second applicant (the applicants) commenced proceedings in this court by the issue of a notice of motion in which were reflected truncated time periods in respect of the filing of a notice of opposition and an answering affidavit. The notice of motion indicated that the applicant would move for a rule nisi on 20 June 2019, returnable on 18 July 2019. The applicants sought a relief in the following terms:

1. That condonation be granted to the applicants for the non-compliance with the rules of the Court regarding the time periods, service and form of this application and that the application be heard in terms of rule 6 (12) as an urgent application.

2. That a rule *nisi* be issued, calling upon the respondents to show cause on 18 July 2019 at 09:30, why the following orders should not to be made final:

2.1 That pending the finalisation of the action instituted by the applicants against the respondents in this Honourable Court under case number 2122/2019 ("the main action") for the transfer of the immovable property known and registered as Erf […]. Bloemfontein, Extension 166, Mangaung Metropolitan Municipality, Free State Province held under Title Deed T15089/2018, better known as […] Road, Woodland Hills Wildlife Estate, ("property") to the fifth respondent (the Trustees for the time being of the Van der Merwe Family Trust). The first, second and fifth respondents are prohibited and interdicted from transferring the immovable property from the first and second respondents to the fifth respondent:

2.2 That, pending the finalisation of the main action, the Fourth respondent is interdicted from registering the Transfer of the immovable property from the first and Second respondent to the fifth respondent;

2.3 That the first and second respondents, be ordered to pay the costs of this application; and

2.4 In the event that this application is opposed by the third

and/or fifth respondents that the third and/or fifth respondents, jointly and severally with the first and second respondents, be ordered to pay the costs of this application

3. That the paragraphs 2.1 and 2.2 above shall serve as interim interdict with immediate effect pending the finalisation of this application.

4. Further and/or alternative relief.

Although a rule nisi was sought initially in the notice of motion, I am sure that with the full exchange of affidavits what was contemplated by the parties was the finalisation of the matter as if it were the return day of the rule nisi.

BACKGROUND

[2] The applicants were owners of a property described as erf […] Bloemfontein extention 166, Mangaung Metropolitan Municipality better known as […] Road, Woodland Hills Wildlife Estate, ("property").

[3] Around February 2017 the applicants entered into an agreement with the third respondent, represented by its trustee Stompie Buys, in terms of which the applicants would sell their property to the third respondent and simultaneously conclude with it a lease

agreement allowing the applicants to stay in occupation of the property with an option to buy the property back at an agreed price.

[4] The purchase price was the outstanding amount the applicants owed the bank in terms of the loan agreement, a securing covering bond registered in favour of the commercial bank (Standard bank) over the property.

[5] The sale was necessitated by the fact that the applicants had fallen into arrears with the monthly repayments with the bond holder and unable to settle the outstanding loan.

[6] The property was registered in the name of the third respondent after the amount owing to Standard Bank was settled in full.

[7] The applicants' financial position did not improve and as a result they failed to pay rental owed to the third respondent in terms of the lease agreement.

[8] An agreement was reached between the applicants and the first and second respondents in terms of which the first and second respondents would purchase the property from the third respondent for the same amount that the third respondent paid to the bond holder to extinguish applicants' debt.

[9] The applicants would in terms of the agreement stay in occupation of the property under a lease agreement.

The applicants would have an option to repurchase the property from the first and second respondent.

[10] The agreement between the applicants and the first and second respondents was not reduced into writing.

The applicants presented a draft lease agreement to the first and second respondents which the respondents refused to sign.

The first and second respondents presented their own version of the lease agreement which the applicants refused to sign.

Correspondence was exchanged between the parties in an attempt to reach a common ground to formalise the lease agreement. Letters were exchanged between 31 October 2018 and 12 November 2018. In the letter of 12 November 2018, the applicants had proposed amendments to the lease agreement prepared by the first and second respondent.

[11] The applicants instituted an action in this court under case number 2122/ 2019 during May 2019 (the main action) in which action the applicants seek transfer of the property from the first and second respondent to the applicants.

[12] The basis for their claim in the main action is that the transactions that resulted in the transfer of the property into the names of the third respondent and, further, into the names of the first and second respondent were unlawful and against the public policy.

The first and second respondent entered into an agreement of sale with the fifth respondent

[13] The parties are at variance on whether the transfer of the property into the names of first and second respondents from the third respondents was as a result of loan agreement between the first and second respondents and the applicants with the first and second respondent maintaining that the transaction was a pure sale agreement between the first and second respondents and the third respondents with no attachment to the applicants.

Contentions by the parties

[14] Mr. Van der Merwe, on behalf of the first and second applicant, submitted that the matter became urgent on 16 May 2019 when the first and second respondents refused to keep the transfer of the property in abeyance pending the finalisation of the main action. He contended that, throughout, the transfer of the property was meant to serve as security for what was actually a loan that the third respondent advanced to the applicants and a further loan that the first and second respondent advanced to the applicants.

[15] He contended further that first and second applicants never had the intention of passing ownership of the property to the third respondent as well as the first and second respondents. He argued that the applicants' continued occupation of the property and its sale far below its market value are an indication that the agreement was a simulated transaction concealing the real

intention of the parties, which was a loan agreement to clear the debt owing to Standard bank. He argued, further, that the transaction has complete characteristics of a *pactum commissarium.*

[16] Mr Reynders, on behalf of the first, second and fifth respondents, argued that the applicants created their own urgency as they knew as far back as November 2017 that their request for the first and second respondents to suspend the sale of the property was not favourably considered by the first and second respondents. He contended further that the agreements that the applicants rely on for the relief they are seeking are bad in law and unenforceable in that Section 2 (1) of The Alienation of Land Act requires that agreements for the sale of immovable property must be in writing. He argued that the first and second respondents entered into a valid sale agreement with the Third respondent which establishes no relationship between the first and second respondent and the applicants. He, further, argued that failure by the applicants to exercise the option to repurchase the property

It is clear from the papers that after the letter of 31 October 2018, from applicants' Attorney, there was a line of communication opened with the parties engaging each other in an attempt to settle the matter.

[17] *Pactum Commissarius* was defined as follows by Cloete JA **in Graf v Buechel 2003 (2) All SA 123 SCA.**

A *pactum commissorium* in the context of a pledge is an agreement that if the pledger defaults, the pledgee may keep the security as his own property.

[18] Solomon JA in *Sun Life Assurance Co of Canada v Kuranda 1924 AD 20 at* 24 said of a *pactum commissorium*:

> '[T]he very essence of that pact is that the creditor is entitled to retain the article pledged, however great its value may be, in satisfaction of a debt, however small in amount. And it was because of the harshness and injustice of such an arrangement made with the debtor in straitened circumstances that the Emperor Constantine decreed that such pacts should for the future be prohibited'

[19] It is so that our courts have repeatedly confirmed that an agreement whereby a creditor retains a pledged asset tendered as security for a debt for itself for no value is a *pactum commisorium* and is invalid and unenforceable. The creditor must realise the pledged asset at a fair market value for the transaction to be enforceable. The fair price must be determined at the default date and not the pledge date.

[20] In **Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** Corbett JA found on 634 and 635:

"It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion

disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd, 1949 (3) SA 1155 (T), at pp 1163-5; Da Mata v Otto, NO, 1972 (3) SA 585 (A), at p 882 D - H).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf. Petersen v Cuthbert & Co Ltd, 1945 AD 420, at p 428; Room Hire case, supra, at p 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks."

[21] The parties are at variance as to whether the purchase price paid by the first and second respondents to the third respondent was a

fair market value for the property. The applicants allege that the property was worth about 6 million rands while the first and second respondents aver that it was worth far below 6 million rands.

It is the applicants' case that the agreement was that they would have the first option to repurchase the property at a price determined on the date of pledge.

[22] First and second respondents deny that they were bound in terms of the verbal agreement to give the applicants the first option to repurchase the property at a predetermined price, being the amount the first and second respondents paid to extinguish the applicants' indebtedness to the third respondent.

The following communication was exchanged between the first applicant and Buys who was the trustee of the third respondent before an agreement of sale was entered into between the third respondent and the first and second repondent.

"From: Stompie Buys

To: The first Applicant

Date: 2018/ 06 27

Hello Motsima

> I refer to our conversation this morning. Can you please confirm who the buyer of this property will be? Send his ID. I would also need your approval in writing that we can sell the property to this person."

On the same day the applicant responded as follows to Buys:

> Hi Stompie
>
> "Our previous telephonic conversation on the matter stated above has reference. I wish to confirm that I have authorized you to process the buying back of the property situated at No. […] Road, Woodland Hills Wild life Estates in Bloemfontein, Free State Province. Secondly, I also wish to confirm that I have authorized you to sell the property to Mr. and Mrs. Kopa as per the copies of their ID numbers I sent to you earlier.
>
> I hope you will find the above in order and for any inquiries please do not hesitate to contact me."

[23] From the correspondence exchanged between Buys and the first applicant it is clear that third respondent required permission from the first applicant before the third respondent could enter into an agreement of sale of the property with the first and second respondents. This is an indication that the applicants still had a say on how the property had to be disposed off.

It is further not in dispute that the applicants were the ones who approached the first and second respondents to request them to

buy the property from the third respondent in order to ease their financial burdens.

On 05 November 2018 first and second respondents' Attorney wrote a letter to the applicants' Attorney in response to the latter's correspondence of 31 October 2018.

[24] Paragraph 2 and 3 of the letter written by respondents' Attorney read as follows:

> '2) Your clients have not once given any indication they have security to pay anything. Your clients have not once given our clients any proof that they are trying to buy back the property. Since registration of the property in in the name of Mr. and Me. Kopa there has been no attempt from your client with proof of funding for the buy back, in fact they would not meet with the Kopa's and myself and omitted to pay rental. Your client also did not want to put the property on the market or it seems pay rental.
>
> 3) it is becoming apparent / or seemed so that your client wants to stay in a property they cannot afford, and they refuse put the property back in the market, irrespective of the understanding between the parties. Writer first phoned your client in August 2018 regarding the property and the sale thereof, thus they were aware what the Kopa's understanding was. The fact that your client does not want to put property in the market is now clear.'

[25] It is clear from the above paragraph that there was a relationship between the applicants and first and second respondents emanating from some verbal agreement between the parties. It is not clear why the first and second respondents would worry about

the applicants' opinion on further alienation of the property if they understood that they were complete owners of the property with no strings attached to the applicants. What is apparent is from the above extract is that the applicants refused to put the property in the market much to the dismay of the first and second respondents who were losing money because the applicants had failed to honour their rental payments.

[26] The purpose of section 2 of The Alienation of Land Act is to achieve certainty in transactions involving the sales of fixed property so as to avoid fraud or unnecessary litigation. See **Swanepoel v Nameng** 2010 (3) SA 124 SCA. An agreement is valid whether written or not. What is important is the meeting of the minds and articulation of the parties' intention.

[27] Before any agreement is reduced into writing the parties agree on the terms to be reflected on the written document. The written document does not exist in vacuum. It is clear from the conduct of the applicants and the first and second respondent that they agreed on certain terms which have a bearing on whether their agreement constituted a *pactum commissorium* or a conditional sale agreement. These issues are pending in the main action and can be better ventilated at trial.

REQUIREMENTS FOR AN INTERIM INTERDICT:

[28] It is trite that the requisites for an *interim* interdict are the following:

i. a *prima facie* right, although open to some doubt;

ii. a well-grounded apprehension of irreparable harm if interim relief is not granted and ultimate relief is eventually granted;

iii. the balance of convenience favours the granting of the interim interdict, and

v. the applicant has no other satisfactory remedy. See: **Webster v Mitchell 1948 (1) SA 1186 (W)**

[29] The respondents contend that the balance of convenience does not favour the applicant in that the respondents are saddled with the burden of enduring all expenses relating to the property *pendente lite*.

[30] On the other hand the applicants contend that they will suffer irreparable harm should the property be transferred to the fifth respondent pending the main action. The transfer will result in the applicants not being suited. They further contend that the granting of the relief will only result in maintaining the status quo *pendente lite*. If the applicants are unsuccessful in the main action, the transfer of the property from the first and second respondent to the fifth respondents can still be effected.

[31] The test to be applied in adjudicating a *prima facie* right in the circumstances of an interim interdict is well established. Having regard to the facts averred by the applicant, together with those

facts put up by the respondent that are not disputed, it must be considered whether, having regard to the inherent probabilities, the applicant should obtain final relief on those facts at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the applicant's case, it cannot succeed. See: **Simon No v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA)** at **228G**

[32] It is well established that for the applicants to be granted the relief sought they must demonstrate a prima facie right which if not protected harm may ensue. I have already mentioned that the applicants have demonstrated that there was an agreement between them and first and second respondents which the validity of its terms must be tested at trial.

The principle that the creditor should realise the pledged asset at a fair price must be respected. It is against this background that I am of the view that the applicants have an issue justiciable in law which the trial court must determine.

[33] The applicants request that the sale be stayed pending the finalisation of the main action. When all is considered I am of the view that the balance of convenience tilts the scales of fairness and justice in favour of the applicants. The only way their rights can be protected *pendente lite* is by maintaining the status quo. I am of the view that the harm that may be suffered by the applicants if the relief sought is not granted far outweighs the

prejudice likely to be suffered by the first, second and fifth respondents if the status quo prevails *pendente lite*.

[34] It is trite that the issue of costs falls within the discretion of the court. Such discretion must be exercised judiciously having regard to the facts of each matter. In the current matter I am of the view that costs must be in the cause of action. In view of the above the following order is made:

ORDER:

2. Condonation is granted to the applicants for the non-compliance with the rules of the Court regarding the time periods, service and form of this application and that the application be heard in terms of rule 6 (12) as an urgent application.

2. 1 Pending the finalisation of the action instituted by the applicants against the respondents in this Court under case number 2122/2019 for the transfer of the immovable property known and registered as Erf […]. Bloemfontein, Extension 166, Mangaung Metropolitan Municipality, Free State Province held under Title Deed T15089/2018, better known as […] Road, Woodland Hills Wildlife Estate, to the fifth respondent. The first, second and fifth respondents are prohibited and interdicted from transferring the immovable property from the first and second respondents to the fifth respondent:

2.2 pending the finalisation of the main action, the Fourth respondent is interdicted from registering the Transfer of the immovable property from the first and Second respondent to the fifth respondent;

3. Costs are costs in the cause.

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NM MBHELE, J

On behalf of Applicant	:	Adv R Van der Merwe
Instructed by	:	Maree & Vennote Attorneys **BLOEMFONTEIN**

On behalf of 1st, 2nd and 5th Respondent(s):	Adv S. Reynders
Instructed by:	Van Wyk & Preller Inc **BLOEMFONTEIN**