REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **44294/17**

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) ~~REVISED.~~

.....
SIGNATURE

15/8/2019
.....
DATE

In the matter between:

SABLE HILLS HOMEOWNERS ASSOCIATION (PTY) LTD	APPLICANT
and	
SABLE HILLS WATERFRONT ESTATE CC	1ST RESPONDENT
ANDRIES JACOBUS VENTER	2ND RESPONDENT
MOKETE INVESTMENTS (PTY) LTD	3RD RESPONDENT
THE REGISTRAR OF DEEDS, PRETORIA	4TH RESPONDENT

JUDGMENT

MALI J

[1] The applicant seeks the following relief by way of urgent application:

> "*1. The matter be heard on an urgent basis as contemplated in Rule 6(12) and the Applicant's failure to comply with the rules of court relating to service and time periods is condoned;*
>
> *2. Pending final determination of the action and the counterclaim instituted in the above Honourable Court under case number 14373/2016, Fourth Respondent is ordered to register the following caveat over the immovable property described as Erf 284, Sable Hills Waterfront Estate Township, Registration Division J. R., Province of Gauteng (hereinafter Erf 284);*
>
> *Erf 284 is subject to a long-term lease for so long as the Applicant exists; the validity and duration of the long-term lease is the subject of a pending action instituted by SABRE HILLS WATERFRONT ESTATE CC as the Plaintiff against SABRE HILLS HOMEOWNERS ASSOCIATION as Defendant and a counterclaim instituted by SABRE HILLS HOMEOWNERS ASSOCIATION as the Plaintiff in reconvention against SABRE HILLS WATERFRONT ESTATE CC as Defendant in*

reconvention under Case Number 14373/2016 in the High Court of South Africa, Gauteng Division, Pretoria

3. *Pending final determination of the action instituted in the above Honourable Court under case number 44176/2017*

   3.1 *Fourth Respondent is ordered to register the following caveat over the immovable property in paragraph 4 below:*

   The property is subject to a usufruct in favour of the Applicant as long as the Applicant exists; the validity and duration of the usufruct is the subject of a pending action instituted by SABRE HILLS HOMEOWERS ASSOCIATION as the Plaintiff against SABRE HILLS WATERFRONT ESTATE CC as Defendant under Case Number 44176/2017 in the High Court of South Africa, Gauteng Division, Pretoria

4. *The properties referred to in paragraph 3 above are the following:*

   Erven 283, 285, 286, 291, 292, 293 and 295 Sable Hills Waterfront Estate Township, Registration Division JR, Province of Gauteng

5. *Pending finalization of the litigation referred to in Paragraph 2 and Paragraph 3 above:*

5.1 *First and Thirds Respondents are prohibited and interdicted from implementing or from further implementing the terms of the Purchase Agreement concluded in respect of Erf 284, Sable Hills Waterfront Estate Township ('Erf 284")*

5.2 *First Respondent is interdicted and prohibited from transferring ownership of Erf 284 to the Third Respondent;*

5.3 *First and Second Respondents are interdicted and prohibited from;*

5.3.1 *representing to any third party and in particular to tenants present on Erf 284, that the long-term lease in respect of Erf 284 is void, alternatively has been terminated, alternatively will be terminated;*

5.3.2 *interfering in any way with the exercise by the Applicant of its rights under the usufruct and the long-term lease over Erf 274;*

5.3.3 *evicting, alternatively from threatening to evict any of the Applicant's tenants from Erf 284;*

6. *First, Second and Third Respondents are ordered to pay the costs jointly and severally with such other Respondents who may oppose the application."*

[2] The fourth respondent is not opposing the application. The first, second and third respondents, do not quarrel with the urgency of the application, however they have responded by way of counter application.

[3] The applicant is a homeowner's association incorporated within the laws of the Republic. The main object of the applicant is the promotion of the communal group of interests of the owners of erven within Sable Hills Waterfront Estate Township (*"Sable Hills"*).

[4] The first respondent is a close corporation duly registered within the laws of the Republic of South Africa and a developer of Sable Hills. The second respondent is a major businessman who is a sole and managing member of the first respondent. The third respondent is a private company duly incorporated within the laws of the Republic of South Africa. The fourth respondent is the Registrar of Deeds cited as the implementing party of the relief sought in the event the applicant is successful.

[5] The conditions of establishment of Sable Hills came into being in 2005. The conditions are that erven 1 up and including 282 and erven 297 and including erf 305 are zoned residential and shall be used

solely for the purpose of one dwelling house and associated outbuildings. Erven 283, 285, to 287, 291 to 295 and 307 are zoned private open space and shall be used solely for the purpose of private open space with related facilities. Erf 284 is zoned Special (Clubhouse, Gymnasium and Restaurant) and shall be used solely for the purpose of a Clubhouse, Gymnasium and Restaurant. Erf 288 is zoned Special (OFFICES) and shall be used solely for the purposes of an office block. Erf 289 is zoned Special (BOATHOUSE) and shall be used solely for a boathouse.

[6] Erf 290 is zoned SPECIAL (PRIVATE ACCESS WAY) and shall be used solely for the purpose of a private access way, office, gatehouse, caretaker's house and the conveyance of electricity, water, sewerage and related services. The erven in Sable Hills and the owners and occupiers of the erven in the township shall be members of the applicant and shall be bound by applicant's Memorandum and Articles of Association and related Rules and Regulations.

[7] It is common cause that the first respondent marketed the property in the estate on the basis of the use of the facilities of the recreational area on the leased premises to be for the benefit of the resident and occupiers of residents in the estate.

[8] It is also common cause that during 2008 the first respondent commenced with the development of certain erven that were rezoned

without the applicant's knowledge from private open spaces to residential. Consequentially a dispute arose between the applicant and the first respondent. The ensuing dispute led to the conclusion of a Settlement Agreement on 5 June 2008 and a subsequent Arbitration Award which was made an Order of Court on 20 March 2014. In the arbitration award the first respondent was ordered to secure the release of the "open" properties from the operation of the mortgage bond. This was necessary to ensure registration of the *usufruct* with the fourth respondent. As a result of the first respondent's failure to comply with the order arising from the arbitration award, the applicant instituted a contempt of court application. The court did not find the respondents in contempt, the applicant has appealed the judgment.

[9] On 17 March 2017 the first respondent notified the applicant that it had received an offer from the third respondent to purchase erf 284 for a sum of R13 110 000.00. On 28 April 2017 the respondent issued the applicant with a notice to terminate the lease agreement with effect from 1 August 2017. The basis of the first respondent's termination of the lease was that since the lease was for indefinite period. The respondent's interpretation is that there is no duration attached to the lease as prescribed by law, therefore there was no lease between the parties and that there was no servitude created in respect of open spaces. All that was required from the respondents was to give reasonable notice, which it had done.

[10] At the date of launching of this application there were two actions pending in the above honourable Court, arising from the non-compliance by the respondents with the terms of the settlement agreement. The first action instituted in 2016 concerns the validity of the lease agreement and the second action instituted in 2017 concerns the termination of the lease agreement and the validity of *usufruct*.

ISSUE

[11] The issue for determination is whether the applicant is entitled to the interim interdict sought.

INTERIM INTERDICT

[13] An interim interdict is a court order preserving or restoring the *status quo* pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination

[12] The requirements for the granting of an interim interdict are the following: a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favours

the granting of an interim relief, and that the applicant has no other satisfactory remedy.[1] In this regard Holmes JA[2] said the following:

"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at p. 227. In general the requisites are –

(a) a right which, 'though prima facie established, is open to some doubt';

(b) a well grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations 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 to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see Olympic

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[1] ERKSEN MOTORS (WELKOM) LTD v PROTEA MOTOTS WARRENTON & ANOTHER 1973 (3) SA 685 (A) and
KNOX D ARCY LTD v JAMISON & ANOTHER 1996(4) SA 348 (A) at 361

[2] ERKSEN MOTORS (WELKOM) LTD v PROTEA MOTOTS WARRENTON & ANOTHER supra at 691

Passenger Service (Pty) Ltd v Ramlagan, 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration."

[13] The question therefore is whether the applicant has established a prima facie right. The approach to be adopted in considering whether an applicant has established a prima facie right has been stated to be the following[3]:

"*The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.*"

ARGUMENTS

[14] According to the applicant since the settlement agreement, over the ensuing seven years the first respondent repeatedly sought to cancel the agreement. The first respondent alternatively made contentions that the agreement was void. The applicant refers to the terms of the

[3] In SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS 1999 (1) SA 217 (SCA) at page 228

settlement agreement as give- and -take by both sides. The essence of the settlement agreement entailed the following:

14.1 The first respondent was given the right to develop a limited number of "open" erven.

14.2 In exchange for this, the developer granted the applicant for the benefit of its members:

(a) A usufruct over all the remaining "open" erven;

(b) A lease over Stand 284 (the recreational area) at a rental equivalent only to the actual running expenses associated with stand 284.

[15] It was submitted on behalf of the applicant that on the proper interpretation of the Settlement Agreement as a whole and the provisions of Clause 1 and Clause 3 in particular, having regard to all the relevant circumstances and the contractual context that:

15.1 both usufruct and long-term lease were granted for as long as the applicant exists;

15.2 it was a tacit, alternatively implied, term that the applicant is entitled to have the long-term lease agreement registered as a long-term lease against the Title Deed of Erf 284 and the First

respondent is obliged to take all steps necessary and to do all things required to have such registration effected.

[16] The apprehended harm is that from 1 August 2017 the first respondent will prohibit the use of clubhouse and gymnasium for the benefit of members of the applicant. In respect of open spaces the first and second respondents may sell the erven and or develop them in that, forbidding the use of the open spaces for the benefit of the members of the applicant. The estate was marketed to the members of the applicant with added value of a game reserve; which is accessed through the open spaces. The members of the applicant were sold a dream to traverse the open spaces as part of their residence status in Sable Hills.

[17] The fact that the second respondent contemplates to sell Erf 284 to the third respondent increases the apprehension of harm. The applicant submits that it has a well-grounded apprehension that the whole purpose behind the second and third respondents entering into the purchase agreement is an attempt of the first respondent to avoid his obligations. The obligations are in terms of the long-term lease agreement and to deny the applicant the opportunity to exercise its right of first refusal. Furthermore the sale of erf 284 to any third party may result in increase of rent and levies to the prejudice of the members of the applicant.

[18] Compounding the issues, amongst others in respect of the third respondent is that the purchase price of R13 110 000.00 grossly exceeds the market value of erf 284. Furthermore the third respondent is the alter ego of the second respondent and/ or is directly controlled by the second respondent. The third respondent is an empty shell with no means of paying or obtaining finance to pay the purchase price. The respondent/s did not dispute the submissions by the applicant.

[19] The first and second respondent's (*"respondents"*) argument is that the members of the applicant will be given opportunity to use erf 284 as they are currently doing. Secondly the respondent will not interfere with open spaces. The respondents do not understand why they cannot be trusted by the applicant because they are making the averments under oath. Judging from the protracted litigation between the parties; as well as confirmed in the affidavit of first and second respondent at paragraph 121 the mistrust by the applicant is well founded.

[20] The third respondent pleads knowledge of the long-term lease agreement. By operation of law the third respondent will therefore be bound and will be obliged to honour terms and conditions of the long-term lease agreement.

[21] Furthermore the respondents contend that the applicant has no *prima facie* right because the usufruct over the properties is not valid and

binding. Therefore it is impossible to perform the registration of the lease and *caveats* as it is prohibited by law. According to the respondents they once submitted a notarial deed to register the contested servitude or usufruct.

[22] To the above submission the office of the fourth respondent replied as follows:

> *"1. The provisions of section 66 of the deeds act 47/37 (sic), stating that no personal servitude of usufruct or habitation (sic) purported to extend beyond the lifetime of the person in whose favour it is created shall be registered, or may a transfer or cession of such personal servitude to any person other than the owner of the land incumbent thereby, be registered.*
>
> *2. A home owners association is a juristic person and the usufruct can be registered for a period of 100 years or until the home owners association does not exist anymore.*
>
> *3. The draft notarial deeds as it is cannot be registered for an unlimited period (indefinite) over the mentioned properties, our suggestion would be to change the wording of the period from unlimited to 99 years, for the notarial deed to be registered."*

[23] It appears that the respondents took the advice from the office of fourth respondent. On 14 September 2015, hardly 12 days

subsequent to the receipt of the letter from the fourth respondent the respondents authorised a special power of attorney ("SPA"). The SPA was intended to effect the registration of the personal servitude of *usufruct* over the Properties. In the relevant extract of the special power attorney the following is stated:

"*...**AND WHEREAS** a Home Owners Association is a juristic person and the usufruct can be registered for a period of 100 (one hundred) years or until the Home Owners Association does not exist anymore;*

*"**AND WHEREAS** the draft Notarial Deed which forms part of the Memorandum of Agreement dated 5 June 2008, in its current form, cannot be registered for an unlimited/indefinate (sic) period over the mentioned Properties;*

***AND WHEREAS** the parties are desirous to amend the wording of the period unlimited / indefinate (sic) to 99 (ninety nine) years in order to effect registration of the personal servitude of Usufruct over the Properties, which servitude of Usufruct will only relate and refer to the Properties aforementioned..."*

[24] To the above the respondents contented that the SPA related to some of the erven which are not part of the settlement agreement. Be that as it may the amendments in the special power of attorney arise from the same contract and related facts between the parties. The

determining statement is that the homeowners association has a life of 100 years.

[25] The respondents were eager to amend the wording indefinite or unlimited to 99 years in order to effect registration. This is despite that some of the properties in dispute were covered and some not from that intended registration. There is therefore compelling evidence that it is possible to register servitudes based on the amendment of terms by the respondents. One cannot speculate the cause of the change of heart on the part of the respondent in respect of the servitudes under question.

[26] There is no reason to believe the argument that it is impractical to register servitude for the benefit of the applicant. The process must be preceded by the amendment of the wording from unlimited to 99 years. It has already been found that the settlement agreement is valid in law. From the above it is established that registration is capable of being performed.

[27] According to the respondents there is no dispute that the lease is a long term lease, however the lease has been cancelled. The cancellation of the lease is the subject of the pending litigation. The issue of the lease has also been determined in terms of the settlement agreement. I need not repeat the validity of same. The validity of settlement agreement has been confirmed in the order of 22 May 2015 under the hand of the Learned Mr Justice Bertelsmann.

[28] I am satisfied therefore that the balance of convenience favours the granting of the relief sought by the applicant

COUNTER APPLICATION

[29] The respondents seek a declaratory order as follows:

"1 It is declared that the lease provided for in clause 3 and the usufruct provided for in clause 1 of the memorandum of agreement that was made and entered into by and between Sable Hills Waterfront Estate Proprietary Limited and Sable Hills Home Owners Association (an association incorporated under section 21) dated 5 June 2008 (of which a copy is attached to the founding affidavit as MF5) have been terminated;

2 The Sable Hills Home Owners Association is ordered to pay the costs hereof".

[30] The uppermost argument proffered on behalf of the respondents is that a long lease and right to servitude may by law be registered only for the life-time of the holder of the servitude of the right of usufruct or lessee under a long lease if a legal person, for a period of 99 years.

[31] The court is persuaded to deal with the "core" issue. According to the respondents the core issue is whether the word "indefinite" used to describe the duration or term of both servitude meant forever as the applicant argues. As alluded in the applicant's argument the applicant

in the alternative seeks the court should find on the proper construction of the settlement agreement that the applicant shall endure for 100 years and that the term unlimited should be amended to 99 years. The court has already dealt with this issue at paragraphs 25 and 26 above.

[32] Respondents further argued that the applicant is seeking a disguised final relief. I cannot agree with this contention. The applicant's application is not vailed in any form. It is clear that it seeks interim relief. The applicant has further alluded to various concerns, amongst them that the agreement between the first and the third respondent is a sham. The court cannot determine this based on papers before it. It is clear that there is a dispute of fact regarding the status of the third respondent as a legitimate purchaser. The respondent ought to have foreseen various disputes of facts, including the manner of cancellation of the lease and disputed right to servitudes. The counter application cannot be limited to only interpretation of the word *"indefinite"*. The action proceedings should run in order to allow opportunity for the ventilation of all the pending issues.

[33] In the circumstances it is appropriate to dismiss the counter application.

ORDER

[34] In the result the following order is made:

1. Draft order marked "X", as amended, made an order of Court.

N.P. MALI
JUDGE OF THE HIGH COURT

Counsel for the Applicant:	Adv. M Maritz SC & B Stoop SC
Instructed by:	KOTZE & ROUX ATTORNEYS.
Counsel for the 1st & 2nd Respondents:	Adv. P F Louw SC & D J Vetten
Instructed by:	EDWARD S CLAASEN & ASSOSIATES c/o VAN DER MERWE VAN DEN BERG ATTORNEYS & CONVEYANCERS
Counsel for the 3rd Respondents:	N/A
Instructed by:	BARNARD & PATEL INCORPORATED
Date of hearing:	4 August 2017
Date of Judgment:	15 August 2017