IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

Case No.: 3601/2009
Date heard: 06 May 2010
Date delivered: 15 June 2010

In the matter between:

CHERYL HEATHER DREYER	Applicant
and	
LOUFRAN PETER DUNCAN	First Respondent
GREYVENSTEINS INCORPORATED	Second Respondent
REGISTRAR OF DEEDS	Third Respondent

J U D G M E N T

DAMBUZA, J:

[1] In this matter the applicant brought an urgent application against the respondents, seeking a rule *nisi* calling upon them, and any other interested parties to show cause why an order should not be granted that the first respondent immediately restore possession of an immovable property described as 68 Constance Road, Broadwood, Port Elizabeth (Erf 1333) ("the property"), together with all the movable goods therein, to the applicant. The applicant further seeks an order that the respondents be interdicted and restrained from proceeding with registration of transfer of the property to any other person, pending finalisation of an action to be instituted by her against the first

respondent, for the setting aside of a purported agreement of sale of the property between her and the first respondent. The applicant contends that this agreement of sale is tainted by fraud on the part of the first respondent.

[2] Both the applicant and the first respondent agree that as the matter is now opposed there is no purpose in granting a rule *nisi*; if the applicant has made out a case for the relief that she seeks, a final order may be granted, albeit such an order is in the nature of an interim interdict pending an action to be instituted by the applicant against the first respondent.

[3] The common cause facts which form the background to this matter are that in 1996 the applicant bought the property for a purchase price of R195,000.00. A portion of the purchase price was secured by way of a mortgage bond registered over the property in favour of Standard Bank ("the bank"). At some stage the applicant fell into arrears with her bond repayments. In November 2007 she was advised that the bank was selling her property in execution. About ten days prior to the sale in execution, she found a pamphlet offering or advertising loans in her post box. She contacted the number and spoke to someone called Francois who offered her a loan to pay the arrears on her bond.

[4] Subsequently, the applicant entered into certain negotiations with Francois which led to the sale in execution by the bank being

abandoned as Francois made the necessary payment of R24,000.00 to the bank. Francois turned out to be the first respondent. The applicant and the first respondent are in dispute as to what the payment made by the first respondent to the bank constituted. The applicant contends that the payment was a loan by the first respondent to her whilst, according to the first respondent, the payment constituted a portion of the purchase price of R300,000.00 paid by him in respect of the property.

[5] The applicant's version is that in repayment of this loan, from January 2008, she made certain deposits of R950.00 per month into a bank account in the name of the first respondent. She paid this amount every month until about June 2008 whereafter she stopped as she had not been provided with a copy of the "loan agreement". She also had not been provided with a statement setting out the outstanding amount, despite promises by the first respondent, on many occasions, that he would provide a copy of the document to her. According to her when she met with the first respondent in November 2007 the latter had caused her to sign a document which she thought was a loan agreement. They further went to a police station as the first respondent required a certified copy of the applicant's identity document.

[6] It is now common cause that there is presently a written agreement of sale in respect of the property, in terms of which the applicant sold the

property to the first respondent. As I understand the applicant's case, she does not dispute that she signed the agreement of sale as the seller; her contention is only that she was misled by the first respondent into thinking that she was signing a loan agreement.

[7] During April 2009, the applicant left the property and went to Cape Town to visit her daughter. In November 2009 whilst in Cape Town, she was advised by a friend who had been looking after her cats that her property was on sale and that the locks thereto had been changed. The applicant contacted the estate agent whom, she had learnt, was responsible for the sale, and was advised that the first respondent was in fact the owner of the house and the he had instructed the estate agents to sell it.

[8] In due course the applicant contacted Peet Viljoen Attorneys who had handled the transfer of the property from the applicant to the first respondent. The attorneys advised that they were in possession of, amongst others, a Deed of Sale, a Power of Attorney, a South African Revenue Services (SARS) Transfer Duty Form, an affidavit and an annexure, all signed by the applicant in respect of the sale and transfer of the house. The applicant insists that she only signed a two page document and denies having signed an affidavit and any document with a SARS logo on it. She states that she would never have signed any document relating to the sale of her property.

[9] The first respondent denies that there ever was a loan agreement between the applicant and himself. He states, in his answering affidavit that he advised the applicant that he could not lend her money as she was already blacklisted. According to him, the terms of the agreement between the applicant and himself were that he would pay the arrears on the bond and the applicant would then continue to stay in the house as long as she paid the bond repayment instalments subsequent to the arrears being extinguished. The applicant's payments would now, constitute occupational rental. The house would be sold if the applicant failed to make these payments.

[10] *In limine*, the first respondent contends that the application should be dismissed for lack of urgency alone, as the applicant first became aware, at least on 16 November 2009, that the property was for sale and could be transferred to a third person once sold, however, she waited until 11 December 2009 before launching the application. I start with the issue of urgency.

[11] Rule 6(12)(b) of the Rules of this Court provides that an applicant in an urgent application must, in his or her founding affidavit, set out explicitly, the circumstances on which he or she relies to render the matter urgent and the reason why he or she claims that he or she cannot be afforded substantial relief at a hearing in due course. In this regard the applicant's case is that at the time of launching the

application she had no details relating to how far the sale to the third person had progressed. From what appears on the papers the applicant's attorneys, on 19 November 2009, wrote to Peet Viljoen Attorneys requesting an undertaking that they would not proceed with the sale on behalf of the first respondent, so as to allow time for the matter to be investigated by the applicant's attorneys. They also demanded that the keys to the property be returned to the applicant so that she would be reinstated to the property. On 24 November 2009, Peet Viljoen Attorneys responded advising that the first respondent had a right to change the locks on the property as the property was his. They also warned that if the applicant did not remove her possessions from the property, the first respondent would charge storage fees. On 25 November 2009, the applicant's attorneys replied to Peet Viljoen Attorneys enquiring whether they would accept service of documents in this application as they did not have the first respondent's physical address at the time. Peet Viljoen Attorneys in a later letter dated 26 November 2009, advised that they did not have instructions to accept service in this matter. They further advised that they were trying to get hold of the first respondent to obtain his full particulars and instructions. It appears that thereafter the first respondent instructed a different firm of attorneys to handle the matter on his behalf. On 4 December 2009, the applicant's attorneys wrote to Greyvenstein Attorneys requesting an address whereat the first respondent would be willing to accept service of the application. This letter is followed by the institution of the application on 10 December 2009.

[12] This Court has held that where an applicant first seeks compliance with the respondent before launching an application on an urgent basis, it cannot be said that the applicant has been dilatory in bringing the application or that urgency was self created.[1] I do not agree with the submission on behalf of the first respondent that the urgency in this application was self created. The evidence shows that during the period of about three weeks subsequent to the applicant being aware of the sale of the property, she and/or her attorneys were in continuous contact with the first respondent's attorneys and the estate agents who had been instructed by the first respondent to attend to the sale of the property. There is evidence that the purchase price in respect of the property had already been paid by the new purchaser to Greyvensteins Attorneys and that the first respondent was demanding from the attorneys that the money be paid to him. There was the difficulty regarding service of the papers on the first respondent. The first respondent suggests that the applicant could have immediately obtained the required information from the Registrar of Deeds or the South African Revenue Services. On the other hand the first respondent himself states that transfer of the property had not yet begun. It is also apparent from the papers that the first respondent's attorneys were not willing to divulge particulars of the buyer of the property, the first respondent's physical address or how far the process of transfer had advanced. It seems to me that the options suggested

[1] **Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others** 2004 (2) SA 81 (SE) at 94E-F.

by the first respondent would not have necessarily yielded the speedy solution he contends they would have. It was in my view, not unreasonable in the circumstances for the applicant and/or his attorneys to first contact the estate agents and the attorneys handling the registration of transfer of the property prior to launching the application. Such communication did not detract from the urgency inherent in saving or trying to avoid the impending loss of the applicant's home. Consequently I am not persuaded that the application falls to be dismissed for lack of urgency.

[13] It is trite that an applicant in an application for an interim interdict must prove 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 the interim relief and that the applicant has no other satisfactory relief.[2]

[14] As to whether the applicant has established a *prima facie* right to the relief she seeks, both the applicant and the first respondent are in agreement that there are a number of disputed facts in the application which can only be properly resolved at trial. The disputed facts are apparent from a mere reading of the above paragraphs and I do not intend to set them out in detail, save to state that, in the main, they relate to the parties intention during the signing of the deed of sale. I

[2] **L.F. Boshoff Investments (Pty) Ltd v Cape Town Municipality, Cape Town Municipality v L.F. Boshoff Investments (Pty) Ltd** 1969 (2) SA 256 (C) at 267B-E.

agree that the disputes of fact can only be resolved at trial. Having regard to the common cause facts or facts that are not in dispute, together with the inherent probabilities in the application, I am satisfied that the requisite of a *prima facie* right has been established. It is not in dispute that the property in question belonged to the applicant and that it was her home prior to the first respondent obtaining transfer thereof to himself.

[15] The applicant contends that if she is successful in her action to set aside the transfer of the property to the first respondent on the basis of fraud, she would lose any claim to the property if the first respondent would sell it to a third party. She would therefore have lost her home and the harm done would be irreparable. I agree with the submission on behalf of the applicant that a claim of damages against the first respondent as suggested by the first respondent may not be the appropriate relief to a person who has lost her home. A damages claim would not sufficiently compensate the applicant for the loss of her home, in the event that she is successful in the action against the first respondent.

[16] For the same reasons, I am satisfied that the prejudice which the applicant stands to suffer if the interim interdict is not granted outweighs prejudice which the respondents stand to suffer if the orders sought are granted. The balance of convenience clearly favours the applicant.

[17] With regard to spoliation, it is common cause that the first respondent broke the locks on the property to gain access thereto. I can find no evidence to countenance the contention by the applicant that prior to the first respondent breaking the locks, she (the applicant) was in peaceful and undisturbed possession of the property, albeit not physically present there. The applicant's neighbour and/or friend held the keys on behalf of the applicant and the applicant was therefore in control of the property when the first respondent changed the locks thereto. Consequently, the applicant has established the requisites for a spoliation order, being that she was in peaceful and undisturbed possession of the property and that the first respondent deprived her of the possession, forcibly and/or wrongfully, without her consent.

[18] Consequently, I grant the following order:

(a) That the first respondent immediately restore possession of the immovable property, more fully described as No. 68 Constance Road, Broadwood, Port Elizabeth, to the applicant.

(b) The first, second and third respondents are hereby interdicted and restrained from proceeding with registration of transfer of the property at 68 Constance Road, Broadwood, Port Elizabeth, to any other party pending the finalisation of an action to be instituted by the applicant against the first respondent for the setting aside of the purported agreement of sale between the applicant and the first respondent, such application to be instituted within one month of this order.

(c) In the event that the applicant fails to institute the said action within one month of this order, the interdict shall lapse.

(d) The first respondent is ordered to pay the costs of this application.

N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv PWA Scott instructed by Kaplan Blumberg Attorneys of Port Elizabeth

For the first respondents: Mr S B Laubscher of Laubscher Attorneys of Port Elizabeth