

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE HIGH COURT: PORT ELIZABETH

CASE NO: 1723/07

Heard on: 17/06/11

Delivered on: 02/08/11

In the matter between:

STEVE VORSTER

First Applicant

MATTHYS JOHANNES LOUWRENS EADES

Second Applicant

GLORIA DOROTHY EADES

Third Applicant

and

ROYDEN VORSTER

First Respondent

ELIZABETH VORSTER

Second Respondent

STEVE CHRISTIAAN BRESLER

Third Respondent

THE REGISTRAR OF DEEDS

Fourth Respondent

JUDGMENT

NHLANGULELA J:

[1] The applicant seeks an order declaring a written sale agreement to be declared *null* and *void* and that alienation of an immovable property, the subject of the sale agreement, be interdicted pending finalization of the action under case number 1723/2007 in which the parties respectively seek, *inter alia*, transfer of each others' undivided shares in the immovable property aforesaid.

[2] Two issues arise for determination in this application. The first issue is whether the written sale agreement dated 04 March 2011, involving an immovable property held in joint ownership by the applicants together with the first and second respondents, complies with a requirement in s 2(1) of the Alienation of Land Act, Act No. 68 of 1981 (the "Act") that a property sought to be sold should be described properly. The second issue is whether the applicants have a right to interdict a sale of the said property by the respondents to a third party without a court order having been obtained to partition the property.

[3] There is a point in *limine* which was raised by the respondents that the application falls to be dismissed on the basis that it is not urgent. A further point in *limine* raised is that the set down of the application is irregular because a certificate of urgency was not issued together with the application

papers. These points were not argued separately from the *merits* of the application. Therefore, I will decide them in the same manner.

[4] The subject matter of this application is an immovable property which is described as Erf 3686, situated at No. 28 Strang Street, Korsten, Port Elizabeth and measuring 486m². It was registered on 11 September 1995 in the names of the first applicant, third applicant and first respondent. These people are siblings. They became joint owners of the undivided property, with each holding a one-third share. By virtue of the fact that the third applicant and first respondent were married in community of property to second applicant and second respondents, respectively, their spouses are the owners of the property as well. The property is being used by the applicants as a business for manufacturing general steel works and structures, such as, burglar guards and frames. They have been holding the property since the date of registration. The respondents have no interest in the business that is being operated on the property.

[5] So many disagreements ensued between the parties which undermined the consensual joint-ownership of the property. In the year 1999, their relationship became worse and culminated in a complete breakdown, so much so, that the first and second respondents expressed a wish to sell their

one-third share to the applicants. But the sale did not materialize, as a price at R80 000,00, could not be agreed upon. There is a dispute with regard to whether or not R80 000,00 did pass hands or, if it did, whether it was refunded by the respondents. This dispute saw the applicants issuing summons on 13 August 2007 against the respondents to recover the R80 000,00. Further disputes arose out of the payment for the mortgage bond costs and electricity, water and rates accounts. Such disputes were yet again to be the cause for litigation under the same summons. In all, the applicants sued the respondents to recover a sum of R313 115,56 being a claim for a refund of the purchase price, pro-rata contribution towards mortgage bond costs, payments to the municipality and costs of improvements to the property.

[6] On 10 November 2010, the applicants increased their claims by introducing claims for the termination of joint ownership in the property and transfer of respondents' one third share to the applicants against set-off of such sums as may be found by the court to be due by the respondents to the applicants.

[7] The respondents are defending the applicants' claims vigorously and have raised counter-claims to, *inter alia*, terminate the joint ownership of the

property and transfer of the applicants' two-third share to the respondents against set-off of such sums as may be found to be due by the applicants to the respondents arising from rentals and other income derived from the occupation of the property.

[8] The action proceedings were not yet finalized when, on 04 March 2011, the first and second respondents suddenly took steps to dispose of their undivided one-third share in the property in favour of the third respondent for R350 000,00. They sought to do this by means of a written agreement of sale, which is a subject of a declarator and interdict in these application proceedings. A copy of the sale agreement is attached to the founding affidavit and marked "SV2". It is dated 04 March 2011 and it was signed by the respondents on the same date.

[9] On 04 and 06 March 2011 the applicants were approached by the first and second respondents with an offer to sell their one-third share in the property at R350 000,00 to the applicants failing which, the third respondent who had already agreed to the sale for the same amount, would be allowed to take transfer of the property. The applicants rejected the offer on the perceived ground that the offer was false to the extent that it was two times higher than the value of the entire property being R592 000,00 which the

court had been referred to in the summons. The second reason for which the applicants rejected the offer was that, based on legal opinion obtained, the sale agreement was *null* and *void* in that the entire property was the subject of sale, yet the share of the respondents was limited to one-third share in the property. The debate about the sale price and a defective description of the property occupied the parties from 04 March 2011 to 10 May 2011. After that the applicants proceeded to prepare the application papers and issued them for hearing on 17 June 2011. The attitudes of both parties may be gleaned from a letter addressed by the applicants to the respondents on 09 May 2011, where the following is stated:

“My clients are of the view that the sale of your sellers’ share is an attempt to frustrate the relief sought by my clients [in the action proceedings].”

(The brackets are mine)

To this, and a request for an undertaking that transfer will not be proceeded with, the respondents replied on 06 April 2011 as follows;

“7. I have difficulties understanding the basis upon which there would be any impediments on my clients by operation of law, from selling a one third interest.

8. The suggestion that the sale is an attempt to defeat

your clients' claim, with respect, lacks foundation.

9. Besides the fact that your clients' claim is in dispute, I knew of no basis upon which my clients can be impeded in the sale of an asset simply because there is a dispute in respect of a property.

10. Accordingly, my clients are proceeding with the sale and any application to interdict will be resisted, not only on the *merits*, but also on the grounds that since 8th March 2011, your clients have been fully apprised of the position“

[10] I now turn to deal with the objection that the application is not urgent. The submission by *Mr Friedman*, who appeared on behalf of the respondents, that it took the applicants two months to prosecute the application is correct. However, it would be something else to argue that such a period of time extinguished the element of urgency in the application. *Mr Nepgen*, who appeared on behalf of the applicants, contended that a proper approach to an assessment of urgency should be a consideration of the degree thereof (*Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SECLD) at para. [37]), taking

into account the presence or absence of prejudice to the respondents (*Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F), and in a manner appropriate to the circumstances of the application (*Federated Trust Ltd v Botha* 1978 (3) SA 645 (A) at 654C–F).

[11] In my view the circumstances of this case, as already outlined, were such that a proper weighing-up of the threat posed by the sale of the property to the action proceedings would have required some time for consideration and engagement, as the applicants did. To my mind, the existence of the action proceedings determines the urgency in the application. The delay was reasonable to the extent that it was necessary for the applicants to prevent the property from being transferred to a third party, otherwise the action proceedings would be rendered academic. The debate of the price was not unreasonable and the suspicion that the applicants' claim was being frustrated by the sale was genuine. A need to prevent transfer of the property defines the element of urgency of the matter, in my view. The respondents incurred no prejudice and the setting down of the case was not disruptive to the court's roll. I have no hesitation in condoning the delay of approximately two months in the bringing of this application. For these reasons I am of the view that since a certificate of urgency was present in the court file before the hearing of the application on 17 June 2011 no harm

would be occasioned by accepting it.

[12] The rights sought to be protected and advanced by the applicants have been set out in the founding affidavit. The applicants, as the joint owners of the property with the respondents, seek relief that their two-third share together with one-third share of the respondents be transferred to them subject to appropriate compensation. The respondents seek similar relief. The reason is that their relationship as joint owners of the property is not tenable, it has irretrievably broken down. In law, both parties are exercising a remedy of *actio communi dividundo*. See: *Robson v Theron* 1978 (1) SA 841 (A) where the following is stated at 854H-855A:

“...The *actio communi dividundo* has a twofold purpose, viz. to claim division of joint property and payment of *praestationes personales* relating to profits enjoyed or expenses incurred in connection with the joint property...”

A relevant passage which appears in the case of *Ntuli v Ntuli* 1946 TPD 181 at 184 reads:

“Where there are co-owners who have agreed to divide then the only relief that one can claim from the other is an action for specific performance in terms of that agreement.

Secondly, if there is a refusal on the part of one of the co-owners to divide then the other co-owner can go to Court and ask the Court to order the other to partition. Again, if the parties agree that there is to be a partition but the parties cannot agree as to the method or mode of partition, then, because they cannot agree as to the method or mode of partition, the Court is asked to settle the mode in which the property is to be divided.”

[13] In this case, the parties could not reach an agreement to partition the property. They could also not agree to sell one’s share to the other. Each side wants the whole property for itself. On this the following was said in the case of *Robson, supra*, at 855D:

“Thus where it is impossible, impracticable or inequitable to make a physical division of the joint property, the Court in exercising its equitable discretion may award the joint property to one of the co-owners provided that he compensates the others, or cause the joint property to be put up to auction and the proceeds divided among the co-owners.”

If it is so that the applicants have a right to claim the whole property, as they have done in the action proceedings, and the trial Court has a discretion to

exercise in that regard. It seems to me that the first and second respondents had no right to alienate the property in favour of the third respondent without first obtaining the permission of the trial Court to do so. The applicants having already approached the Court for an order that the property be given to them, it was no longer open to the respondents to sell the property to a third party, the third respondent. The respondents' right of disposal is surely not absolute. On this CG van der Merwe with Anne Pope in *Wille's Principles of South African Law*, 9th Edition, Chapter 22 at page 560 have the following to say:

“Needless to say, an unfettered right of disposal has the potential to introduce conflict amongst the co-owners insofar as the possibility of forcing the others into a legal relationship with a stranger is concerned; hence the right of a co-owner to demand partition at any time.”

[14] In so far as the applicants have a right under *actio communi dividundo* to a determination of their claims on the property, they are clearly entitled to an interdict.

[15] *Mr Nepgen* referred the Court to s 2(1) of the Act contending that failure by the respondents to describe the property sought to be sold with

absolute clarity, as envisaged in s 6(1)(b) of the Act, renders the sale agreement *null* and *void*, and it cannot be rectified. I accept this submission. In the sale agreement, the one-third share which is intended to be sold, is described in the property clause as: “Erf No. 3686 Korsten, situated at and known as: 28 Strang Street, Korsten, Port Elizabeth.” This description does not mean a one-third share. The submission by *Mr Friedman* that clause 18 of the sale agreement cures the mis-description cannot be sustained. A one-third portion of Erf 3686 cannot be ascertained from either the property clause or clause 18, or both, because Erf 3686 has not yet been divided and portions thereof endorsed on a title deed.

[16] It also seems to me that the fact that the applicants, as the joint owners, are not signatories in the sale agreement renders the agreement *null* and *void* for want of compliance with s 2(1) of the Act. In the case of *Docrat v Willemse and Others* 1989 (1) SA 487 (N) at 495I–J the court held that a sale agreement signed by one co-owner to the exclusion of the other cannot be enforced in the light of s 2(1) of the Act.

[17] In the circumstances, the applicants have succeeded to prove that the

sale agreement of the respondents is *null* and *void*. This finding also holds good for the right which the applicant must prove to obtain an interdict. To hold otherwise would cause harm to the applicants whose claim under *actio communi dividundo* may be defeated by the sale of the property. A suitable remedy for the applicants at this stage is to preserve the property in their names and that of the first and second respondents. The *status quo ante omnia* must be maintained until the trial Court gives direction(s) as to what must happen to the property in relation to the respective claims of the parties.

[18] After hearing arguments on 17 June 2011 I immediately granted an interdictory relief in terms of paragraphs 3 and 4 of the Notice of Motion, with reasons being reserved until a judgment is given on the entire application. In the light of the reasons in this judgment it should now be clear that there was *merit* in granting the said order to prevent unnecessary harm to the applicants.

[19] The costs of the entire application should be paid by the first and second respondents because they opposed the application without success.

The third and fourth respondents are excluded from the order of costs.

[20] In the result the following order shall issue, incorporating the previous order which I granted on 17 June 2011:

- “1. That the contract of sale, marked “SV2”, between the first and second respondents as sellers and the third respondent as purchaser, for the purchase of Erf Number 3686, Korsten situated at and known as 28 Strang Street, Korsten, Port Elizabeth, be and is hereby declared *null* and *void*.
2. That the first and second respondents be and are hereby interdicted and restrained from alienating their jointly held undivided $\frac{1}{3}$ (one-third) share in the immovable property being Erf 3686, Korsten, situated at and known as 28 Strang Street, Korsten, Port Elizabeth.
3. That the interdict in paragraph 2 above continue to operate pending the finalization of the action and

counterclaim under case number 1723/2007 whereby the parties respectively seek, *inter alia*, transfer of each other's undivided shares in the immovable property referred to above, pending payment of what is due.

4. That the costs of this application be paid by the first and second respondents jointly and severally, the one paying the other to be absolved."

Z.M. NHLANGULELA

JUDGE OF THE HIGH COURT

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