

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

Case Number:007217/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 23 JUNE 2023

SIGNATURE

In the matter between:

GLEN LIFE DEVELOPMENT COMPANY CC

Applicant

and

MONAGHAN FARM HOMEOWNERS ASSOCIATION NPO

First Respondent

SHERIFF RANDBURG WEST

Second Respondent

JUDGMENT

SC VIVIAN AJ

1. This application concerns the alleged right of the First Respondent to deny the Applicant access to a residential housing estate in Lanseria (“the estate”). In my view, the First Respondent has shown no basis in law for it to deny the Applicant access to the estate. The First Respondent has a legitimate reason for wanting access – it intends to show immovable property (“the property”) situated within the

estate to potential purchasers and to valuers in order to discharge its contractual obligation to obtain a guarantee from a financial institution. In order to discharge its contractual obligation, it requires access to the property. The Second Respondent is contractually obliged to allow the Applicant such access and has raised no objection to the Applicant gaining such access. The First Respondent's conduct is what is preventing the Applicant from gaining access to the property. This constitutes wrongful interference in the contractual relationship between the Applicant and the Second Respondent.

2. Only the First Respondent opposes this application.
3. There are preliminary issues. The First Respondent sought condonation for the late filing of its answering affidavit, which was granted for the reasons that follow. The First Respondent raised three points *in limine*, which were each dismissed for the reasons set out below.

Condonation

4. At the outset of the hearing, the First Respondent applied for condonation for the late delivery of its answering affidavit. Unsurprisingly, the Applicant opposed the application for condonation. The explanation offered was weak and did not cover the entire period of delay.
5. Nonetheless, I agree with Mr Luyt, who appeared for the First Applicant that the only prejudice suffered by the Applicant was delay. The prejudice to the First Respondent in not having its version before the Court would be significant.
6. In reply, Mr Luyt informed me that he was instructed to tender costs of the application for condonation on the attorney and client scale.
7. Having considered the matter and weighed the prejudice to the parties, condoned the late filing of the answering affidavit and ordered the First Respondent to pay the costs of the application for condonation on the attorney and client scale.

The relevant facts

8. The Applicant is the purchaser of the property in terms of a contract of sale entered into between the Applicant and the Second Respondent following a sale in execution on 18 January 2022. The property is an undeveloped erf situated within the estate.
9. The First Respondent controls access to the estate. Before the auction sale, Mr Sinwamali, who is the sole member of the Applicant, went to the offices of the First Respondent and spoke to Mr Chandré Buys, the estate manager, in order to ascertain the extent of the outstanding levies owed by the owner of the property to the First Respondent. After the auction, Mr Sinwamali returned to the offices of the First Respondent. He informed Mr Buys that the Applicant would on-sell the undeveloped erf or develop it and then sell the developed erf. Mr Buys said that if the Applicant elected to on-sell the undeveloped erf, he recommended that the Applicant use a particular estate agent who resides within the estate.
10. Mr Sinwamali asked that his number be added to the estate intercom system, but Mr Buys refused and said that the Applicant's representatives would only be granted access through him and that he would generate a visitor code for them to enter the estate.
11. Access codes were generated over the following weekend. The Applicant was able to show the property to potential purchasers. It is common cause that these viewings proceeded without incident.
12. However, when Mr Sinwamali contacted Mr Buys on 31 January 2022 to ask for further codes to again show the property to prospective purchasers, Mr Buys declined to do so. Access was then refused on a number of occasions.
13. In terms of the conditions of sale, the Applicant paid a 10% deposit and was required to secure the balance of the purchase price within 21 days after the date of sale. The Applicant did not do so. The effect is that the applicant is in breach of the contract of sale entered into between the Applicant and the Second Respondent.

14. On 18 February 2022, the Second Respondent's attorneys sent an email to the Applicant in which they pointed out that the Applicant was in breach of the conditions of sale and said that they were instructed to place the Applicant on terms and to launch an application for the cancellation of the sale. They also said that their client's position was that the issue of access is a matter between the Applicant and the First Respondent.
15. On 6 June 2022, the Applicant's attorneys wrote to the First Respondent. They drew attention to the Applicant's contractual obligation to secure the balance of the purchase price and said that the Applicant required access to the property in order to fulfil this obligation.
16. On 8 June 2022, the First Respondent's attorneys replied to the letter. The author of the letter, Mr van Rensburg, recorded that he was present at the auction and was in possession of a copy of the conditions of sale. He said that management of the First Respondent had granted access to the Applicant as an indulgence and following the relevant security protocols. However, it had then become clear to management that the Applicant intended to on-sell the property, which Mr van Rensburg said was prohibited by the conditions of sale. Mr van Rensburg recorded that the relationships between the officials of the Applicant and management of the First Respondent had become strained "*... and as such the indulgence was withdrawn.*"
17. Mr van Rensburg then said that the information that they had received from the execution creditor was that it was applying for the cancellation of the sale and that the application was at an advanced stage. Accordingly, the First Respondent's attorneys could see no reason to reply to the demand.
18. On 14 June 2022, the Second Respondent launched an application for cancellation of the sale in the Johannesburg Seat of this Division. The execution creditor, Standard Bank, is cited as a respondent in the cancellation. The Applicant received notice of the Second Respondent's application and is opposing the cancellation. The cancellation application has not yet been heard.

19. In terms of Rule 46(11), if the purchaser of immovable property in execution fails to comply with conditions of sale, the sale may be cancelled by a Judge summarily on the report of the sheriff conducting the sale, on due notice to the purchaser. The decision to ask for cancellation is made by the sheriff, not the execution creditor. Whilst such cancellations were previously done by a Judge in chambers, in terms of the Judge President's Practice Directive of 18 April 2019, applications for cancellation in terms of Rule 46(11) in this Division are now set down in the interlocutory court.

Lis Alibi Pendens

20. The First Respondent relies on the dilatory defence of *lis alibi pendens*. The argument is that the Applicant and the Second Respondent are parties to pending litigation, namely the cancellation application.
21. Mr Luyt submits that the cancellation application is premised on the same cause of action and the same subject matter as this application.
22. In **Caeserstone**, Wallis JA explained that there are traditionally three elements to the defence of *lis alibi pendens*, namely:
- 22.1. The litigation is between the same parties;
- 22.2. The same cause of action;
- 22.3. The same relief is sought in both matters.¹
23. Each of the three requirements can be relaxed in appropriate circumstances. In respect of the same cause of action requirement, Wallis JA held: "... *the requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that*

¹ *CAESARSTONE SDOT-YAM v WORLD OF MARBLE AND GRANITE 2000 2013 (6) SA 499 (SCA)* at para 12

latter case."²

24. The key issue in the cancellation application is the breach of the conditions of sale by the Applicant and whether the sale should be cancelled. The key issue in this application is whether the First Respondent is entitled to prevent the Applicant from gaining access to the estate and accordingly to the property that is the subject of the sale.
25. I accept that, if the sale is cancelled, then the Applicant will not have a legitimate reason to gain access to the property. But that is where the similarity ends. The parties to the cancellation application are not the same as the parties to this application. The relief is different. The parties to the two matters are not identical.
26. In my view, the requirement of same cause of action, even in its relaxed form, is not met.
27. Accordingly, the defence of *lis alibi pendens* must fail.

Non-joinder

28. The First Respondent says that Standard Bank should have been joined in this application. Standard Bank is the execution creditor at whose instance the property was attached and sold in execution by the Second Respondent.
29. Standard Bank is joined as a respondent in the cancellation application, though the reasons for this are not clear to me.
30. A defence of non-joinder will only be upheld if the joinder of the party is a matter of necessity. Joinder is a matter of necessity only if the "... *party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.*"³

² CAESARSTONE SDOT-YAM v WORLD OF MARBLE AND GRANITE 2000, *supra* at para 21

³ Absa Bank Ltd v Naude NO and Others 2016 (6) SA 540 (SCA) at para 10

31. As I have held above, the key issue in this application is whether the First Respondent is entitled to prevent the Applicant from gaining access to the estate and accordingly to the property that is the subject of the sale. Standard Bank's rights will not be prejudiced by the decision in this application.
32. In his heads of argument, Mr Luyt argued that the Applicant levelled serious allegations against Standard Bank in its founding affidavit, which Standard Bank should be called upon to answer. As I understand the point, it is that the Applicant says that the First Respondent was in regular contact with Standard Bank's attorneys, which "*raises suspicions*". Moreover, neither the Second Respondent's attorneys nor Standard Bank's attorneys have informed the First Respondent that it should grant access to the property.
33. The problem with this reasoning is that, in order for a party to be joined in litigation, it must have a direct and substantial interest in the outcome of the litigation. The fact that serious allegations are made against it in the evidence before the Court is not a reason for a party to be joined in the litigation.⁴
34. Accordingly, the defence of non-joinder must fail.

Proper Service

35. The final point *in limine* is that the application was served on the First Respondent's attorneys rather than at its registered address or principal place of business as required in terms of Rule 4(1)(a)(v).
36. I drew Mr Luyt's attention to the judgment of Flemming DJP in **O'Sullivan v Heads Model Agency**.⁵ To paraphrase the learned Deputy Judge President: the notice of motion and founding affidavit in this matter were an invitation to a party. The First Respondent received the invitation to the party and responded in the appropriate way, by delivering a notice of intention to oppose and an answering affidavit (albeit late). The First Respondent duly arrived at the party, represented by Mr Luyt. The purpose of service was accordingly achieved.

⁴ Compare: National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at para 85

⁵ O'Sullivan v Heads Model Agency CC 1995 (4) SA 253 (W) at 255 H

37. In **Viker X**, Adams AJ held:

*“The purpose of rule 4 is to provide for a mechanism by which relative certainty can be obtained that service has been effected upon a defendant. If certain minimum standards are complied with as set out in the rule, then the assumption is made that the service was sufficient to reach the defendant's attention and his failure to take steps is not due to the fact that he does not have knowledge of the summons. The converse is not true — namely that if service is not effected as required by the rule, the service is not effective — in that the purpose for which service is required was fulfilled, namely the defendant came to know of the summons. The rules, as was pointed out by Roux J in *United Reflective Converters (Pty) Ltd v Levine*, 1988 (4) SA 460 (W), set out procedural steps. They do not create substantive law. Insofar as the substantive law is concerned, the requirement is that a person who is being sued should receive notice of the fact that he is being sued by way of delivery to him of the relevant document initiating legal proceedings. If this purpose is achieved, then, albeit not in terms of the rules, there has been proper service.”*⁶

38. The purpose of service having been achieved, there is no merit in this point *in limine*.

Merits

39. The central question is: does the First Respondent have a right to refuse the Applicant access to the estate and accordingly the property?

40. The Applicant and its member have the right of freedom of movement in terms of Section 21 of the Constitution. Anyone who seeks to prevent them from entering a particular area must show that they have the lawful right to do so. Further, the Applicant has a contractual right to access the property in order to comply with its

⁶ *Investec Property Fund Limited v Viker X (Pty) Limited and Another* (2016/07492) [2016] ZAGPJHC 108 (10 May 2016)

contractual obligations. The First Respondent's conduct unlawfully interferes with that right.

41. The First Respondent has not explained why, as a matter of law, it is entitled to prevent the Applicant from gaining access to the estate. It did not produce a copy of its Memorandum of Incorporation. It did not explain the legal basis upon which it controls access to the estate. The First Respondent has provided no information whatsoever about the estate. How was it established? Is it a private township? What were the terms of the township approval? Are the roads within the estate public or private roads?
42. This lack of evidence can be compared to the evidence that was before the Court in **Mount Edgecombe**.⁷ That case concerned the right of a homeowners association to impose sanctions on its members for exceeding speed limits on roads within a gated estate. It is apparent from the judgment that the evidence before the Court included the Memorandum of Incorporation, the Conduct Rules and the township approval. In this case, the First Respondent has elected not to produce any such evidence.
43. The First Respondent does not explain in its answering affidavit why it asserts that it has a right to prevent the Applicant from gaining access to the estate.
44. The First Respondent instead says that it has a duty to keep all the residents in the estate safe and that, in doing so, it cannot allow access to the Applicant "... *or any of its agents, potential buyers, estate agents, valuers, maintenance persons and/or electricians.*" Quite why this is so is not explained.
45. The First Respondent does not say why it has such a duty. If the duty arises from its Memorandum of Incorporation, then that document should have been produced and relied upon. Moreover, as Mr Sithole (who appeared for the Applicant) pointed out, the First Respondent initially allowed the Applicant and potential buyers access to the estate. It is undisputed that there were no security incidents arising from such

⁷ *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh and Others* 2019 (4) SA 471 (SCA)

access.

46. In its answering affidavit, the First Respondent relies on the conditions of sale. It points out that the Second Respondent has applied to have the sale cancelled and that the application is still pending.
47. The First Respondent concludes that this means that the Applicant has no right to gain access to the estate “... *because it is not the owner, nor will it become the owner of the immovable property.*” The First Respondent accordingly assumes that the Judge hearing the cancellation application will cancel the sale. But that is not an assumption that either the First Respondent or I can make.
48. The Applicant is in breach of the conditions of sale and the cancellation application is pending. But while it is pending, the contract of sale remains in force. The Applicant may be able to comply with its obligations in terms of the conditions of sale before the cancellation application is heard. The Applicant says that the First Respondent’s conduct is preventing it from complying with the conditions of sale.
49. The First Respondent says in the answering affidavit that the decision to refuse access was made because the Applicant was in breach of the conditions of sale and the Second Respondent had elected to seek cancellation of the sale. But the decision to refuse access was taken on or before 31 January 2022. This was before the guarantee was due. Accordingly, as at 31 January 2022, the Applicant was not in breach of the conditions of sale. The cancellation application was only launched in June 2022.
50. Accordingly, the decision must have been made for a different reason to that asserted under oath in the answering affidavit. The 8 June letter gives a different reason – the assertion that the so-called indulgence was withdrawn because the conditions of sale prohibited the Applicant from on-selling the property. It is significant that this reason is not persisted with in the answering affidavit.
51. The 8 June reason is in any event without merit. First, on the common cause facts, the First Respondent allowed the Applicant access for purpose of showing the

property to potential purchasers and only subsequently refused to do so.

52. Second, it is of course not for the First Respondent to enforce compliance by the Applicant with the terms of the conditions of sale. There is no contractual privity between the First Respondent and the parties to the contract.
53. Third, the conditions of sale do not prohibit the Applicant from on-selling the property. Clause 3.3 provides that the purchaser may not nominate a third party to take transfer in its stead. But this does not prevent the Applicant from selling the property to a third party even before ownership is transferred to it.
54. It is trite that a non-owner can enter into a contract in terms of which it sells property to a third party, even without the owner's consent. The seller is then obliged to deliver the property to the third party purchaser.⁸ In this case, the Applicant, in the expectation that it will be in a position to deliver the property to the third party purchaser, is not prohibited from on-selling the property.⁹
55. The Applicant explained in its founding affidavit that its business model was to purchase distressed properties and then to on-sell them. It is preferable for the Applicant to sell the property as quickly as possible, ideally such that there are simultaneous transfers from the original seller to the Applicant and then to the final purchaser. If the Applicant cannot sell the property quickly, it needs to obtain a guarantee from a financial institution. This will only happen if a valuer appointed by the financial institution is able to view the property. But if the Applicant manages to sell the property quickly, it can then rely on the security from the second sale to obtain security for the original sale.
56. The Second Respondent, as seller, is aware of the Applicant's intention and has not objected to the Applicant seeking to on-sell the property.
57. In his heads of argument, Mr Sithole submitted that it is the Second Respondent

⁸ Ensor v Kader 1960 (3) SA 458 (D) at 459 H; S v Commissioner of Taxes 1984 (3) SA 584 (ZS) at 587 E

who has the real right in the property which entitles the Second Respondent to sell the property in execution.¹⁰ The Second Respondent is the seller and is obliged to perform his obligations in terms of the sale, including but not limited to the obligation to give transfer to the Applicant.¹¹

58. I agree with Mr Sithole's submissions. Moreover, the Second Respondent, as seller, is obliged to co-operate with the Applicant in order to allow the Applicant to perform its contractual obligations. The failure to do so would constitute *mora creditoris* and accordingly entitled the Applicant to contractual remedies, including an order for specific performance.¹² Accordingly, if it was the Second Respondent that was refusing to allow the Applicant access to the property, the Applicant would be entitled to an order for specific performance.
59. However, the Second Respondent is not preventing the Applicant from gaining access to the property. It is the First Respondent that is doing so.
60. All that stands in the way of the Applicant is the refusal of the First Respondent to allow him access to the property.
61. The First Respondent is aware not only of the existence of the contract but also of its terms. The First Respondent knows that the Applicant has a contractual obligation to furnish the Second Respondent with a guarantee for the balance of the purchase price. In its founding affidavit the Applicant says that, because the First Respondent refuses to allow even a valuer from a bank to view the property, the Applicant cannot comply with this obligation.
62. In response, the First Respondent says that it was willing to allow any financial institution's representative access to the property in order to confirm the value thereof, but the Applicant was negligent in failing to act speedily to obtain a loan in order to secure the balance of the purchase price. As is clear from Mr van

¹⁰ *Dream Supreme Properties 11CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA) at para 14

¹¹ *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 549 at 558 to 559

¹² *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd; LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others* 1984 (3) SA 861 (W) at 877 B onwards

Rensburg's letter of 8 June 2023, the First Respondent is now not prepared to allow a valuer access to the property. No reason is given for this apparent change in its stance.

63. The effect is to prevent the Applicant from complying with its contractual obligations. The Applicant says in its founding affidavit that this constitutes interference in its contract with the First Respondent.
64. In **Lanco**,¹³ the plaintiff hired a property in terms of a lease with the owner of the property. The defendant, who had been a tenant in the property, held over. This usurped the plaintiff's right in terms of its lease agreement. The plaintiff successfully claimed damages under the *actio legis Aquiliae*. Galgut J held that the defendant's conduct was wrongful despite the fact that, on the facts of that case, the defendant had not induced the owner to breach the lease agreement. This was not a necessary requirement.¹⁴ **Lanco** was referred to with apparent approval by Khampepe J in **Country Cloud**.¹⁵
65. In **Masstores**,¹⁶ Froneman J referred to the decisions in **Lanco** and **Country Cloud**. He held:

*"The lesson to be learnt from these cases is not that the mere interference or deprivation of a contractual right by a third party is sufficient to establish the wrongfulness of interference, but that the nature of the interest protected by the contractual right is of crucial importance. If the nature of the interest is of the kind that commands protection against the whole world, and not only the protection afforded to the contracting parties themselves by the provisions of the contract, interference by third parties is more likely to be found wrongful than otherwise."*¹⁷

66. In my view, the nature of the interest protected by the contractual right is not an

¹³ Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd 1993 (4) SA 378 (D) at 384E

¹⁴ At 384 E

¹⁵ Country Cloud Trading CC v MEC, Department of Infrastructure Development 2015 (1) SA 1 (CC) at para 31

¹⁶ Masstores (Pty) Ltd v Pick N Pay Retailers (Pty) Ltd 2017 (1) SA 613 (CC)

¹⁷ At para 37

exclusive one. It will not assist the Applicant to simply pursue a contractual remedy against the Second Respondent. The Applicant cannot gain access to the property without the cooperation of the First Respondent. This makes this matter distinguishable from **Masstores**. Accordingly, the interference by the First Respondent in the exercise by the Applicant of its contractual rights is wrongful.

67. In the premises, (1) the First Respondent has produced no evidence to show that it has a right to prevent the Applicant from accessing the estate and (2) the First Respondent is in any event unlawfully interfering in the contract between the Applicant and the Second Respondent.

Conclusion

68. The Applicant has accordingly made out a case for a mandatory interdict.
69. Mr Sithole conceded that the relief sought in the notice was widely phrased and instead sought more narrowly formulated relief as set out in a draft order. I have considered the draft order, but am of the view that the relief sought in that order is still too widely phrased. It also makes provision for access to buildings and for access by an electrician, neither of which is appropriate for an undeveloped erf. I accordingly grant narrower relief.
70. Mr Sithole informed me that the Applicant is content with supervised access. In my view, it is unnecessary to expressly provide for this in the order. The First Respondent will take whatever security measures it considers reasonably necessary to ensure that the Applicant and its invitees confine their access to the estate to viewing the property.
71. The Applicant sought an order to the effect that, if the First Respondent does not comply with the terms of the order, the Sheriff or the South African Police Services is authorised and directed to do all things necessary in order to allow access as per the terms of the court order. In my view, it is not appropriate to grant such an order. Should the First Respondent fail to comply with my order, that would constitute contempt of court, and the Applicant then has its remedies against the First

Respondent and whichever of its representatives are responsible for its failure to comply with the order. However, I can and do assume that the First Respondent will comply with the terms of my order.

72. Mr Sithole sought costs on the party and party scale. I agree that the First Respondent should be ordered to pay the costs of the application.

73. I accordingly make the following order:

73.1. The late filing of the answering affidavit is condoned.

73.2. The First Respondent is ordered to pay the costs of the application for condonation on the scale as between attorney and client.

73.3. The First Respondent is ordered to grant the Applicant, its staff and estate agents duly mandated by the Applicant, together with the Applicant's prospective purchasers and their families, and valuers appointed by a financial institution, reasonable access to the property situated at Monaghan Farm Ext 1[...] Monaghan Farm, A[...] Road, Lanseria, Gauteng ('the property'), at all reasonable times to enter and view the property.

73.4. Reasonable times shall be interpreted to mean between the hours of 08h00 and 17h00 on weekdays and between the hours of 08h00 and 15h00 on public holidays and weekends.

73.5. The First Respondent may require any persons granted access to the property in terms of paragraph 73.3 above to produce proof of identity before being permitted to access the property.

73.6. The First Respondent is to pay the Applicant's costs of this application.

Vivian, AJ

Acting Judge of the Gauteng Division of the High Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Advocate Wesley Sithole

FOR THE FIRST RESPONDENT: Advocate Marcel Luyt

Date of hearing: 01 June 2023

Date delivered: 23 June 2023