IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE .DIVISION, KIMBERLEY)

Case Number: 2651/2021

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

POTGIETER H.H.	Applicant
and	
VILLAGE S.F.W.	1st Respondent
REGISTRAR OF DEEDS KIMBERLEY	2nd Respondent
VISSER H	3rd Respondent

Coram: Lever J

JUDGMENT

Lever J

1. This matter was argued before me on Friday 14 January 2022 as an

opposed urgent application. I reserved judgment in the matter until Tuesday 18 January 2022.

2. The applicant seeks an urgent interdict to restrain the first and second respondents from passing transfer of the property situate at No: [....] C[....] Road, Belgravia, Kimberley to the third respondent. This interdict is to operate pending an action by the applicant to claim transfer of the said property and that such action is to be instituted within 90 days of the granting of the order in which the said interdict is issued.

3. The first respondent is the current registered owner of the said property. The first respondent opposes this urgent application. The second respondent, being the Registrar of Deeds for the appropriate Deeds Registry, does not oppose this application.

4. The third respondent is the prospective purchaser in respect of whom the applicant seeks to interdict the property being transferred to. The third respondent has filed a notice indicating that she will abide the decision of this court.

5. The interdict sought in this matter, pending the outcome of an action as contemplated in the Notice of Motion in this matter is for interlocutory relief. The requirements for such an interdict have been set out by Corbett J (as he then was) in the matter of **L.F. BOSHOFF INVESTMENTS V CAPE TOWN MUNICIPALITY[1]** as follows:

> "(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
> (c) that the balance of convenience favours the granting of the of

[1] 1969 (2) SA 256 [CPD].

interim relief; and

(d) that the applicant has no other satisfactory remedy."[2]

6. This statement of the rule is often summarised and shortened in today's practice. I have stated the rule in full because part (a) is particularly relevant to the present case. The present practice is to state that a *'prima facie'* right is required. In most cases it is sufficient to deal with only whether a *'prima facie'* right has been established. However, the applicant's Counsel, Mr Van Tonder is asking me to find that a *'prima facie'* right has been established by the applicant and that certain aspects of applicant's case should be decided by the trial court. In other words, he is asking me to find a 'prima facie' right though open to some doubt.

7. There has been an ongoing history of litigation between the applicant and the first respondent. For the purposes of the present urgent application, it is not necessary for me to deal with the history. It suffices to state that the property in respect of which an interdict was sought was previously attached to found alternatively confirm jurisdiction in a claim the applicant had/has against the first respondent. This matter was then settled with an agreement to market and sell the said property. *Inter alia* this agreement set out the basis upon which the said property would be valued, marketed and ultimately sold. Unfortunately, there were ongoing disputes in this process. Briefly, the property was overvalued for the current market.

8. Ultimately, a written proposal was made by the first respondent's attorney in a letter dated 17 August 2021 addressed to the applicant's attorney. The substance of the said letter reads as follows:

"1. …

2. In an attempt to resolve any outstanding issues between the parties in relation to the property known as [....] C[....] Road, our client is prepared to sell the property to your client for an amount of R3 500 000.00 subject to the following;

[2] L.F. Boshoff case above at 267B-D.

2.1 Your client will need to provide our client with the necessary guarantees within 21 days of the signing of the Deed of Sale;

2.2 Your client will be responsible for any transfer costs, fees and transfer duties relating to the transaction;

2.3 Should your client not be able to provide the necessary guarantees as stated above, the parties agree that the property can be marketed for a flat rate of R4 000 000.00 and your client will give her full co-operation in this regard;

2.4 If your client delivers the guarantees for the purchase price of R3 500 000.00, our client renounces any further claims that he may have in terms of the Court Order, save for the arrear rates and taxes which will be for your clients account once and if transfer takes place;

2.5 Should your client however fail to provide the necessary guarantees and the property is then marketed in terms of paragraph 2.4 above, then our clients claim for any shortfall in terms of the Court Order will remain.

3 We are of the opinion that the above is a very reasonable offer and trust that your client will agree. If your client is amenable to purchase the property we kindly request that you provide us with the detail of the purchaser, should same be a Company ora Trust.

4 Kindly also take note that this proposal does not derogate from the terms of the court order and does same (sic) remain in place pending any final resolution.

5 We look forward to your response at your earliest convenience."[3]

9. To this proposal the applicant's attorney responded in writing in a letter dated 14 September 2021. The substance of this reply reads as follows:

"The above matter and your letter of the 17 August 2021 refers. Our client is prepared to accept your client's proposal.

As discussed the Meratrix Trust (meant to read Mercatrix Trust) will be purchasing the property.

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[3] Founding affidavit indexed bundle pp 40-41.

We have submitted the Trust documents to the Master and will request the Master to issue the letter of authority as a matter of urgency.
The parties can then attend to the finalisation and signing of theagreement.
The guarantees for the R3 500 000 are already in place.
We confirm that our firm has already received instructions for the registering of the Bond from Standard Bank."[4]

10. Then on the 23 September 2021 the first respondent's attorney by way of a letter bearing that date purported to withdraw the offer set out in the letter of the 17 August which is quoted above.

11. Before Discussing the submissions made on behalf of the applicant and the first respondent's response thereto, I need to point out that there are certain statutory requirements that need to be complied with when a transaction deals with the sale of immovable property. These requirements are set out in s2(1) of the ALIENATION OF LAND ACT No: 68 OF 1981 (the Act). The said section reads as follows:

> "2(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force and *effect* unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

12. As can be seen from section 2(1) of the Alienation of Land Act, quoted above when acting through an agent, as both applicant and first respondent were acting through their respective attorneys, there would have to be written authority for both attorneys to bind their respective principals to a valid agreement to sell land.

13. In debating this issue with Mr Van Tonder he submitted that this was one of those issues to be determined by the trial court in the contemplated action should I grant the interdict as requested. In my view, this can never be correct. The applicant must at least allege in her founding affidavit that her attorney had

[4] Founding affidavit indexed bundle p 42.

the requisite written authority. Also, that to her knowledge the first respondent's attorney also had the requisite authority alternatively had represented that such authority existed. At the very least applicant must have laid a basis for asserting that such authority existed that could be determined at the contemplated trial. The applicant has failed to make such assertion in her founding affidavit.

14. In the absence of such assertion there is no basis to hold that a valid and binding sale in respect of the relevant immovable property has been established even on a *prima facie* basis. In these circumstances, the applicant has not complied with the first requirement for an interim interdict. On this ground alone, the application stands to be dismissed.

15. However, in case I am wrong in this conclusion I will examine whether the letters quoted above indicate an intention to contract on the part of both parties to their respective letters as they stand.

16. Mr Van Tonder, on behalf of the applicant, submits that such letters show the required intention and constitute a valid, binding and lawful agreement of sale in respect of the relevant immovable property. Mr Van Tonder further submits that the respective letters cover all aspects of the contemplated agreement. He submitted that there was no need for a further written Deed of Alienation. That taken together the letters concerned complied with the requisite statutory formalities. Mr Van Tonder further submitted that it wasn't a condition precedent of the first respondent's offer that there be a further written deed of alienation.

17. Mr Van Niekerk SC, who appeared for the first respondent, submitted that in expressing their intention both the first respondent and the applicant in their respective letters used the future tense. The first respondent's attorney states "...our client is prepared to sell the property to your client...". The applicant's attorney replies, "Our client is prepared to accept your client's proposal." He submitted that this does not show that there was the necessary intention to contract in the letters exchanged, without more.

18. Reading both letters together I am forced to conclude that neither party had the intention to contract merely by way of their respective letters as quoted above. I am fortified in this conclusion by the fact that the applicant's attorney wrote the relevant portion of his letter in the passive voice "Our client is prepared to accept your client's proposal".

19. Further, both applicant and first respondent contemplated the signing of a separate deed of sale in their respective letters. Mr Van Tonder misses the point when he submits that this was not a condition precedent to the first respondent's offer in the letter written on his behalf. The correct question is; what does this show in relation to the first respondent's intention at the relevant time.

20. Similarly, the letter written on behalf of the applicant also contemplates finalisation and signing of an agreement subsequent to the said letter. Even if this was not a condition precedent it shows that at the time the respective letters were written on behalf of the first respondent and the applicant, even though the letters might encompass all the terms the first respondent and applicant contemplated applicant did not intend to contract on the basis of mere acceptance of his offer alone without the formality of a deed of sale. In these circumstances it cannot be said that applicant intended to be bound upon mere acceptance of his offer, without more.

21. First respondent clearly contemplated that a deed of sale should be signed for whatever reason. The same is true of the applicant. In fact, the applicant states the requirement for finalising the deed of sale in more direct terms than the first respondent. In the sense that both parties foresaw a deed of sale being finalised and signed before a binding agreement came into existence, it is in that sense a condition precedent.

22. On this basis the applicant has not shown a *prima facie* right though open to some doubt. There is simply too much doubt to be accepted as a *prima facie* right.

23. In normal circumstances, if an attorney sets out in writing that he is in possession of guarantees I would certainly accept it at face value. However, in this case in her replying affidavit the applicant annexes a quotation for a loan in her sister's name. The document annexed to the replying affidavit does not even show that the loan has been accepted by applicant's sister. On the basis of this document relating to the loan as far as the bank is aware the sister is purchasing the relevant property. There is nothing to indicate that the bank is aware that the relevant property will be registered in the name of the trust or that the applicant accepted the offer in her personal capacity, as contended by Mr Van Tonder. This has muddied the waters as far as the guarantees are concerned. Mr Van Niekerk raised questions as to what this might mean in regard to the purported guarantees being in place. In the circumstances I think Mr Van Niekerk's concerns are well grounded.

24. The next issue raised by Mr Van Niekerk relates to who would be the buyer and what the effect would be on the purported agreement of the trust being nominated as the purchaser. Mr Van Niekerk submitted that the trust being the nominated purchaser would be problematic in circumstances where the trust is not yet registered. No trustees have been appointed by the Master as the letters of authority have not been issued to the trustees. Mr Van Niekerk submitted in these circumstances, that the trust could not be the purchaser of the property without the intervention of the Master, which has not been alleged nor established by the applicant.

25. In response Mr Van Tonder submitted that the applicant in her personal capacity was the purchaser and she was merely nominating an entity to be her nominee in the transaction as the first respondent invited her to do. That there was a cession of her rights to the trust. In support of this contention Mr Van Tonder referred to the case of **NOORMOHAMED v VISSER & ANOTHER**[5] That the wording of the letter of acceptance is an issue to be determined at the contemplated trial.

[5] 2006 (1) SA 290 (SCA)

26. After considering the submissions made by Mr Van Niekerk and Mr Van Tonder and after reading the NOORMOHAMED case although there is doubt and the wording of the letter written on behalf of the applicant runs counter to this, by virtue of the invitation by the first respondent to make use of a nominee I am prepared to accept that the applicant intended to be the purchaser and make use of a nominee to whom she intended to assign her rights. However, in the circumstances it does not assist applicant.

27. Applicant has not alleged compliance with the statutory formalities in regard to her and first respondents agents. This on its own is enough to dismiss the present application.

28. Further, in the event that I am wrong on the above conclusion, on the wording of the respective letters I do not believe that either applicant or first respondent intended to act and contract on the strength of their respective letters without more. To this extent, the applicant has not established a *prima facie* right though open to some doubt.

29. In these circumstances the application stands to be dismissed.

30. In relation to costs the first respondent sought costs on an attorney and client scale. In my view the application is ill founded but I do not believe that a sufficient basis has been laid for me to exercise my discretion and make a punitive costs order. In the circumstances I believe costs should follow the event.

In the circumstances the following order is made:

1) The application is dismissed.
2) The applicant is to pay the costs of this application on the ordinaryparty and party scale.

Lawrence Lever
Judge Northern Cape Provincial
Division, Kimberley

Representation:
Applicant: Mr A.G. Van Tonder oio Haarhoffs Inc
Respondent: Mr J.G. Van Niekerk SC oio Duncan & Rothman

Date of hearing 14 January 2022.
Date of judgment 18 January 2022.