



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **747/2017**
Datum aangehoor / Date heard: **24/04/2017**
Datum beskikbaar / Date available: **28/04/2017**

In the matter between:

JOHANNES DIEDERICK LATEGAN N.O	1 st Applicant
CHEREÉ LATEGAN N.O	2 nd Applicant
PETRUS JOHANNES ERASMUS N.O	3 rd Applicant

And

NG WHITE FARM PROPERTIES (PTY) LTD	1 st Respondent
WIM SCHOLTZ	2 nd Respondent
THE REGISTRAR OF DEEDS, VRYBURG	3 rd Respondent

Coram: Snyders AJ

JUDGMENT

SNYDERS, AJ

1. The applicants herein applied for an urgent interim interdict to restrain the 1st respondent from passing transfer of the property known as Plot 588, Vaalharts Settlement A, Registration Division Vryburg, Northern Cape measuring 91.4895 ha (the property) to 2nd respondent, pending the finalisation of an action to be instituted by the applicants claiming transfer of the property to applicants.
2. The applicants, Johannes Diederick Lategan NO, Cheree Lategan NO and Petrus Johannes Erasmus NO, act in their capacity as trustees of the Elnathan Trust ("the trust"). The 1st respondent is NG White Farm Properties (Pty) Ltd ("the company") and is the owner of the property. The 2nd respondent is Wim Scholtz ("Scholtz") and the 3rd respondent is the Registrar of Deeds, Vryburg ("the Registrar"). The Registrar is cited by virtue of s 97 of the Deeds Registries Act 47 of 1937 and no relief is sought against the 3rd respondent.
3. During November 2012, the trust and the company entered into a deed of sale for the purchase of the property by the trust from the company. The clause under dispute herein reads as follows:

'1. KOOPPRYS

Die koopprys is die bedrag van R8 000 000.00 (AGT MILJOEN RAND) plus BTW teen 'n nulkoers indien van toepassing, wat deur die Koper aan die Verkoper betaalbaar is 2 (Twee) maande voor die verstryking van die bestaande Huurkontrak tussen NG WHITE FARM PROPERTIES (EDMS) BPK en JDL TRUST op 31 Desember 2016.

Die Koper sal 'n goedgekeurde Bankwaarborg(e) vir die volle koopsom aan die Verkoper lewer, betaalbaar op datum van registrasie te Hartswater, vry van wisselkoste 6 maande voor die verstryking van die bestaande huurkontrak.'

4. In terms of clause 1 of the deed of sale, a guarantee was to be delivered by the trust to the company for the full purchase price by 31 July 2016. The full purchase price was thereafter payable by 31 October 2016.
5. The deed of sale referred to a lease agreement which was concluded between the company and JDL Trust. The lease agreement was concluded during July 2011 and JDL trust was represented by the 1st applicant in his capacity as trustee of said trust. In terms of the lease agreement, JDL trust would lease the property from the company from 1 July 2011 to 31 December 2016.
6. To further convolute matters, the company signed an acknowledgment of debt in favour of the trust. The date upon which it was signed is unclear but the resolution by the company to sign such acknowledgment of debt is dated 17 August 2012. In terms of the acknowledgment of debt, the company borrowed R2 500 000.00 from the trust against a bond to be registered over the property in favour of the trust. The instrument further determined that should the trust not perform in terms of the deed of sale on 31 December 2016, the trust would forfeit R1 250 000.00 of the loan amount. The company would then only be liable for the remaining R1 250 000.00. The amount in the acknowledgement of debt became due and payable on 31 March 2017.

7. A guarantee dated 30 June 2016 for the amount of R5 500 000.00 was received by the transfer attorneys on 2 August 2016. On 20 December 2016, NG White signed a power of attorney on behalf of the company, authorising the transfer attorneys to appear before the Registrar to pass transfer of the property to the trust. On the same day however, the company addressed a letter to the transfer attorneys, confirming the averment by said attorneys that the purchase price had not been paid on the due date, viz 31 October 2016. The letter further stated that the company was exercising its rights in terms of clause 8.1.1 of the deed of sale. Clause 8.1.1 gave the company the right to cancel the agreement in the event of breach of contract by the trust. The company followed up with the transfer attorneys on 4 and 17 January 2017, respectively.
8. On 19 January 2017, the transfer attorneys notified the company that they would not proceed with the transfer without the instruction of the company and that the trust had proposed paying interest on the outstanding purchase price which was to be paid on 31 October 2016.
9. On 31 January 2017, the company once again sent a cancellation letter in terms of clause 8.1.1 of the deed of sale to the trust. The breach alleged in said notice was the failure by the trust to pay the purchase price on 31 October 2016. The letter further revoked the power of attorney signed on 20 December 2016.
10. On 28 February 2017, the company sent a letter to the trust indicating that despite the cancellation, the trust was given an opportunity to match an offer of R18 500 000.00 made on the property by a 3rd party. The company

indicated that they were under pressure to accept the offer and the trust was to provide an offer with haste, should they so choose.

11. Needless to say, the trust responded on 1 March 2017 and indicated that clause 1 of the agreement did not reflect the true intention of the parties. The trust alleged that the second part of clause 1 reflected the common intention correctly, being that a guarantee for the purchase price should be delivered 6 months prior to the expiry of the lease agreement. The trust placed on record that it had complied with its obligations in terms of the deed of sale and that the company had in fact also complied with its obligations by signing the power of attorney to effect transfer of the property. The trust then denied that the company had the right to cancel the agreement and demanded specific performance, being the transfer of the property into the trust's name.
12. There were various correspondence exchanged between the parties between 1 and 31 March 2017. The gist of said correspondence was in an effort to reach some accord as to the way forward, to establish the parties positions and for the trust to ascertain the identity of the 3rd party to whom the property was sold. The trust alleged that they had ascertained the identity of the new purchaser as Scholtz on 30 March 2017 and confirmed with him that the property had indeed been sold to him.
13. It was at this stage that papers were issued on 6 April 2017 for hearing on 13 April 2017 on an urgent basis. The company opposed the application and filed opposing papers on 12 April 2017, as was set out in the notice of motion. On the hearing on 13 April 2017, the trust requested a postponement to the urgent roll for 24 April 2017 in order to file replying

papers. At that stage, the trust argued that the postponement would not affect urgency and the Judge hearing the matter on 24 April 2017 would be in a better position to make a determination on urgency. I granted the postponement on 13 April 2017 and adjudicated on the matter on 24 April 2017.

14. A determination was to be made on the urgency of the matter and whether the trust had made out a proper case for the granting of an interim interdict restraining the company from passing transfer to Scholtz, pending finalisation of action to be instituted by the trust against the company.
15. Counsel for the applicant argued that the issue of urgency was no longer relevant as the matter could be finally determined as all papers had been filed. The main application was instituted as a matter of urgency. The respondent denied that the matter was urgent and moved for the matter to be removed from the roll. I was of the strong view, based on the reasons below, that the main application was not urgent and the usual rules should have applied. However, I believed to have struck the matter from the roll on the ground of absence of urgency, would only have delayed the finalisation of these proceedings unnecessarily. I therefore dealt with the main application on urgency, as well as the merits.¹
16. The trust's grounds for urgency were that the company had concealed the identity of Scholtz and the true position of the further sale of the property. The further reason for the delay in approaching court was for the parties to attempt to settle the issues *inter partes*. The trust was only able to obtain

¹ Compare *Blue Nightingale Trading 397 (Pty) Ltd t/a Siyenza Group v Amathole District Municipality 2017 (1) SA 172 (ECG)*

Scholtz' details on 30 March 2017 and was not in a position to approach court before then. Incidentally, the deed of sale was not concluded between the company and Scholtz but between the company and Swellendam Trust, of which Scholtz is a trustee. The matter is further argued to be urgent as the transfer of the property may pass to the Swellendam Trust within a month, whereas the application would take much longer to be finalised.

17. Counsel for the company argued that the matter was not urgent by virtue of the trust having had knowledge as early as 28 February 2017 of the offer to purchase the property. The trust was also the bondholder of a first mortgage bond registered over the property and the company could not pass transfer without the trust's consent.

18. In *Gouws v Scholtz*², Steenkamp J held as follows:

“Gronde vir dringendheid sal van die omstandighede van elke saak afhang. In hierdie Afdeling word daar te maklik beweer dat 'n aansoek dringend is en praktisyns behoort noukeurig na te gaan of 'n aansoek dringend is aldan nie, want as die Hof bevind dat 'n aansoek nie dringend is nie en dat die gewone kennisgewing van mosie soos in Vorm 2(a) uiteengesit, gebruik moes gewees het, dan kan die aansoek van die hand gewys word, met verspilde koste en tyd wat verlore gaan. Die meeste dringende gevalle sal egter nog steeds op 'n gewone Mosiehofdag verhoor kan word - dit sal die uitsonderlike geval wees, waar 'n veiling gestop moet word of waar een of ander dringende grond uitgemaak kan word, wat in Kamers of na ure verhoor sal moet word.”

² 1989 (4) SA 315 (NC) at 322 B - D

19. The Honourable Judge went further and aligned himself with the following passage from *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*³:

“Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip-service to the requirements of Rule 6(12)(b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.”

20. The applicant submitted that the urgency is not self-created with reference to *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC & Others*,⁴ where it was held that the protracted attempts by a litigant to resolve a matter before it approached the court did not amount to dilatory action which negated the urgency of the matter.⁵

21. Urgent applications which are not *ex parte* applications under Uniform Rule 6(4) entails the abridgment of time periods prescribed by the rules. The question is thus whether a departure from time frames in the rules is justified and if so, to what extent such departure is necessitated.⁶

³ 1977 (4) SA 135 (W) op 137E - G

⁴ 2004 (2) SA 81 at 94 C-E

⁵ Compare *Stock & Another v Minister of Housing & Others* 2007 (2) SA 9 at 12 F - J

⁶ *Luna Meubels case* at 136 G – 137 A

22. The trust was in a position to bring this application on an urgent basis on the e-mail dated 28 February 2017. To suppose that an entire month should be taken up with negotiations that were leading nowhere, is opportunistic.
23. The application was served on the company on 7 April 2017, providing the company with 3 court days to file opposing papers on 12 April 2017 and to argue the matter on 13 April 2017. Whilst I find there to be some measure of urgency in the application, it was semi-urgent at best and did not justify such a drastic departure from the rules.
24. Taking into account the fact that all the papers were filed and arguments heard herein, I nevertheless disposed of this matter on the merits as well, notwithstanding the lack of urgency herein.
25. In order to obtain interim relief in the form of an interdict, the trust must make out a case as was recently confirmed by the Constitutional Court in *South African Informal Traders Forum & Others v City of Johannesburg & Others*:⁷
- “Once we grant leave to appeal our immediate concern becomes whether we should grant temporary relief. Foremost is whether the applicant has shown a prima facie right that is likely to lead to the relief sought in the main dispute. This requirement is weighed up along with the irreparable and imminent harm to the right if an interdict is not granted and whether the balance of convenience favours the granting of the interdict. Lastly, the applicant must have no other effective remedy.”*

⁷ 2014 (4) SA 371 (CC) at para 24

26. In *Simon NO v Air Operations of Europe AB*⁸, the court held that it was incumbent upon the applicant to establish, as one of the requirements for the relief sought, a *prima facie* right, even though open to some doubt. The court then formulated the following test to determine whether a *prima facie* right exists:

“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.”

27. The facts averred by the applicant are that its *prima facie* right arises out of a deed of sale, the trust complied with the deed by providing the company with a guarantee in terms of said deed of sale, the company did not indicate that the guarantee was defective, the company relied on a failure to pay the sale price in their letter of cancellation and not the defective guarantee and the company signed a power of attorney to pass transfer, clearly indicating the company’s intention to proceed with the transfer.

28. It cannot be disputed that in order for the property to be sold as a going concern, it was a requirement that the trust be registered as a VAT vendor. Thus, if the trust were a registered VAT vendor, the amount of R8 000 000.00 would be payable for the property. If the trust was not registered as

⁸ 1999 (1) SA 217 (SCA) at 228 G-H

a VAT vendor, the purchase price for the property would be R912 000 000.00. The guarantee was delivered to the company for an amount of R5 500 000.00. The trust did not dispute that it was not a VAT vendor at the time of the delivery of the guarantee, as the trust only provided proof of registration as a VAT vendor on 24 November 2016. Thus the amount of the guarantee was to be for the amount of R912 000 000.00.

29. The trust avers that the amount of R2 500 000.00 in the acknowledgment of debt was set off against the purchase price of R8 000 000.00. The amount in the acknowledgement of debt, although a liquid amount, was not yet due and payable at the time of the issuing of the guarantee and could not be set off against the purchase price. The contract clearly stated that the guarantee should be for the *full purchase price*. The trust had also not disputed that the guarantee was delivered to the company on 2 August 2016, being 2 days after the guarantee was to be *delivered* to the company. Thus, not only was the guarantee delivered late, it was also delivered for the incorrect amount.

30. In the letter of cancellation, the company relied on the trust's failure to pay the purchase price by 31 October 2016. The issues raised by the trust hereon are twofold: firstly the applicant now relies also on the defective guarantee and did not indicate that they were dissatisfied therewith at the time that it delivered; and secondly the interpretation of the contract is such that the payment of the purchase price should be scrapped by a trial court to give effect to the common intention of the parties.

31. The SCA has indicated the settled law on the grounds of cancellation in the *Datacolor matter*⁹ as follows:

“In particular, the innocent party need not identify the breach or the grounds on which he relies for cancellation. It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was only discovered after, the time (cf Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases 1985 (4) SA 809 (A) at 832C - D).”

32. The deed of sale contains a clause which stipulates that the company reserves all its rights in terms of the deed of sale, notwithstanding any relaxation of the terms thereof or indulgence extended to the trust. Coupled with the above *dicta*, the argument regarding the grounds of cancellation did not assist the trust.

33. This clause in the deed of sale also impacted the argument that the company did not raise a concern as the correctness of the guarantee at the time that it was filed. This also goes to the root of the argument regarding the company having signed the power of attorney. The company's explanation for signing same is supported on the papers. The power of attorney was revoked by the company. This revocation was also done within a short period of time and cannot be seen as the company waiving its right to cancellation in terms of the deed of sale.

34. Based on the above, the trust's *prima facie* right is open to too much doubt to have established such right. In the *Informal Traders matter*¹⁰ the

⁹ *Datacolor International (Pty) Ltd v Imtamarket (Pty) Ltd 2001 (2) SA 284 (SCA) at para 28*

Constitutional Court held that a *prima facie* right may be established by demonstrating prospects of success in the review. In this matter, the trust must show prospects of success in the intended action. The action will contain relief for specific performance in terms of the deed of sale. In order to sustain such an argument, a trial court will have to give an interpretation to clause 1 of the deed of sale.

35. In the SCA matter of *Bothma-Batho Transport*¹¹ the guidelines pertaining to the interpretation of contracts is set out as follows:

"Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs stages but is 'essentially one unitary exercise'

36. The court further indicated that when interpreting a document, one must have regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision

¹⁰ See fn 7 at para 25

¹¹ *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12

appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used.

37. I cannot pre-determine the result of an action that has yet to be instituted. I can however make a finding on the prospects of success. The company indicates that clause 1 was worded as such in order to obtain a guarantee by 31 July 2016, being 6 months before the expiry of the lease agreement on 31 December 2016. This, stated the company, was to account for the expiry of the lease agreement and for the crop rotation regarding JDL Trust's farming activities on the property. The parties were of the view that transfer of the property would occur within a 4 month period, hence the purchase price being payable on 31 October 2016. It is disingenuous of Counsel for the trust to state that this explanation defies understanding.
38. Thus looking at the context, the purpose of the provision and the background to the preparation thereof, the two sections of clause 1 are not contradictory and ought not to be scrapped by a trial court. Even if this does occur, and the section on the delivery of the guarantee in clause 1 remains, the trust will not be able to prove their compliance with the deed of sale. I find that the trust has not established a *prima facie* right.

39. The further requirements for an interim interdict are to be considered in conjunction with the establishment of a *prima facie* right. The trust must thus also show that it will suffer irreparable harm if the relief is not granted. The trust must show that the balance of convenience favours the granting of the interim interdict, as well as there being no other satisfactory remedy at the trust's disposal.
40. The trust must indicate a well-grounded apprehension of irreparable harm if the interdict is not granted. The test in this regard is an objective¹² test on the basis of the facts presented to me. In order to determine whether the balance of convenience favours the granting of the interim interdict, I must compare the prejudice to the applicant if the interlocutory interdict is refused against the prejudice to the respondent if it is granted. Usually this will resolve itself into a consideration of the prospects of success in the main action. The weaker the prospects of success, the greater the need for the trust to show that the balance of convenience favours it.¹³ The last requirement is that there must be no other adequate ordinary remedy. This requirement is closely linked to the requirement of irreparable harm. The trust herein claims delivery of specific property as owner thereof under a legal right emanating from the deed of sale. The trust's claim is thus seen to be vindicatory, alternatively, quasi-vindicatory.¹⁴ Therefore, the trust need not show that it will suffer irreparable harm if the interdict is not granted,¹⁵

¹² *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A) at 304 H-I

¹³ See fn 8 at 231 G - I

¹⁴ *Stern v Ruskin NO v Appleson* 1951 (3) SA 800 (W) at 810-811

¹⁵ Compare *Huthwaite v Wainer Ltd* 1916 WLD 117

nor that it has alternate satisfactory remedy. However, this is only a presumption, which may be rebutted by the company.

41. I have taken the following factors into account in exercising my discretion to refuse the interdict. The trust will not suffer irreparable harm as the company had rebutted the presumption of the irreparable harm applicable to a quasi-vindictory action on the following basis:

41.1 There is a dispute between the parties as to whether the R1 250 000.00 was forfeited by the trust in terms of the acknowledgement of debt. Pending such dispute, the trust is under no obligation to consent to the cancellation of the mortgage bond. This will result in the passing of transfer of the property being halted pending the resolution of such dispute. Counsel for the company had indicated that they do not intend to tender payment of the full amount of R2 500 000.00 in terms of the acknowledgment of debt.

41.2 As Scholtz, on behalf of Swellendam Trust, was notified of these proceedings, the trust can claim transfer of the property from Scholtz if they are successful in their action for specific performance.¹⁶

42. Thus, the lack prospects of success in the main action does not lend itself to the balance of convenience favouring the granting of the interim relief. The transfer cannot proceed until finalisation of the dispute on the acknowledgment of debt and there is no immediate irreparable harm for the

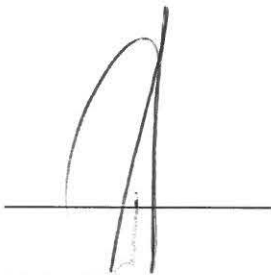
¹⁶ *Bowring NO v Vrededorp Properties CC & Another 2007 (5) SA 391 (SCA) at para 11*

trust. The trust may also claim transfer of the property from Scholtz, if necessary, if the trust is successful in the action.

43. I can find no reason why costs should not follow the result. Added to this, the trust failed to make out a case on urgency which gives an added reason for an adverse cost order against the trust.

Wherefore I make the following order:

- 1. THE APPLICATION IS DISMISSED WITH COSTS.**

A handwritten signature in black ink, appearing to be 'JA SNYDERS', written over a horizontal line.

JA SNYDERS

ACTING JUDGE

On behalf of Applicant:

Adv H De Bruin SC (Van de Wall & Partners)

On behalf of First Respondent:

Adv EJJ Nel (Duncan & Rothman Attorneys)