

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 12226/2015

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED ✓

10/4/2015

DATE

SIGNATURE

10/4/2015

In the matter between:

K201405406 (PTY) LIMITED

APPLICANT

and

DEON MARIUS BOTHA N.O

1ST RESPONDENT

CHRISTIAAN FREDERIK DE WET N.O

2ND RESPONDENT

MATOME STANLEY MPHAHLELE N.O

3RD RESPONDENT

STRYDOM & BREDEKAMP INC

4TH RESPONDENT

VARSIGYN (PTY) LIMITED

5TH RESPONDENT

REGISTRAR OF DEEDS, PRETORIA

6TH RESPONDENT

JUDGMENT

RAULINGA J

[1] The Applicant brought an urgent application, seeking an interdictory relief pending the outcome of an action to be instituted against First, Second, Third and Fourth Respondents, in the following terms:

1.1 The First, Second, Third and Fifth Respondents are interdicted and restrained from taking any steps to effect, and from effecting, registration of transfer into the name of the Fifth Respondent of the immovable properties being Units 3, 4, 5, 6, 7, 8, 16, 17, 18, 19, 22, 23, 26, 27 Scheme Number 911/2008 of 55 Tomglewood, Portion 209 of the farm Zeekoegat 296, Registration IR, Dam Street, Roodeplaat ("the immovable properties").

1.2 The Order in 1.1 above shall operate as an interim interdict pending the outcome of the action to be instituted by the Applicant against the First, Second, Third and Fifth Respondents within 30 days from the date of the order for the following relief:-

1.2.1 Declaring that the sale agreement, Annexure "FA4" to the Applicant's founding affidavit, and the addendum, Annexure "FA11" to the Applicant's founding affidavit, is valid and binding on the Applicant and the First, Second and Third Respondents.

1.2.2 An Order that: -

1.2.2.1 The First, Second and Third Respondents take all necessary steps including signing all necessary documents to effect registration of transfer into the name of the Applicant of the immovable properties.

1.2.2.2 In the event of the First, Second and Third Respondents failing to comply with the order in 1.2.2.1 above, authorising the sheriff to take all necessary documents to effect registration of transfer into the name of the Applicant of the immovable properties.

1.2.3 Costs of suit.

1.2.4 Further and/or alternative relief.

1.3 That the costs of this application be in the cause in the action referred to in 1.2 above.

[2] The Applicant abandons the relief sought in its notice of motion and in the founding affidavit for a final relief in the first instance and interim relief in the alternative. The Applicant does not persist in seeking final relief and instead seeks interim relief as stated above. The Forth Respondent does not oppose the application, whereas the Fifth Respondent supports the contention of the First – Third Respondents.

[3] On the 04th November 2014, the Applicant as nominee for a company formed or to be formed concluded a written sale agreement with the liquidators ("First – Third Respondents") for the purchase of the immovable properties. Annexure "FA3" is a copy of the sale agreement, being the conditions of sale signed on 21 December 2014 by the Applicant and on 04th November 2014 by the First Respondent (the sale agreement"). The effective date of the conclusion of the sale agreement is therefore the 04 November 2014. It is the contention of the Applicant that the First Respondent in signing the sale agreement was authorised to do so on behalf of all liquidators. The First, Second and Third Respondents are the joint liquidators of ADPOINT TRADING 77 (PTY) Ltd (in liquidation) (ADPOINT)

[4] Some of the salient terms of the sale agreement, are inter alia:-

4.1 The purchase price of the immovable property in the sum of R6 500 000.00 plus VAT was payable as following:-

4.1.1 A non-refundable deposit of the purchase price upon signing of conditions of sale and payable to the auctioneer for the benefit of the seller. (clause 2.1)

4.1.2 The balance by registration of transfer on the name of the purchaser would be obliged to furnish an approved Bank or Financial Institution

guarantee within 30 days of confirmation of the sale, for the full balance of the purchase price, together with interest thereon calculated monthly at the rate of 1% of the outstanding balance of the purchase price from date of confirmation until date of registration of transfer, which guarantee would be payable to the Seller's attorney on demand. (clause 2.3)

4.1.3 Should any party fail to comply with any of the terms and conditions, as set out in the sale agreement and that the defaulting party did not remedy such breach within a period of 7 business days after written notice has been given to the defaulting party at its chosen *domicilium*, calling upon the defaulting party to remedy such breach, then the aggrieved party would be entitled to any other remedies available, to cancel the sale by way of written notice either by fax or per hand or registered mail, claim specific performance in terms of the sale agreement or claim damages from the defaulting party. (clause 7)

[5] It is common cause that the Applicant failed to furnish the bank guarantee in terms of clause 2.3 of the sale agreement within 30 days of the conclusion of the said agreement. It is also common cause that an addendum ("FA10"), was signed by the Applicant on the 09 January 2015 and the first Respondent on 19 January 2015, however it is disputed by the Respondents that such a document culminated in an amendment of the sale agreement which extended the time period for the furnishing of the guarantee to be within 72 hours

from 19 January 2015, the date of the conclusion of the addendum. The Applicant is adamant that a copy of the addendum was personally delivered to the offices of Corporate Liquidators and handed to Mr. Lourens Stander, and further that it was signed by the First Respondent on behalf of all liquidators. The addendum was attached to an email received by the Applicant on the 19 January 2015 and signed by the First Respondent which states the following:-

“Vind hierby angeheg die addendum tot die koopkontrak onderteken deur Mnr Botha”. Mr Botha is the First Respondent.

[6] Notwithstanding the clear terms of clause 2.3 of the sale agreement amended as per the addendum, being that the guarantee had to be submitted by the Applicant within 72 hours of 19 January 2015, i.e by midnight on 22 January 2015, (so the Applicant contends) on 20 January 2015 the Fourth Respondent addressed a letter to P.J Kleynhans Attorneys on behalf of the Applicant in terms whereof the Fourth Respondent advised that unless payment was made within 48 hours from receipt of their letter, the Fourth Respondent held instructions to cancel the sale agreement. The sale agreement was subsequently cancelled on the 29 January 2015 per letter from the Fourth Respondent.

[7] The Applicant alleges urgency of the application on the basis that transfer of the immovable property into the names of the Fifth Respondent is imminent. However the First Respondent denies that the matter is urgent and avers that the transfer documents have not been lodged with the Sixth Respondent who is the conveyancing attorney. The

submission by the First Respondent is of no moment in that the First to Fourth Respondents may continue to lodge an application for transfer since there is no guarantee with the Applicant that the transfer of the immovable properties is imminent, which renders the matter urgent.

[8] The sale agreement between the liquidators and the Fifth Respondent was signed on behalf of the Fifth Respondent on the 05 December 2014. It is therefore clear that the liquidators (First to Third Respondents) sold the immovable properties even before the Fourth Respondent on behalf of the liquidators placed the Applicant on terms to provide the guarantee within 7 days, on the 08 December 2014. It is also important to mention that the copy of the sale agreement between the liquidators and the First Respondent is not signed by any of the liquidators and no other copy has been put up. I mention this because the First Respondent disputes that the addendum is valid because it was not signed by the other liquidators. It seems to me that the *modus operandi* of the First - Third Respondents is that the First Respondent signed on behalf of all the liquidators. The fact that the Applicant was only placed on terms after the properties were sold to the Fifth Respondent, plagues the arguments that the Applicant had breached the agreement which culminated in the cancellation of the agreement.

[9] I am of the view that the addendum is valid and confirmed by the *modus operandi* of the First Respondent who is found to have signed all the documents on behalf of the other liquidators. The allegations by the First Respondent that he was unable to obtain the

concurrence of the other liquidators and that one of the liquidators was incapacitated by virtue of unknown illness, cannot be countenanced. The averments of the First Respondent are exacerbated by the production of a document signed by all liquidators only during the hearing.

[10] The First, Second, Third and Fifth Respondents submit that in terms of Section 382(1) of the Companies Act 61 of 1973 ("Old Companies Act"), where two or more liquidators have been appointed they shall act jointly, in performing their functions as liquidators and shall be jointly and severally liable for every act performed by them jointly. The liquidators contend that section 381(1) was not complied with, and that the addendum is invalid.

[11] The submissions of the Applicant are supported by what was stated in Henochberg on the Companies Act:

"A plurality of liquidators must act jointly in performing their functions as such (see Murphy & Benjamin NNO V Semphill 1954(3) SA 450(W); Millman NO V Goosen 1975(3) SA 141 (O); Powell V Leech [1997] 4 ALL SA 106(W) at 117). As each is incapable of delegating his powers, they cannot jointly delegate their joint powers to one of them, or to another (Powell case supra at 117-118). But they may, authorise one to execute a document on behalf of all (cf In re London & Mediterranean Bank, Ex parte Birmingham Banking co (1868) LR3 ch App 651 at 653-654). And it is quite competent for them to

delegate administrative acts and functions to another person, as opposed to the delegation of their powers as such generally and matters of discretion, which they must, perform themselves jointly and personally, and may not delegate (R Miller V Natcoc Investment Holding Company [2010] 4 All SA 44 (SCA at Pomars 14.16". Page 313.

It therefore follows that when the First Respondent signed the addendum he had the authorisation of the other liquidators. It is strange that the liquidators acted jointly in concluding the sale agreement and did not act jointly when it come to the addendum. My conclusion is that the addendum is valid, in that in the letter from the Third Respondent dated 20 January 2015 it is expressly stated that the First Respondent only signed the addendum.

[12] The Fifth Respondent contends that each of the liquidators had to sign the sale agreement and that if any one liquidator signed alone this required written authority of the others as per Section 2(1) of the Alienation of Land Act 68 of 1981. However, in *Howat Motors (PTY) Ltd Waterson 1963(3) SA 669 (T)* it was stated that the position of a provisional liquidator can be compared with that of the manager or managing director of the company. In fact the liquidators as well as the Fifth Respondent conceded to the fact that as envisaged in Section 2(1) of the Alienation of Land Act one liquidator does not require the written authority of the other to sign a deed of alienation. This was confirmed in *AMS Marketing Co (PTY) Ltd V Holzman 1983(3) SA 263(W)* at 269D-270A.

[13] I am in agreement with the Applicant that as at 20 January 2015, the Applicant was not in breach of the sale agreement as amended. The Applicant would only be in breach of the sale agreement as amended after midnight on 22 January 2015. There was no basis for the Respondents to cancel the same agreement in the event the guarantee was not submitted within 48 hours of 20 January 2015, or thereafter absent the Applicant being placed on terms pursuant to clause 7 of the sale agreement. The fact that the Applicant had not furnished guarantee by 29 January 2015 did not give the liquidators a right to cancel the sale agreement. Therefore the sale agreement is valid and binding on the liquidators and the Applicant.

[14] While the liquidators are correct in stating that the Applicant was obliged to furnish an approved bank or financial institution guarantee, the fact of the matter is that payment was available in the form of money in the bank account of the Applicant's Attorney which could have been paid immediately to the liquidators on demand. The money was kept in an account of the Applicant's Attorney with Standard bank. The argument of the liquidators is a mere technicality, which cannot be sustained.

[15] In an application for a temporary interdict, Applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the Applicant together with any facts set out by the Respondent which Applicant cannot dispute and consider whether, having regard to the inherent probabilities, the Applicant could on

those facts obtain final relief at trial Webster V Mitchell 1947 1186 (WLD) and also the different requirements for any interim interdict interact and where the Applicant for such an interdict has established a strong *prima facie* right, the Court in the exercise of its discretion may place less emphasis on the other requirements (Harms Civil Procedure in the Supreme Court at p10). I am convinced that the Applicant has established a strong *prima facie* right and must be granted the relief sought.

[16] I accordingly would grant the application with costs to be in the cause in the action referred to in 1.2 above.

A handwritten signature in black ink, appearing to read 'T J RAULINGA', is written over a horizontal line.

T J RAULINGA

JUDGE: GAUTENG DIVISION, PRETORIA