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

IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBELEY)]

Case No:220/14

In the matter between:

C.J.G HORN **APPLICANT**

AND

GREAT FORCE INVESTMENTS 25 (PTY)LTD **1ST RESPONDENT**

F.J COETZEE **2ND RESPONDENT**

CORAM: LEVER AJ

JUDGMENT

Lever AJ

1. The applicant seeks an order on an urgent basis suspending the implementation of an eviction order against him and others granted by Erasmus AJ on the 12th December 2014 pending the institution of an action to rectify an agreement of sale, in part involving the properties being the subject of the said eviction order.

2. The applicant was given approximately two months to vacate the said property and he launched the present application only four days before he was to vacate the relevant fixed property in terms of the said Court Order.

3. The urgent application was opposed and was argued before me on the 19th March 2015. After hearing the oral arguments I dismissed the application with costs and indicated that my reasons for doing so would follow as soon as was practically possible. These are my reasons for dismissing the urgent application.

4. To establish the context in which the urgent application was brought, it is necessary to set out the background as briefly as possible.

5. During 2005 the applicant had a number of judgment creditors who were about to sell the relevant fixed properties in execution. The second respondent was a friend of the applicant and the applicant approached him for help. In order to stop the sale in execution the applicant and first respondent entered into a written agreement in terms of which first respondent bought the relevant fixed properties at a price that was acceptable to the relevant judgment creditors. In terms of an addendum to such contract the first respondent also bought certain movables and farming implements.

6. It is common cause between the parties that at all material times, the first respondent is the registered owner of the relevant fixed properties.

7. It was alleged in the eviction application that second respondent, in terms of an oral agreement, agreed to sell back the relevant properties to the applicant at the original purchase price plus 10% (ten percentum) per annum. This in fact formed the basis of the present applicant's defense in the

eviction application. The present second respondent on behalf of the first respondent conceded that there was an oral "buy-back agreement" but maintained that it was only open for applicant to do so within a year or two from the original purchase. Applicant has conceded that it was the intention of the parties that he would repurchase the relevant properties within a year or two but maintained that it was within their contemplation that it may take longer to repurchase the properties, but he gave no details of what the parties contemplated. More about this later.

8. In the eviction application present first respondent argued that the oral repurchase agreement did not comply with the formalities required by the Alienation of Land Act[1]. Erasmus AJ found that the oral "repurchase agreement" did not comply with the requirements of section 2(1) of the said Act. Furthermore, that the terms of the said oral repurchase agreement for the land were vague to say the least. Erasmus AJ characterised the oral repurchase agreement as an agreement to enter into an agreement.

9. In the papers in the present application the applicant concedes that on the case before Erasmus AJ her findings were correct.

10. In the present matter there are wide ranging issues taken up by the parties. These issues include ***inter alia*** urgency, procedural matters, mis-joinder and prescription. For present purposes it is not necessary to deal with all of these issues.

11. In the present matter the applicant is endeavoring to assert a right to rectification of an underlying contract by way of an action. The applicant is not merely trying to avert an injustice. In these circumstances the classic requirements for an interim interdict need to be established so that the operation of the eviction order can be suspended pending the determination of an action for

[1] Act 68 of 1981.

rectification of the written contract of sale to incorporate the terms of the oral "repurchase agreement". The classic requirements for an interim interdict are:

11.1. A ***prima facie*** right though open to some doubt;

11.2. A reasonable belief that the applicant will suffer irreparable harm if interim relief is not granted and ultimately applicant succeeds in the action;

11.3. The balance of convenience favours the granting of interim relief; and

11.4. There is no suitable alternative remedy.[2]

12. The applicant has to establish a prima facie right that would entitle him to rectification of the written contract to include the alleged terms of the oral repurchase agreement. In the circumstances of the present case the applicant will also have to establish that if rectification is granted he would have a ***prima facie*** right though subject to some doubt to "repurchase" the properties concerned. The ***prima facie*** right may only be open to some doubt. "Some doubt" is an elastic concept that has to be established with due regard to the circumstances and the evidence already placed on record. Considering the question of whether the level of doubt is within acceptable bounds this court is entitled to consider the evidence filed by the parties in the eviction application as well as the evidence filed in the present application.

13. A ***prima facie*** right though open to some doubt is something more than a bald assertion and something less than establishing the ***prima facie*** right on a balance of probabilities. One considers the inherent probabilities or improbabilities disclosed by the evidence and whether the evidence if proved at trial establishes the ***prima facie*** right claimed.[3]

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[2] L.F. BOSHOFF INVESTMENTS v CAPE TOWN MUNICIPALITY 1969 (2) SA 256 (C) at 267 B – D.

[3] WEBSTER v MITCHELL 1948 (1) SA 1186 (W) at 1189.

14. The approach to be followed has been set out by Corbett J (as he then was) in the LF BOSHOFF INVESTMENTS case[4] as follows:

> "Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the Court's approach in determining whether the applicant's right is ***prima facie*** established, though open to some doubt, is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action."

15. In order for the court to find that there may be a valid "repurchase" agreement capable of being included in the original written sale agreement relating to the relevant properties, the applicant would have to allege and provide some inherently credible evidence on the basic requirements to establish an agreement of sale in respect of the repurchase agreement. It must be remembered that Erasmus AJ characterised this "buy back" or "repurchase" agreement as an agreement to enter into an agreement. Something more than this is required to establish the claim for rectification and a valid repurchase agreement. For present purposes I only intend to consider the requirement that the price be agreed or that it be capable of being readily established.

16. In the present application and the eviction application the present applicant asserts that the "repurchase price" was the original capital sum paid by the first respondent to purchase the said properties plus 10% (per centum) per annum interest. Further, present applicant also asserts that he would rent certain of the properties in terms of two lease agreements and that the rental would pay the annual interest due under the repurchase agreement. He then goes on to assert that the combined monthly rental in respect of the two leases before VAT was equal to 1% (one per centum) of the capital sum per month. The stark question is why pay 12% per annum rent to cover the interest if he was only obliged to pay 10% interest per annum. In the absence of any kind of

[4] L F BOSHOFF INVESTMENTS., supra at 267 E – F; See Also: WEBSTER v MITCHELL 1948 (1) SA 1186 (W) at 1189.

explanation for this, it simply does not make sense and is inherently improbable. I specifically canvassed this issue with Mr Husselman who appeared for the applicant and he conceded that this was inherently improbable and he could offer no explanation for this.

17. The next issue relating to the price in respect of the “repurchase agreement” is the behavior of the present applicant as disclosed in the record of the eviction proceedings and the present proceedings. The present applicant asserts that the “repurchase” price for the relevant properties was the capital sum plus 10% interest per annum. This can readily be established on the face of it, but in the affidavits referred to, the present applicant on his own version approaches the second respondent “countless times” asking him to establish the “repurchase price”. This behavior is at odds with the assertion that the repurchase price was the capital sum plus 10% interest per annum.

18. There is a further aspect that is connected to the “repurchase price” that needs to be considered. At some point the present applicant stopped paying rental for the properties concerned. The explanation proffered by him was that he had built an extra “chicken house” on the property to the value of R100 000.00 (one hundred thousand Rand). In the context of the applicant’s case that the whole sale of the properties concerned was merely and exclusively to assist him as some sort of security for a loan, this explanation is inherently improbable because applicant would be improving his own property. It is improbable that first respondent would accept this variation of the lease agreement in this context. There is a second reason why it is improbable that first respondent would accept such a variation of the lease agreement. The value of the new “chicken house” is alleged to be R100 000.00. This is less than 10 months rental at the rate alleged by applicant to have been agreed between the parties. It is improbable that first respondent would have agreed to rentals ceasing for an indeterminate period. It is common cause that the Applicant has not paid any rental for a number of years.

19. In the context of whether or not the applicant has established a ***prima facie*** right though open to some doubt, there is a further aspect to be considered, being that in the relevant affidavits, present applicant concedes that it was intended that he would “repurchase” the relevant properties within a year or two, although he asserts that it was in the contemplation of both parties that this might take longer. Present applicant gives no details of what was contemplated by the parties for this extended period to “repurchase” the relevant properties. In the present circumstances I believe it was incumbent upon the applicant to spell out what was contemplated by this extended period of time to “repurchase”. The applicant has failed to give such details.

20. Taken individually and collectively all of these factors establish that the ***prima facie*** right that the applicant wishes to assert is simply open to too much doubt. This doubt is essentially established from the various versions proffered by the applicant himself. In the circumstances I hold the view that he will fail to establish these facts at the trial itself. In short the applicant’s ***prima facie*** right is open to an unacceptable degree of doubt. If the applicant fails to establish a ***prima facie*** right through open some doubt, he is not entitled to the interim relief he claims.

21. These are the reasons why I dismissed the application with costs on the 19th March 2015.

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LEVER AJ

Appearances:

Applicant:	Mr. Husselmann
Respondents:	Adv. Snellenberg
Date of hearing:	19 March 2015
Date of Judgment:	27 March 2015