

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

REPORTABLE

Case No: 1601/09

In the matter between:

CHRISTOPHER EDWARD MARTIN DAMON

Applicant

and

SAHRON DAMON

First Respondent

BFP ATTORNEYS

Second Respondent

THE REGISTRAR OF DEEDS

Third Respondent

CORAM	:	D H ZONDI J
JUDGMENT BY	:	ZONDI J
FOR THE APPLICANT	:	ADV. S A HARMSE
INSTRUCTED BY	:	MALAN LOURENS TYGER VALLEY
FOR THE FIRST RESPONDENT	:	ADV. N DE JAGER
INSTRUCTED BY	:	EDWARD NATHAN SONNENBERGS
DATE OF HEARINGS	:	05 MARCH 2009
DATE OF JUDGMENT	:	02 APRIL 2009

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(WESTERN CAPE HIGH COURT, CAPE TOWN)**

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CASE NO: 1601/09

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DIE REGISTRATEUR VAN AKTES

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JUDGMENT DELIVERED ON 02 APRIL 2009

ZONDI, J

Introduction

[1] This is an application in which the applicant seeks *inter alia* an order in terms of which the second respondent, (“the transferring attorneys”) is ordered to retain in trust an amount for R155 825-00 being a portion of the proceeds of sale of erf 5597 Mitchells Plain pending final determination of certain civil proceedings which applicant has instituted against the second respondent in the Mitchells Plain

Magistrate Court under case numbers 4652/2008 to 4656/2008 as well as 4657A/2008 & 4657B/2008.

[2] In the alternative the applicant seeks an order interdicting the second and third respondents from registering transfer of erf 5597 Mitchells Plain pending resolution of the civil proceedings in the Mitchells Plain Magistrates Court.

[3] The second and third respondents are not opposing the relief sought by the applicant. The first respondent opposes the relief sought by the applicant on various grounds. At the hearing hereof *Mr Harmse*, who appeared for the applicant, indicated that the applicant no longer seeks an order interdicting the second and third respondents from registering transfer of erf 5597 Mitchells Plain. In the result it became unnecessary to make a decision on a non-joinder point which the first respondent had taken.

Factual Background

[4] It is common cause that the first respondent is the owner of erf 5597 Mitchells Plain ("the Mitchells Plain property") which she has sold to one Da Costa for R370 000-00. The first respondent has appointed the second respondent to attend to the registration of transfer of the property to Da Costa.

[5] In anticipation of the sale of her Mitchells Plain property the first respondent bought immovable property known as erf 1491 Delft ("the Delft property") for

R131 000-00. The first respondent has also appointed the second respondent to attend to the registration of transfer of the Delft property. The first respondent expects to finance the sale of the Delft property from the proceeds of sale of her Mitchells Plain property. There is presently a mortgage bond over the Mitchells Plain property in the sum of R155 092-69 in favour of ABSA Bank.

[6] The bases upon which the applicant seeks relief against the first respondent are that during the period February 2008 and July 2008 he advanced various sums of money to the first respondent to enable her to meet her bond repayments in respect of the Mitchells Plain property and for which the first respondent had signed acknowledgments of debt. It is alleged by the applicant that in terms of the loan agreements the first respondent undertook to repay the loan out of the proceeds of sale of the Mitchells Plain property and by way of reassurance to the applicant, the first respondent gave written instruction to Theart Attorneys, the then first respondent's transferring attorneys, to pay applicant on registration of transfer of the Mitchells Plain property.

[7] The applicant further alleges that in terms of the loan agreements he was given mandate to market the Mitchells Plain property and pursuant thereto he arranged with certain estate agents to introduce prospective buyers to the property.

[8] The applicant alleges that in breach of the agreement the first respondent failed to make property available for viewing by prospective buyers and frustrated the applicant's attempts to have the property marketed. At paragraph 11 of his founding affidavit the applicant explains why he resorted to litigation:

“In die afwesigheid van enige terugbetaling en aangesien dit vir my duidelik was dat Eerste Respondent my en voornemende kopers ontduik het ek opdrag gegee aan my prokureur van rekord om dagvaarding teen die Eerste Respondent uit tereik waarin terugbetaling van die gelde geëis word.”

[9] The first respondent has defended the Mitchells Plain Court proceedings and has requested further particulars to the applicant's particulars of claim. The applicant has not responded to the first respondent's request and it is alleged by the first respondent that the applicant's delay is preventing her from pleading to the applicant's claims.

[10] It is submitted by the first respondent that the applicant has launched the present proceedings in order to frustrate her disposal of the Mitchells Plain property in an effort to secure a tactical advantage forcing her to pay the applicant the amounts claimed by him which the first respondent does not admit are owing. The first respondent denies that she entered into an agreement with the applicant in terms of which the Mitchells Plain property or the proceeds from the sale thereof would be provided as security for any debt owing by her to the applicant.

[11] The first respondent further denies that she received money to the value of R155 825-00 from the applicant and has asked the applicant to produce the original of the documents purporting to be acknowledgments of debt.

Legal Principles

[12] In this application the applicant seeks an interim interdict pending an action. It is trite that an interim interdict pending action is an extraordinary remedy aimed at temporary relief (**Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another** 1973 (3) SA 685 (A) at 691 C – G). It is not granted unless all the legal requisites for such remedy are met. Its object is to preserve or restore the status quo pending the determination of the rights of the parties in an action. It does not involve or affect the final determination of those rights but seeks to place a restraint on the future action of the respondent until final determination of the dispute. Legal rights must be in issue and not the preservation of commercial interest.

[13] In an application for an interim interdict the applicant must show a *prima facie* right, 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, that the balance of convenience favours the granting of interim relief and finally that the applicant has no other satisfactory remedy (**L F Boshoff**

Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd 1969(2) SA 256(C) at 267 A – F).

[14] In this matter I intend resolving factual disputes between the parties in accordance with the approach as set out by Corbett J, as he then was, in **L F Boshoff Investments**, supra, at 267 E which is to the following effect: where the applicant cannot show a clear right, and in the event of there being dispute of facts, in determining whether the applicant has established a *prima facie* right, the court has 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] The question is whether the applicant has established a *prima facie* right for the relief he seeks. The applicant relies on various loan agreements as a basis for the relief he seeks. It was argued by *Mr Harmse* that in terms of the loan agreements the first respondent undertook to pay her debts, amounting to R155 825-00 from the proceeds of sale of her Mitchells Plain property. In developing this argument, *Mr Harmse* pointed out that because the proceeds of sale of the Mitchells Plain property were identified as a source from which to satisfy various debts, the applicant was entitled in law to an interim interdict preserving the sum of R155 825-00 .

[16] To counter *Mr Harmse's* contention *Mr De Jager*, who appeared for the first respondent, argued for the dismissal of the application on the basis that the applicant has failed to establish a *prima facie* right. He pointed out that, although the first respondent may be indebted to the applicant in an amount less than R155 825-00, there was no agreement that the Mitchells Plain property or the proceeds of its sale was or were to be used as security for any debt owing by the first respondent to the applicant. *Mr De Jager* pointed out that the purpose of this application is to obtain security for the applicant's claims at the Mitchells Plain Magistrates Court. He accordingly argued that in order to succeed the applicant must demonstrate a *prima facie* right to such security.

[17] It is correct that the onus of proving a *prima facie* right rests upon the applicant and that an interdict may not be granted unless there is some connection between the right upon which the applicant's claim is based or founded and the property sought to be interdicted.

[18] In the present case the *prima facie* right upon which the applicant relies arises out of the loan agreements and the property sought to be interdicted is a portion of the proceeds of sale of the Mitchells Plain property. In an attempt to establish a connection between the *prima facie* right sought to be asserted and the property sought to be interdicted, *Mr Harmse* pointed out that monies which the applicant advanced to the applicant were used or to be used by the first respondent for the bond repayments in respect of the Mitchells Plain property and

the loans were to be repaid from the proceeds of sale of this property. He referred to the two payments of R10 000-00 each which the applicant made in February 2008 and June 2008 respectively into the first respondent's ABSA Bank bond account as providing support for his contention.

[19] *Mr Harmse* argued that when applicant made these payments, the first respondent's bond account was substantially in arrears and he made these payments to prevent the property from being sold at a sale in execution.

[20] In her answering affidavit the first respondent does not pertinently dispute averments made by the applicant with regard to payments made into her ABSA Bank account and the purpose for which they were made. In the circumstances I am prepared to assume that the applicant has made out a case justifying the *prima facie* right for the recovery of some of the amounts claimed by him at the Mitchells Plain Magistrates Court.

[21] Money, like any other species of property may be interdicted if it can be shown that the money to be interdicted is identifiable with or ear-marked as a particular fund to which the applicant claims to be entitled (**Stern and Ruskin, N.O. v Appleson** 1951 (3) SA 800 (W) at 811G).

[22] The important question remaining for consideration is whether the applicant is entitled to an interdict, pending the adjudication of various claims at the Mitchells Plain Magistrates Court.

[23] It is apparent from the applicant's founding affidavit that the claims he has instituted against the first respondent at the Mitchells Plain Magistrate Court are neither vindicatory nor quasi – vindicatory. This is clear from the allegation the applicant makes in para 11 of his founding affidavit in which he avers as follows:

“In die afwesigheid van enige terugbetaling en aangesien dit vir my duidelik was dat Eerste Respondent my en voornemende kopers ontduik het ek opdrag gegee aan my prokureur van rekord om dagvaarding teen die Eerste Respondent uit tereik waarin terugbetaling van die gelde geëis word.”

[24] In the circumstances the applicant cannot obtain an interdict unless he proves in addition to a *prima facie* case an actual or well grounded apprehension of irreparable harm if an interdict is not granted. In the case of vindicatory or quasi – vindicatory claims this is presumed. (**Stern and Ruskin**, supra at 813B).

[25] In this regard the applicant makes the following allegation at para 26 of his founding affidavit:

“Dit is vir my duidelik dat die Eerste Respondent besig is om my aan 'n lyntjie te hou ten einde die verkoop van die eiendom deur te kry sonder dat betaling van die gelde aan my verskuldig verseker word en ek is respekvol van mening dat die Eerste Respondent geen intensies het om by die ooreenkoms te hou nie en verder dat die verdediging van die reedsingestelde aksies, soos hierbo na verwys, bevestiging is daarvan.”

[26] In my view what the applicant needs to establish is that the first respondent has no *bona fide* defence to the action and that he has good grounds for fearing that the first respondent intends to make away with the proceeds of sale of the Mitchells Plain property in order to defeat his claims. The first respondent is defending various actions instituted by the applicant. There is no evidence from which it may be inferred that the first respondent intends to make away with the proceeds of sale of the Mitchells Plain property in order to defeat the applicant's claims. In fact the first respondent has offered to settle the Mitchells Plain proceedings on the basis that she would undertake not to encumber or alienate the Delft property pending the finalisation of the Mitchells Plain proceedings and to instruct the second respondent to retain an amount of R25 000-00 in its trust account pending the determination of the Mitchells Plain proceedings. This, to me, shows an intention on the part of the first respondent to settle the applicant's claims.

[27] In the circumstances I find that the applicant has failed to show that there exists a well-grounded apprehension of irreparable harm to him if the interim relief is not granted.

[28] The next matter to consider is whether the balance of convenience favours the granting of interim relief.

[29] The first respondent avers that the Mitchells Plain property is bonded to ABSA Bank and due to her changed financial circumstances she has found it becoming more difficult to service the mortgage bond. She therefore took a decision to sell the Mitchells Plain property to save it from repossession by the bank. It is the first respondent's intention to utilise part of the proceeds of sale of the Mitchells Plain property to finance the purchase of the Delft property.

[30] It is clear to me that were an interim relief to be granted the first respondent would be severely prejudiced. The effect of an interim relief would be that while R155 825-00 is being kept in the trust account of the second respondent the first respondent would have no access to it and will be unable to utilise it to finance the purchase of the Delft property. The result would be that the first respondent would have no where to stay pending the finalisation of the Mitchells Plain proceedings.

[31] There is no doubt in my mind that granting interim relief in these circumstances will have a severe impact on the first respondent's protected rights under section 26 of the Constitution which guarantees everyone a right to have access to adequate housing. In this regard section 39(1) and (2) of the Constitution enjoins me to promote the spirit, purport and objects of the Bill of Rights when developing the common law. The result of granting an interim order is that the first respondent will not be able to utilise part of the proceeds of sale of her Mitchells Plain property to acquire the Delft property. Not only will the first respondent be denied access to substantial amount of her funds but will also be

deprived of an opportunity to exercise her right to have access to adequate housing. The refusal of an interim order will not prejudice the applicant's right to pursue his civil claims against the first respondent. The applicant is not without remedy. In these circumstances it is clear that the balance of convenience does not favour the granting of the interim relief.

The Order

[32] In the result the application for an interim relief is dismissed with costs.

ZONDI, J