

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 461/2007

Date heard: 2008-04-25

Date delivered: 2008-05-09

In the matter of:

RM RILEY

APPLICANT

versus

CJ SLIEP NO

FIRST RESPONDENT

CJ SLIEP

SECOND RESPONDENT

MASTER OF THE HIGH COURT THIRD RESPONDENT

REGISTRAR OF DEEDS FOURTH RESPONDENT

UNI BOARD TRUST LIMITED FIFTH RESPONDENT

PA BEKKER SIXTH RESPONDENT

Coram: **MAJIEDT J**

JUDGMENT

MAJIEDT J:

1. The applicant, who is the plaintiff in the main action (and to whom I shall refer to hereinafter as “the applicant”), applies for an interdict *pendente lite* against the second respondent (second defendant in the main action, and referred to as “the second respondent”

hereinafter).

- 2.1 The relief sought by the applicant is for an order interdicting and restraining the second respondent from

“alienating, encumbering or in any way dealing with immovable property being Erf 1246, a portion of Erf 327, Warrenton, Magareng Municipality, pending the outcome of the action instituted by applicant against (first) respondent and others under the above case number”.

The applicant also seeks a costs order against the second respondent on an attorney client scale.

- 2.2 In the main action the applicant seeks the setting aside of the transfer of the property into second respondent's name, transfer of the property into her own name and alternative claims based on delict and on unjustified enrichment.
- 3.1 The second respondent is cited in her personal capacity and is cited as first respondent in her representative capacity as executrix of her late husband's estate.
- 3.2 The Master and the Registrar of Deeds are cited in their official capacities as third and fourth respondents respectively.
- 3.3 The fifth respondent is Uniboard Trust Limited, a company appointed by the second respondent to assist her in the

administration of her late husband's estate. The sixth respondent is employed by the fifth respondent.

3.4 Relief is sought only against the second respondent. The other respondents have been joined only because of their potential interest in the matter.

4. The facts pertaining to this matter are common cause and can succinctly be stated as follows:

4.1 On 22 July 2003 the applicant purchased immovable property being Erf 1246, a portion of Erf 327, Warrenton, Magareng Municipality (hereinafter referred to as "*the property*") from Mr Sliep, the second respondent's late husband. A written deed of sale was duly entered into between the applicant and Mr Sliep in respect of the property.

4.2 Some five months later, namely on 5 January 2004, Mr Sliep passed away before transfer of the property had been effected into the applicant's name.

4.3 On 9 January 2004 the second respondent was appointed by the Master of this Court as executrix in the estate of her late husband. The second respondent, in turn, appointed Uniboard Trust Ltd ("*Uniboard*"), the fifth respondent herein, as her agent to assist with the administration of her late husband's estate.

4.4 On 12 February 2004 the applicant informed Uniboard, as agent of

the second respondent, of the deed of sale concluded in respect of the property between her and the late Mr Sliep. On the next day, i.e. 13 February 2004, the applicant also telefaxed a copy of the said deed of sale to Uniboard.

4.5 On 3 November 2004 the final liquidation and distribution account in respect of the deceased estate was prepared by Uniboard and same was advertised during the course of December 2004 in the Diamond Fields Advertiser as well as in the Government Gazette. The said account also laid for inspection until 14 January 2005 at the Master's Office and at the Warrenton Magistrates' Court. No objection was lodged against the said liquidation and distribution account.

4.6 In the liquidation and distribution account the property was allocated to the second respondent as heir, despite the applicant's communication to Uniboard in respect of the deed of sale signed by her and the late Mr Sliep in respect of the property.

4.7 Pursuant to the aforementioned allocation in the liquidation and distribution account, the property was transferred into the name of the second respondent on 31 January 2006.

4.8 An earlier application to this Court in similar form and claiming substantially similar relief, under case number 662/2006, was dismissed with costs, but not on the merits.

5. An important aspect which emerges from the aforementioned

common cause facts, is that it is not disputed by the second respondent that the property was allocated to her in the liquidation and distribution account and in pursuance thereof transferred into her name, while she had full knowledge of the fact that the applicant concluded a deed of sale in respect of the property with the late Mr Sliep and that no effect had been given to the aforementioned deed of sale. From the papers it is also clear that certain communications had been exchanged between the applicant and second respondent regarding the former's purchase of the property from the late Mr Sliep.

6. A number of defences had been raised by the second respondent in her opposing papers. In argument, Mr Benade who appeared for the second respondent, very wisely abandoned most of these defences and proceeded with only two of them, namely:
 - a) That, based on the abstract system of property ownership in our law, the act of transfer of the property would remain in force if it had already been effected, notwithstanding the fact that the underlying agreement is invalid.
 - b) That alternative remedies are available to the applicant, who is seeking an interdict *pendente lite* herein.
7. Mr Riley for the applicant has, on the other hand, contended that the doctrine of notice in the law of contract is applicable in the present matter and that the applicant has fulfilled all the requirements for an interdict *pendente lite*.

8. Mr Riley has not taken issue with the contentions of Mr Benade regarding the application of the abstract system of property ownership in our law. In this regard they are *ad idem* that the following decisions are applicable in this regard:

Kraphol v Oranje Koöperasie Beperk 1990(3) SA 848 (A) at 864 E-G;

Kriel v Terblanche 2002(6) SA 132 (NKA) at 142 C – 148 G.

9. Mr Benade has contended that there is an important distinguishing feature in the facts of the present matter, namely the underlying legal process which preceded the transfer of ownership of the property to the second respondent, in terms of the provisions of s35(12) of the Administration of Estates Act, No 66 of 1965. In support of this submission Mr Benade has pointed out that the applicant has not objected to the final liquidation and distribution account which laid for inspection as required in the aforementioned Act. The applicant's response to this is that she had no knowledge whatsoever, being a lay person, that the said account had laid for inspection at the Master's office and at the Warrenton Magistrates' Court. She stated in her affidavit that she was *bona fide* under the impression that, since she had lodged a claim in respect of the property and had forwarded a copy of the deed of sale to the second respondent's agent, who was tasked with the administration of the estate, that she needed to do nothing further.
10. In my view, Mr Benade is correct in his submission that a decision

on the first leg contended for by him (see par 6(a) above) must be made through a consideration of the abstract system of property ownership on the one hand and the doctrine of notice in the law of contract on the other.

11. The requirements for for an interdict *pendente lite* are well established, namely that in order for an applicant to succeed he/she/it must prove the following:
 - a) A right which, though *prima facie* established, may be open to some doubt;
 - b) A well grounded apprehension of irreparable injury;
 - c) The absence of an alternative ordinary remedy; and
 - d) The balance of convenience.

In the latter regard see: **Eriksen Motors Welkom Ltd v Protea Motors Warrenton and another 1973(3) SA 685 (A)** at 692:

“In exercising its *discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice of the respondent if it is granted. This is sometimes called a balance of convenience.*”

12. In my view it is either common cause on the papers or it has not been seriously disputed that the applicant has fulfilled the requirements in (b) and (d) above, namely that she has a well grounded apprehension of irreparable injury that the second

respondent may alienate the property or encumber it with a mortgage bond and that the balance of convenience favours the granting of an interdict, provided all the other requirements are met.

13. The two requirements which are in serious dispute are the applicant's *prima facie* right (and here a consideration of the abstract system of property ownership and of the doctrine of notice is required) and the absence of alternative remedies.
14. In **Reynders v Rand Bank Bpk 1978(2) 630 (T)** at 637A, Nestadt J discussed the exception to the general rule (that a real right generally prevails against a personal right when they are in competition with each other in relation to an asset of a common debtor), namely where the holder of the real right had, before acquiring same, knowledge of an existing personal right. The learned Judge held that the basis of this principle was “(that) *it is a species of fraud to attempt to acquire a res which is known to have been promised to another*”.

In **De Jager v Sisana 1930 AD 71** at 74 Curlewis JA referred to the principle which has been laid down in various decision of our courts that a purchaser of property “*who buys with the knowledge of the rights of a third party to or in such property, is bound thereby, and that it would be a species of fraud on his part if he attempted to defeat such third party's rights.*”

See also: **Dream Supreme Properties 11 CC v Nedcor Bank Ltd and others 2007(4) SA 380 (SCA)** at 387 E-H (par. 15).

15. Mr Benade, in a valiant effort to counter the force of these aforementioned decisions, especially the **Dream Supreme Properties** matter, *supra*, contended that no fraud or conspiracy to deceive had been proved on the part of the second respondent on the facts of this matter. He contended that the fact that the transfer of the property was done openly and transparently and through a legal process set forth in s35 of the Administration of Estates Act, namely the administration of a deceased estate, distinguishes the matter from other decisions in which fraud had been proved. I do not agree with this contention. In my view mere knowledge on the part of the second respondent of the applicant's existing right to the property is sufficient. See in this regard: **Kazazis v Georghiades en andere 1979(3) SA 886 (T)** at 893 B-D per Spoelstra AJ:

“Dit is duidelik van hierdie aanhaling dat die beginsel wat neergelê word, bloot kennis van die bestaan van ‘n derde party se regte vereis. Die verwysing na bedrog is duidelik slegs ‘n verklaring van die grondslag waarom die latere koper nie toegelaat word om sy regte af te dwing nie. Hierdie stelling van die Appélhof is in ooreenstemming met die gemene reg..... wat ook die gevolgtrekking van kwade trou of bedrog aanvoer as rede waarom aan die eerste koper se regte voorkeur verleen word bo die regte van die tweede koper. Die gevolgtrekking van bedrog volg uit die blote feit van ‘n koop met kennis van die bestaan van ‘n vorige koper se vorderingsreg en ‘n daaropvolgende aanspraak wat teenstrydig is met die eerste koper se regte.”

Later in the judgment, at 893 G the learned judge states as follows:

“Daar hoef geen oogmerk of motief bewys te word dat die latere koper beoog het om die vroeëre koper se regte te verydel nie. Die blote feit dat hy bewus is van die reeds bestaande regte en die feit dat hy, ondanks

daardie kennis, voortgaan om sy eie regte af te dwing waardeur die vroeëre regte verydel word of daarop inbreuk gemaak word, word beskou as 'n vorm van bedrog teen die party met die vroeëre regte."

16. The doctrine of notice in the law of contract is premised on the general principle that "*nobody will be allowed to derive a benefit or advantage from his own bad faith*". See in this regard: **Badenhorst, Pienaar, Mostert: Silberberg and Schoeman's THE LAW OF PROPERTY 5th ed** at 83. The learned authors point out that the doctrine of notice applies where a purchaser acquires ownership of a thing sold knowing that it has previously been sold to another person; **op cit 83 footnote 100**.

17. The aforementioned authorities to the effect that mere knowledge of the rights of a third party is sufficient, are confirmed in the following judgments: **Cussons en andere v Kroon 2001(4) SA 833 (HHA)** at 839 C-D:

"Waar A sy goed aan B verkoop en daarna dieselfde goed verkoop en oordra aan C, wat bewus was van die regte van B, is B geregtig op kansellasië van die verkoping en van die oordrag van die goed, op grond daarvan dat die verkoper en C geag word op 'n bedrieglike wyse teenoor hom op te getree het ... Werklike bedrog word nie vereis nie. Blote kennis aan die kant van C van die bestaan van B se vorderingsreg is voldoende Die verwysings na bedrog in sake van hierdie aard dien slegs as aanknopingspunt in die regsisteem ter onderskraving van die kennisleer."

See also : **Bowring No v Vrededorp Properties CC and another 2007(5) SA 391 (SCA)** at 395 G-H.

18. Based on the aforementioned authorities, I am of the view that

mere knowledge on the part of the second respondent of the preceding deed of sale concluded between her late husband (as seller of the property) and the applicant (as purchaser) would be sufficient in the circumstances to assail the second respondent's rights in the present matter. There can therefore be no doubt whatsoever in my view that the applicant has made out a *prima facie* right with regard to an interdict *pendente lite*.

19.1 With regard to the second defence (see par. 6(b), *supra*), Mr Benade has merely made the bald submission that the applicant has other remedies available, namely a claim for damages and a claim based on unjustified enrichment. He pointed out that the applicant has in fact included these claims as alternatives to the main claim in her Particulars of Claim.

19.2 I do not agree with Mr Benade's argument. It must be borne in mind that the applicant is claiming specific performance. The second respondent has, despite a request to do so, refused to furnish an undertaking to the applicant that the property would not be alienated or encumbered in any way pending the outcome of the main action. A consideration of this aspect is closely linked with the balance of convenience. Moreover, it is a matter which falls in my discretion, to be exercised upon a consideration of all the facts.

See: **Moroka Swallows Football Club Ltd v The Birds Football Club & others 1987(2) SA 511 (W)** at 536 E-F.

- 19.3 In the exercise of my discretion, I take heed of the fact that the applicant has fairly strong prospects of success in the main action (for the reasons advanced above) and there is therefore less of a need for the balance of convenience to favour the applicant. See: **Ndauti v Kgami and others 1948(3) SA 27 (W)** at 36-7.
- 19.4 Having carefully considered the facts and the law, I have come to the conclusion that there is no adequate alternative remedy available to the applicant, particularly because she is claiming specific performance. All the requirements for an interdict *pendente lite* have accordingly been met.
20. Lastly, with regard to costs, I am of the view that this is not a matter where a punitive costs order on the attorney-client scale, sought by the applicant, is warranted.
21. I issue the following order:
- A. **The second respondent is interdicted and restrained from alienating, encumbering or in any way dealing with the immovable property being Erf 1246, a portion of Erf 327, Warrenton, Magareng Municipality, pending the outcome of the action instituted by the applicant against the respondents under case number 461/2007.**
 - B. **The second respondent is ordered to pay the costs of this application.**

**SA MAJIEDT
JUDGE**

FOR THE APPLICANT : MR N RILEY
INSTRUCTED BY FLETCHER'S ATTORNEYS

FOR THE DEFENDANT : ADV HJ BENADE
INSTRUCTED BY BOOYSEN MCLEOD ATTORNEYS