

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5185/2006

In matter between:

PRESIDENT STEYN GOLD MINES
(FREE STATE) (PTY) LTD

Applicant

and

CHARNINA INVESTMENTS (PTY) LTD

1st Respondent

ADAM ERIC COETZEE

2nd Respondent

ALL LESSEES/OCCUPIERS OF NO 1 HOSTEL,
PRESIDENT STEYN MINE WELKOM

3rd Respondent

HEARD ON: 14 DECEMBER 2006

JUDGMENT BY: C.J. MUSI, J

DELIVERED ON: 25 JANUARY 2007

[1] On 7 December 2006 my brother H.M. Musi J issued a rule nisi calling upon the first respondent to appear and show cause on 14 December 2006 why orders to the following

effect should not be made:

“2.1 that the first respondent be and is hereby prohibited from:

- a) effecting any alterations to.
- b) Demolishing or afflicting damages to any structures or buildings or part of buildings on the premises or complex of.
- c) Removing any fixtures or property or building materials or copper cables or any items from the premises.

Of the No 1 Shaft Hostel, President Steyn Mine, Welkom, without the written authorisation and permission of the General Manager of the applicant, pending the final adjudication and outcome of the action between the applicant and the first respondent instituted in the above Honourable Court under case number 5109/2006.

2.2 that the first respondent be and is hereby prohibited from allowing any persons whose names do not appear on the “list of occupants on the No 1 Shaft Hostel” as referred to in prayers 3 below, to occupy the No 1 Shaft hostel, pending the final adjudication and outcome of the action between the applicant and the first respondent instituted in the above Honourable Court case number 5109/2006.

2.3 that the costs of this application shall be costs in the

action, but that the costs of opposition hereto, if any, be paid for by the first respondent.

2.4 that such further and/or alternative relief be granted to the applicant as the Honourable Court may deem fit.

2.5 the first respondent forthwith compile a list containing the following particulars of all persons presently occupying the No 1 Shaft Hostel (herein referred to as “the list of occupants of the No 1 Shaft Hostel”) and to submit the said list to the General Manager of the applicant mine on or before 12h00 on Wednesday 20 December 2006...”

[2] The applicant instituted an action, in this Court, against the first respondent. In the action the plaintiff/applicant claimed inter alia for an order ejecting the defendant from Hostel No 1 President Steyn Mine, Welkom and an order authorising the plaintiff to retain the amount of R600 000.00 paid by the defendant to the plaintiff as “rouwkoop” or penalty or predetermined damages.

[3] The second respondent, Adam Eric Coetzee, who is the sole shareholder and director of the first respondent used to work for the applicant as a manager until 5 June 2006. No relief is

sought against the second and third respondents.

[4] During 2005 the applicant experienced financial difficulties and had to sell some of its assets. On 12 October 2005 the applicant represented by its general manager, Mr Johan Vorster, accepted the first respondent's offer to purchase number one shaft hostel (the property) for R800 000.00. On 15 January 2006 first respondent paid R600 000.00 to the applicant. On 16 January 2006 the first respondent took occupation of the property.

[5] On 31 March 2006 the applicant represented by Gerhard Geyser, an engineering manager, who left the employ of the applicant on 3 August 2006, and the first respondent represented by the second respondent entered into an agreement entitled Concept Heads of Agreement of Sale, because the property could not be accurately described as it still had be subdivided.

[6] The relevant terms of the agreement were:
6.1 That the balance of the the purchase price, R200

000.00 will be paid by the first respondent on or before 30 April 2006.

6.2 That the first respondent is entitled to occupy the property from the date on which the purchase consideration was effected.

6.3 That no occupational rent was payable by the first respondent.

6.4 that all benefits and risk in and to the property shall pass to the first respondent on transfer of the property.

6.5 Should the first respondent breach the agreement and fail to remedy such breach within 10 (ten) days after the date of receipt of written notice requiring the first respondent to do so, the applicant shall be entitled to cancel the agreement and to retain any amount paid as a *rouwkoop* or by way of a penalty.

[7] The first respondent failed to effect payment of the outstanding balance of the purchase consideration on or before 30 April 2006. First respondent however alleges that the date of 30 April 2006 was included in the agreement because the bank needed a date of payment in order to consider the loan application. Second respondent further alleges that the agreement between him and Geyser was that the balance R200 000.00 will be paid on registration of the property.

[8] The first respondent, in breach of the agreement, undertook major alterations and renovations to the property. The first respondent also excavated copper cabling on the surrounding land and sold it as scrap metal in order to fund its alterations and renovations to the property. First respondent also removed bricks from buildings on the property and used those bricks to effect alterations and renovations.

[9] Notwithstanding demand, the first respondent refuses to vacate the premises or to refrain from excavating cabling and selling same as scrap metal.

[10] After numerous discussions, negotiations and exchange of letters the applicant brought this application on an urgent basis. The first respondent is of the view that there is no urgency in this matter.

[11] Mr Van Rhyn SC on behalf of the first and second respondents argued that this matter is not urgent because on the applicants own case it knew since August 2006 that cabling is being excavated by employees of the first

respondent. On 4 October 2006 a security officer of the applicant also saw cabling being removed by the first respondent's employees. He confronted the second respondent and his wife about this and reported the incident to his superior on 9 October 2006. Mr Van Rhyn also pointed out that the applicant also states that the second respondent was repeatedly requested to refrain from demolishing the property of the applicant and to refrain from cutting up and selling electric cables. Mr Van Rhyn argued that the delay in bringing this application is unreasonable in the light of the fact that the applicant knew from, at least, August 2006 that buildings are being demolished and cables are being removed by the second respondent.

[12] Mr Ploos Van Amstel SC on behalf of the applicant argued that there was no undue delay in launching the proceedings. The application was ultimately brought after protracted negotiations and exchange of letters could not yield the desired result.

[13] It is trite that applications for interdicts *pendente lite* requires the maximum expedition on the part of an applicant. The Court has an overriding discretion whether to grant or refuse an interim interdict. See Yusuf v Abboobaker and

Pietermaritzburg Local Road Transportation Board 1943

(NPD) 244 at 247; **Juta & Co. LTD v Legal & Financial**

Publishing Co. LTD 1969 (4) SA 443 (C); **Chopra v Avalon**

Cinemas SA (PTY) LTD and Another 1974 (1) SA 469 at

472 H.

- [14] It is common cause that there were negotiations in order to settle this matter without instituting legal proceedings. Although the first respondent is of the view that the negotiations finally broke down on 11 November 2006 it is clear that it only broke down on 14 November 2006. The applicant's attorney wrote to the first respondent's attorney on 14 November 2006 and stated the following:

“Our client is of the opinion that further round table discussions will not resolve the issues in dispute, especially in view of our client's cancellation of the agreement.”

The first respondent's attorneys responded on 21 November 2006. They were still desirous to continue the negotiations.

They wrote to the applicant's attorney and stated:

“U word weereens uitgenooi na samesprekengs (sic) soos wat bespreek is tussen u meneer Peyper op skrywe hiervan op 13 November 2006, ons bemerk egter dat u in die skrywe van 14 November meld dat dit nie gehou kan word nie in die lig van die kansellasie. Moontlik sal dit nou meer relevant wees vir u klient om wel die rondetafelsamesprekengs (sic) by te woon.”

[15] The first respondent does not deny that it gave a firm undertaking to desist from any alterations or demolishing of buildings or the excavation of copper cable and the selling thereof pending the negotiations. The first respondent admits that a pump station was demolished on 23 November 2006 in order to use the bricks for renovations or improvements.

[16] It is in my view clear that the applicant tried its best to settle this issue amicably. The undertaking of the first respondent to desist from removing copper cables and from demolishing buildings pending the negotiations was indeed sufficient reason for the applicant to think that there was a genuine willingness on the part of the first respondent to settle the matter. The source of risk was therefore temporarily absent.

It is only when the demolishing activities resumed on 23 November 2006 that the South African Police Services were called. Esme Kennedy who is the applicant's legal adviser consulted an attorney as well as counsel on Wednesday 29 November 2006 being the first day on which she could do so because she had commitments in Johannesburg on 27 and 28 November 2006. There might have been a delay but the explanation therefore is acceptable. I detect no dilatory conduct by the applicant. There was no undue delay in launching these proceedings on 5 December 2006. In any event it is clear that it is in the interest of justice that this matter be dealt with on a urgent basis. To dismiss this application for lack of urgency would not be in the interest of justice. It would unnecessarily rob this Court of the opportunity to dispose of the matter. The attractiveness of justly and finally disposing of this matter in the interest of justice appeals to me. Why should the application be prosecuted de novo when the first respondent does not allege in any event that the urgency worked to its prejudice. This application was, in my view, properly brought on an

urgent basis.

[17] The requirements for an interim interdict are:

- (a) a prima facie right;
 - (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
 - (c) that the balance of convenience favours the granting of an interim interdict; and
 - (d) that the applicant has no other satisfactory remedy.
- In view of the discretionary nature of an interim interdict these requisites are not judged in isolation and they interact.

See **LAWSA Vol 11 first Reissue** p291 – 292 paragraph

316.

[18] A prima facie right can be established even if it is open to some doubt. The proper approach is to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to decide whether, with regard to the inherent probabilities and the ultimate onus, 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 they throw serious doubt on the applicant's case he cannot succeed. See **LAWSA** *supra* paragraph 317 and the cases cited thereat.

- [19] The applicant argued that Gerhard Geyser who signed the "Concept Heads of Agreement of Sale" on behalf of the applicant had no authority or mandate from the applicant's Board of Directors to do so. It was further argued that Geyser had no written authority to act on the applicant's behalf and therefore the purported alienation of land is of no force and effect, in terms of the provisions of section 2(1) of the Alienation of Land Act, No 68 of 1981 (the Act). Section 2(1) of the Act reads as follows:

"No alienation of land after the commencement of the section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."

[20] In view of the conclusion that I have reached in relation to another aspect of this matter I do not deem it necessary to decide whether Geyser had or ought to be deemed to have had authorisation written or otherwise to enter into a land alienation agreement on behalf of the applicant. I will, for the purposes of this matter accept, in the first respondent's favour, that he did have the necessary authorisation.

[21] It is common cause that the applicant is still the registered owner of the property. The applicant's averment that Peyper, the applicant's attorney, advised both Geyser and Coetzee that the land on which the property was situated still had to be subdivided and that the property could therefore not be described accurately and that a final agreement of sale would have to be drawn up and signed by the parties subsequent to such subdivision is in my view in sync with Peyper's subsequent actions. Because of this impediment he only drafted a "Concept Heads of Agreement of Sale." It is clear from the heading of this document that it was indeed only meant to be a preliminary or draft agreement of sale. In

fact on 9 October 2006 Peyper summarised the discussions that took place between him, Geyser and Coetzee in their representative capacities at his offices. This is, *inter alia*, how he captured the discussions:

“We confirm that *inter alia* the following transpired during our abovementioned discussions:

1. Mr Geyser of President Steyn Gold Mines instructed writer in your presence during our 12:00 discussions to draft a sale agreement in terms whereof Charnina Investment purchase the hostel building situated at President Steyn Gold Mines’ No 1 shaft from President Steyn Gold Mines.
2. Writer from the outset advised both yourself and Geyser that it would not be appropriate and/or possible to draft a final agreement of sale without a proper description of the land on which the hostel was erected (hereinafter referred to as the “property”) as reflected in title deed.
3. Both Geyser and yourself informed writer that no title deed was readily available for the purposes of drafting the agreement due to the fact that the land on which the property was erected still had to be subdivided and that it will accordingly only be possible to describe the property accurately, after the subdivision has been attended to and registered in the Deeds Office.
4. Geyser and yourself hereafter requested writer to draft *some sort* of agreement due to *inter alia* the following.
 - 4.1 the parties have agreed in principle to bind themselves for the sale of the property for a purchase consideration in the amount of **R800**

000.00 (eight hundred thousand rand);

4.2 Charnina Investments have already paid an amount of **R600 000.00** (six hundred thousand rand) to President Steyn Gold Mines in respect of the purchase consideration;

4.3 Charnina Investments agreed to settle the balance of the purchase consideration on or before **30 April 2006**, notwithstanding the date of registration of the property in the name of Charnina Investments;

4.4 Charnina Investments required *some sort* of confirmation of the agreement between the parties for purposes of acquiring financial assistance from Nedcor.

5. We hereafter agreed that writer will draft a concept agreement reflecting *inter alia*:

5.1 the sale transaction;

5.2 the purchase consideration;

5.3 the payment made by Charnina

Investments on **15 January 2006**;

5.4 the agreement that the balance of the purchase consideration will be settled on **30 April 2006**;

5.5 the agreement in respect to the occupation of the property.

6. Writer specifically informed both Geyser and yourself that a further final agreement of sale will have to be drafted and signed by both parties for purposes of registering the property in the name of Charnina Investments.

7. We adjourned our discussions until 14:00 on the same day in order to afford writer an opportunity to draft a preliminary concept agreement.

8. The concept heads of agreement of sale annexed hereto

and marked Annexure “**A**” was signed on your return to our offices at approximately 14:15 by yourself on behalf of Charnina Investments and Geyser on behalf of President Steyn Gold Mines.”

[22] The first respondent handed this letter over to his attorneys Neumann van Rooyen Sesele. In response to that letter the first respondent’s attorneys wrote the following:

“Ons bevestig die inhoud van u skrywe van 9 Oktober 2006 gerig aan ons kliënt en stem saam dat dit in wese korrek is.

Dit is egter jammer dat die kliënte nie gewys is op die gevolge van die oorbetalings van gelde voor registrasie Okkupasiehuur ens. nie.

Ons ontvang graag dringend van u die konsepooreenkoms sowel as ‘n konsepkaart van die eiendom wat getranspoteer moet word.”

The above makes it abundantly clear that the understanding between the parties was that a final agreement would be drafted after the impediment in relation to subdivision has been eradicated. I agree with Mr Ploos Van Amstel that a material term of the contract of sale of land has thus been left inchoate in that the identity of the subject matter of the agreement was to be agreed upon at a later stage by the

parties. See **Johnston v Leal** 1980 (3) SA 927 (AD) at 937 – 938. It is therefore not a source of surprise to me that the first respondent's attorney wrote on 9 May 2006 to the applicant's attorney that:

“Die eiendom soos omskryf in die kontrak bestaan nie. Die eiendom wat verkoop word is 'n gedeelte van 'n plaas wat eers onderverdeel moet word, voordat 'n transaksie kan voortgaan. Ons sou by paragraaf 1 van die kontrak gevoeg het dat die eiendom nog onderverdeel moet word en dat die proses aan die koper verduidelik is...”

[23] In my view the concept agreement is of no force or no effect.

It is clear to me that the applicant should on these facts obtain final relief at the trial.

[24] In vindicatory claims, such as this one, the principle is that the court is entitled to ensure that the property will be preserved until the dispute is decided. It is therefore factually presumed until the contrary is shown that the applicant will suffer irreparable harm if the interdict is not granted. See **UDC Bank Ltd v Seacat Leasing & Finance**

Co. (Pty) Ltd 1979 (4) SA 682 (T) at 688 G – 689 A – C.

Stern & Ruskin v Appleson 1951 (3) SA 800 (W) at 810.

- [25] The first respondent argued that the balance of convenience favours the refusal of the interim interdict. It points out that it occupies the property since 18 January 2006. That the first respondent has incurred high expenses and costs to preserve and improve the buildings. The first respondent has incurred debt in order to improve the buildings. These costs can only be recouped if the property can be leased to its full capabilities. I do not agree that the balance of convenience favours the first respondent. The parties agreed that no alterations shall be done to the Property prior to registration of transfer. Irrespective of this clause in the “agreement” the first respondent went ahead and made alterations prior to registration of transfer. He received rental income from the property. In fact he will still continue to do so even if the applicant is given interim relief. In order to effect the improvements the first respondent excavated copper cables and sold it as scrap. It used bricks from

existing buildings which still belonged to the applicant in order to effect improvement so that it could improve its earning potential. The more lease agreements it signs the more costly it will become for the applicant if it is successful in its action for eviction. The applicant will have to secure alternative accommodation for more people. If the applicant knows exactly how many families or people are currently living on the property it will be better able to assess its options. The applicant merely wants the first respondent to desist from demolishing its buildings; from removing building materials; from removing cabling and from allowing more people to occupy the property. The current income of the first respondent from the property will not be stopped or jeopardised. In terms of section 28 of the Act the first respondent is in any event entitled to reasonable compensation for the necessary expenditure that it incurred in regard to the preservation of the land or any improvements thereon.

[26] I am also in agreement with Mr Ploos van Amstel, and it was

not disputed by Mr Van Rhyn, that the applicant has no other adequate remedy.

[27] In my view the applicant has shown that it is entitled to the relief that it seeks in its notice of motion. The date of 20 December 2006 has however been overtaken by events. It ought to be adjusted.

[28] There is also no reason why the costs should not follow the event in this matter.

[29] **In the circumstances the following order is made:**

1. The rule nisi is confirmed and it is specifically ordered that:

1.1 the first respondent be and is hereby prohibited from:

a) effecting any alterations to,

b) demolishing or damaging any structures

or buildings or part of buildings on the

premises or complex of,

c) Removing any fixtures or property or

building materials or copper cables or

any item from the property situated at No

1 Shaft Hostel, President Steyn Mine,

Welkom, without the written authorisation and permission of the General Manager of the applicant, pending the final adjudication and outcome of the action between the applicant and the first respondent instituted in the above Honourable Court under case number 5109/2006.

1.2 the first respondent be and is hereby prohibited from allowing any persons whose names do not appear on the “list of occupants on the No 1 Shaft Hostel” as referred to in 1.3 below, to occupy the No 1 Shaft hostel, pending the final adjudication and outcome of the action between the applicant and the first respondent instituted in the above Honourable Court case number 5109/2006.

1.3 the first respondent forthwith compile a list containing the following particulars of all persons presently occupying the No 1 Shaft Hostel (herein referred to as “the list of occupants of the No 1 Shaft Hostel”) and to submit the said list to the General Manager of the applicant mine on or before 12h00 on Wednesday 31 January 2007:

1.3.1 name of person.

1.3.2 gender.

1.3.3 identity number.

1.3.4 date of birth.

1.3.5 residential address.

1.3.6 room or unit or apartment number in

No 1 Shaft Hostel.

1.3.7 capacity, i.e. lessee or unlawful occupant.

2. The first respondent is ordered to pay the cost of the application on an opposed basis.

Namens die eiser: Adv. C. PLOOS VAN AMSTEL SC
In opdrag van:
Peyer Attorney Inc
BLOEMFONTEIN

Namens die verweerders: Adv. A.J.R. VAN RHYN SC
In opdrag van:
Naudes
BLOEMFONTEIN

/ms