

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

Application No. : 2032/2005

In the application between:

ELLEN-ANN FINNEMORE First Applicant
ELLEN-ANN FINNEMORE N.O. Second Applicant

and

DUDLEY ARTHUR FINNEMORE First Respondent
(in his personal capacity)
DUDLEY ARTHUR FINNEMORE N.O. Second Respondent

CORAM: MALHERBE JP

HEARD ON: 9 JUNE 2005

DELIVERED ON: 17 JUNE 2005

First applicant and first respondent (to whom I shall simply refer as applicant and respondent respectively) are the children of the late Mrs. Jacoba Cornelia Finnemore. They have been involved in litigation in this Court for some time. The bone of contention between them is an immovable property in Bloemfontein. On 3

February 2005 their settlement agreement was made an order of Court. Paragraph 10 of this agreement provides as follows:

“10. Hangende die afhandeling van hierdie skikking onderneem **Ellen-Ann Finnemore** in haar persoonlike hoedanigheid en amptelike hoedanigheid as Eksekutrise in die boedel van wyle **Jacoba Cornelia Finnemore** om geen aksie te neem om die betrokke eiendom te vervreem en/of met ‘n verband te beswaar nie anders as om ‘n lening te verkry sodat sy die betalings waarna in 8 hierbo verwys word kan doen. Die Fin Prop Trust en **Dudley Arthur Finnemore** sal die nodige samewerking (indien nodig) en toegang tot die eiendom verleen sodat **Ellen-Ann Finnemore** ‘n verband vir doeleindes van die maak van die betalings waarna in 8 hierbo verwys word, kan verkry.”

On 18 May 2005 applicant obtained the following order by default, despite service of the application upon respondent:

- “1. This application is heard on an urgent basis.
2. A *Rule nisi* is issued calling upon the first respondent and

second respondent to appear before this Honourable Court on the 26th day of May 2005 at 09h30 so soon thereafter as the matter may be heard to furnish reasons why the following order should not be made a final order of this Honourable Court:

3.1 that a valuator, to be appointed by First National Bank, be allowed to enter the property, and dwelling and or other building, situated at Erf 17, Pentagon Park, more commonly known as 97 Gascony Crescent, Pentagon Park, Bloemfontein, during business hours, for the purpose of valuating the said property.

3.2 that a valuator, to be appointed by Nedbank Limited, be allowed to enter the property, any dwelling and or other building, situated at Erf 17, Pentagon park, more commonly known as 97 Gascony Crescent, Pentagon park, Bloemfontein, during business hours, for the purpose of valuating the said property.

3.3 that, in the event that the aforesaid valutors are refused entrance notwithstanding the provisions of this order, the Sheriff of this Honourable Court or his deputy, may take all reasonable steps to ensure that entrance is obtained and a valuation is completed.

3.4 that the costs of this application, including costs relating to all attendances as from 3 February 2005, be awarded in favour of the applicants against both respondents, jointly and severally, the one to pay the other to be absolved, on a scale as between attorney and client.”

This is the extended return date of that order.

It is applicant’s case that respondent frustrated her attempts to obtain valuations of the property with a view to register a bond in terms of clause 10 of their settlement agreement, by denying access to the property by valuers. In this regard she says the following in her founding affidavit:

“10. Unfortunately, a bank valuator of Nedbank Limited was refused entrance and, on the **8th of February 2005** my attorney of record forwarded an urgent facsimile to First Respondent and Second Respondent’s attorneys of record, a copy of which is attached as annexure “**EAF4**”.

On the **29th of March 2005** a facsimile was received from First Respondent and Second Respondent’s attorneys of record, confirming that a bank valuator was to be afforded permission to enter the property. A copy of the facsimile so received, is attached as annexure “**EAF5**”.

11. Notwithstanding, the First Respondent had yet again refused entrance to the property, resulting in a further facsimile, dated **19 April 2005**, forwarded to his attorneys

of record, a copy of which is attached hereto as annexure
“EAF6”.

I quote from the letter EAF4:

“Intussen, en op die veronderstelling dat onderverdeling van die eiendom nie kan plaasvind nie, het ons kliënt aansoek gedoen om ‘n verbandlening. Hierdie aansoek is in die proses van goedkeuring, maar soos u weet, moet die betrokke finansiële instansie toegang tot die eiendom bekom vir waardasie doeleindes. Binne die volgende week of wat, sal ‘n amptenaar van sodanige finansiële instansie dus sy opwagting by die eiendom maak. Dit is in iedergeval in ooreenstemming met die inhoud van klousule 10 tot die Skikkingsakte en vertrou ons derhalwe dat u kliënt sy samewerking sal gee.

Ons kliënt sal egter uit die aard van die saak eers die verband registreer na 30 April 2005, sou dit blyk dat die eiendom nie onderverdeel kan word nie. Die verband sal dus nie voor die tyd geregistreer word nie. U kliënt sal waardering hê vir die feit dat die aansoekprosedure wat registrasie van die verband voorafgaan, reeds nou afgehandel moet word, ten einde te verseker dat dit geregistreer kan word na 30 April 2005, maar voor 1 Junie 2005, wanneer u kliënt die balans van R300 000,00 moet

ontvang. Kommunikeer asseblief hierdie toedrag van sake aan u kliënt, sodat die bankamptenaar nie weggewys word wanneer hy sy opwagting by die eiendom maak nie.

The relevant portion of EAF5 reads as follows:

“Die telefoniese gesprek tussen die skrywer hiervan en u Mnr le Roux vanoggend verwys. Ons bevestig dat ons kliënt toestem dat ‘n waardeerder intussen die eiendom waardeer vir doeleindes van ‘n lening.

Kliënt oorweeg intussen sy opsies rondom die onderverdeling van die erf. U kliënt moet onder geen omstandighede voortgaan met die registrasie van die verband nie.”

Applicant’s complaint was once again communicated to respondent’s attorneys by means of EAF6. I quote the relevant paragraphs:

“Soos bespreek, het u kliënt ongelukkig weereens toegang geweier tot die perseel en kon geen van die bankwaardeerders dus die eiendom binnegaan met die oog daarop om dit te waardeer nie. U Mnr van Biljon het dan ook te kenne gegee dat u kliënt se optrede vreemd is, aangesien dit in teenstelling was met sy instruksies. Die *de facto*

situasie is dat u kliënt egter volhard en toegang weier.

Ons plaas ook op rekord dat daar nog geen sinvolle vorderingsverslag van u kliënt ontvang is aangaande die gepoogde onderverdeling van die eiendom nie. Ons kliënt bevestig dan ook dat sy telefoniese met die kantoor van die Landmeter Generaal, sowel as die Munisipaliteit in verbinding was, wie bevestig het dat geen aansoek om onderverdeling al ontvang is nie. Hoe beoog u kliënt om binne 8 werksdae 'n aansoek van die aard deur te kry?

Soos u weet, korrespondeer ons reeds **8 Februarie 2005** met u kantore, asook die van Bezuidenhouts Ingelyf om die toegang deur bankwaardeerders tot die perseel te fasiliteer, stuur u kliënt hom glad nie daaraan nie en was hy deurgaans in flagrante minagting van die Hof. Onder die omstandighede, plaas ons dus op rekord dat ons vanmiddag nog 'n brevet aan Adv. de Villiers oorhandig met instruksies om 'n dringende Hofaansoek op te stel, sodat toegang tot die perseel verkry kan word. In die verband, gaan ons aansoek doen om 'n Hofbevel, ingevolge waarvan u kliënt, op 'n prokureur-en-kliënt skaal, sal betaal vir ons kliënt se koste aangegaan sedert **8 Februarie 2005**. Ons sal dus die hof versoek om u kliënt te gelas om al die koste te betaal wat verband gehou het met alle opwagtings sedert voormelde datum.

U kliënt se optrede is, met respek, onverstaanbaar. Die Skikkingsakte is in 'n baie goeie gees onderteken en is basies 'n bloudruk van die Skikkingsakte wat deur sy regsvertegenwoordigers opgestel is. Daar kan min twyfel bestaan dat u kliënt se optrede kwaadwillig en kwelsugtig is. Onder die omstandighede is 'n bestrawwende kostebevel dus meer as geregverdig en

gaan ons kliënt op sodanige bevel aandrings.”

Respondent replies, *inter alia*, as follows to these allegations:

“6.1 No detail is provided as to the manner of refusal. No affidavit is annexed in corroboration thereof and I am advised that Applicant cannot cure this defect in her replying affidavit. In so far as it is implied that a bank official was refused entry between **3 and 8 February 2005**, I have no knowledge whatsoever.

6.2 Likewise I did not have sight of Annexure **EAF4** until the present application was served.

6.5 The letter **EAF5** merely confirms my attitude as set out in Annexure **DAF1**. I am not sure what steps Applicant took between **28 February 2005** and **1 March 2005** to arrange for valuations, as she is silent on this aspect. I categorically deny that I ever refused access to the property. I admit reconfirming to **Mr van Biljon** that Applicant was welcome to proceed with any arrangements she wished in order to effect the valuations.

7.

Once again, absolutely no detail regarding my alleged refusal is provided. I categorically deny this unfounded allegation. It is inconceivable that bank officials could not gain access to either 97A or 97B during the period **29 March 2005** until **19 April 2005**. Applicant is obviously attempting to place the blame on

me for the ineptness of the bank officials involved. I am not sure as to how I could ever refuse access, as I am not the owner of the said property.”

It is unnecessary to quote at length from respondent’s answering affidavit. His bare denial that he denied access to the property rings hollow in the light of the repeated allegations to the contrary in the letters from applicant’s attorneys to his attorneys. His denial is in any event effectively discredited by the affidavit of Mr. Rinus Pretorius, to whom he himself refers in his answering affidavit.

Mr. Williams, who appeared on behalf of respondent, correctly conceded that on his own version respondent discouraged Mr. Pretorius from visiting the property for the purpose of valuating it. It is also common cause that both dwellings on the property were occupied at all relevant times: one by respondent’s ex-wife and one by lessees. I cannot agree with Mr. Williams’s submission that applicant should simply have instructed the valuers to enter the property or should have made arrangements with his ex-wife for that purpose. No one else but respondent was obliged by the terms of clause 10 of the settlement agreement:

“om die nodige samewerking en toegang tot die eiendom te verleen.”

The evidence as a whole leaves me with no doubt that the probabilities favour applicant's version. She was obviously anxious to fulfil her obligations in terms of paragraphs 8 and 9 of the settlement agreement. For that purpose she had to register a bond over the property as provided for in paragraph 10. It was definitely not in her interest to delay the registration of the bond. The repeated letters of her attorneys, in which consent to access was sought, confirm her allegation that access was denied to the valuers. Although it was also not in respondent's interest to delay payment to him, my clear impression from all the papers is that he was obstructive throughout, as the history of the litigation between the parties shows.

I, therefore, accept applicant's version as probably true.

It is common cause that applicant threatened to bring an urgent application to gain access to the property as early as 8 February

2005. This threat was repeated on 19 April 2005. In both these letters her attorneys intimated that she will seek a punitive costs order. Eventually the notice of motion was issued on 17 May 2005 and the application was moved the following day. I was satisfied that urgency had been shown and granted prayer 1 as appears from the order quoted above. I am now also satisfied that first respondent's conduct and attitude throughout was calculated to obstruct and frustrate applicant. Mr. Williams nevertheless submitted that should the Court decide to grant a final order in terms of prayers 3.1, 3.2 and 3.3, it should order that the parties pay their own costs. In my view, applicant acted prudently to launch the application. She is resident in the Western Cape and as far as she was concerned, both respondents occupied the property, or at least had the right of occupation, until 1 May 2005, as is evident from clause 9 of the settlement agreement. She was not physically in Bloemfontein to have made arrangements with the people who occupied the property to grant access thereto.

In the settlement agreement respondent bound himself to perform all the obligations of the Fin Prop Trust. In the result paragraph

3.4 of the rule *nisi* can also be confirmed.

The order of the Court is as follows:

The rule *nisi* dated 18 May 2005 is confirmed.

J.P. MALHERBE, JP

On behalf of applicants:	Adv. H.J. Benade Instructed by: Symington & De Kok BLOEMFONTEIN
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On behalf of respondents:	Adv. A. Williams Instructed by: Bezuidenhouts Inc BLOEMFONTEIN
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