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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2024-090057

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

29 October 2024

Date

K. La M Manamela

In the matter between:

M[...] G[...] H[...]

Applicant

and

Y[...] W[...] -H[...]

First Respondent

REGISTRAR OF DEEDS, PRETORIA

Second Respondent

DATE OF JUDGMENT: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **29 October 2024**.

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The applicant, Mr M[...] G[...] H[...]¹ is 75 years old. The first respondent, Ms Y[...] W[...] -H[...] is 79 years old. They are involved in an acrimonious divorce which is pending before Gauteng Division, Johannesburg of the High Court ('the Johannesburg High Court').² The applicant launched an application for urgent relief on 12 August 2024 concerning an immovable property situated in Northriding, Randburg described as Erf 5[...], Noordhang Extension 42 Township, Registration Division IQ, Gauteng Province ('the Property'). The Property is currently registered in the name of the first respondent.

[2] The applicant, in the main, seeks that the first respondent be interdicted from selling and transferring the Property to a third party pending the finalisation of the divorce action by the Johannesburg High Court. The second respondent, the Registrar of Deeds ('Registrar') is not actively participating in these proceedings, but merely abiding the outcome.³ The Registrar is joined to give effect to the part of the relief seeking registration of a caveat⁴ in its records to ensure that no transfer of title to the Property is passed, in support of the interdict sought by the applicant. Therefore, I would refer to Ms W[...] -H[...], simply, as the respondent and the second respondent whenever it features again, simply as the Registrar.

¹ The applicant's forenames were inadvertently stated as 'M[...] G[...] ' on the Notice of Motion. The error was also noted in the report by the Registrar of Deeds, Pretoria, cited as the second respondent. See CaseLines 08-3. Therefore, to avoid implications of incorrect names in a court order, I have reflected the correct names of the face of this judgment and elsewhere.

² Reference to the 'Johannesburg High Court' as the 'Local Division' is incorrect as '[t]he Superior Courts Act 10 of 2013 abolished local divisions and constituted the High Court in its present nine divisions corresponding to the nine provinces, with main seats in all of them and local seats in some': *Murray and others NNO v African Global Holdings (Pty) Ltd and others* 2020 (2) SA 93 (SCA) [15], [18]. See also *Isibonelo Property Services (Pty) Ltd v Uchemek World Cargo Link Freight CC and Others* (55408/2021) [2023] ZAGPJHC 156 (17 February 2023) [9].

³ Par [14] below.

⁴ Par [15] below for a meaning of a 'caveat'.

[3] The urgent application was heard on 03 September 2024. Ms C van Schalkwyk appeared for the applicant and Ms M Fabricius for the respondent. After listening to oral submissions by counsel I reserved this judgment. I had also requested counsel to furnish heads of argument on specific two issues or points. I deal with the two specific points below,⁵ gratefully benefiting from the written submissions by counsel. The last of these submissions were promptly delivered on 09 September 2024, but, regretfully, this judgment was not handed down soon enough than was initially intended. Hopefully, the informal undertakings from the parties, particularly the respondent, given at the conclusion of the hearing that, there would be no material change to the status *quo* by the one to the detriment of the other, pending delivery of this judgment, are still holding.

Brief background

[4] A brief background of the matter is necessary before discussion of the parties' respective cases and submissions made on their behalf. What is reflected under this part is - to a large extent - common cause between the parties or not effectively opposed by the other party. Other material in the background of the matter – which is disputed - would appear as part of the case/submissions of the relevant party.

[5] The applicant and the respondent are married to each other out of community of property with exclusion of the accrual system. This marriage – as indicated above - is pending dissolution in divorce proceedings before the Johannesburg High Court. The divorce action was instituted by the applicant in July 2016. Evidently, a period of more than eight years has lapsed since. Each of the parties accuses the other for 'dragging feet' in the divorce proceedings. Further, there has been a flurry of other applications and, for this reason alone, one would be justified in saying that there is 'no love lost' between the parties.

[6] The other litigation or legal skirmishes between the parties include(s) Rule 43 application, contempt of court proceedings and proceedings relating to maintenance.

⁵ Pars [44]-[48] below.

But, the divorce proceedings appear to be lacking the necessary traction, hence accusations of stalling abound. Also, attempts at settlement (claimed equally by both parties) have, reportedly, not succeeded.

[7] The Property, as actually described by the applicant, is the ‘focal dispute in the divorce action’. The Property, as stated above, is registered in the name of the respondent. The applicant seeks that the respondent be interdicted from selling and transferring the Property pending the finalisation of the divorce action, barring a written consent and/or agreement between the parties. He says this is intended to protect his rights and interests in the Property. The applicant also seeks related relief. He seeks that the Registrar be ordered to register a caveat against the Property in order to obviate transfer of its title pending divorce, unless with his written consent and/or agreement between the parties. The applicant says this Court has jurisdiction due to location of the Property, the address of the cited Registrar and concurrent nature of the jurisdiction of this Court with that of the Johannesburg High Court. The issue of jurisdiction of this Court is in dispute, including whether the ordinary urgent court or the family court ought to be seized with matter. These issues are given specific attention below.⁶

[8] The urgent application or activities towards its launch was/were sparked by the applicant noting the listing of the Property for sale in Property24, an online property site or platform. He is a subscriber to the platform and, therefore, receives notifications about advertisement or listing of properties for sale in the area where the Property is located.

[9] On 30 July 2024, the applicant says he received an alert from the property platform about listing of the Property for sale. The purchase or sale price was R2 950 000. The listing appeared to have been done on 11 July 2024. The purchase price was later reduced to R2 900 000 probably after 11 July 2024. He begrudges the respondent for not informing him about the listing or intended sale. There is also listing on another platform called Private Property for the same price. There may be other listings on other platforms or mandates to sell by the respondent given to

⁶ Pars [44]-[48], below.

estate agents to market and sell the Property, the applicant speculated. Most of these averments are disputed by the respondent. I will deal with the areas of dispute below.

Applicable legal principles

[10] A number of legal principles have been raised on behalf of the parties or are pertinent to the determination of the issues in the dispute between the parties. Some of these principles are dealt with next.

[11] Part of the respondent's opposition of this application is premised on the fact that the applicant's defence before the divorce court that, an oral agreement entitles him to ownership of the Property, is impermissible when considered from the perspective of section 2(1) of the Alienation of Land Act 68 of 1981 ('ALA'). This provision is one of the formalities applicable to alienation of land. The provision and those parallel to it, together with the title to the section, read as follows:

Formalities in respect of alienation of land.—(1) No alienation of land after the commencement of this 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.

(2) The provisions of subsection (1) relating to signature by the agent of a party acting on the written authority of the party, shall not derogate from the provisions of any law relating to the making of a contract in writing by a person professing to act as agent or trustee for a company not yet formed, incorporated or registered.

(2A) The deed of alienation shall contain the right of a purchaser or prospective purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A.

[12] Section 1 of the ALA becomes relevant - in the consideration of the above provision – for its definition of related terms or concepts, as follows:

[12.1] ‘alienate’:

in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolute condition, and “**alienation**” has a corresponding meaning.

[12.2] ‘deed of alienation’:

means a document or documents under which land is alienated.

[13] The relief sought by the applicant is mainly in the form of an interim interdict prohibiting the sale of the Property. In *Setlogelo v Setlogelo*⁷ the requirements for interim interdict were stipulated and they have evolved to be as follows: (a) a *prima facie* right, although open to some doubt;⁸ (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted;⁹ (c) balance of convenience favours the granting of interim relief,¹⁰ and (d) the applicant has no adequate alternative remedy.

[14] Another applicable legal principle concerns the registration of the caveat on records relating to the Property as kept by the Registrar. Ms Van Schalkwyk for the

⁷ *Setlogelo v Setlogelo* 1914 AD 221, endorsed by the Constitutional Court in *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) [41].

⁸ The *prima facie* right has to be established on a balance of probabilities. See *Steam Development Technologies 96 Degrees Proprietary Limited v Minister: Department of Public Works & Infrastructure - Reasons for the Interim Interdict* (4264/2023) [2024] ZAECMKHC 23 (16 February 2024) [8] which reads: “[e]ven if all these requirements are met, the court still enjoys an overriding discretion whether or not to grant the interim interdict ... Applicants for interim relief are required to establish at least a *prima facie* right to relief, even if open to some doubt.” [footnotes omitted]

⁹ Relief ought to be granted only if the discontinuance of the act complained of would involve irreparable injury to the respondent: *Steam Development Technologies 96 Degrees v Minister: Department of Public Works & Infrastructure* [2024] ZAECMKHC 23 (16 February 2024) [12].

¹⁰ The balance of convenience ought to be applied cognisant of the normative scheme and democratic principles which underpin the Constitution, equating to promotion of the object, spirit and purpose of the Constitution. See *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) [46]-[47].

applicant alerted the Court to a report by the Registrar indicating that there is no objection to this part of the relief.¹¹

[15] In *The ABC of Conveyancing*¹² the learned authors described a caveat as follows:

A ‘caveat’ is a note made by the deeds office against a property, to remind the deeds office and other interested parties about doing something or checking something before allowing transfer or other dealings with that property. The word *caveat* means ‘beware’ (or ‘you who read here, be careful’). If the Surveyor-General changes the description of a property, for example, a caveat will be noted against the property. In any transfer of the land the new description will have to be used, and the caveat serves as a reminder to the conveyancer and the deeds office to comply with the necessary steps when the property is eventually transferred.¹³

[16] These legal principles do not serve as an exhaustive reflection of those applicable to this matter, including as cited by counsel in their submissions. They are but only a snapshot thereof. More will probably follow in the discussion below.

Applicant’s case (including submissions)

[17] The applicant is a businessman residing in Randburg, Johannesburg. He says he resides in a garden cottage there.

[18] The applicant’s case is simply that although the records of the Registrar reflect the respondent as the registered owner of the Property, the title to the

¹¹ Report by the Registrar of Deeds, CaseLines 08-2 to 08-3. See par 4.1 of applicant’s further heads of argument at CaseLines 19-48.

¹² Lizelle Kilbourn and Maryna Botha, *The ABC of Conveyancing* (Juta, 2023).

¹³ Kilbourn and Botha, *The ABC of Conveyancing* p 17-9 at par 17.5.3. In RC Claassen and M Claassen *Dictionary of Legal Words and Phrases* (LexisNexis, 2024) a ‘caveat’ is described as “ ‘Let him beware’; a notice to an official objecting for good reasons to the dealing by another person with his property. An objection to the transfer of certain property may be lodged with the Registrar of Deeds”.

Property is in dispute in terms of the papers in the divorce action. He should be reflected as the owner of the Property if the terms of an oral agreement between him and the respondent were given effect to. In support of this contention the applicant included a copy of the particulars of claim and the respondent's plea in the divorce action. These documents, or at least the particulars of claim, reflect that the plaintiff seeks from the divorce court a declaratory order that he is the 'true owner' of the Property. This claim is denied by the respondent, including in the papers before the divorce court.

[19] According to the applicant, the terms of the oral agreement with the respondent include the following, that: (a) he purchased the Property for an amount of R1 780 000; (b) the applicant and respondent ('the parties') agreed that the Property will be registered in the name of the respondent as the applicant's nominee, and (c) he was to pay the purchase price for the Property and all costs associated with it and he did so through funds acquired from his business A[...] T[...] F[...] CC. The agreement, when fully consummated, would result in the Property registered in his name. He says that he complied with or performed in terms of the oral agreement including by paying the costs associated with the Property, in addition to the purchase price. Also, he effected extensive improvements to the Property at his cost. He confirms that these facts or, actually, the alleged oral agreement are/is disputed by the respondent in the divorce action.

[20] He had no choice but to launch this urgent application for interdictory relief. The applicant is confident that his claim for an interdict is meritorious, including on the grounds which follow.

[20.1] He has a *prima facie* right to the Property and an associated right of access to justice to have his claim to the Property adjudicated in the divorce action. He is upbeat about the prospects regarding succeeding with the material claim in the divorce action.

[20.2] With regard to apprehension of irreparable harm, the applicant says that the respondent will sell the Property pending divorce action and, thus, defeat his claim to ownership of the Property. Without the interdictory relief

sought the respondent would proceed naturally to sell the Property. The respondent has previously breached another oral agreement between the parties by selling another property, despite its disputed ownership and without the applicant's knowledge and consent. The latter property also formed part of the issues still to get attention of the divorce court.

[20.3] He considers himself to have no alternative adequate relief to the one currently sought. To expatiate this, he says that any damages claim he might pursue against the respondent - if the Property is sold - would require amendments of the pleadings in the divorce action, which would result in further significant delays. Besides, there is no guarantee that he would be able to recover compensation if the Property is sold to a third party, even if he is subsequently proven to be the true owner. Therefore, all these suggest the absence of another satisfactory remedy to protect his rights. He, thus, would suffer irreparable harm or prejudice if he is refused relief by this Court. In contrast, the respondent would suffer no prejudice if the relief was granted as the Property would remain registered in her name.

[20.4] The applicant says that the Property has been rented out for number of years and the first respondent has been collecting rental payments which can carry on even if the respondent is halted in selling the Property. Therefore, the balance of convenience favours the granting of an interdict in favour of the applicant and registration of the caveat on the deeds records for the Property, pending the outcome of the divorce action. The implications of refusal of the interim interdict would advantage the respondent as opposed to the applicant.

[21] The caveat, as such, is incidental relief to the interdict in order to cause the Registrar to note against the title of the Property that any transfer of the Property is prohibited pending finalisation of the divorce action, save in terms of an agreement between the parties. Registration of the caveat is only possible in terms of a court order and represents an effective way to give effect to the interdict and prevent the transfer of the Property to third parties.

[22] The applicant also says that he tried his earnest to avoid the current application. On 06 August 2024, his attorneys dispatched a letter to their counterpart for the respondent. In the letter they, among others, sought: (a) withdrawal of the Property from the market; (b) details of the platforms and estate agents involved in the sale; (c) removal of all advertisement listing the Property, and (d) termination of the mandates of estate agents involved in the sale of the Property. The respondent was or his attorneys were required to furnish proof of compliance with the aforesaid and an undertaking that - pending the finalisation of the divorce action - she will not attempt to sell the Property in any other way. The respondent, further, was required to consent to a court order for registration of the caveat against the Property. With the required response not received by the stipulated deadline of 08 August 2024, this application became inevitable, at least from the applicant's perspective.

[23] As part of his case on urgency, the applicant raised the following. The Property or house will be sold to his prejudice and harm without the relief sought. He will not be able to receive substantive redress in the ordinary course if the house is sold and such relief in the ordinary course may become academic and defeats the purpose of the application. The divorce action is far from being finalised and if the Property is sold the respondent may dispose of the proceeds of sale. Registration of the caveat is necessary and this will not be promptly achieved in the ordinary course. The applicant became aware of the advertisement on 30 July 2024 and immediately sought advice from his attorneys on how to act in protection of his rights. He took their advice and first dispatched the letter, referred to above, in order to avoid costs before approaching this Court for relief.

[24] The following are further submissions by Ms Van Schalkwyk for the applicant. The respondent despite disputing the applicant's contentions and remaining steadfast about her ownership of the Property, did not attach any statements regarding her payment of the mortgage bond, municipal account and levy account. These would have amounted to proof that the respondent – and not the applicant - has been responsible for settlement of these accounts or obligations. This could have been by way of bank statements reflecting the payments. The oral agreement issue is a live one between the parties to be decided by the divorce court and this Court is not to be bothered thereby. The relief sought is interim and only sought by

the applicant to stop the sale of the Property *pendente lite*. The respondent would despite the relief granted remain the registered owner of the Property and continue renting it out as prior to the incidents in July 2024, which precipitated this application. Counsel also reiterated her client's contention that the respondent was *mala fide* in her conduct. She listed the Property for sale whilst she is aware that the title to the Property is in dispute in the divorce action. Her clear objective was to defeat the applicant's claim or relief in the pending divorce and his right to ownership of the Property, it is further argued by Ms Van Schalkwyk.

Respondent's case (including submissions)

[25] The respondent says she has been retired for 16 years. She resides in Melkbostrand, Cape Town with her daughter. The applicant does not believe that the respondent is retired. He says he knows that she assists her daughter, who is an attorney, in her practice and, thus, earns an income.

[26] Back to the respondent's case. She disputes that the application is urgent. In her view the application is, in fact, 'ill conceived and fatally defective', and constitutes an abuse of a process of the Court, deserving nothing but dismissal. She, also, says that the applicant has purposefully omitted certain facts and correspondence in his founding papers and should not be allowed to rectify this in his reply.

[27] The respondent also denies that this Court has jurisdiction to hear the application. This was also raised by the respondent by way of a point in *limine*. Issues relevant to jurisdiction include the fact that the Property is registered in the Pretoria Deeds Office, although situated in the Randburg area within the jurisdiction of the Johannesburg High Court. Further, the oral agreement was allegedly concluded within the jurisdiction of the Johannesburg High Court. Therefore, when all these are considered, there is no cogent reason why the application was launched before this Court. The applicant is 'forum shopping' and seeks to avoid the Johannesburg High Court due to his previous lack of success there in a number of applications. In his reply the applicant denies all these. According to him this Court has jurisdiction. The divorce action is different from this application. In the latter an interim interdict and registration of caveat are sought, the applicant retorted. He also

denies that the application is interlocutory to the divorce action before the Johannesburg High Court..

[28] The issue of jurisdiction took centre stage during the hearing of this application. It developed a second leg to it through Ms Fabricius' submission that the application ought to have actually served before the family court. The family court of the Johannesburg High Court, to be precise. She also submitted the family court is well-placed or equipped to deal with matters of this nature effectively and on an expedited basis. I would deal with both legs of the issue of jurisdiction, below. But I should – for the moment – also record that the applicant disputes that there is merit in the jurisdiction challenges.

[29] Further, the respondent's case and submissions include the following. The application is *mala fide*. It has been pursued despite the marriage between the parties being out of community of property with the exclusion of the accrual system. The Property is registered in the respondent's name and the applicant has failed to sustain his claims by attaching a single document on his alleged rights to the Property. No such document is also disclosed in the divorce action before the Johannesburg High Court.

[30] The respondent denies that the applicant paid the purchase price of the Property. Actually, he has never made contributions in respect of the Property. The Property was purchased through a bank loan for the full price. The bank secured its lending by registering a mortgage bond over the Property. She – and not the applicant – has to date made all bond repayments and met related costs. This was partially enabled by rental income from tenants occupying the Property. The respondent included monthly accounts for the levies, bond repayment and municipal rates and taxes in support of her assertion that she is liable for these costs.

[31] The Property was vacant for the first three years and the respondent struggled with bond repayments. Absa bank, as a bondholder, instituted foreclosure proceedings which were only averted upon securing a lease agreement. The respondent, also, disputes that the applicant made any extensive improvements to the Property. There were no improvements to the Property. It is telling that this claim

is conspicuous by its absence from the applicant's amended particulars of claim in the divorce action. The current application is nothing but an attempt by the applicant to hold her to ransom.

[32] The respondent's main point of opposition – apart from denying existence of the oral agreement alleged by the applicant - is based on section 2 of the ALA.¹⁴ The provision is to the effect that any alienation of land without a written deed of alienation signed by both parties or their agents is invalid. The oral agreement relied upon by the applicant is bad in law, be it in this application or in the divorce action, it is argued for the respondent.

[33] Regarding the applicant's allegations that the sale of the Property is imminent, the respondent disputed the dates and circumstances of the applicant's signing-up for the platform Property24; the date of his receipt of the alert from the platform, and the date(s) when he downloaded the material from the platform. She charges that the applicant is not being truthful or honest with this Court. On his own version, he was aware of the sale of the Property since 11 July 2024, but simply waited for a month before launching this application on an urgent basis, she further contends. Therefore, the urgency is self-created.

[34] The applicant is claiming damages in the divorce court in respect of another property already disposed of by the respondent. The respondent says he ought to have taken proactive steps with regard to the current Property by way of a caveat registration against the Property or seeking undertakings from the respondent as he recently did. The absence of all these is also telling of the veracity of the applicant's claim. But in his reply the applicant retorts that the oral agreement was concluded before the marriage between the parties crumbled. Then, he did not expect that the respondent would simply disregard the oral agreement as she currently does.

[35] The current application amounts to an attempt by the applicant to strong-arm the respondent into settlement. It is, also, untrue that the sale of the Property would defeat the relief sought by the applicant. The applicant could claim damages which

¹⁴ Par [11] above for a reading of s 2 of ALA in the material respect.

would undo any harm suffered by him. The respondent needs the proceeds of the sale to subsidise her income. She has no source of income other than gratuity income from her investment which is decreasing rapidly. She also need money to meet her legal bills.

[36] The applicant, according to the respondent, would suffer no prejudice if the Property is sold. He is a businessman with various sources of income. This is denied by the applicant. He says he is also battling with his legal fees. He has no significant income or several business interests. He had earmarked the proceeds of the sale of the Property for his retirement. He struggles to make ends meet, in addition to struggling with his health, both physically and mentally. He attributes the latter deficit to the protracted divorce action.

[37] The respondent disclosed that the Property had been in the market to be sold for a month by the time she deposed to the opposing papers. But no offer had been received. She ascribes this to the current slump in the country's property market.

Some aspects from applicant's reply (not included above)

[38] The applicant's assertions in reply include the following. This is in addition to what has already been dealt with above. He says that the respondent conflates his claim in the divorce action with the relief sought in this application. For, there is no need to prove any claim in the divorce action in order to succeed with the relief currently sought in terms of this application. The respondent is already ventilating the dispute in the divorce action. This is premature. The dispute would be determined by the divorce court through the trial.

[39] It is also irrelevant what the respondent thinks of the applicant's claim in the divorce action. The applicant relies on his right to a fair public hearing before a court of law as provided by section 34¹⁵ of the Constitution of the Republic of South Africa,

¹⁵ Section 34 of the Constitution reads as follows, together with its caption:

Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

1996 ('the Constitution'). I think the provision may have been cited by the applicant, essentially, to bolster his argument that it is not for this Court to decide the ownership of the Property but for the divorce court. What this Court is seized with is the relief as set out in the four corners of the notice of motion to the current application.

[40] The applicant also says that the sale price of the Property has been reduced to R2 850 000. This, the applicant maintains, is a clear indication that the respondent is steadfast in selling the Property. Also, the respondent will be utilising the proceeds of sale of the Property to her benefit and not safekeeping same in her attorney's trust account whilst the divorce is being finalised. These could potentially deny justice to the applicant.

Issues requiring determination

[41] From what appears above and the papers filed, I deduce the following as issues to be determined by this Court for the disposal of this matter:

[41.1] is the application urgent?

[41.2] did the applicant meet the requirements for an interim interdict (against sale and transfer of the Property pending the disposal of the divorce action)?

[41.3] should the Registrar be directed to register a caveat in the deeds records of the Property?

[41.4] does this Court have jurisdiction to hear this matter? If so, shouldn't the matter have been enrolled in the family court?

[41.5] is the oral agreement alleged by the applicant invalid in terms of section 2(1) of the Alienation of Land Act 68 of 1981?

[41.6] Costs: whether the granting or dismissal of the applicant warrants a punitive costs order of attorney and client scale.

[42] The above issues, identified as those material for determination and disposal of this matter, are discussed under self-explanatory subheadings, below. The discussion will not follow the order in which the issues appear above. Also, some of issues will be jointly discussed due to interlinkages in substance.

Does this Court have jurisdiction?

General

[43] The parties are involved in divorce proceedings before the Johannesburg High Court, as stated above. The divorce precipitated other ancillary proceedings before that Court. The applicant says this application ought to have been launched there as it is interlocutory or somewhat related to the divorce proceedings. The issue of whether the current application is interlocutory or not does not require separate determination as it is coincidental to the jurisdiction issues.

[44] There are two issues (or two legs to the issue) relating to the jurisdiction challenge: (a) Does this Court have the geographical decision to hear the application? If not, *cadit quaestio*, that will be the end of the matter in this Court. If the Court indeed has the requisite jurisdiction, then the second leg of the issue surfaces. (b) Should the matter have been enrolled in the family court of this Division? The second leg does not seem to be dispositive of the matter or perhaps it was raised to bolster an argument for punitive costs. But I will review the submissions by counsel.

Geographical jurisdiction

[45] The respondent denies that this Court has the requisite jurisdiction to hear the application. This is raised by way of a point in *limine*. In the respondent's view this matter belongs in the Johannesburg High Court within whose jurisdiction the Property is located and the oral agreement was allegedly concluded. The applicant's response is that the Property is registered or recorded in the Pretoria Deeds Office despite being situated in Randburg, Johannesburg. Further, the Registrar, cited in

this matter, is not involved in the divorce action before the Johannesburg High Court. Overall, this Court has concurrent jurisdiction over the area of jurisdiction of the Johannesburg High Court.¹⁶ I agree. This Court has concurrent jurisdiction over the area of jurisdiction of the Johannesburg High Court.¹⁷

Family Court

[46] As part of her jurisdiction argument Ms Fabricius, on behalf of the respondent, submitted that the matter belongs in the family court. In support of her argument she invoked paragraphs 29.2 and 29.4 of the *Revised Consolidated Practice Directive 1 of 2024* of this Court ('Practice Directive').¹⁸

[47] According to Ms Fabricius the family court is geared towards hearing matters in a streamlined and expedited manner in terms of its objectives or reasons for existence. The relief sought by the applicant squarely falls within the mandate of the family court considering it is urgent. Alternatively to the aforesaid, the applicant ought to have sought condonation when approaching this Court for non-compliance with the Practice Directive.

[48] Ms Van Schalkwyk for the applicant saw no need for the matter to be determined in the family court. There is nothing which prohibited this Court from hearing this application. She submitted that the main claim in this application is a claim to property (i.e. action in *rem*); a real action, not a personal one. Also, that this is a substantive application for protection of the rights of the applicant. Besides, the Practice Directive does not require that all interdicts be heard by the family court. Further, in addition to interdictory relief, the applicant seeks registration of a caveat. The family court has no exclusive jurisdiction and the lines are blurred in this regard. Therefore, this Court and not the family court should hear the matter. And no

¹⁶ *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another* (38/2019; 47/2019; 999/2019) [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) (25 June 2021) [37]-[41].

¹⁷ *Isibonelo Property Services v Uchemek World Cargo Link Freight CC* [2023] ZAGPJHC 156 [11]-[15], See also *Murray v African Global Holdings* 2020 (2) SA 93 (SCA) [19] albeit on a different theme.

¹⁸ *Revised Consolidated Practice Directive 1 of 2024 Court Operations in the Gauteng Division* with effect from 26 February 2024, amended on 12 June 2024.

condonation was necessary. I agree. I do not think the current application is a perfect candidate for a determination of the jurisdiction of the urgent court *versus* the family court of this Division. Also, the Practice Directive, as cited by the respondent, does not appear to attract such debate. On the facts, including the nature of the relief sought, I agree that the matter was properly enrolled in the urgent court of this Division. Therefore, the respondent's jurisdiction challenge falls on both its legs.

Is the relief precluded by the Alienation of Land Act 68 of 1981?

[49] The applicant's case is premised on his claim – first raised in the divorce court - that he is the 'true owner' of the Property, despite the respondent being the registered owner of the same property in terms of the records of the Registrar. He relies on an oral agreement allegedly concluded between him and the respondent. He has furnished no documentary proof of his contentions. The divorce court is still to pronounce on this in due course. But the respondent disputes all these and, actually, contend that the alleged oral agreement is barred by section 2(1) of the ALA.

[50] In support of this point of opposition, Ms Fabricius submitted that the wording of section 2(1) does not permit of any exceptions to the provision. For the objective of the provision is to obviate disputes and misunderstandings 'by ensuring that there is a clear, written record of property transactions', she further submitted. Reliance is placed on the following *dicta* from *Huma v Kruger NO and others*:¹⁹

[8]. The first difficulty faced by the applicant is s 2(1) of the Alienation of Land Act, Act 68 of 1981, which provides as follows ...

[9]. The oral agreement, as alleged by the applicant, is therefore of no force or effect.

[10]. That, in my view, is the end of the applicant's application.

¹⁹ *Huma v Kruger NO and others* (39164/2020) [2022] ZAGPJHC 70 (16 February 2022). Application for leave to appeal partly succeeded in *Huma v Kruger and Others* (39164/2020) [2022] ZAGPJHC 400 (7 June 2022).

[11]. The applicant, however, argues that the foregoing section does not find application *in casu* in view of the fact that, as things stand, the property is presently still registered in his name. There is no merit in this argument. The simple common cause fact of the matter is that the deceased is the true owner of the property and can at any time insist on transfer of same into her name. The fact that the property is not presently registered in her name is irrelevant. The only way in which her status as the owner of the property can be changed is by compliance with the provisions of s 2(1).²⁰

[51] Ms Fabricius further argued on the strength of the above authority that the only way in which ownership of the Property in this application can change is by way of compliance with the provisions of section 2(1) of the ALA. Therefore there is no doubt as to whether or not the applicant will succeed in obtaining ownership of the Property.

[52] Ms Van Schalkwyk, for the applicant, submitted that section 2(1), or in fact the ALA itself, does not apply to the applicant's claim (in the divorce) as it is not based on alienation of the property (i.e. land). She labelled submissions on behalf of the respondent a misconstruction of the claim and the relief sought by the applicant, as plaintiff, in the divorce action. For, a proper construction of the claim would reveal that the applicant does not seek any alienation to take place in terms of the oral agreement.²¹ Put differently, the applicant does not claim that ownership has already changed from the respondent to him in terms of the oral agreement. Also, the applicant's claim does not have to be determined for purposes of this application. This Court would not have the evidence which is still to be led before the divorce court equipping it to make such a decision.²² Once a determination is made by the

²⁰ *Huma v Kruger* [2022] ZAGPJHC 70 [8]-[10].

²¹ In the divorce action, the plaintiff seeks declaratory order as follows: '3.1 That the Plaintiff was and is as owner entitled to have registration of ownership of the immovable property ... transferred and effected into his name and his costs. 3.2 That the parties be ordered to take all reasonable steps in order to give effect to the foregoing, in respect of including the signing of any documentation reasonably required to be signed for purposes thereof.' See CaseLines 02-39 to 02-40.

²² Reliance is placed on the decision in *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council* [1986] 4 All SA 120 (C) at 122.

divorce court as to whether the applicant is entitled to registration of the Property in his name, the steps in compliance with the provisions of the ALA would be triggered. The latter would require that relevant documents be signed.

[53] Ms Van Schalkwyk says that *Huma v Kruger* relied on by Ms Fabricius for the respondent is significantly distinguishable from the current application in many ways, including it was an application for final interdictory relief, alternatively damages, further alternatively an order that the applicant be granted the right of first refusal to purchase the property. The facts of that case were different too. In *Huma v Kruger* the court was seized with a distinct dispute: whether the transfer of ownership had already occurred based on an oral agreement. In *casu* the applicant's claim does not include the alienation or registration of the Property based on the alleged oral agreement.

[54] It is clear that section 2(1) proscribes 'alienation' of land without a signed written deed of alienation. But what does 'alienation' or to alienate mean? The definition of 'alienate' is supplied by section 1 of the ALA.²³ It includes to 'sell, exchange or donate' land.²⁴ The applicant says that his claim of being a 'true owner' or that the Property ought to be registered in his name, does not constitute 'alienation' of the Property or that the Property has already been 'alienated'. I agree.

[55] As I have it, the applicant is simply saying that, before the Property was bought and subsequently registered in the respondent's name, he had a 'deal' (my own choice of words) with the respondent in terms of the oral agreement as to who was to be the owner. The 'deal' or oral agreement was followed by the 'purchase' (one of the definitions of 'alienate')²⁵ of the Property (with the purchase price funded by him), but with subsequent registration of title to the Property in the applicant's name.

[56] The logical expansion of this may be that the exercise would have involved a written 'deed of alienation' between the applicant and the seller of the Property for

²³ Par [12] above.

²⁴ *Ibid.*

²⁵ Pars [25], [54] above.

the transaction to be registered by the Registrar. These accords with paragraph 3.1 of the amended particulars of claim in the divorce action.²⁶ What the claim seeks to enforce is pleaded in paragraph 3.2 of the amended particulars of claim: '[t]hat the parties be ordered to take all reasonable steps in order to give effect to the foregoing, in respect of including the signing of any documentation reasonably required to be signed for purposes thereof'.²⁷ I agree that this does not amount to 'alienation of land' and, therefore, the provisions of section 2(1) of the ALA are not implicated. Therefore, to answer the question posed as subheading to this part: no, the relief sought by the applicant is not precluded by the ALA. I proceed to deal with the remaining issues in the determination of this matter.

Are the requirements for interim interdict satisfied?

General

[57] It is common cause between the parties that the relief sought is – in the main - in the form of an interim interdict prohibiting the sale of the Property. The durable authority of *Setlogelo v Setlogelo* sets out the requirements for interim interdict as stated above.²⁸ I deal with the requirements seriatim.

Prima facie right

[58] The applicant claims that he has a right to have the Property registered in his name based on the still to be proven oral agreement. He claims to have established the requisite *prima facie* right to the interdict. This is disputed by the respondent. Counsel for the respondent, in support of her argument, relied on the decision in *Webster v Mitchell*.²⁹ The nature and extent of the required standard in *Webster v Mitchell* is '*whether the applicant has furnished proof which, if uncontradicted at trial ... would entitle the applicant to final relief. The court will then consider the case of the respondent to decide whether it casts serious doubt on the case of the applicant.*

²⁶ Footnote [21] above.

²⁷ *Ibid.*

²⁸ Par [13] above.

²⁹ *Webster v Mitchell* 1948 (1) SA 1186 (W). This decision was cited with approval in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and others* 2023 (4) SA 325 (CC).

*If it does, the standard is not met.*³⁰ [italics added] The argument that the oral agreement is bad in terms of section 2(1) of the ALA was part of the respondent's denial that a *prima facie* right has been shown by the applicant. I have ruled against the respondent on this point. The applicant has clearly established a *prima facie* right, even if it may be open to some doubt.³¹

Irreparable harm

[59] Another requirement for interim interdicts is that the seeker ought to have a well-grounded apprehension of irreparable harm should the interim relief not be granted. The applicant says that the respondent would sell the Property whilst the divorce action is ongoing and also utilise the proceeds for personal disbursements. This is not denied by the respondent. The applicant says such disposition would defeat his claim and, consequently, he would suffer irreparable harm. The respondent ought to be stopped in order to obviate his harm. I find this requirement established.

Balance of convenience

[60] The balance of convenience ought to favour the granting of interim relief.³² The applicant says that the monies obtained from the rental of the Property - which would carry on despite the interdict prohibiting the sale of the Property - tips the balance of convenience in favour of granting of an interdict. But the respondent disputes that the rental monies alone are enough to cover the mortgage and other costs. She also needs the money for her daily living and legal costs. The retort from the applicant on this is that the respondent has managed over the years or at least until when she decided to sell the Property. I accept and agree with the applicant's contentions in this regard. This requirement has also been established.

No alternative remedy

³⁰ *Eskom Holdings v Vaal River Development Association* 2023 (4) SA 325 (CC) [65], relying on *dicta* in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1187-1192.

³¹ Par [13], footnote 8 above.

³² Par [13] above. See also *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) [46]-[47].

[61] An applicant for an interim interdict must show that there is no alternative relief of an adequate degree at his/her disposal. The applicant says this is the situation he finds himself in in this matter. It is argued on his behalf that a damages claim he might pursue against the respondent – which is a possible alternative if the Property is sold - would require that he amend his papers in the divorce action which would delay the action. This argument stands to be immediately rejected. It is meritless and – with respect – only self-serving. The applicant also says that a damages claim may not be adequate or even available as an alternative as the recovery of compensation is not guaranteed, especially if an innocent third party is the purchaser and new owner. He would have to turn to the respondent for his proven damages and the respondent is on record that the sale proceeds are desperately needed for ongoing sustenance and other kind of expenses. I agree that a satisfactory alternative remedy to protect the applicant's rights is absent under the circumstances. This concludes the discussion on whether the applicant has satisfied the requirements for an interim interdict. I deal next with the requirements for registration of a caveat.

Registration of a caveat

[62] There is really not much by way of a dispute with regard to this part of the application. The parties' energy and that of their counsel was largely expended on the interim interdict sought or disputed. Also, the Registrar hasn't raised any objection and effectively abides the outcome of this matter.³³

[63] The applicant says the caveat is necessary to give effect to the protection of his interests or rights availed by the interim interdict against sale of the Property. Also, that the protection would extend to serve interests of third parties, such as potential purchasers of the Property. These accord with the views of the learned authors of *The ABC of Conveyancing* and their description of a caveat, stated above.³⁴ I think the caveat would give effect to the interim interdict. It is warranted and regarding the requirements for its registration I find solace in the fact that the

³³ Par [14] above.
³⁴ Par [15] above.

Registrar seems to be foreseeing no hurdle towards that end. I will include in the order to be granted, if any, that the applicant is not only responsible for costs of the registration of the caveat, but also for the costs of its upliftment or cancellation.

Is the application urgent?

[64] I allowed the argument from both sides to unfold in full extent. I appreciate that the convention is for this part of the determination to be disposed of first. But with the benefit of a full set of facts of the matter after having allowed a full-blown hearing to proceed without overtly pronouncing on urgency, I find that dealing with the other parts of the matter in a written judgment is convenient for a ruling on urgency.

[65] I accept that the urgent application was - or activities towards its launch were - precipitated by the alert received by the applicant about the listing of the Property for sale.³⁵ This, according to the applicant, was on 30 July 2024. The respondent disputes this and suspects the alert was received earlier on 11 July 2024. But it is common cause that the applicant demanded undertakings on 06 August 2024 from the respondent that the Property won't be sold. When this was not forthcoming this application ensued on 12 August 2024. Therefore, in rejection of the respondent's supposition, I find that the applicant brought this application in compliance with the rules and practice of this Court warranting a hearing in the urgent court, as it was the case.

Conclusion

[66] The applicant is successful and will be granted the relief sought, subject to what I have to say next. There is no doubt that an order from this Court would only be followed by one in the divorce action in a while. This will be the case, especially if the respondent doesn't consider employing the rules and practice of Court to get traction in the divorce. History will – no doubt – continue to repeat itself in the lack of speed in the divorce proceedings. I should not be construed to be casting

³⁵ Pars [9], [33] above.

aspersions, but merely saying it is in the interests of justice that different frames of mind prevail in order for a new approach to develop in the divorce action. A protracted litigation often ends with no winner. The Courts, also, are not meant to decide unnecessarily protracted and expensive litigation battles. But, hopefully, the Johannesburg High Court, seized with the divorce action would have something to say about the pace of the divorce action. For my part, I consider that the relief granted in this application be carved out in such a manner that the order granted does not have a life of its own stifling the proceedings in the divorce court. This, the Court would do, by ensuring that the parties - or with respect the divorce court - is not shackled by the order given when dealing with the applicant's defence relevant to the order in this Court. This approach would extend to the issue of costs.

[67] I don't think it is necessary to order that the respondent halts to advertise the Property, if the sale and transfer thereof is made subject to consent of the applicant, failing which a ruling of the Court. Both parties are on record about what they intended to do with the proceeds from the disposal of the Property. Neither has expressed desire to hold the Property in perpetuity.

Costs

[68] The applicant is successful in this application. Naturally, without more, he is entitled to the costs. But I found no justification for a punitive costs order other than an ordinary party and party cost order. To conclude the quest not to turn the relief granted into the proverbial albatross around the respondent's neck, I will order that the costs granted be only taxable after the divorce action irrespective of who is the ultimate successful party in that litigation or any subsequent processes.

Order

[69] In the premises, I make the order, that:

- 1) condonation is granted for the non-compliance with the forms, services and time limits provided for in the Rules and the application is heard as one of urgency in terms of Rule 6(12)(a);

- 2) pending the finalisation of the divorce action between the parties under case number 26673/16 pending before the Gauteng Division, Johannesburg of the High Court ('the Court'), the first respondent is interdicted from selling or causing the transfer of the property described as Erf 5[...], Noordhang Extension 42 Township, Registration Division IQ, Gauteng Province, held by deed transfer number T10542/2006, situated at [...] A[...], 2[...] H[...] Drive, Northriding, Randburg, Johannesburg ('the Property'), unless the applicant consents to the sale of the Property and a written agreement is concluded between the applicant and the first respondent setting out the terms of the sale of the Property, failing which an order of the Court is obtained by the first respondent sanctioning the sale or transfer of the Property on such terms as the Court may deem fit;
- 3) the second respondent is ordered to register a caveat against the Property (i.e. Erf 5[...], Noordhang Extension 42 Township, Registration Division IQ, Gauteng Province, 532 square meters in extent held by deed transfer number T10542/2006), that pending the finalisation of the divorce action; a written agreement concluded between the applicant and the first respondent in respect of the sale of the Property; or an order of the Court sanctioning the transfer of the Property, the transfer of the Property is prohibited;
- 4) the applicant is liable for costs of registration of the caveat against the Property and shall also be liable for costs of the upliftment or cancellation of the caveat against the Property, and
- 5) the first respondent is ordered to pay the costs of this application, but save with the written consent of the first respondent, the costs of this application would not be capable of taxation pending the finalisation of the divorce action between the parties under case number 26673/16 pending before the Gauteng Division, Johannesburg of the High Court.

Khashane La M. Manamela
Acting Judge of the High
Court

Date of Hearing : 03 September 2024

Date of last Further Submission : 09 September 2024

Date of Judgment : 29 October 2024

Appearances:

For the Applicant : Mr C van Schalkwyk
Instructed by : Hurter Spies Inc, Pretoria

For the First Respondent : Ms Fabricius
Instructed by : Yosef Shishler Attorneys, Johannesburg