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

Case No: **051185/2023**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

DATE: 05 NOVEMBER 2024

SIGNATURE

In the matter between:

ANKIA VAN JAARSVELD N.O.

First Applicant

KAREN KEEVY N.O.

Second Applicant

EMMANUEL ZITHULELE FAKUDE N.O.

Third Applicant

(In their capacities as joint liquidators of Red Finch Investments CC (in liquidation))

and

BARZANI 53 (PTY) LTD

First Respondent

(Registration No. 2008/026594/07)

MILLSORE (PTY) LTD

Second Respondent

(Registration No. 2007/088945/23)

PROPERTY TRANSFER FINANCE (PTY) LTD

Third Respondent

REGISTRAR OF DEEDS, JOHANNESBURG

Fourth Respondent

This judgment is prepared and authored by the Judge whose name is reflected as

such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 05 November 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicants, the joint liquidators of Red Finch Investments CC [liquidators] wish to uplift or cancel a caveat which has been noted by the first respondent, Barzani 53 (Pty) Ltd, on section 21, Villa Mia, R[...] E[...] 1[...] Township, City of Ekurhuleni Metropolitan Municipality [the property] held by Deed of Transfer S[...].

[2] The applicant does not seek relief against the first respondent save for costs if it opposes the application and, has cited *inter alia* the second respondent as the owner of the property and the third respondent, the mortgage bond holder. The second and third respondents do not oppose the application. The first respondent however does however oppose the application.

[3] Mr Stephanus David Maartens is a member of Red Finch Investments CC (in liquidation), and a director of the first respondent [Mr Maartens]. Considering those facts, Mr Maartens would have personal knowledge of the facts pertaining to this application as will be demonstrated and he has elected not to provide any assistance to this Court at all.

[4] Maartens has not deposed to an affidavit to assist the first respondent nor has he filed a confirmatory affidavit to assist his attorney, Mr PM Jacobs, who under oath states that, *inter alia*, he is mandated by Maartens to deposed to the answering affidavit. In consequence, the first respondent appears to have no version on the merits under oath nor are there any facts which this Court can rely on when considering any defence raised by Mr Jacobs on the papers relating to

the property nor the possession thereof , rightful or otherwise, by the first respondent.

[5] Mr Jacobs attached a notice of motion confirming that the first respondent is subject to a business rescue application. He confirms that the matter is to be heard on the 22 March 2023. This date has come and gone, and no further facts appear on the papers or were advanced in argument. In fact, the business rescue practitioner too referred to in the papers does not depose to a confirmatory affidavit.

[6] In consequence the reason for opposing this application not completely clear without facts to support any defence raised on the papers in answer.

BACKGROUND FACTS

[7] On the 28 July 2020, the liquidators accepted an offer from the second respondent for the sale of the property. According to a Deeds Search, a caveat with registration number 1[...] on the 27 October 2020 on the property. Such caveat appears from a letterhead of the first respondent in which it is stated that by the first respondent *“We hereby file our objection to certified copies of Deed of Transfer S[...] and mortgage bond S[...] to be issue to either a company or a person in terms of Regulation 68 of the Deeds Registries Act, 1937 as there is a dispute over the property.”* The first respondent in the objection confirms that it is in possession of the original Title Deed S[...] as well as the mortgage bond S[...]. The reason for such objection, simply “ a dispute”? No further facts not amplification provided, not even by Mr Jacobs who states under oath that he is the first respondent’s attorney. No legal claim to the property revealed.

[8] The content of the letter too, is confusing in so far as the objection is recorded as an objection in terms of Regulation 68 of the Deeds Registries Act, 1937. Section 68 deals with circumstances and only applies when a deed can not be found. This is not the case here as the exact whereabouts of the deed is known, in the first respondent’s possession. The first respondent who has been provided with an opportunity to explain the legal claim and whether such objection

is a legal claim and how the caveat was registered, has failed to do so this is even when its lawfulness has been challenged. It only relies on a technical defence through its attorney, Mr Jacobs in terms of section 131(1) of the Companies Act, 71 of 2008 in so far as the first respondent is in business rescue. The veracity of which too has been dealt, if relevant.

[9] Notwithstanding Mr Jacobs states under oath that the first respondent's rights are reserved to file a supplementary opposing affidavit. It is unclear on what basis this right is established in terms of Uniform Rule 6. Without leave of this Court, no supplementary opposing affidavit have been filed nor leave requested.

[10] Mr Jacobs further states that "*The failure to deal with any of the averments as contained in the founding affidavit should not be construed as an admission thereof, but rather a denial.*" This is just a bare denial, it has no particularity, it has no meaning and the weight of such denial in consequence does not constitute a dispute of fact.

[11] Turning to the technical defence, section 133(1) of the Companies Act, the provision states that:

"133. General moratorium of legal proceedings against company

(1) *During business rescue proceedings, no legal proceedings, including enforcement actions, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –*

(a) *with the written consent of the practitioner;*

(b) *with the leave of the court and in accordance with any terms the court considers suitable; ..."*

[12] Section 133 clearly deals with a temporary moratorium of the rights of claimants against a company or in respect of property in the company's possession. The first respondent's contention in argument and with reliance on Cloete Murray and Another NNO v FirstRand Bank Limited t/a Wesbank¹ relying on the fact that the application falls within the ambit of "legal proceedings" as defined in terms of section 131(1) as against the first respondent and as such the relief cannot be granted.

[13] The relevance of section 133 misplaced and not only borne out in the relief sought by the applicant but on the facts or lack thereof. No facts are provided to the first respondent's legal claim to nor possession of the property. Nor has the unlawful challenge of the registration of the caveat in the first place been answered. Only reasonable inference is it can't be answered, remaining unanswered even when called upon and not even with the prospect of filing a supplementary affidavit with or without leave of this Court.

[14] This Court is appalled by the tactics and or stratagem, albeit disingenuous stratagem by the first respondent and the lack of evidence. The opposition appears merely to frustrate the process and not brought in earnest as if it had Maartens would have candidly explained to this Court what is truly going on.

[15] Having regard to the unanswered challenge of the lawfulness of the caveat, the content of the caveat which is misplaced in terms of Regulation 68, and the lack of facts to support the challenge in terms of section 133 of the Companies Act, the liquidators' relief succeeds with a punitive cost order, for the reasons discussed and after exercising a discretion in respect of the costs.

[16] Cost to follow the result.

[17] The following order:

1. That the Fourth Respondent cancels the caveat noted on the immovable property described as:

¹ 2015 (3) SA 438 (SCA).

A Unit consisting of -

- (a) Section Number 21 as shown and more fully described on Sectional Plan Number SS 110/2010 in the scheme known as VILLA MIA in respect of the land and building or buildings situated at R[...] E[...] 1[...] TOWNSHIP, Local Authority: CITY OF EKURHULENI METROPOLITAN MUNICIPALITY, of which section the floor area, according to the said sectional plan is 85 (Eighty-Five) square metres in extent; and
- (b) an undivided share in and to the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

HELD BY Deed of Transfer Number S[...]

which caveat prevents the transfer of ownership of the property.

- 2. The Fourth Respondent is directed and authorised to amend its records as described in paragraph 1 supra to enable the Applicants to pass transfer of the property.
- 3. That the 1st Respondent pays the costs on attorney and client scale.

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

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