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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case Number: 14069/2024

In the matter between:

M[...] S[...]

Applicant

and

REGISTRAR OF DEEDS, CAPE TOWN

First Respondent

VELILE TINTO CAPE INC.

Second Respondent

M[...]S[...] S[...]

Third Respondent

MOGAMED ZEYN KISTEN

Fourth Respondent

JUDGMENT

JANISCH AJ:

1. This is the extended return day of a rule *nisi* issued by Francis J on an urgent basis on 19 June 2024.
2. The rule *nisi* calls on the respondents to show cause why the following orders should not be made final:
 - 2.1. *“Pending the finalization of the relief sought in Part B, the first and second respondents are interdicted and prohibited from giving effect to the registration of transfer of ownership of **ERF 1[...], SILVER TOWN, ATHLONE, CAPE TOWN**, more commonly known as **3[...]** **D[...]** **CRESCENT, SILVER TOWN, ATHLONE, CAPE TOWN, WESTERN CAPE PROVINCE** (“the property”), to the fourth respondent.*
 - 2.2. *Any of the respondents, or such other person having an interest in the matter, who opposes Part A of the application shall pay the costs hereof, jointly and severally, the one paying, the other to be absolved.”*
3. The substantive relief sought in Part B of the application is, in overview, the following:
 - 3.1. Cancelling the sale of the property to the Fourth Respondent; and
 - 3.2. Transferring the Third Respondent’s half share in the property to the Applicant at a specified price, subject to bond approval being granted to the Applicant, failing which the property is to be marketed and sold at market value, with the proceeds being divided between the Applicant and the Third Respondent in a specified manner.

4. Together with the rule *nisi*, Francis J granted an interim interdict preventing the registration of transfer of the property pending the return day which was set for 29 July 2024. He also fixed a timetable for the filing of further papers in the event that there was to be opposition on the return day, as well as directions for the further conduct of Part B once the interim relief application had been finalised.
5. The matter became opposed by the Third and Fourth Respondents. Answering papers were filed. The Applicant was late in filing her replying affidavits. When she did so, the Third and Fourth Respondents, who I understand were preparing to oppose the interim relief on the return day, wanted an opportunity to file further papers to deal with matter in the reply. In any event, since the matter was only on the unopposed roll, it was made clear that the duty Judge would not be able to hear it. This led to an order taken by agreement before Ralarala AJ on 29 July 2024, extending the return day and postponing the interdict proceedings to the semi-urgent roll. Directions were made for the filing of a further affidavit by the Third and Fourth Respondents and for the delivery of heads of argument. The interdict remained in force and costs stood over.

Background

6. The Applicant and the Third Respondent are joint owners in undivided shares of Erf 1[...] Silver Town, Athlone, Cape Town ("*the property*"). The property formed part of their joint estate pursuant to their marriage in community of property.
7. The parties divorced on 1 February 2023. They entered into a consent paper which was made an order of court. This provided for the fate of the property as follows:

"6. *Immovable Property*

It is agreed that Plaintiff shall take sole ownership of the property situated at 3[...] D[...] Crescent, Silvertown. The Plaintiff shall effect payment to the

Defendant in respect of his fifty percent (50%) equity in the property. It is therefore specifically agreed that:

- 6.1 Each party shall obtain a valuation of the said property from a reputable estate agent in order to determine the market value of the property.*
 - 6.2 Plaintiff shall raise either mortgage loan or personal loan in order to effect payment to the Defendant. In respect hereof Plaintiff shall raise the aforementioned within 30 days of the granting of the divorce order.*
 - 6.3 In the event that Plaintiff is unable to comply with the time period as per clause 6.2 above, the property shall be placed on the open market and sold to the highest offer obtained.*
 - 6.4 Both Plaintiff and Defendant shall be each liable for fifty percent (50%) of the outstanding municipal account.*
 - 6.5 Plaintiff shall be liable for both the transfer cost as well as any bond registration costs in respect of the registration of the property solely into her name.*
 - 6.6 The parties shall do all things necessary to ensure that transfer is effected into names of the respective party. In the event that either party does not comply the sheriff of the court is accordingly authorized to sign on behalf of such party.”*
8. The parties commenced the process. Having received estate agent valuations, they agreed on a market value (for purposes of clause 6.1) of R950,000. The Applicant was therefore entitled to acquire the Third Respondent's half share for R475,000, provided she obtained finance to enable her to pay the price.

9. The Applicant however failed to raise the necessary finance within the 30-day period. Even though the Third Respondent was prepared to receive a lower amount of R450,000, finance was still not forthcoming.
10. Accordingly, the fall-back provisions of paragraph 6.3 of the consent order (i.e. the sale of the property on the open market) came into effect.
11. The Third Respondent gave a sole mandate to an estate agent, Ms McBride, but the Applicant did not herself mandate Ms McBride in relation to her 50% share of the property. Precisely what was done to market the property is the subject of some dispute which I address below.
12. On 21 March 2023, the Fourth Respondent, who is a cousin of the Third Respondent, signed an offer to purchase the property for R530,000. The Third Respondent countersigned it. It was then presented to the Applicant by the Fourth Respondent for her signature. She refused. The Fourth Respondent later increased his offer to R650,000. Again, the Applicant refused to sign, on the basis that the amount was too low. There were also various proposals from the Third Respondent to split the R650,000 price more favourably to the Applicant, but she remained unpersuaded.
13. In December 2023, the sheriff of the Regional Court (which Court had granted the decree of divorce) arrived with a document requesting the Applicant's signature, and stating that if she did not sign, the sheriff would do so on her behalf. It is apparent that this was the agreement of sale for R650,000 that had been signed by the Third and Fourth Respondents. The Applicant refused to sign it so, stating that the offer was too low and not in keeping with the divorce order.
14. At some time before 8 February 2024, the sheriff proceeded to sign the agreement of sale on the Applicant's behalf, apparently relying on the powers set out in clause 6.6 of the consent order.

15. The sale then proceeded to the stage of transfer to the Fourth Respondent. On 20 February 2024 the Applicant was asked to sign the transfer documents, failing which the sheriff would do so. She declined to sign the documents. Once again, it appears that the sheriff signed the transfer documents on her behalf. The exact date on which this occurred is not clear.
16. In June 2024, the Applicant learned that the transaction documents had been lodged for registration and that transfer of the property was imminent. She secured legal representation and proceeded to launch the urgent proceedings which gave rise to the original rule *nisi* and interim interdict on 19 June 2024, which was extended on 29 July 2024.
17. The First and Second Respondents (namely the Registrar of Deeds and the conveyancing attorneys) have not opposed the relief sought.

The issues

18. Francis J considered the matter to be urgent and issued the rule *nisi* and interim interdict on that basis. I am not required to revisit the issue of urgency.
19. Condonation is sought for the respective parties' failure to meet certain deadlines for the filing of papers and heads of argument:
 - 19.1. The Applicant failed to file her replying affidavit on 19 July 2024, as ordered by Francis J. It is dated 26 July 2024, hence approximately a week out of time;
 - 19.2. The Applicant failed to file her heads of argument on 23 September 2024, as required by the order of Ralarala AJ. The heads are dated 27 September 2024 and bear a Court stamp of 30 September 2024; and
 - 19.3. As a result of the Applicant's delay in filing her heads, the Third and Fourth Respondents filed their heads on 3 October 2024, three days outside the deadline.

20. In oral argument, neither party pressed me to refuse condonation of the other party's (or parties') default, which was relatively minor. I do not see that these delays caused any material prejudice to either party in the determination or conduct of the litigation. It is in the interests of justice that the Court has regard to the replying affidavit (to which the Third Respondent has in any event had an opportunity to respond) as well as to both parties' heads of argument. Counsel for the Third and Fourth Respondents did however ask me to make an order as to the wasted costs of the hearing on 29 July 2024, which was delayed in part because of the late filing of the reply. I deal with this below.
21. In the circumstances, I grant condonation for the stated instances of non-compliance.
22. The substantive question before me is whether a proper case has been made out to extend the interim interdict restricting transfer of the property to the Fourth Respondent, pending the final determination of the relief sought by the Applicant in Part B.
23. I am also required to address two issues of costs: those of this application for interim relief, and those occasioned by the postponement on 29 July 2024.

The interim interdict

24. The interdict sought is of an interim nature, preserving the *status quo* in respect of ownership of the jointly-owned property until this Court decides whether, *inter alia*, the sale agreement is to be cancelled.
25. The requirements for granting interim relief are well-traversed. The following four aspects are typically required to be present:
 - 25.1. A *prima facie* right, even though open to some doubt;

- 25.2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the final relief is eventually granted;
- 25.3. That the balance of convenience favours the granting of the interim relief; and
- 25.4. The absence of any other satisfactory remedy.

(Economic Freedom Fighters v Gordhan 2020 (6) SA 325 (CC) in paras [21] and [22]; **Eskom Holdings SOC Limited v Vaal River Development Association (Pty) Limited** 2023 (4) SA 325 (CC) in para [253].)

26. These factors must be applied “*in a way that promotes the objects, spirit and purport of the Constitution*” (**National Treasury and Others v Opposition to Urban Tolling Alliance** 2012 (6) SA 223 (CC) in para [12].)
27. It will commonly occur that there are disputes of fact on the papers in relation to an application for an interim interdict. In such a case, the court will take the facts set out by the applicant together with any facts put up by the respondent that the applicant cannot dispute, and then consider whether, having regard to the inherent probabilities, the applicant should (not could) obtain final relief on those facts. Against this is then considered the respondent’s contradicting facts. If these cast serious doubt upon the prospects of obtaining final relief, then the applicant may fail in relation to interim relief. But if not, the tendency will be to protect the rights in the interim, pending the final determination of the main relief. (**Webster v Mitchell** 1948 (1) SA 1186 (W) at 1189, read with **Gool v Minister of Justice** 1955 (2) SA 682 (C) at 68D-E.)
28. A *prima facie* right is not necessarily easily established. As stated in **Economic Freedom Fighters** (*supra*) in paragraph [44] in the context of administrative review:

“In addition, before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main

review. The claim for review must be based on strong grounds which are likely to succeed.”

29. I turn to deal with the relevant factors in the light of the above authorities.

Prima facie right

30. The Applicant must establish that she has a *prima facie* right to the main relief which she seeks, thus warranting the interim protection of the *status quo*. If she cannot establish such a right, there would be no purpose in granting interim protection.
31. The nub of the Applicant’s complaint is that she cannot be subjected to having the property sold and transferred to the Fourth Respondent under the sale agreement which she did not sign, and at a price (R650,000) which she does not believe reflects its market value. Her primary relief, to be sought under Part B, is for the sale agreement to be cancelled. If that occurs, there will necessarily have to be another attempt to give effect to the consent order in the divorce.
32. I must therefore consider whether the Applicant has established, in the first instance, a *prima facie* right to have the sale agreement cancelled or set aside.
33. It is common cause that the parties attempted to give effect to clauses 6.1 and 6.2 of the consent order, in that they agreed a market value purchase price for the Third Respondent’s share, and the Applicant then tried to obtain finance for the price so determined (R475,000). It is also common cause that the 30-day period expired without finance being raised.
34. In argument it was suggested that in the main proceedings the Applicant should still be able to enforce a right to purchase the Third Respondent’s 50% share of the property because the Third Respondent’s conduct prior to the divorce was the cause of her inability to obtain bond finance. That however is not a case that is squarely made on the papers before me, and I do not deal with it further.

I proceed from the premise that, on the face of it, the Applicant's right to purchase the 50% share for R475,000 lapsed once the 30-day period in the consent order passed without finance being obtained.

35. That being so, the fall-back position arose, namely that the property had to be placed on the open market and sold under the highest offer, with the proceeds being split between the Applicant and the Third Respondent.
36. Although the Third and Fourth Respondents had agreed that the whole property should be sold for R650 000, the Applicant did not agree because she found the price too low. Nevertheless, the sheriff purported to sign the offer on her behalf, ostensibly clearing the way for transfer to occur at that price.
37. The primary relief which will be sought in Part B is to have the sale of the property cancelled. That will in my view come down to whether the sheriff was properly empowered to sign the sale agreement on the Applicant's behalf in fulfilment of the divorce order, thus binding her to sell at the price offered by the Fourth Respondent.
38. As a preliminary issue, I consider whether under the consent order the sheriff had the power to sign the sale agreement in any circumstances. This is because clause 6.6 authorises the sheriff to take steps to "*ensure that transfer is effected into the names of the respective parties*". Transfer of a property is a different juristic act from the conclusion of an underlying agreement of sale.
39. Without deciding the point, it appears to me that on a sensible and businesslike interpretation of the order (which, like any legal document, must be interpreted in accordance with the principles summarised in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA) in para [18]), the powers of the sheriff must if possible be interpreted in a manner that gives effect to the purpose of the document. So as to ensure that a legitimate sale of the property in keeping with the ambit and purpose of the order can be given effect to, it would not be far-fetched to conclude that the sheriff's powers under

the order extend in principle to signing the sale agreement on behalf of a recalcitrant party. I proceed on that premise.

40. At the same time, there must be a limit beyond which the sheriff cannot validly bind a party to an agreement against his or her will.
41. It is well-established in our law of agency that if a person acts without another's express, implied or residual authority, he "*cannot place under any obligation the person in whose name he does any business of whatever nature*" (Kerr *The Law of Agency* (4th Edition) p. 80, quoting from Pothier on Mandate. See also **Du Preez v Laird** 1927 AD 21 at 28; **Clifford Harris (Rhodesia) v Todd NO** 1955 (3) SA 302 (SR) at 303F-G).
42. Although the sheriff is not a true agent in the above sense, the principle must be the same: a party cannot be held bound by the sheriff's signature of an agreement where doing so exceeds the proper limit of the sheriff's authority under the order by which the power is conferred.
43. The extent of the sheriff's authority to bind the Applicant therefore depends on the proper interpretation of the consent order.
44. The purpose of clause 6.3 of the consent order is clearly to safeguard both parties in the event that the Applicant is unable to purchase the Third Respondent's half share (which is the preferred option). It clearly aims to ensure that the property is then sold for the best possible price which will be shared between them.
45. To this end, the consent order specifies in express language that the property "*shall be placed on the open market*" and sold "*to the highest offer obtained*".
46. To my mind, it is necessarily implicit in this formulation that the property should, as a bare minimum, be subjected to a process which is suited to attracting the best available price. This would be in keeping with clause 6.1 which bases the Applicant's right to purchase the Third Respondent's share on the "*market*

value”. At the same time, clause 6.3 differs from clause 6.1 as the latter does not guarantee a sale at the same price as the parties may have agreed was the market price.

47. In determining what is meant by placing the property “on the open market”, it is helpful to have regard to the standard definition of “market value” as adopted by the International Valuation Standards Council:

“The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm’s length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently, and without compulsion.”

48. The phrase “after proper marketing” is explained as follows in paragraph 30.2(g) of the *International Valuation Standards* (2022):¹

“After proper marketing” means that the asset has been exposed to the market in the most appropriate manner to effect its disposal at the best price reasonably obtainable in accordance with the Market Value definition. The method of sale is deemed to be that most appropriate to obtain the best price in the market to which the seller has access. The length of exposure time is not a fixed period but will vary according to the type of asset and market conditions. The only criterion is that there must have been sufficient time to allow the asset to be brought to the attention of an adequate number of market participants. The exposure period occurs prior to the valuation date.”

49. I cite these sources not as legal authority but to illustrate what should be obvious, namely that an open market process is one that exposes the item to a sufficiently wide range of market participants who may be interested in acquiring it, and that therefore, through the natural process of competition, realises the most favourable offer. What will suffice for this purpose will depend

¹ https://viewpoint.pwc.com/dt/gx/en/ivsc/international_valuat/assets/IVS-effective-31-Jan-2022.pdf

on the facts of each case. What is important is not so much the level of any offer received (although that may be indicative of the quality of the marketing process) but the content of the marketing process itself.

50. To the extent that the Applicant can therefore demonstrate that the offer placed before the sheriff is not the product of an open market process as envisaged in the consent order, then – on the face of it – clause 6.3 has not been complied with. It would then follow that the sheriff lacked authority under the consent order to bind the Applicant to that agreement.
51. Applying the approach towards disputes of fact in Webster and Gool, the first question is whether the Applicant has put up facts to conclude *prima facie* that the Fourth Respondent's offer of R650,000 was not the product of a proper or adequate marketing process for the property. If she has, then assuming that those facts are substantiated at a hearing under Part B in due course, the Applicant should succeed in having this particular sale agreement cancelled or treated as not binding on her.
52. My understanding of the facts is as follows.
53. The Applicant lives in the property. She says that she was not aware of any public marketing process having occurred by the time she was first contacted by the conveyancers and presented with the R530,000 offer. She had never signed any marketing mandates to an estate agent. It is true that the Third Respondent's attorney, in an email of 2 March 2023, indicated that if the arrangement suggested in that letter (whereby she bought him out for R475,000) did not go ahead, he would appoint his own agent "*as sole mandate to sell the property.*" However, she contends that she was not aware of any such marketing process actually having occurred.
54. The Applicant also avers that in light of the purchase prices reflected in the original and amended offers to purchase (by which she means R530,000 and R650,000 respectively), and the relationship between the Third and Fourth Respondents (as cousins), she "*can only infer that the property was never*

properly advertised and marketed, that the transaction is not one at arm's length, and that the transaction was created, amongst other reasons, to indirectly have the children and me ejected therefrom and deny me any proper benefit from the transaction".

55. In my view, the Applicant has put up sufficient facts to show, *prima facie* at least, that what one would think of as an open market sale process was not undertaken. The mere fact that no-one was brought to view the property, and that the only person who made an offer is a close family member of the Third Respondent, bolsters this *prima facie* conclusion.
56. The question then arises whether the Third and Fourth Respondents have put up facts that cast serious doubt on the Applicant's prospects of establishing her case in this regard at a hearing in due course.
57. I do not think that the Third and Fourth Respondents have done so. Key to this is how the Third Respondent answered the Applicant's averment that she can only infer that there was no open market process (as quoted above). The Third Respondent denied this baldly, calling it "*speculation*," and put the Applicant to the proof thereof. In the context of the dispute, this was not helpful; indeed, it is damaging to the Respondents. Whatever was done to market the property was plainly done by the Third Respondent pursuant to the sole mandate that he gave the estate agent, Ms McBride. He should therefore be in a position to tell the Court what steps were taken to market the property. He however chose not to do so, lending support to the inference that no real marketing effort was made.
58. It is true that the Third and Fourth Respondents put up an affidavit of the estate agent. She says that she received a sole mandate from the Third Respondent, that she "*proceeded to market the property and receive multiple offers*" but that due to difficulties in obtaining photographs and the inability to access the property, the marketing process was hindered. She also "*observed*", "*on driving past the property ... that it was not in good condition*".

59. In my view, this is not the conduct of an agent that is actively trying to attract the best offer on the open market. Whether or not it is true that the Applicant hindered the process or refused access to the property (which is also disputed), it cannot be said that what was done met the objective requirements of the consent order. She herself seems only to have viewed the property by way of a single drive-by.
60. Moreover, as regards the alleged “*multiple offers*” that she allegedly received, not one of these was attached to Ms McBride’s affidavit. The Third Respondent did attach to his affidavit a number of standard-form non-binding expressions of interest. None of these amounted to offers. Moreover, the Applicant pointed out in her reply that all the signatories to these expressions of intent were in some way closely related to the Third Respondent. Apart from a blanket denial in the second answering affidavit, the Third Respondent did not do anything to cast doubt on this averment. Far from proving that there was a proper, rigorous and open marketing process, the impression is of the Respondents creating a paper record from connected parties to bolster the credibility of the price offered by the Fourth Respondent. I certainly do not think I can place any reliance on Ms McBride’s bald allegation of having marketed the property.
61. It is also not without significance that the R650,000 offer that was on the table was considerably lower than what the parties had at the outset agreed upon as the market value, namely R950,000. That was based on estate agent valuations. Indeed, the Third Respondent himself put up, with his second answering affidavit, a recent sworn appraisal of the property which fixed the value, having regard to certain work that needed to be done to it, at R950,000. It is also apparent that the appraiser had had access to the property to provide the valuation, since there were internal photographs and descriptions of the property, which demonstrated that the Applicant was prepared to co-operate in this process. The R650,000 offer price was almost at the bottom of the reasonable range of values for the area identified by the appraiser.
62. While it is clear that clause 6.3 of the order cannot guarantee that the parties must receive a particular price, all indications are that if a proper marketing

process were to be followed for this property, an offer significantly higher than R650,000 should be obtained. The impression I am left with is that the current sale price is not reflective of a proper open market process, as envisaged by the order.

63. The Third and Fourth Respondents contend that the Applicant could herself have put the property on the market. She however responded that she had tried to engage another agent, but that the Third Respondent had made it clear (in an email that was attached to her replying affidavit) that “[the Applicant] is running around to other agents when I have told her that [Ms McBride] will be the agent that will be dealing with the selling of the property...”. In the circumstances, I do not think that the fact that the Applicant did not herself undertake a parallel marketing process can be held against her. But even if it could, objectively this does not assist in demonstrating that the offer was the product of an open market process.
64. In conclusion, in my view the Third and Fourth Respondents’ contention that a proper marketing process was adopted, from which the Fourth Respondent’s offer was the highest offer, is not supported by facts that cast significant doubt on the *prima facie* conclusion that the offer was not the product of “*placing the property on the open market*” as clause 6.3 requires.
65. Thus on a *prima facie* basis I think that the Applicant should on those facts be able to show, when the main relief is determined, that the Fourth Respondent’s offer does not meet the standard agreed to and included in the consent order as being an offer to which the parties would be bound, and accordingly fell outside the realm of the sheriff’s authority to bind her. If that is so, a *prima facie* right has been established to have the sale agreement cancelled or set aside.

Apprehension of irreparable harm

66. The Applicant’s concern is that in the absence of an interim interdict, transfer of the property will shortly be effected to the Fourth Respondent. Counsel for the Respondents accepted this.

67. Once the property is transferred, there will be two effects:

67.1. The first effect is that, in the event that the sale is later set aside under Part B (which dispute will remain even if the interdict is refused), the Applicant will have to undertake a further costly process of seeking to reverse the consequent transfer, thus having the property returned to the parties' joint ownership. It is quite possible, given the Applicant's apparent financial position, that she may not be able to afford such steps. But even if she can, this assumes that the property is still capable of being transferred back. It may conceivably be that by that time the Fourth Respondent has on-sold it to a *bona fide* third party, rendering even that relief impossible.

67.2. The second effect is that the Fourth Respondent will no doubt seek to take occupation of the property, leaving the Applicant and her children having to find alternative accommodation. Even though they will also have to vacate the property following a legitimate and binding open market sale, the consent order is premised on the parties getting the best possible financial result if the Applicant cannot acquire the whole property. That in turn will ensure that the Applicant obtains the best possible alternative accommodation. It is possible that success in Part B will result in more money becoming available to the Applicant, but in the meantime she and her children will have suffered harm as a result of having to vacate to less appropriate accommodation.

68. I therefore think that if transfer is allowed to occur, the Applicant will suffer harm that cannot necessarily be repaired by the granting of the main relief.

Balance of convenience

69. The balance of convenience clearly favours the grant of the interim interdict. The Third and Fourth Respondents have not put up any facts to demonstrate

how they will be prejudiced if the transfer is merely delayed while the parties conclude their dispute about the binding nature of the sale agreement.

70. On the other hand, the inconvenience to the Applicant and her children from losing her right to remain in the property and having to pursue further claims in due course to have the property re-transferred to her for a new marketing process to commence is apparent. In my view, it clearly outweighs any inconvenience to the Respondents.

No adequate alternative remedy

71. A temporary interdict is in my view an apt remedy to preserve the *status quo* until the main dispute is resolved.
72. The Third and Fourth Respondents state that there are sufficient legal remedies available to recover alleged damages in the event of any proven financial harm. Although there may be scope for a damages claim in the longer term, I do not see that as an adequate alternative remedy to an interim interdict that will preserve the *status quo*, without undue disruption to the living arrangements of the Applicant and her children, until there is finality as to the parties' respective rights and obligations.

Conclusion on interim relief

73. For the above reasons, and weighing all the factors up, I believe that the Applicant has established all the requirements for the grant of interim relief, and is entitled to an order extending the interdict until the final determination of the main relief in Part B.

Costs

74. Two issues arise in relation to costs:

- 74.1. The costs pertaining to the original return day, when the rule *nisi* was extended following a delay in the filing of the replying affidavit; and
- 74.2. The costs of the present application.
75. As stated above, the postponement of the matter on the first return day was at least in part the result of the Applicant's failure to file her replying affidavit timeously. The Third and Fourth Respondents had intended to argue the matter on the original return day, but this could not be done after the late filing of the reply. Moreover, even though the matter had become opposed, it was still set down in the unopposed court, with the parties facing the risk that the duty Judge would not be in a position to decide it. The Applicant as *domina litis* ought to have addressed that issue, perhaps by proposing a further timetable and postponement well before the return day was upon the parties. It seems to me that she was therefore the party primarily responsible for the fact that the matter had to be postponed, and for any wasted costs as a result.
76. In the premises, it would be appropriate for the Applicant to pay any wasted costs incurred by the Third and Fourth Respondents pursuant to the postponement.
77. As regards the costs of the interim interdict which I have confirmed, the Applicant has been successful in having the order confirmed. The usual rule is that costs should follow the result. It is salutary for a Court to deal with costs issues when they arise and not (without good reason) to have them stand over for another Judge to address at a later stage.
78. The latter course may however be preferable where there are prospects that in the fullness of time, when the main application (here Part B) is determined, facts may come to light which could warrant a different costs order being made at this interim stage.
79. I do not consider it likely that material further facts will arise which would alter the appropriateness of a costs order against the Third and Fourth Respondents

for their unsuccessful resistance to the grant of the interim interdict. Counsel for the Third and Fourth Respondents could not suggest any such probability. The Applicant had to approach the Court for interim relief, while the Third and Fourth Respondents could easily have made an undertaking to suspend the transfer process pending the determination of Part B. Their failure to do so resulted in the present proceedings having to be argued and decided.

80. In the circumstances, I believe that I should grasp the nettle and make an order for costs at this stage.
81. In the premises, the Third and Fourth Respondents, having unsuccessfully opposed the grant of interim relief, should bear the Applicant's costs, including the costs of counsel, jointly and severally, the one paying the other to be absolved.
82. As regards the scale of costs, I see no reason to depart from the ordinary party and party scale. Both counsel agreed that, this not being a matter of particular complexity, the fees of counsel should also be taxed on Scale A as envisaged in Rule 67A.

Part B

83. The original order of Francis J provides for the next steps in relation to the determination of Part B. It grants leave to the applicant to apply for the relief in Part B on the same papers, duly supplemented if necessary. The timetable for the filing of such papers must be determined and agreed between the parties within five days of the order made on the return day, failing which the exchange of papers will be in accordance with the Uniform Rules and any Practice Directions.
84. It is therefore unnecessary for me, in handing down my order, to regulate the further conduct of the matter for purposes of Part B.

ORDER

85. In the premises, I make the following order:

- 85.1. Pending the finalization of the relief sought in Part B, the First and Second respondents are interdicted and prohibited from giving effect to the registration of transfer of ownership of **ERF 1[...], SILVER TOWN, ATHLONE, CAPE TOWN**, more commonly known as **3[...], D[...], CRESCENT, SILVER TOWN, ATHLONE, CAPE TOWN, WESTERN CAPE PROVINCE** (“the property”), to the Fourth Respondent.
- 85.2. The Third and Fourth Respondents shall pay the costs of the application for interim relief, jointly and severally, the one paying, the other to be absolved, on a scale as between party and party, including the costs of counsel to be taxed on Scale A.
- 85.3. The Applicant shall pay the wasted costs of the Third and Fourth Respondents pertaining to the postponement of the original return day on 29 July 2024, on a scale as between party and party, including the costs of counsel (if applicable) to be taxed on Scale A.

M W JANISCH
Acting Judge of the High Court
Western Cape Division

APPEARANCES:

For the Applicant:

Adv P Smit
Instructed by:
Roelf Jumat Attorneys Inc

For the Second and Third Respondents:

Adv A Koester

Instructed by:

Raymond McCreath Inc

Date of hearing:

14 October 2024

Date of judgment:

16 October 2024 (electronically)