

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-077412

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
28/5/25	
DATE	SIGNATURE

In the matter between:

SEVEN AND TWELVE ON HOUGHTON (PTY) LTD

Applicant

(REGISTRATION NUMBER: 2001/029787/07)

and

THE TRUSTEES FOR THE TIME BEING OF THE

Respondent

MS PROPERTY TRUST

(REGISTRATION NUMBER: IT002916/2015(G)0)

JUDGMENT

Wijnbeek, AJ

[a] The application before court

1. The applicant is owner of units 8557, 12233, 12433 and 12432 of Sectional Title Scheme SS, the Houghton ("the properties"). The respondent occupies the properties and retains all occupational rental.
2. The applicant seeks in the main a declaration that the respondent has no right to occupy the properties, coupled to some ancillary relief.
3. The respondent asserts its right to occupy on the following, namely that:
 - 3.1. The respondent had lent money to the applicant, and the full amount of the loan has not been repaid;
 - 3.2. The applicant is owing interest on the loan;
 - 3.3. The occupational rental currently received is set off against the claim for interest; and
 - 3.4. The parties agreed to an 'upside', an additional R1,5m payment to be made by the applicant to the respondent once the aforesaid properties are sold. These payments have not been made to date.
4. The respondent has also instituted a conditional counter application seeking payment of R44 369 030.40 plus interest if the court finds in favour of the applicant in the main application.
5. The respondent further argues that –
 - 5.1. There is a material dispute of fact that cannot be resolved on the papers; and

5.2. The parties bound themselves to arbitration to resolve their disputes; the court must refuse to deal with the matter by referring same to arbitration.

6. There is broad consensus between the parties about the relevant properties and the written documents constituting the contractual nexus comprising of agreements of sale, addenda to the agreements of sale and Heads of Agreement.

6.1. In addition, the respondent alleges that there were further oral agreements that must be considered.

7. Arguing the matter, the applicant was represented by Advocates Antonie SC and Laher and the respondent by Advocates Stais SC and Acker. The court found their argument helpful.

8. I will accordingly deal with the arbitration clause before the disputes of fact are addressed.

[b] The arbitration issue

9. Clause 21 of the agreement(s) of sale between the parties prescribes that any matter arising out of the agreement or termination thereof must be referred to arbitration.¹

10. The respondents argue that the court is bound to enforce an agreement to arbitrate unless there are compelling reasons to order otherwise², and that the applicant

¹ See inter alia Case lines 02-83

² Stielor Properties CC v Shaik Prop Holdings (Pty) Ltd 2014 JDR 2393 (GJ) at paras 49 - 54

must show there is sufficient reason not to be bound by the arbitration agreement and must make out a very strong case based on compelling reasons.³

11. Although the respondent's argument in respect of arbitration and disputes of fact represent a lucrative basis with which to kick for touch, on a preponderance, the court cannot accede thereto.

12. The court referred the parties to *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others* 1980 (1) SA 301 (D&CLD)⁴ where Didcott J held that if either of the parties take the arbitrable issues straight to court, and the other does not protest, the litigation follows its normal course, without a pause. Protesting, as in this case, a party must actively request a stay of the proceedings. The court has a discretion whether to call a halt for arbitration or to tackle the disputes self. 'Throughout, its jurisdiction, though sometimes latent, thus remains intact.'

13. The applicant seeks declaratory relief.

13.1. The power to issue declaratory relief orders in respect of anticipated or ongoing arbitration proceedings is consistent with section 21(1)(c) of the Superior Courts Act (Act 10 of 2013) which deals with the power of the court to grant declaratory orders.⁵

13.2. In *Baleni and Others v Minister of Mineral Resources and Others*⁶ at paragraph [30], Basson J said:

"Declaratory orders are discretionary and flexible as the court pointed out in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*:

³ *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) 334A

⁴ At 305F-H

⁵ Section 21(1)(c) provides: "'A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power ... in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'"

⁶ *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) at paragraph [30], referring also to *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* 1997 (3) SA 514 (CC) at para 15

'[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.'

14. The court formed the view that it has jurisdiction and that it was at liberty to establish whether there were any real disputes of fact closing the door on the application. Untying the knot on the perceived disputes of fact, there remain no arbitrable disputes disentitling the court from granting the declaratory relief sought herein.

14.1. In *Body Corporate Pinewood Park v Dellis (Pty) Ltd*⁷, Mpati P writing on behalf of the Court summarised the judgment of Plewman JA in *Telecall (Pty) Ltd v Logan*⁸ as follows:

"... in *Telecall (Pty) Ltd v Logan* this court (per Plewman JA) said that before there can be a reference to arbitration, a dispute which is capable of proper formulation at the time when an arbitrator is to be appointed must exist and there cannot be an arbitration, and therefore no appointment of an arbitrator can be made, in the absence of such a dispute. Thus, if the word 'dispute' is used in a context which indicates that what is intended 'is merely an expression of dissatisfaction not founded upon competing contentions no arbitration can be entered into'."

⁷ *Body Corporate Pinewood Park v Dellis (Pty) Ltd* [2013 \(1\) SA 296](#) (SCA) at para 8

⁸ *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA)

15. In any event, it seems as if the respondent's reliance on arbitration is fluid, having regard to the respondent's attorney's email of 19 April 2024 wherein the view was formed that the issues of occupation/possession of the relevant units is not subject to arbitration.⁹

[c] On the perceived disputes

16. The court accepts that it must take a robust, common-sense approach to the alleged disputes of fact.¹⁰

[i] Basic overview

17. It seems, in the main, that the respondent purchased certain properties from the applicant in a scheme (from a plan before the construction work was complete). The respondent initially paid a deposit of R700 000 per unit, but later paid the remainder of the purchase price per unit to the applicant, before the development was complete.

18. Making payment as it did, the respondent had an option to take transfer of the properties once completed, and if decided not to take transfer, that the money paid in lieu of such properties would constitute a loan that the applicant was required to settle.

19. To further compensate the respondent making payment upfront, there are allegations of an upside that was to be paid on some units of R1,5m per unit when such units are sold. The upside represents payment in addition to the loan amount and becomes payable once the said units are sold to third parties.

20. By 2023, the respondent demanded repayment of the loan. The parties eventually concluded a Heads of Agreement ("Heads") that would settle payment of the loan

⁹ Case lines 02-274

¹⁰ *Soffiati v Mould* 1956 (4) SA 150 (E) at 154G

with transfer of two units (12532 & 12533) and agreeing to a transfer of shares in Houghton Home from Home (Pty) Ltd ("HHH") to the value of R31 465 000.

21. The respondent admits that the two units were transferred but denies that the shares were transferred. The respondent also says that interest is due to it on the loan.

[ii] Chronology of agreements

22. On each of the relevant properties the parties concluded separate agreements of sale. On 17 February 2021 in respect of unit 8557, on 22 February 2021 in respect of unit 12433 and on 15 May 2021 in respect of units 1233 and 12432. Units 12532 and 12533 ("the additional units") were also purchased in 2021.

- 22.1. The respondent took transfer of additional units, and the additional units do not form part of the current issue between the parties. The combined purchase price for all six units was R44,1m.

23. By or about 2 April 2021 the parties concluded what is styled as 'Addendum to Agreement of Sale – Sectional Title. The addendum relevant to unit or section 8557 is found as annexure FA11.¹¹ The scheme applied across the board.

- 23.1. Save to the extent that the addenda expressly varied terms, the remainder of the respective agreements of sale remained binding.

- 23.2. The purchaser (i.e. respondent) agreed to make payment of the deposit and the balance of the purchase price to the seller in advance of registration and transfer of the section.

- 23.3. The respondent accordingly paid about R7m per section to the applicant in lieu of the deposit and balance of the purchase price.

¹¹ Case lines 02-175

24. By September 2021 the parties entered into a further addendum¹² wherein it was inter alia agreed that:

- 24.1. The purchase price may be released to the applicant prior to transfer of the properties;
- 24.2. The respondent had, for a period of 12 months after the approval of the sectional plan, an option not to proceed in terms of the agreements of sale, and that it does not need to take transfer of the units despite making payment thereof.
- 24.3. When the respondent exercises the option (that is not to take transfer), the money paid shall be deemed a loan. When such units are sold to third parties, the applicant becomes obliged to settle the loan amount by paying the proceeds of such sale less sales commission at a rate of 3%.

25. The respondent took occupation of the units when the conveyancing attorneys released the aforesaid funds to the applicant.

26. In early 2023 the respondent elected not to take transfer of the property in dispute in this application and sought to be repaid the loan.

27. The verbal agreements introduced by the respondent seem to deal with the discussions before the conclusion of the Heads, laying the table for the election not to take transfer and requiring repayment of the loan.

- 27.1. The first verbal agreement¹³ ostensibly agreed to on 10 January 2023, is styled "Disinvestment Rosebank1, Upside and Interest. Deal between

¹² FA15, Case lines 02-187 – 02-188

¹³ AA1, Case lines 04-29

MS Prop Trust and Houghton Seven and Twelve on Houghton Pty Ltd. Six properties are identified that are held as security in lieu of a loan to the applicant. The properties include the two properties transferred to respondent and the four claimed by the applicant in the notice of motion. There is also speak of upside and interest at bank rate.

- 27.2. The second verbal agreement purports to record the outcome of a meeting of 4 March 2023¹⁴ addressing the loan should there be a shortfall in the sales of the relevant units. Provision is also made for the upside and interest to be paid independently.
- 27.3. The third verbal agreement relates to 9 March 2023¹⁵ with the parties ostensibly agreeing to interest and upside.

28. However, by 28 April 2023 the parties concluded a further agreement styled 'Heads of Agreement' ("the Heads")¹⁶. The Green Trust that is not before the court, formed part of the Heads. The following is material from the Heads:

- 28.1. The applicant admitted that it was indebted to the respondent for payment of R46,4m arising from a loan. (The loan follows from the earlier addenda and option to the respondent not to take transfer of specific sections.)
- 28.2. The aforementioned indebtedness was to be settled by transferring two sections or units to the respondent, and with the Green Trust agreeing to transfer 10,85% of its shares held in Houghton Home from Home (Pty) Ltd ("HHH").
- 28.3. The Heads includes a typical Shifren-clause.¹⁷

¹⁴ AA2, Case lines 04-30

¹⁵ AA3, Case lines 03-31

¹⁶ FA16, Case lines 02-190 and further

¹⁷ Read clauses 8.1 and 9.1, Case lines 02-195

[iii] Was the loan settled?

29. The respondent agrees that two units were transferred but denies that the loan was settled, inter alia as:

- 29.1. The shares in HHH were not transferred;
- 29.2. Interest on the loan was not paid in full; and
- 29.3. 'Upside' was not paid to date.

30. However, in an email from respondent's attorneys dated 2 November 2023¹⁸, the respondent records that the loan of R46,4m was settled. Apart from the admission that the loan capital amount was paid, the respondent claimed an additional R9 771 020.00 as interest. The email and its contents are not in dispute.

- 30.1. Common cause is thus that the capital amount of R46,4m was settled. This puts paid to the conditional counterclaim of the respondent.
- 30.2. It is accepted that to raise or claim interest makes business sense. I was, other than the alleged verbal agreements that preceded the Heads, not taken to specific clauses in support of the respondent's claim for interest. (Interest is dealt with in more detail later in the judgment.)

[iv] Was the shares transferred?

31. The court accepts that the respondent's attorney would not write that the capital amount of the loan was settled if a substantial portion thereof that was to be secured by a share transfer had not happened.

¹⁸ FA29, Case lines 02-242

32. In respect of the transfer of shares, the respondent introduced a document styled as "Share Subscription Agreement" that was concluded amongst HHH, the respondent and two other entities.¹⁹ Although the contention is that the applicant had not complied with the agreement strictly, it is not said that there was no compliance.

32.1. It is recorded that following the issuance and allotment of shares in HHH, the Green Trusts percentage of shareholding decreased from 33% to 7,68%, with the respondent becoming the owner of the difference in shares, namely 25,32% or 1 087 ordinary shares.²⁰

32.2. A share certificate and register of share accounts, underscore the issuing of the 1 087 shares to the respondent.²¹

33. I find that the requisite shares in HHH were transferred to the respondent towards settlement of the loan, as confirmed in the respondent's attorneys' letter stating that the capital amount of the loan was paid.

[v] More on interest on the loan

34. Enquiring from the respondent about the basis for its conditional counterclaim of R44,369,030.40, and its entitlement to hold onto the units claimed by the applicant and the occupational rental on such units, the court was referred to paragraph 27 of the answering affidavit.²² Paragraph 27 embodies the alleged indebtedness of the applicant to the respondent and reads as follows:

"In this context, the applicant remains indebted to the respondent as follows:

¹⁹ AA5, Case lines 04-33 and further

²⁰ Case lines 04-40.

²¹ Annexure RA12, Case lines 06-64 and 06-65

²² Case lines 04-13

27.1 The upside in the sum of R9,000,000 being R1,500,000 per unit (there being 6 units)

27.2 The sum of R31,465,000.00 being the balance of the combined purchase price.

27.3 The sum of R9,160,657.37 being the interest on the outstanding loan amount as of September 2023.

27.4 Less the occupational rental received in the sum of R5, 256,627.00 leased to third parties, as of September 2024."

35. The calculation of the indebtedness is thus as follows:

- 35.1. A claim for R9m as upside, although it is common cause that the units were not sold to third parties yet. Such claims are premature, at best.
- 35.2. R31 465 000 as balance of the combined purchase price. This claim cannot be reconciled with the respondent's attorney's email that confirms that full payment was made of the capital sum of the loan, and having regard to the transfer of shares discussed above.
- 35.3. R9 160 657.37 as interest on the outstanding loan amount as of September 2023. There is no document attached to the answering papers setting out how the interest is calculated. I fail to reconcile this claim for arrear rental with the respondent's attorney's calculation claiming that interest of R9 771 020.00 was due on 2 November 2023.
- 35.4. The respondent says that R5 256 627.00 was received as occupational rental to September 2024 and that same must be deducted from the interest of about R9,16m in September 2023.

36. Analysing the calculation of interest further, the court also took note of Annexure RA10, ostensibly an attachment to the respondent's attorney's email of 13

November 2023²³ wherein the interest at 1 September 2023 is set at R5 347 020.00 and the value of the loan plus interest on 1 September 2023 as R56 271 010.00.

36.1. The share certificate wherein the respondent is holding 1087 shares in HHH is dated 23 August 2023.²⁴

36.2. The 'Register of Share Accounts'²⁵ records the transaction date of the shares as 1 August 2023 and the registration date as 7 August 2023.

36.3. To therefore calculate interest on an alleged balance of the purchase price of R31 465 000.00 recorded in paragraph 27 of the answering affidavit cannot be sustained. On the respondent's own admission of 2 November 2023, the capital amount of the loan was settled in accordance with the Heads.

36.4. The court found it impossible to reconcile the figures recorded in paragraph 27 of the answering affidavit with the recordal of 1 September 2023 and 13 November 2023.

37. And, furthermore, this application was issued in July 2024. The respondent presented its answering affidavit on 13 September 2024. Days before the hearing in May 2025, both sides filed further affidavits. All the affidavits were admitted into evidence. Yet, the respondent did not update the court on occupational interest received to date, whether there was any escalation and/or, even on its version, whether any portion of interest remained outstanding.

37.1. If the court does the sums on the interest claimed to September 2023 from which the occupational rental up to September 2024 must be deducted (as advised in paragraph 27 of the answer), it seems as if occupational rental amounts to about R440 000 per month. There is accordingly another R3m to R3,5m that ought to be deducted from October 2024 to the date of the hearing. Adding this amount to the amount in paragraph 27.4 and deducting that from the amount of R9,16m

²³ Case lines 06062

²⁴ RA12, Case lines 06-64

²⁵ Case lines 06-65

recorded in paragraph 27.3, results in a sum suggesting that any claim for interest is settled.

[vi] Assessment of the alleged material disputes of fact

38. Having regard to the assessment above, I am of the view that:

- 38.1. The applicant settled the capital sum to the respondent in the amount of R46,4m with transfer of two units and transfer of shares in HHH.
- 38.2. The claim for the "Upside" is premature – only once the relevant units is sold, may the respondent become entitled to any such payment. The respondent has no right premised on the 'Upside' to retain occupation of the relevant units in the interim until the units are sold.
- 38.3. The respondent fails to create a real dispute of fact in relation to interest, entitling it to hold onto any of the units claimed by the applicant in these proceedings.

[d] Order

39. In the premises, the applicant succeeds in the main application and the conditional counterclaim is dismissed. However, because of the findings above, I do not deem it necessary to order the declarations sought in prayers 1 and 2 of the notice of motion dated 11 July 2024.

40. Both parties were *ad idem* that the court ought to order costs on Scale C, inclusive of the costs of two counsel.

41.I accordingly make the following order:

- 41.1. It is declared that the respondent has no right of occupation over, and no right to sub-let to any third party, any of the following properties, namely:

Units 8557, 12233, 12433 and 12432 of the Sectional Title Scheme SS the Houghton,

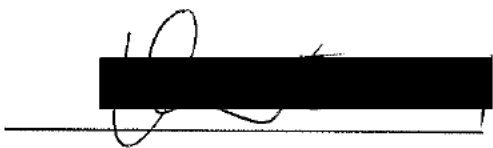
situate at:

The Houghton, Osborn Road, Houghton Estate,

Johannesburg, 2041.

- 41.2. The conditional counterclaim lodged by the respondent is dismissed.

- 41.3. The respondent is to pay the costs of the application and conditional counter application on Scale C, inclusive of the costs of two counsel.


DH WIJNBEEK

**ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the applicant:

Counsel: Adv MM Antonie SC (with Adv A Laher)

Instructing attorney: Vermaak Marshall Wellbeloved Inc.

For the respondent:

Counsel: Adv. P Stais SC (with Adv L Acker)

Instructing attorney: KWA Attorney