IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

CASE NO: 3922/2022

In the matter between:

CHRIST THE KING PRIMARY SCHOOL CC

(Registration No. 2008/183435/23) Applicant

and

PRAKASH VALLABH N.O First Respondent

RENUKA VALLABH N.O. Second Respondent

BAREND JOHANNES SAHD N.O. Third Respondent

(in their joint capacities as trustees
for the time being of the
VF Group Trust (Master's Ref: IT29/2011(E))

THE REGISTRAR OF DEEDS Fourth Respondent

JUDGMENT

Rugunanan J

[1] In a notice of motion issued on 10 November 2022 the applicant approached this court on urgency in which it sought interim relief in the form of an interdict *pendente lite* restraining the first, second and third respondents ('the respondents') from selling and/or entering into a contract with any potential purchaser and/or transferring certain fixed property namely, ERF 4793, Queenstown ('the property'), pending the finalisation of a further application previously issued on 17 October 2022 under Case Number 3668/2022 ('the pending application/proceedings').

[2] The relief sought in the pending proceedings is mentioned later in this judgment.

[3] The present application was triggered when the deponent to the applicant's founding affidavit (in which she describes herself as 'the managing member of the applicant'), came across a website advertising the property for sale while surfing the internet on 8 November 2022.

[4] I heard argument in the matter on 15 November 2022, and on 16 November 2022, I made an order dismissing the application and indicated that a judgment incorporating reasons together with an appropriate order as to costs will follow.

[5] What follows are my reasons.

History

[6] During March 2016 the deponent acting on behalf of the applicant entered into a written agreement of sale in terms of which the applicant purchased the property from the VF Group Trust ('the trust') – the latter, duly represented by the respondents.

[7] The applicant breached the agreement by defaulting on its payment obligations.

[8] Clause 6 to the agreement regulated the applicant's payment obligations. The clause expressly directs that all payments made by the purchaser are non-refundable. The applicant's default was occasioned by a breach of its payment obligations when it failed to make payment in terms of the agreement. In addition the agreement obliged the applicant to pay municipal services charges levied on the property, which it failed to do.

[9] The respondents also make averments about damage to the property occasioned by internal structural modifications without approval from the trust, and about a fine imposed on the trust by the local municipality for an electricity meter that was tampered with during the applicant's occupancy of the property.

[10] Following applicant's default of the payment terms stipulated in the agreement, the agreement was cancelled on 31 January 2019.

[11] I will revert to the cancellation date when assessing the question of urgency.

[12] What followed upon the cancellation was an application launched in the district magistrates' court for the applicant's ejectment from the property.

[13] The ejectment order was granted by default. This order then became the subject of a rescission application ('the first rescission application') which the applicant withdrew but was soon after followed by a second rescission application, as also an urgent application in which a rule *nisi* was sought against the trust pending the outcome of the second rescission application. Despite opposition by the respondents to the urgent application, it appears that the matter was never argued in the lower court.

[14] The second rescission application proceeded to argument and was dismissed by the magistrate with an order that the applicant pays costs on a punitive scale. The applicant did not dispute its breach of the abovementioned agreement. It was also not disputed that the agreement had been cancelled and that the applicant enjoyed no lawful entitlement to maintain occupation of the property. Foundational to the magistrate's decision was that, on the undisputed issues, the applicant could not demonstrate a *prima facie* defence with a reasonable prospect of success.

[15] The applicant appealed to the high court against the dismissal of the second rescission application. The appeal was dismissed with costs. A further appeal to the high court constituting a full bench was aborted as an irregular proceeding and the application withdrawn by the applicant with a tender for costs.

[16] The further application of 17 October 2022 was subsequently precipitated by the applicant. The status of that application is that it is not ripe for hearing. In that application the applicant seeks, in essence, an order compelling the respondents to transfer the property into the name of the applicant. Paired therewith is a claim that the trust be directed to comply with the written agreement of March 2016, which ostensibly appears to be a challenge to its cancellation. The events that followed culminated in the initiation of the present proceedings as set out in the circumstances earlier mentioned in this judgment.

[17] In summary, there has been one appeal and six applications – three in the high court and three in the district court – all of which evolved in the period that followed the cancellation of the sale agreement to date. It is pertinently asserted in the respondents' opposing affidavit that the attorney and client costs of the trust are substantial; that to date efforts to tax the bill of the trust's attorneys have been thwarted by the applicant ostensibly on the basis that the litigation regarding the property is still pending in this court.

[18] In each of the applications (as in the present) and the appeal referred to earlier, the applicant has never directly challenged the cancellation of the sale agreement. Similarly, it has never denied: (i) that it was in default of its payment obligations under the agreement, and (ii) that upon the cancellation thereof, the applicant has no occupational right in the property. This, the respondents maintain, was the sole basis of the magistrate's unopposed order for ejectment.

[19] On 1 June 2022 the property was sold to a business of funeral undertakers.

Approach to the papers

[20] The entire evidentiary basis on which the present application is brought resides in the founding affidavit. Evident from the ensuing analysis of the merits of the matter, the affidavit is wholly unsustainable.

[21] The events and circumstances in the aforementioned paragraphs, recounted from the opposing affidavit, are undisputed by the applicant in reply.

[22] For the granting of interim relief, the proper approach is to take the facts set out by the applicant, together with the facts set out by the respondent which the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant should, not could, on those facts, obtain final relief in due course.[1]

[23] I accept the facts averred by the respondents that are not disputed by the applicant, and the respondents' version insofar as it presents as inherently probable.

[24] I adopt this approach to the papers accordingly – the outcome of the matter turning on that basis.

The merits

[25] In these proceedings the applicant seeks what the respondents correctly describe as 'a supernatural remedy' for an order that this court effectively accords recognition to the cancelled agreement pending

[1] *Spur Steak Ranches Limited and Others v Saddles Steak Ranch, Claremont and Another* 1996 (3) SA 706 (C) at 714E-F; *Windsor Hotel (Pty) Ltd v New Windsor Properties (Pty) Ltd and Others* [2013] ZAECMHC 14 para 6.

determination of an asserted right to claim specific performance in the pending application.

[26] In argument the applicant sought reliance on the following *dictum* in *Gugu v Zongwana*[2]:

> 'Where ownership has not yet passed to any of the competing purchasers, the personal right of the purchaser who is first in time is given preference by the application of the maximum *qui prior est tempore potior est jure* … The result of this is that the first purchaser has the right to claim specific performance of his contract and to restrain the seller from committing a breach of his contract by interdicting the seller from passing ownership to the second purchaser, whose only remedy in turn is an action for damages against the seller.'

[27] The applicant does not dispute that the agreement concluded during March 2016 was cancelled on 31 January 2019. This occurred as a result of a breach at its own instance. In the circumstances, the applicant cannot assert a personal right as envisioned in the above-mentioned *dictum*; nor can such a right be accorded recognition, at the very least, even at a *prima facie* level.

[28] Under the lead of the Alienation of Land Act 68 of 1981, the applicant seeks to enforce a claim for specific performance in its pending application, this ostensibly on the basis that the legislation protects the interests of those who purchased fixed property in instalments. For reasons dealt already with, a personal right cannot be accorded recognition where the aforementioned cancellation is undisputed. It is therefore unnecessary to consider the argument relating to the applicability or otherwise of the Alienation of Land Act.

---

[2] [2014] 1 All SA 203 para 32.

[29] For the respondents it was contended in argument that the applicant's claim is for the delivery of immovable property, which claim has prescribed three years from the date of the cancelled agreement.[3] I do not read the current notice of motion to suggest that the claim is one for delivery. This depiction of the relief appears more readily in the notice of motion in the application pending. It is therefore considered unnecessary to deal with the prescription issue in these proceedings, regard being had to the approach adopted hereto.

[30] The respondents have addressed me in considerable length as to the remaining jurisdictional requirements for granting interim relief. These arguments have been dealt with on record and in their heads of argument and do not require detailed repetition herein, save to the extent dealt with in the ensuing paragraphs.

[31] The applicant has not demonstrated a well-grounded apprehension of irreparable harm in the sense that the respondents have deliberately attempted to sell the property to defeat the relief sought in the pending proceedings. Absent any meaningful challenge (whether in these proceedings or at any stage prior thereto) to the cancellation of the agreement, it appears that nothing precluded the sale of the property on 1 June 2022 to another purchaser. In the passage of events, the sale of the property occurred well before the institution of the pending application, this at a stage when the applicant (on the papers as they stand) never disclosed its intention to seek specific performance, ancillary to which lies the challenge to the cancellation of the agreement.

[3] *Botha v Standard Bank of South Africa Ltd* 2019 (6) SA 388 (SCA) para 27.

[32] The respondents contended that the applicant has not shown that it has no other satisfactory remedy. In point of fact, the argument is that the applicant has, as an effective and satisfactory remedy, a claim for damages if on its version, the respondents have breached the terms of the sale agreement. Assuming this to be the case (without finding as such), the applicant has not demonstrated that a claim for damages will be rendered nugatory or that such a claim will be unavailable to it.

[33] As for the balance of convenience favouring the grant of interim relief, the multitude of factors informing the failure by the applicant to establish any of the above-mentioned jurisdictional requisites do not resolve into a favourable consideration thereof. Indeed, on a conspectus of the material before me, they significantly detract therefrom. The considerations of a *prima facie* right, a well-grounded apprehension of harm, and the absence of an ordinary remedy are not individually decisive but are interrelated. Put otherwise, what is meant thereby is that the stronger the applicant's prospects of success, the less is its need to rely on prejudice to itself; and conversely, the more the element of some doubt, the greater the need for the other factors to favour the applicant.[4] The other factors certainly do not count in favour of the applicant; common sense therefore, refutes any suggestion that the balance of convenience favours it.

[34] It is acknowledged that the nature of interdictory relief is discretionary[5].

[35] The lack of merit in these proceedings and the abuse of process count against the exercise of a discretion in favour of granting the relief prayed for.

---

[4] *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691C-G.
[5] *Hix v Networking Technologies (Pty) Ltd v System Publishers (Pty) and Another* [1996] 4 All SA 675 (A) at 684.

[36] Before concluding, there remains one issue that requires mentioning.

[37] It relates to urgency.

[38] Nowhere in the founding papers does the applicant disclose that the agreement was cancelled on 31 January 2019. The failure to do so is not disputed, nor is the asserted cancellation. On the applicant's case, urgency was triggered when the deponent encountered a website advertising the property for sale while surfing the internet on 8 November 2022.

[39] In *National Union of Metalworkers of SA v Bumatech Calcium Aluminates*[6] the court stated that:

> 'Urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately, or risk failing on urgency.'

[40] Unreservedly, I agree herewith in principle.

[41] The present application is a manufactured attempt by the applicant to buy time against the backdrop of a long delay underpinned by an inexplicable failure to make full and candid disclosure. Had the applicant genuinely desired for this court to come to its assistance it would have reacted at the very first opportunity – it stood back for several years and did nothing until 8 November 2022 when it decided to approach this court on urgency, without any consideration (in its notice

[6] (2016) 37 ILJ 2862 (LC)

of motion) for an abridgement of the time periods to accommodate the respondent.

[42] Plainly, the proceedings are an abuse of process.

[43] Ineluctably, the applicant's conduct and motives must be assessed in the light of the above undisputed history and circumstances, as also its failure to demonstrate a *prima facie* right.

[44] The history of the matter indicates the numerous occasions in which the applicant has been litigating over the property.

[45] It has conducted itself in disregard for standing court orders by embarking on a series of strategies that have been meritless and oppressive (on occasion having gone to the extent of recruiting intervention from a political to threaten the first respondent if occupation of the property was not restored to the applicant).

[46] The respondents contended that the applicant litigates with impunity, that its conduct is oppressive, and that its applications clog up the court roll with attendant constraints on judicial resources.

[47] They seek an exemplary costs order.

[48] I see no reason to take issue with their contentions in this regard.

[49] In the circumstances:

1. The order dismissing the application is confirmed.

2. The applicant shall pay the costs of the first, second and third respondents on a scale as between attorney and own client; such costs shall be taxable immediately and payable thereafter.

_____

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicant:	A. Teko Instructed by: Z. E. Sontshi & Associates c/o Yokwana Attorneys Makhanda (Ref: N. Yokwana)
For the 1st, 2nd and 3rd Respondents:	D. A. Smith Instructed by: Wesley R. Hayes Attorneys c/o Borman & Botha Attorneys Makhanda (Ref: J. Powers)

Date heard:	15 November 2022
Reasons delivered:	13 December 2022