

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 59502/2021

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

12/01/22

.....

Date

.....

ML TWALA

In the matter between:

S: T

(Born: B)

And

APPLICANT

S: G

FIRST RESPONDENT

FIRST NATIONAL BANK LIMITED
(Registration No: 1929/001225/06)

SECOND RESPONDENT

THE REGISTRAR OF DEEDS, PRETORIA

THIRD RESPONDENT

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 12th of January 2022 at 10H00.

TWALA J

[1] The applicant launched this application before this Court on urgent basis seeking the following interdictory relief against the first respondent:

1.1 The time period, forms and service provided for in the Uniform Rules of Court are dispense with and this application is disposed of as one of urgency in terms of the provisions of Rule 6(12);

1.2 Pending finalisation of the action proceedings issued under case number 2019/14003, alternatively by agreement between the applicant and first respondent –

1.2.1 The first respondent is interdicted and restrained from selling, transferring and or disposing of the immovable property described as Section No. 5 Sectional Title Plan No SS 10/1989

in the scheme known as Ambar Downs in respect of the land and building or buildings situated as Erf [...], Local Authority; City of Johannesburg, held by Deed of Transfer Number ST 8237/2014 (“*The immovable property*”).

1.2.2 *Alternatively*, the net proceeds derived from the sale of the immovable property, be held in the conveyancing attorney’s interest bearing trust account;

1.2.3 The first respondent to pay the costs of the application on the attorney and own client scale.

[2] The first respondent opposed this application whilst the other respondents did not take part in these proceedings as no particular order was sought against them. For the sake of convenience, I shall therefore proceed to refer to the parties as applicant and respondent herein.

[3] Given that this matter served before me in the urgent Court and I allowed the applicant to proceed to argue the merits of the case before it attempted to argue the issue of urgency, I directed the respondent to as well proceed and argue the merits and not the issue of urgency. It was no longer necessary for me to consider the issue of urgency when I had allowed the applicant to argue the merits of the matter – hence I directed the respondent to proceed with the merits for I had already allowed the matter to proceed on urgent basis.

[4] The genesis of this matter is that the parties were married to each other out of community of property and profit and loss on the 25th of April 2015. Before the marriage of the parties, the respondent procured and bought himself the immovable property which was registered in his name on the 7th of February 2014. There respondent had a bond registered over the

immovable property in favour of the third respondent. Whilst living together, the parties concluded certain agreements between themselves regarding their assets and living expenses as to how each one of them will contribute since there was a child born between them.

- [5] By agreement between the parties, the applicant sold her property which she owned before the marriage and deposited a sum of R400 000 directly from the proceeds of the sale into the bond account of the respondent on the understanding that she was buying a half share in the immovable property. The total amount she contributed towards the immovable property, excluding the monthly bond repayments and other household expenses (e.g. Rates and taxes and water and lights) which she was sharing with the respondent, is the sum of R677 000 which includes money spent on the improvements effected on the immovable property.
- [6] When the marriage relationship between the parties experienced difficulties they agreed, and this was on a number of occasions, that they should sell the immovable property so that the applicant can get some money to buy herself and her son another property. Eventually the applicant and her minor child moved out of the immovable property on the 29th of March 2019. On the 4th of December 2019 the attorneys of record for the respondent gave a written undertaking that the respondent will not dispose of or disinvest and or draw down on the access bond of the immovable property until the divorce and or the action proceedings instituted to determine the issue of the sale of the immovable property is finalised or it is otherwise agreed upon between the parties.
- [7] On the 10th of December 2021 the applicant came across the website of Property24 and was surprised to discovered that the respondent had place the

immovable property in the market and at the time it reflected as being under “Offer”. On the 23rd of December 2021 the applicant received confirmation from the Property 24 website and from the Remax Estate Agency Group’s website that the respondent has sold the immovable property. However, it has been learned now the proceeds of the sale are still lying in the trust account of the conveyancing attorneys – hence this application.

[8] It is trite that the purpose for an interdict pendente lite is the preservation of the status quo ante or the restoration thereof pending the final determination of the parties’ rights; it does not affect or involve the determination of such rights. Furthermore, it has long been established and decided in a number of judgments that the requirements for an interim interdict are; (a) a clear or prima facie right even if it is open to some doubt; (b) a well-grounded apprehension of irreparable and imminent harm if the interim relief is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other or adequate remedy in the circumstances.

[9] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18 the Constitutional Court stated the following:

“Paragraph 50 Under the Setlogelo test, the prima facie right a clamant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable

harm. The right to review the impugned decisions did not require any preservation pendente lite.”

[10] The respondent contends that the applicant does not own any half share in the immovable property since he bought the property before marriage and it is registered in his name only – hence he did not have to explain anything to her when he decided to sell the property. Furthermore, so the argument went, there is no written agreement of purchase and sale concluded between the parties for the applicant’s half share in the immovable property as required by section 2 of the Alienation of Land Act, 68 of 1981. He sold the immovable property in order to be nearer his child since the applicant had moved premises without informing him. If the applicant succeeds with his claim in the action proceedings, so it was contended, she will have recourse against the immovable property the respondent is purchasing now.

[11] I do not agree. The applicant has a right in the property as a result of the oral agreements concluded between the parties during the course of their marriage. It is undisputed that the applicant has invested money in the property as a result of an oral agreement between the parties that she would own a half share in the property. The fact that the formal registration of the applicant’s name as the co-owner of the property did not take place does not mean that there was no agreement between the parties to that effect. It should be recalled that these parties were married to each other and they were doing things between themselves in a cavalier manner as a married couple. It is my respectful view that, if the respondent felt strongly that the applicant does not have a claim or rights in the immovable property, he would not have made the undertaking not to deal with the property in any manner until the action proceedings have been finalised or otherwise agreed upon between the parties.

[12] Furthermore, it is a trite principle of our law that the privity and sanctity of a contract should prevail and the Courts have been enjoined in a number of decisions to enforce such contracts. Parties are to observe and perform in terms of their agreement and should only be allowed to deviate therefrom if it can be demonstrated that a particular clause in the agreement is unreasonable and or so prejudicial to a party that it is against public policy.

[13] In *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176 (1 December 2017)* the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of the contract and stated the following:

“paragraph 23 The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract.”

[14] The Court continued and quoted with approval a paragraph in *Wells v South African Alumenite Company 1927 AD 69 at 73* wherein the Court held as follows:

“If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.”

[15] Recently the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others CCT 109/19 [2020] ZACC 13* also had an opportunity to emphasize the principle of *pacta sunt servanda* and stated the following:

“paragraph 84 Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

*Paragraph 85 The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.”*

[16] It is necessary at this stage to restate the undertaking made by the respondent through its attorneys of record in favour of the applicant in an e-mail dated the 4th of December 2021 which reads as follows:

“Paragraph 3: Our client has no intention of disposing of the aforementioned property, disinvesting same nor drawing down on the

access bond and undertakes not to do so until this matter has become finalised or it is otherwise agreed between the parties.”

[17] It is undisputed that in the other litigation that is going on between the parties, the respondent has under oath made a list and disclosed his income which is about R60 000 per month and of his debts and monthly expenses which amount to R73 000. He even sent a letter to the applicant’s attorneys requesting an arrangement in paying the taxed bill of costs of the applicant in the tune of about R70 000 for he does not have money settle same. Furthermore, an offer to purchase an immovable property was attached to his answering affidavit showing that he was buying another property for the sum of R2.9 million for which he is liable to pay a deposit of R1million leaving him with a balance of R1.9 million. It is not clear what the bond repayments would be on the R1.9 million but it is estimated to be around R19 000 per month.

[18] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (case no: 33767/2011) [23/09/2011 (SGHC) Johannesburg*, the Court stated the following:

“Paragraph 7: It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard.

[19] The Court continued in paragraph 8 to state the following:

“In my view the delay in instituting proceedings is not, on its own a ground, for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand, a delay may have been caused by the fact that the applicant was attempting to settle the matter or collect more facts with regard thereto.”

[20] It is not unreasonable for the applicant to have the apprehension of harm if the funds were to be released to the applicant. Given the disclosures under oath by the respondent of his financial situation, I am of the firm view that he is over indebted and would not be able to meet the claim of the applicant if she is successful when the pending action proceedings relating to the immovable property are finalised. Furthermore, there is no merit in the submission that the applicant will have recourse on the new property of the respondent if she is successful in her claim. I say so because the respondent has displayed a tendency of not observing and respecting the agreements between the parties. There is nothing that will prevent the respondent from selling the new property without the applicant knowing and dissipate the funds or proceeds before the applicant could lay claim on them.

[21] It is not open to the respondent to raise the issue of section 2 of the Alienation of Land Act which requires the transfer of land to be made based on a written agreement between the parties. It is of no moment that the applicant refused to pay the transfer costs – hence the transfer was not effected. As indicated above, the parties were married and there was no reason for the applicant to insist on a written agreement to protect her rights. It is

my considered view that the respondent is raising this technical point against the respondent because it does not really have a defence to her action. Moreover, this Court is not concerned with the issue of ownership in the immovable property which issue is a subject for determination by the Court dealing with the action proceedings.

[22] In *Cherangani Trade and Invest 50 (Pty) Ltd v Razzmatazz (Pty) Ltd and Another (2795/2018) [2020] ZAFSCHC 100 (28 May 2020)* the Court stated the following:

“Paragraph 20: Unnecessary technicality should be avoided during litigation as reliance thereon by a litigant is often aimed at trying to evade judgment on the merits and more often than not, the party relying on a technicality know full well that he/she does not have a proper defence on the merits.”

[23] It follows ineluctably therefore that the respondent acknowledged that the applicant has a right to the immovable property by his conduct during the course of the marriage by agreeing orally that the applicant invest the proceeds of the sale of her property into the bond account of the respondent and by making the undertaking not to deal with the immovable property in any way whatsoever until the litigation to determine the issues of the sale of the immovable property is finalised. The respondent has in a clandestine manner sold the property in breach of his undertaking to the applicant in order to deprive the applicant of her share in the proceeds of the sale of the immovable property.

[24] Based on the disclosures made under oath in the other litigation between the parties, it is not unreasonable for the applicant to apprehend that the

respondent will dissipate the proceeds of sale once he accesses them. Furthermore, there is no guarantee that he will not clandestinely sell the new immovable property in order to evade the claim of the applicant. The inescapable conclusion is that the applicant has met the requirements for the granting of the interim interdict.

[25] It is undesirable for parties involved in divorce proceedings not to treat each other with respect and openness. There was no plausible reason for the respondent to clandestinely sell the immovable property except to take advantage of the applicant and deprive her of her rights and entitlement. This has necessitated this unnecessary litigation between the parties and the respondent did not relent in his quest to deprive the applicant of her entitlement by raising technical defence to her action. The respondent has filed an answering affidavit with annexures which is about 100 pages in its quest to deprive the applicant the relief she sought in these proceedings raising issues of ownership in the property which issues are the subject of the pending action proceedings.

[26] This kind of conduct by the respondent is deplorable and will not be countenanced by the Court and deserves to be sanctioned. I am therefore persuaded by the applicant that the respondent should pay her costs for this application on the scale as between attorney and own client.

[27] In the circumstances, I make the following order:

1. The time period, forms and service provided for in the Uniform Rules of Court are dispensed with and this application is disposed of as one of urgency in terms of the provisions of the Rule 6(12);

2. Pending the finalisation of the action proceedings issued under case number: 2019/14003, alternatively by agreement between the applicant and the first respondent –

2.1 The net proceeds derived from the sale of the immovable property described as Section No. 5 on Sectional Title Plan No SS 10/1989 in the scheme known as Ambar Downs in respect of the land and building or buildings situated as Erf [...]: City of Johannesburg, held by Deed of Transfer Number ST 8237/2014, be held in the conveyancing attorney's interest bearing trust account;

3. The first respondent to pay the costs of the application on the attorney and own client scale.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 11th of January 2022

Date of Judgment: 12th of January 2022

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