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

CASE NO: 2023 - 81925

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the application by

EVOKE REALITY (PTY) LTD	Applicant
and	
AUGUSTINE, QUINTIN JACOBUS	First Respondent
PEERS ATTORNEYS	Second Respondent
MEDJSETTI, PAVAN KUMAR	Third Respondent
BYRON THOMAS PROPERTIES 9239 (PTY) LTD	Fourth Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Urgent application – interim interdict – requirement of prima facie right even if open to some doubt – right relied upon by applicant open to serious doubt

Anti-dissipatory interdict – applicant must show that respondent is wasting or hiding assets with the intention of defeating claims of creditors

Order

[1] In this matter I make the following order:

1. *The application is dismissed;*

2. *The applicant is to pay the first respondent's costs.*

[2] The reasons for the order follow below.

Introduction

[3] The applicant seeks an interim anti-dissipatory interdict in the Urgent Court to freeze a portion of the proceeds of the sale of the first respondent's house in the trust account of the first respondent's conveyancer, pending the outcome of an action to be instituted by the applicant for estate agent's commission flowing from the sale of the house. It is common cause that the first respondent (Mr Augustine) is emigrating to New Zealand and that he sold the property to the third respondent (Mr Medjsetti).

[4] I refer to Mr and Mrs Medjsetti collectively as the "third respondent" and to the first respondent and Mrs Augustine as the "first respondent."

[5] When the ownership of the property is transferred the proceeds of the sale will be paid into the trust account of the second respondent, a firm of attorneys and conveyancers. The second respondent will then be obliged to account to the first respondent for the money, and the applicant seeks an order that the money be retained in trust pending the outcome of an action to be instituted for commission.

[6] It is common cause that the agreement of sale provides for commission payable to the fourth respondent, an estate agency firm by the name of Byron Thomas Properties or BT Properties (the fourth respondent) and that this firm has a claim for commission against the first respondent. The applicant is not a party to the agreement between the first respondent and BT Properties and is not bound by its terms, and it is possible in principle that both agencies might be entitled to commission. The claim of the one does not exclude the claim of the other.[1]

Urgency

[7] I am satisfied that a case is made out for approaching the Court on an urgent basis. The applicant satisfactorily deals with the aspect of urgency and with the steps taken to obtain a commitment from the first respondent to retain the money sought in trust pending the outcome of an action in its founding affidavit.[2]

The requirements for an interim interdict

[8] The crisp question to be answered first is whether the applicant has satisfied the

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1 Compare *Wakefields Real Estate (Pty) Ltd v Attree and Others* 2011 (6) SA 557 (SCA) para 23.

2 See *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE), *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* 2011 JDR 1832 (GSJ) para 9, and *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) para 37.

requirement of a *prima facie* right to the commission that might entitle it to an interim interdict. If such a *prima facie* right were established, even if it were open to some doubt, the applicant would also have to show -

8.1 that it had no alternative remedy,

8.2 that it had a reasonable apprehension of irreparable harm[3] if the interdict were not granted,

8.3 and that the balance of convenience favours the granting of the interim relief.

[9] The requirement to show a favourable balance of convenience (referred to in *Webster v Mitchell* as the *"respective prejudice"*) would fall away if the applicant were able to show a clear right to the final relief, and the stronger the *prima facie* right the less important the influence of the balance of convenience.[4] In *Webster v Mitchell*, [5] Clayden J said:

> *"The use of the phrase 'prima facie established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and*

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3 One would expect such an applicant to make factual averments to show that it would be impossible, or very difficult and prohibitively expensive to execute in the foreign country where the respondent is heading.

4 Van Loggerenberg *Erasmus: Superior Court Practice* D6-5, D6-16C and the authorities there cited.

5 *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189 to 1190. See also *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC) para 47.

> *the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief. Although the grant of a temporary interdict interferes with a right which is apparently possessed by the respondent, the position of the respondent is protected because, although the applicant sets up a case which prima facie establishes that the respondent has not the right apparently exercised by him, the test whether or not temporary relief is to be granted is the harm which will be done. And in a proper case it might well be that no relief would be granted to the applicant except on conditions which would compensate the respondent for interference with his right, should the applicant fail to show at the trial that he was entitled to interfere."*

[10] As will be shown below, serious doubt is thrown on the case of the applicant. The application must fail for that reason.

Analysis of the right relied on

[11] The first respondent gave an exclusive mandate to market his property to BT Properties in March 2023. This exclusive mandate was for the period 20 March 2023 to July 2023 and provided for commission of 4.5%.[6]

[12] In April 2023 the third respondent contacted BT Properties and expressed an interest in the property. In May 2023 the third respondent appointed the deponent to the founding affidavit (Hendrik van Zyl, a director of the applicant) to identify a suitable property in the Bryanston area for purchase. The third respondent provided the deponent with certain specifications for their ideal home and he kept these details on record while attempting to find an appropriate property to introduce to them.

[13] The deponent then identified the property of the first respondent as a potential opportunity for the third respondent to purchase. This occurred a month after the third respondent had already expressed an interest in the property in writing to BT Properties. It is not clear whether he did so independently or whether he knew that the

[6] The applicant lays claim to 6.25% commission but concedes that no percentage was ever agreed.

third respondent had already contacted BT Properties to express an interest.

[14] The deponent refers to communication that took place on the Whatsapp application (constituting data messages as referred to in the Electronic Communications and Transactions Act, 25 of 2002) between himself and the first respondent and between himself and the third respondent. He states that he contacted the first respondent and discussed his involvement as an agent able to introduce a prospective buyer to the property. The prospective buyer was the third respondent.

[15] The first respondent denies that he ever gave a mandate to the deponent to sell the property and his denial must be seen in the context of the exclusive mandate already given to BT Properties, and also in the context of the instruction given to the deponent by the third respondent.

[16] It is obvious from the first of these messages dated 10 May 2023 that there was prior communication between the deponent and the first respondent. They are on first-name terms and the deponent enquires whether he could bring buyers to view the first respondent's property the following day.

[17] Further correspondence took place on 11 May 2023 regarding the opportunity to view the property and the deponent enquired whether the first respondent had signed *"a sole mandate with the other company."* He therefore knew on 11 May 2023 that another estate agent firm had a mandate to market the property and he wanted to know whether this was a sole mandate. He never received an answer.

[18] The fact that the applicant knew about the BT Properties mandate at all relevant times appears also from a letter written by the applicants attorneys on 24 July 2023 where the following is stated: *"Our client forwarded a copy of the OTP* [offer to purchase] *to the sellers on 21 May 2023. Quintin* [first respondent] *was interested in the OTP but informed our client that he had given a mandate to another estate agent in respect of the property."* He knew that another agent had an existing mandate and on the evidence he had no reason to believe that he had been given a second, perhaps conflicting mandate to also market the property.

[19] In his affidavit the deponent states that he spoke to the first respondent about his

involvement as an estate agent of the applicant in procuring the third respondent as a prospective buyer for the property. This of course does not necessarily mean that the applicant was an estate agent representing the seller; it could equally refer to its involvement on behalf of the purchaser to obtain the property.

[20] He made arrangements for the third respondent to visit the property and show the property to them on two occasions on 11 and 12 May 2023. He was requested by the third respondent to obtain the house plans of the property and obtained these plans from the first respondent. On 15 May 2023 the first respondent asked for an *"update on the offer"* and the deponent confirmed that the third respondent had received the house plans and were interested in the property. The first respondent replied with the words *"OK. Cool"* and the deponent inferred that the first respondent was interested in concluding a sale agreement with the third respondent. The deponent then states that: *"it is equally clear that [the first respondent] consents and agrees to me acting as his agent in pursuing the conclusion of a sale of his property with"* the third respondent.

[21] Such consent is however not clear at all. The allegation seems to be that the deponent subjectively thought or convinced himself that he had a mandate without there being any express or even tacit confirmation from the first respondent.

[22] There is in my reading of papers no reason to equate the fact that the first respondent was willing to sell his property to the third respondent with consent given to the applicant, who had thus far represented the third respondent and who had approached the first respondent on the basis that he was acting for clients who might be interested in the property for sale, to now act as an agent for the first respondent as seller in concluding an agreement.

[23] The respondent remained in contact with the third respondent about the offer and the third respondent promised to *"revert soon."* At the time there was another potential offer for the property and the deponent told the third respondent that he was *"trying to see if I can get him* [the first respondent] *out of the other offer"* so that the property could be sold to the third respondent and not to the other prospective purchaser. This is an indication that the deponent was acting or purporting to act in the best interest of the third respondent as purchaser rather than in the best interests of the first respondent as seller.

[24] On 20 May 2023 the third respondent forwarded an incomplete *"offer"* to purchase the first respondent's property to the applicant and two days later the deponent advised that he was waiting for the first respondent's response to the offer. He again confirmed that he was acting in the best interests of the third respondent and wrote that *"as I said if they want to discuss we will be open for one discussion so that we give each other an opportunity to negotiate."* Certain portions of the draft agreement had not been filled in as the third respondent wanted to discuss these aspects with the first respondent.

[25] On 23 May 2023 the deponent advised that the first respondent had reverted and that the first respondent would discuss the matter upon his return as he was away in New Zealand. On 29 May 2023 the deponent advised the third respondent that he had yet again spoken to the first respondent who was still considering the offer. On 1 June 2023 the deponent wrote to the first respondent to tell the first respondent that the third respondent wanted to know what *"you will counter at please, as she can make her sum or move on."* It would appear that the conversation was about the purchase price and a possible counter-offer and it is again the deponent acting on behalf of the third respondent in writing these words.

[26] Further correspondence followed on 2 June 2023 and the first respondent referred to Kaylynn of BT Properties, and said that if the third respondent *"wants to walk away it is their prerogative, but otherwise let's work with Kaylynn."*

[27] On the same day the deponent wrote to the first respondent confirming that he knew of the mandate held by another firm of estate agents. He said that *"I think the best is to let me know when the mandate expire and if not sold, I can go back to see if they* [obviously a reference to the third respondent] *did not buy another home as yet and get they to reinstate their offer but higher."*

[28] The deponent discussed making an higher offer with the third respondent and advised the first respondent that the offer might be increased. The deponent remained in contact with the third respondent who advised him that they wanted to purchase the house and needed a commitment from the first respondent. The opponent then contacted the first respondent who advised that he was *"open to a discussion closer to the time."*

[29] On 30 June 2023 the third respondent advised that as *"we haven't heard from you*

I had to reach out to BT Properties."

[30] The deponent to the founding affidavit never venture beyond bald allegations that he had a mandate from the first respondent to market the property. A mandate need not be in writing and may be given orally, or even tacitly,[7] but the facts must be alleged to show that there was a mandate, how and when it was given, and what its terms were.

[31] The deponent accuses the first respondent in the reply of making bald denials but in the absence of firm evidence of a mandate given to the applicant by the first respondent the first respondent cannot elaborate much as it is not really necessary or possible to elaborate on a denial of a bald allegation relating to an event that according to the first respondent never happened.

[32] An estate agent is in a position of trust and is expected to observe the utmost good faith.[8] The agent is expected to act solely for the benefit of the principal.[9] An agent acting for a purchaser is ordinarily expected to negotiate the best (i.e., lowest) possible price on behalf of the principal and an agent acting for the seller is similarly expected to negotiate the best (i.e. highest) possible price for the seller. The two approaches required are usually incompatible. There are indeed special circumstances where it may be quite possible for the same agent to act on behalf of both the seller and the purchaser such as when the parties have agreed on all the terms and requires the services of an agent only to administer their transaction. The facts of this case are quite different and it is impossible to see how the same agent could negotiate in good faith for both the seller and the purchaser.

[33] I conclude that the applicant has not made out a *prima facie* right and the application stands to be dismissed. Costs should follow the result.

[34] There is a second obstacle to the relief sought: There is no evidence presented to show that the first respondent is planning to remove his assets from this court's jurisdiction with the *intention* to defeat the applicant's claim. Except perhaps in exceptional circumstances (none of which are pleaded here) such an intention is a prerequisite for an anti-dissipatory interdict. In *Poolman v Cordier and others*, Erasmus

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7 *Muller v Pam Snyman Eiendomskonsultante (Edms) Bpk* [2000] 4 All SA 412 (C); 2001 (1) SA 313 (C).

8 *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4.

9 *Mallinson v Tanner* 1947 (4) SA 681 (T) 684.

AJ said:[10]

> *"[17] A Mareva injunction is a species of an interim interdict compelling a respondent/defendant to refrain from dealing freely with his assets to which the applicant can lay no claim. The purpose thereof is to prevent the intended defendant, who can be shown to have assets and who is about to defeat the plaintiff's claim or defeat the plaintiff's claim or dissipating assets, from doing so. To be successful, the applicant must show that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors."*

[35] These words echo what was said in *Polly Peck International plc v Nadir and Others (No 2):*[11]

> *"It is not the purpose of a Mareva injunction to prevent a defendant acting as he would have acted in the absence of a claim against him."*

[36] In the present matter the evidence is that the first respondent was selling his house because he was in the process of moving to New Zealand.[12] There is not a hint of evidence that he was secreting away his assets to avoid paying his debts.

[37] There is also no evidence that it would be impossible to execute a judgment in New Zealand, or that it would be so expensive that exceptional circumstances exist that would merit an anti-dissipatory interdict even in circumstances where the respondent is *bona fide*. One may well imagine that exceptional circumstances[13] may perhaps be found to exist in a situation where the respondent was relocating not to a functioning country like New Zealand, but to a war-torn country where law and order has collapsed.

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10 *Poolman v Cordier and others* [2017] ZANCHC 49 para 17. See *Knox D'Arcy Ltd and others v Jamieson and others* [1996] 3 All SA 669 (A); 1996 (4) SA 348 (A), *Bassani Mining (Pty) Ltd v Sebosat (Pty) and others* 2021 JDR 2276 (SCA) paras 12 to 19, and the judgment by Moshoana J in *Commissioner for the South African Revenue Services v Moloto and others* 2022 JDR 3201 (GP) paras 8 to 18.

11 *Polly Peck International plc v Nadir and Others (No 2)* [1992] 4 All ER 769 (CA) 785g-h

12 The first respondent is still resident in South Africa within the geographical area of jurisdiction of the Gauteng Division and the cause of action arose here. The applicant could have served its summons in the intended action at any time, and need not wait to do so until the first respondent has finally left for foreign shores. The jurisdiction of this Court is not disputed by the first respondent and had the applicant chosen to it could have obviated any dispute about attachment to confirm jurisdiction by simply serving its summons before the first respondent actually emigrated. The first respondent is also the owner of other immovable property in South Africa but the value of the property is uncertain.

13 *Knox D'Arcy Ltd and others v Jamieson and others* [1996] 3 All SA 669 (A); 1996 (4) SA 348 (A) 372G, 377A.

The averment of exceptional circumstances would have to be supported by evidence.

[38] For all the above reasons I make the order in paragraph 1.

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J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **4 SEPTEMBER 2023**.

COUNSEL FOR THE APPLICANTS:	A BISHOP K DEWEY
INSTRUCTED BY:	DEWEY McLEAN LEVY INC
COUNSEL FOR THE FIRST RESPONDENT:	M J COOKE
INSTRUCTED BY:	LANHAM-LOVE GAILBRAITH VAN REENEN ATTORNEYS
DATE OF ARGUMENT:	28 AUGUST 2023
DATE OF JUDGMENT:	4 SEPTEMBER 2023