

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2024-019086

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

..... **...08/03/2024.....**
SIGNATURE **DATE**

In the matter between:

NEW MODEL PROJECTS

Applicant

and

LEVENBRO CENTRE (PTY) LTD

First Respondent

REGISTRAR OF DEEDS

Second Respondent

JUDGMENT

Manoim J

[1] In downtown Johannesburg are four adjacent properties. This case concerns who owns three of them. They are described as erfs 1403, 1404 and 1405. The applicant's case is that these properties were sold to it by the applicant in November 2018 although they were never transferred to it and remain registered to the first respondent. The first respondent used to be a family-

owned company. Two brothers Raymond and Brian Levenberg owned all the shares in the first respondent through their respective eponymous family-owned companies. They sold their shares in the first respondent to the present sole shareholder Golden Phoenix Investments (Pty) Ltd (“Golden Phoenix”).

[2] The reason I refer to four, is that on erf 1402 there is a large building which extends on to erf 1403. Erf 1402 still belongs to the first respondent, even on the applicant’s version. But one of the many peculiarities of this case is how erf 1403 could get sold, without the seller at the same time, selling erf 1402. But there are more mysteries to this case, as I can on to describe.

[3] First, I must deal with what the makes the application urgent. The applicant claims ownership of all three erven, something the first respondent, now under new ownership of Golden Phoenix since December 2023 disputes. The erven are all still registered in the name of the respondent. For this reason, the applicant has brought an application to compel transfer of the three erven into its name. This application, which I will refer to as the transfer application, has been brought in the ordinary course. What has made the present application urgent is that the first respondent has, since January 2024, commenced building operations on erf 1403. In the applicants’ view these operations constitute a demolition of its asset. It seeks an interim interdict to prohibit the further building and to prevent the respondent or any other party from registering a mortgage or any other real right over the properties.

- [4] The first respondent contends that it is the owner of all three erfs and that it is entitled to build on the property. I now consider the issues in dispute.

Urgency

- [5] If the applicant is able to prove all the elements of its case the matter is urgent. Simply put an owner of a property is entitled to take urgent action to prevent the destruction of its property: The applicant became aware that construction was taking place on erf 1403, in January of this year, and having first brought a spoliation action that failed on grounds of urgency, then brought this application. I am satisfied that it acted expeditiously and that if it is the owner, and the property was being demolished as it alleges, it would not get substantial relief in due course. Since the applicant is seeking interim relief pending the conclusion of the transfer application, which is pending, I now consider whether the application meets the requirements.

Prima facie right

- [6] The applicant's case is that it entered into an agreement of sale with the first respondent in November 2018. It has attached the agreement to the founding affidavit. What it does not do is indicate how the agreement came about and who they dealt with from the first respondent. The agreement is purportedly signed on behalf of the first respondent, by Brian Levenberg, who at the time was a director and through his family-owned company a shareholder of the first respondent. The other shareholder was a similar family-owned company in the name of his brother Raymond. The deponent to the answering affidavit

for the applicant is Mr Mafa. He signed on behalf of the applicant. The salient details of the transfer agreement were:

- a. The purchase price was R 2 million. The applicant was to pay the purchase price in instalments. The first instalment was R 400 000 payable within 7 days of signature. The last signature on the agreement was 13 November 2018. The remaining R 1 600 000 was payable in 12 equal instalments of R 133 333.33 to be paid on the first of each month and payable on each consecutive month commencing 1 January 2019;
- b. The applicant was liable for the payment of transfer duty;
- c. The applicant would be given possession and occupation of the properties on payment of the R 400 000 initial amount, which would include giving it the right, if necessary, to evict any unlawful occupiers and to demolish or alter structures;
- d. Howard Woolf was appointed to do the conveyancing, and payments were to be made into his trust account. It can be assumed that transfer would only take place once the full purchase price had been paid. Transfer the agreement stated would take place within ‘a reasonable time’; and
- e. The agreement was signed by Brian Levenberg on behalf of the respondent.

- [7] In order to prove its ownership of the properties the applicant has put up the following documents. The sale agreement, various deposit slips that show payments that the applicant made into Woolf's trust account and a letter from Woolf setting out what payments had been made.
- [8] All this might suggest that the applicant had made out a *prima facie* right to be considered the owner of the property. If it is the owner, then it would have a *prima facie* right to an interdict to prevent its destruction. However, even on the applicant's own case there are serious questions. The applicant has put up some, but not all the deposit slips. As Mafu the deponent put it in his founding affidavit he has put up "... some Proof of Payments "Based on the deposit slips he has attached it is not clear that it has paid the full purchase price. Some of them are indistinct and he has not even made taken the elementary step of setting them out by amount of date of payment which one would expect of an applicant claiming he is entitled to ownership of a property not registered in its name because it has complied with its obligations for payment in terms of the transfer agreement. Nor does the applicant does explain where the rest of the deposit slip are, and if they are missing when the remaining payments were made.
- [9] The Woolf letter confirming certain payments is addressed to whom it may concern. No explanation is given for why the letter was requested and for whom it was to be used. But these are minor quibbles. The problem is that the Woolf letter which is dated 4 February 2019 only details three payments having been made which total R 139 733.33. At this time in terms of the transfer agreement the applicant should have paid the first instalment of R

400 000 and two of the next monthly instalments (January and February 2010) being a total of R 666 666.66. Nor do the amounts reflected in the deposit slips up to this period furnished by the applicant correlate with the payments on the dates Woolf reflects. Woolf for instance does not reflect the payments allegedly made in November 2018. The first payment Woolf records having received in December 2018.

[10] Of course, this goes back in time and both the applicant and Woolf may have made errors. I accept this as a possibility. But the applicant knows that ownership is contested. Why, if there is an explanation for this has the applicant has not given it. Allen Mafu who is the deponent to the founding affidavit and a director of the applicant has been involved since the beginning so he would be aware of all the facts. He has signed what deposit slips there are and the letter from Woolf is headed "Sale of Land Levenbro //Mafu."

[11] Mafu states that ever since he paid the purchase price the respondent has failed or refused or neglected to attend to the transfer despite demand. But if these was a written demand this is not included in the papers. If there was an oral request, to whom did he speak. Nor does the applicant say when the purchase price was paid in full. If the applicant was aware that transfer had not taken place it does not explain why despite demand it did not take any further steps. If the applicant had complied with the transfer agreement the last instalment would have been payable on 1 December 2019. A reasonable time for transfer to take place might have taken one to the middle or even latter half of 2020. Yet the applicant took no further steps for more than three years to assert its ownership and only now when ownership is being

contested in late 2023 early 2024 with advent of Golden Phoenix as the new shareholder.

[12] There is no explanation of what the applicant did with the property between the date it was entitled to occupation in November 2018, and December 2023, when the first respondent commenced its building operations at the initiative of the new owner. If the applicant was the owner since late 2018, it would have been able to put up these facts. It is silent on all these points. The only evidence of possession, and this is common cause, is that the applicant is using two of the erfes viz., 1404 and 1405, to park buses on. This became known when the first respondent (post the takeover by Golden Phoenix) began demanding that the applicant remove the buses from these properties.

[13] By contrast the first respondent (now Golden Phoenix) has put up a robust case to question whether the transfer agreement was ever concluded or completed. The one witness it could not contact is Brian Levenberg who purportedly signed the transfer agreement. This is because Brian Levenberg passed away on 2 July 2021. But the first respondent's attorney has contacted everyone else who might throw light on the situation. Both shareholder families sold their shares to Golden Phoenix, so it is now a sole shareholder. This includes the shareholding formerly owned by the family company of Brian Levenberg. His surviving spouse and erstwhile attorneys claim they have no knowledge of the transfer agreement. Confirmatory affidavits from all of them are attached to the answering affidavit Thus a further mystery.

- [14] The one person the applicant's diligent attorney could not get an affidavit from is Woolf. Nevertheless, unlike the applicant she at least contacted him. Woolf, she says could not recall the events. He was at best for the applicant non-committal. Another deponent recalled Woolf having acted for someone called Steven Rosen who had wanted to buy the properties in 2022 (thus after the alleged sale to the applicant) but this sale had not materialised.
- [15] The applicant argued that there was something suspicious about the sale of shares agreement to Golden Phoenix. The purchase price is reflected as R 200 000; thus, one tenth of the price that the applicant had paid five years earlier. This might appear anomalous particularly given that in the sale of shares transaction Golden Phoenix was also getting erf 1402, which the applicant on its own version, had not purchased. But on further reflection this price anomaly is not dispositive. The fact that the two transactions may have the same assets underpinning them, does not necessarily make them comparable commercially. The applicant's transaction is a sale of land. The Golden Phoenix transaction is a sale of the shares of a business that owns properties; not a sale of properties. The sale of the business included the liabilities. Without balance sheets we do not know what liabilities were taken on. We do know from Golden Phoenix's deponent that the building was in a woeful state when it took over. This may also explain the low price.
- [16] I do not consider the applicant has established that it ever made full payment of the purchase price and was thus entitled to transfer. By contrast the respondent has thrown considerable doubt over whether a sale ever took

place to the applicant or, at the very least, a successful one that entitles it to claim transfer.

[17] The first respondent has also advanced two further legal arguments to dismantle the applicants' claim of a *prima facie* right. Both assume that the transfer agreement is a valid document. The first argument is that the claim has prescribed. If the applicant had conformed with the terms of the transfer agreement it would have paid the last instalment by January 2020 and then become entitled to take transfer. The applicant however has never claimed specific performance on the contract and since more than three years have elapsed this claim has prescribed.

[18] The next argument was based on company law. The argument was that in terms of section 112 of the Companies Act, 71, 2008 a company may not dispose of a greater part of its assets unless it has been approved by a special resolution of its shareholders. Here the argument is that the property represented a greater part of the assets of the first respondent (it only had in addition to the transferred erfs, erf 1402) and therefore the greater part was disposed of. Second, since the other shareholder, Raymond, would have by virtue of his shareholding at the time had to approve the special resolution his denial of any knowledge of such resolution is sufficient proof that there never was one.

[19] In response counsel for the applicant contended that in terms of the well-known *Turquand* or indoor management rule, this argument did not prevail against an outsider like the applicant. I do not think I can at this state decide either of

these points against the applicant. I do not have sufficient facts to know when the last payment was made hence the prescription argument is speculative. On the section 112 argument I note that there is controversy about the application of the Turquand rule to a statutory obligation.¹ I do not consider that I should decide such a point now in an urgent application.

[20] Nevertheless, even if I do not take these two law points into account, I can only conclude that the applicant's case for a *prima facie* right, whilst not non-existent, is evidentially weak, as opposed to the strength of the case put up by the first respondent to challenge it.

Apprehension of irreparable harm and balance of convenience.

[21] I will deal with these two issues together. The applicant's case here is that the respondent commenced operations to demolish the building situated on erf 1402 and 1403. Erf 1402 it is common cause belongs to the first respondent and therefore no demolition to it can give any right to the applicant. Rather the bigger problem for the applicant and its claims of ownership is that the building which is a large structure is according to a photograph attached to the answering affidavit, built across both properties.² Visually it would appear that the border between the two properties bisects the single building (comprising a continuous structure) almost in half. It is not clear how the one erf could have been sold without the other to the applicant, but that again is one of the many mysteries.

¹ See Henochsberg commentary on this point page 407, issue 18. The authors cite the literature where contrary views on the point of the application of the Turquand rule to a statutory provision is expressed.

² See photo on Case Lines at 002-38.

- [22] But the first respondent has put up facts seriously rebutting the case for irreparable harm and the balance of convenience. First, the first respondent dates the commencement of its building work to a date prior to the institution of the applicant's action, so it was not a step responsive to it, as suggested. Second, the demolition part of the work has already been completed. Third, but perhaps most important is that the first respondent is not demolishing the building. What the photos show is that it has demolished illegal structures that someone had added on to the building. The structure of the building remains intact. What it has also done is to repair ceilings that were decaying by replacing them.
- [23] At the time this application was heard these building operations have not been completed. What remains to be done which the first respondent says is urgent, is to close gaps in the structure of the building caused by the removal of the illegal structures and to complete the ceiling replacement. An interdict from further building would leave parts of its open to illegal occupiers to enter and to cause the building to deteriorate. The first respondent has supplied several photographs which are consistent with its description.
- [24] On the first respondent's version an interdict imposed now would lead to irreparable harm in a building situated in parts of the downtown area vulnerable to illegal occupation. Moreover, leaving an incomplete structure could lead to liability from the City. The balance of convenience the first respondent argues favours it in not granting the interdict.

[25] On the facts before me the first respondent has made out a more convincing case. Whilst the applicant case rests on generalised allegations the first respondent has put the facts in specific detail. The photographs it attaches to its papers support its contentions.

No other remedy

[26] It is not clear to me that the applicant has no other remedy. On the facts before me the building operations are enhancing the value of the building not detracting from it. If the applicant succeeds in its transfer application, it will be the first respondent which is at risk of loss not the applicant.

Conclusion

[27] I now consider if the applicant has put up a sufficient case to justify granting an interim interdict.

[28] The case law recognises that a weak case on a *prima facie* right might still justify the grant of an interdict if the other elements are present. As Holmes J as he was then put in *Olympic Passenger Service (Pty) Ltd v Ramlagan 1957* (2) SA 382:

"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the

intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict — it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience —the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.

[29] This is a case where a weak prima facie case is not bolstered by a strong case on any other the requisites. On the contrary on these aspects as ai have discussed the applicants' case is also weak. For this reason, the case for interim relief cannot succeed. The application is dismissed. Costs should follow the result, but I see no basis for a punitive costs award.

ORDER: -

[30] In the result the following order is made:

1. The application is dismissed.
2. The applicant is liable for the party and party costs of the first respondent.

N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Date of hearing: 29 February 2024

Date of judgment: 08 March 2024

Appearances:

Applicants' Counsel:

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