IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED:

Date: ***14th March 2019*** Signature: _____

CASE NO: 2017/78274

DATE: 14TH MARCH 2019

In the matter between:

NORMAN & GARY ABKIN DUNSWART PROPERTIES (PTY) LTD	Applicant
and	
ARCELORMITTAL SOUTH AFRICA LIMITED	First Respondent
WICTRA HOLDINGS (PTY) LIMITED	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent

JUDGMENT

ADAMS J:

[1]. This is an opposed application by the applicant for interim interdictory relief against the first and second respondents. The applicant applies for an order interdicting the first respondent, pending the adjudication and finalisation of an action instituted during 2004 by the applicant against the first respondent, from selling, disposing of, alienating, encumbering or transferring certain Erven in Benoni. The applicant also applied for an order interdicting the second respondent from purchasing or taking transfer of some of the aforementioned erven.

[2]. The application is opposed only by the first respondent. The second respondent did not deliver notice of intention to oppose the application and the relief sought against it, which is dependent upon and ancillary to the relief claimed against the first respondent. This means that the applicant would be entitled to the relief prayed for against the second respondent should it be successful with its application for an interdict against the first respondent. Conversely, in the event of the application for an interdict against the first respondent failing, the application against the second respondent also stands to be dismissed. This is a matter of sheer logic.

[3]. The application is based on a written agreement concluded between the applicant and the first respondent during March 2003 ('the option agreement'), in terms whereof the first respondent granted to the applicant the sole and exclusive option for a period of one year to purchase certain immovable properties described in the option agreement for the purchase price of R8 million. This agreement was subject *inter alia* to the suspensive condition that the first respondent would obtain the consent to establish a Township on the properties in terms of the provisions of section 96 of the Town Planning and Township Ordinance, 15 of 1986. During February 2004 the applicant exercised the option to purchase the properties, which meant that, according to the

applicant, a valid agreement for the purchase and sale of the properties came into existence. This was disputed by the first respondent who denied that a valid sale agreement was concluded pursuant to the option agreement. The dispute could not be resolved between the parties and the applicant instituted legal action against the first respondent, claiming a declaratory order that a valid and enforceable sale agreement for the purchase of the properties came into existence between the applicant and the first respondent. The first respondent defended the action on the basis *inter alia* that the option agreement relied upon by the applicant in the action was not an option.

[4]. This action is presently still pending although it was followed by certain events, the most notable of which was the fact that the parties purported to settle the action by concluding a further agreement for the sale and purchase of the properties. It is however common cause between the parties that the agreement in terms of which the parties supposedly settled the dispute between them, which formed the subject of the 2004 action, is void *ab initio*. Those events can and should therefore, in my view, be disregarded for purposes of the sequence of events relevant to this application. The simple fact of the matter is that the 2004 action is still extant and pending.

[5]. During 2017 the establishment of Benoni Extension 74 Township was approved.

[6]. The first respondent opposed the application on the basis *inter alia* that the applicant has not demonstrated, as it is required to do in an application for interim interdictory relief, that it has a *prima facie* right which requires protection. It is the applicant's case that its right to bring this application is founded on the option agreement, which right the applicant is attempting to enforce in the 2004 action, which is presently pending.

[7]. The first respondent contends that the applicant has no such *prima facie* right for the simple reason that the option agreement is void and unenforceable if regard is had to the provisions of section 67 of the Town Planning Ordinance, 15 of 1986 ('the Ordinance'), which provides as follows:

> '**67. Prohibition of certain contracts and options**.—(1) After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70—
>
> (a) enter into any contract for the sale, exchange or alienation or disposal in any other manner of an erf in the township;
>
> (b) grant an option to purchase or otherwise acquire an erf in the township,
>
> until such time as the township is declared an approved township: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing land on which he wishes to establish a township subject to a condition that upon the declaration of the township as an approved township, one or more of the erven therein will be transferred to the seller.
>
> (2) Any contract entered into in conflict with the provisions of subsection (1) shall be of no force and effect.
>
> (3) Any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.
>
> (4) For the purposes of subsection (1)—
>
> (c) "steps" includes steps preceding an application in terms of section 69 (1) or 96 (1);
>
> (b) "any contract" includes a contract which is subject to any condition, including a suspensive condition.'

[8]. As I indicated above, applicant's application for interim interdictory relief is based on its alleged *prima facie* right in terms of the option agreement. It is

the case of the first respondent that it has an unassailable defence to the 2004 action which is based on the option agreement. The first respondent contends that, having regard to the provisions section 67 of the ordinance, the option agreement is invalid and *void ab initio*.

[9]. I agree with this contention on behalf of the first respondent. From the papers before me it is clear that the provisions of section 67 of the Ordinance are applicable to the option agreement. If regard is had to the wording of the option itself, there can be no doubt that the first respondent, as the owner of the properties in question, started taking steps to establish a township, being Benoni Extension 74 Township, prior to the conclusion of the option agreement between the applicant and the first respondent. Clause 4.1 of the option agreement, which was concluded between the parties on the 25th March 2003, provides as follows:

> '[The applicant] acknowledges that [the first respondent] is in the process of establishing a township on the additional properties and certain of the properties.'

[10]. I also have no doubt in my mind that the properties, which are the subject of the option agreement, were in fact Erven, as envisaged in section 67 of the Ordinance, in Benoni Extension 74 Township, which the respondent intended establishing, and in respect of which Township the first respondent had already taken steps to establish by the time the option agreement was concluded. Section 67(1)(b) expressly prohibits the granting of an option to purchase or otherwise acquire immovable property in the Township.

[11]. The first respondent was involved in litigation with another company, namely Reclamation Property Holdings (Pty) Limited ('Reclamation'), which had also purchased immovable properties, which also formed part of the proposed

Township. That agreement between the first respondent and Reclamation was concluded on the 19th of March 2003, that is at more or less the same time during which the option agreement was entered into between the applicant and the first respondent. First respondent contended that the property which formed the subject of the litigation between Reclamation and the first respondent was part of the Township, which the first respondent intended establishing. The aforegoing came out and was confirmed during the aforementioned litigation, which, according to the first respondent, is support for the first respondent's contention that properties which the applicant would have acquired pursuant to the option agreement did not constitute, as contended for by the applicant, the whole of Benoni Extension 74 Township, which would have taken the option agreement outside of the ambit of the provisions of section 67 of the ordinance.

[12]. The version of the first respondent is furthermore to the effect that the application by the first respondent for the establishment of a township had been submitted by the 19th March 2003. Therefore, it has to be accepted that by the time the option agreement was entered into, the first respondent had already commenced the processes for the establishment of the Township. I find myself in agreement with the submissions made by Mr Du Plessis, Counsel for the first respondent, that there is no merit in the contention by the applicant firstly that all of the properties on the land in the Township to be established were acquired by the applicant pursuant to the option agreement and secondly that the processes of establishing the Township had not as yet commenced at the time the option agreement was concluded. The applicant's version in that regard, if one has regard to the papers before me, is so far-fetched, that same can be rejected without further ado.

[13]. Some of the facts, not all of them, upon which I base my conclusions herein, are contained in a Supplementary Answering Affidavit by the first respondent, delivered on the 8th of March 2018, after the applicant had delivered its replying affidavit on the 9th of February 2018. The first respondent

applies for leave to file the said supplementary affidavit and proffers the following explanation for the filing of an additional affidavit. The first respondent contends that it was necessary for it to file the additional affidavit because in its replying affidavit the applicant deals with two issues, which ought to have been dealt with in the founding affidavit. Firstly, so the first respondent contends, the applicant alleged for the first time in the replying affidavit that it purchased all of the properties comprising the Township and for that reason the Ordinance is not applicable. This is factually incorrect. Secondly, the applicant states in the replying affidavit that the first respondent had not taken steps to establish the Township at the time that the option agreement was entered into, which means, so the applicant submits, that the Ordinance is not applicable for this reason as well. This is denied by the first respondent, who contends, rightly so, in my view, that this assertion by the applicant flies in the face of clause 4.1 of the option agreement (*vide supra*). The applicant opted not to reply to the first respondent's replying affidavit. Instead it opposed the first respondent's application for leave to file the supplementary answering affidavit on the basis of what I can only term technical defences. The applicant objects in the main to the admission of the supplementary answering affidavit because it does not comply with the procedural requirements of the Uniform Rule of Court 6 and because the 'filing of such supplementary affidavit' caused the applicant prejudice.

[14]. In terms of Uniform Rule of Court 6(5)(e), a Court 'may in its discretion permit the filing of further affidavits.' There are normally three sets of affidavits in motion proceedings. The court will exercise its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. See: *Dickinson v South African General Electric Co (Pty) Ltd*, 1973 (2) SA 620 (A) at 628F. It is for the court to exercise the discretion. It is only in exceptional circumstances that a fourth set of affidavits will be received. Special circumstances may exist where something unexpected or new emerged from

the applicant's replying affidavit. It is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be permitted.

[15]. There should in each case be a proper and satisfactory explanation, which negatives *mala fides* or culpable remissness, as to why the facts or information had not been put before the court at an earlier stage, and the court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs.

[16]. Applying these principles *in causa*, I am satisfied that the first respondent has made out a proper case for leave to file the supplementary answering affidavit. What weighs heavily on my mind in that regard is the fact that the said affidavit was delivered shortly after the filing of the applicant's replying affidavit, which means that the applicant had more than sufficient time to file its own supplementary affidavit if it deemed it necessary. It chose not to do so. I am also of the view that the applicant should pay the cost of the said application.

[17]. The result of my aforesaid ruling is that there are a number of facts which are undisputed by the applicant. I have alluded to those facts above. Importantly, the option agreement was concluded between the applicant and the first respondent after the first respondent had taken steps to establish a Township. The properties which were the subject of the option agreement were erven which would be part of the Township to be established by the first respondent. The properties which the applicant were entitled to purchase in terms of the option agreement did not constitute all of the land which would have comprised the Township to be established. This means that the option agreement on which the applicant relies to establish its *prima facie* right to claim an interdict is unenforceable, of no force and effect and void *ab initio.* Therefore, the first respondent does not have a *prima facie* right on which to found the interim interdictory relief claimed by it.

[18]. I am, in any event, not persuaded that the applicant has satisfied the other requirements for an interim interdict, namely: that it is threatened with immediate and irreparable harm; that it has no alternative remedy, and that the balance of convenience favours it.

[19]. All of the issues relating to these three requirements for the interdict are closely tied in with the question of balance of convenience and prejudice. An aspect which weighs heavily on my mind is the fact that the applicant since 2011 has done very little to pursue its 2004 action against the first respondent. The question is this: what prevented the applicant since 2011 from pursuing to finality the action it instituted as far back as 2004.

[20]. There is, in my judgment, no reason in principle why the applicant can claim the interim interdict, which it seeks in this application.

[21]. The application of the applicant therefore stands to be dismissed. This, in turn, means that the application against the second respondent also stands to be dismissed.

Costs

[22]. The first respondent has been successful in opposing the applicant's claim against it. This means that, applying the general rule, the first respondent is entitled to a cost order.

[23]. I can see no reason to deviate from the general rule and cost should therefore be awarded in favour of the first respondent against the applicant.

Order

In the result, I make the following order:-

1. The first respondent is granted leave to file its supplementary answering affidavit dated the 26th February 2018.

2. The applicant shall pay the first respondent's cost of the application for leave to file the additional affidavit.

3. The applicant's application against the first and second respondents be and is hereby dismissed.

4. The applicant shall pay the first respondent's cost of this opposed application.

L R ADAMS
Judge of the High Court
Gauteng Division, Pretoria

HEARD ON:	12th March 2019
JUDGMENT DATE:	14th March 2019
FOR THE APPLICANT:	Adv L C Leysath
INSTRUCTED BY:	Wayne Teich Attorneys
FOR THE FIRST RESPONDENT:	Adv D T v R Du Plessis SC
INSTRUCTED BY:	Deon Rens Attorneys
FOR THE SECOND RESPONDENT	No appearance
FOR THE THIRD RESPODENT	No appearance