

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>

Case no: 4619/2022

In the matter between:

HANS MERENSKY LAND OWNERS' ASSOCIATION

APPLICANT

And

REGISTRAR OF DEEDS, POLOKWANE

FIRST RESPONDENT

SOUTHERN SKY HOTEL AND LEISURE (PTY) LTD

(IN LIQUIDATION)t/a HANS MARENSKY HOTEL SPA

SECOND RESPONDENT

MUSTUFA MOHAMED N.O

THIRD RESPONDENT

PULENG FELICITY BODIBE N.O

FOURTH RESPONDENT

MARYNA ESTELLE SYMES N.O

FIFTH RESPONDENT

JOHANNES ZACHARIAS HUMAN MULLER N.O

SIXTH RESPONDENT

INDALO INVESTMENT HOLDINGS (PTY) LTD

SEVENTH RESPONDENT

JUDGMENT

MULLER J:

- [1] This application was launched as extremely urgent a day after another urgent application in respect of the same property was struck from the roll with costs on 17 May 2022. The application stood down to yesterday 19 May 2022 at 14hoo to allow the respondents the opportunity to file opposing affidavits. The applicant filed two separate replying affidavits late yesterday afternoon. The application was argued last night.
- [2] The parties were informed at conclusion of the arguments that judgment will be delivered on Monday. However, I decided during the course of the night to issue the order today so as to inform the parties with equal urgency of the outcome and to give the reasons for the order as soon as possible.
- [3] The application was dismissed with the question of costs postponed until 10 June 2022, when CJ Langenhoven, S Matlala and Me Rinderknecht were to advance reasons, on affidavit, at 9hoo why they should not be ordered to pay the costs of the application on the scale as between attorney and client, including the costs consequent upon the employment of two counsel.
- [4] I informed the parties when the order was pronounced in open court that the reasons will follow promptly. These are my reasons.
- [5] The applicant is a non-profit company and Home Owners Association in respect of a development in Phalaborwa better known as the Hans Merensky Estate. The estate borders the Kruger National Park. The golf course was once (and it might still be) a championship golf course with the

relevant amenities and a hotel. The development which also includes about fifty home owners is situated on the property, the subject matter in both the applications. It is described as:

“Remaining extent of Portion 1 of the Farm Merensky 32 registration Division L.U. Limpopo Province.

Measuring 112, 7071 (One Hundred and Twelve Comma Seven Zero Seven One) Hectares.”¹

- [6] The following restrictive conditions, which are relevant for present purposes, are registered in the title deed in favour of the Hans Merensky Land Owners Association,² its successors in title or assigns. They read:

- “1 .Neither the land nor any undivided share therein shall be transferred to any person without the prior written consent of the Land Owners Association. Every owner of the property, or any interest therein, shall automatically become and remain a member of the Landowners Association and the conditions pertaining to the resort permit applicable to each portion and the Remaining Extent of Portion 1 until he/she ceases to be the owner as aforesaid.
2. the owner of the property shall not be entitled to transfer the property or any share interest or members interest therein without a clearance certificate of the Land Owners Association to the effect that he provisions of the articles of Association have been complied with.”

- [7] The deponent to the founding affidavit is the chairman of the Association. The Articles of Association which are not attached to the founding papers, but which the third to sixth respondent³ attached revealed that a

¹ Hereinafter called “the property”.

² Hereinafter called “the Association”.

³ Hereinafter called “the liquidators”.

board of trustees is established for the association and consist of no less than three and not more than 10 members.

- [8] There are presently five trustees. The Articles provide in clause 9.3.3 that when there are five trustees, three trustees are nominees by the developer, which is Hans Merensky Country Club (Pty) Ltd. The deponent, as well as Mr S Matlala and Me Rinderknecht are the three trustees nominated by the developer. The remaining two trustees are Messrs Coppin and Bronèe, who were nominated as representatives by the home owners, on the board.
- [9] Clause 14.2 provides that a quorum for the holding of any meeting of the trustees are two trustees who must be personally present and during the development stage the presence of a majority of trustee who are nominees of the developer shall be necessary at all meetings to constitute a quorum. A simple majority of votes is required for a resolution.
- [10] The resolution to institute the proceedings which bind the home owners was obtained without the nominees of the home owners being present or invited to the meeting of the trustees where the resolution was taken. It is therefore, not surprising that the three trustees nominated by the developer met and took the resolution to institute the present application.
- [11] The facts set out by the deponent in the founding affidavit reveal that the second respondent is a company in liquidation which is the owner of the property. The liquidators in the exercise of their duties concluded a sale

agreement with the seventh respondent in terms whereof the property of the second respondent was sold to it.

[12] On Tuesday 10 May 2022, subsequent to a Deeds Office Title Deed Search document, which was furnished to the deponent it came to the attention of the Association that the seventh respondent was seeking registration of the property in its name on 11 May 2022.

[13] The deponent was absolutely shocked by the discovery since he was unaware that consent, as required by the restrictive conditions in the title deed has never been sought by or granted to the seventh respondent.

[14] The deponent continued to aver that he sought urgent advise from the Association's attorneys, Knowles Husain Lindsay Inc. The attorneys addressed a letter to the first respondent (the Registrar of Deeds) and to the liquidators in which it was pointed out that consent from the Association is required prior to transfer of the property to the seventh respondent. An attorney, one Cameron, who represented Me Rinderknecht and other applicants in the application that was struck from the roll on 17 May 2022 happened to be present and hand delivered the letter on behalf of attorneys to Mr Phali an employee at the deed office. During their discussions Phali informed Cameron that the sale is treated as a sale by auction by the liquidators as a "forced sale" and as such all restrictive conditions are ignored by the deeds office. Cameron was surprised and enquired from Phali what is considered as a "forced sale." Phali informed him that he believed it to be a forced sale because the sellers are the liquidators. The deponent believes differently. The deponent knows that no consent was granted, and, if consent was

granted, that it constitutes a fraud on the deeds office, the Association and, of course, its members.

- [15] The clear right the Association relies on is the restrictive condition registered against the title deed in favour of the Association.
- [16] The first respondent opposed the application mainly because the Association seeks a costs order against it in the notice of motion. Counsel on behalf of the first respondent said that the first respondent does not wish to take sides or wish to become embroiled in the disputes and will abide the decision of the court. I consider the stance of the first respondent as prudent and what is to be expected from the first respondent.
- [17] The liquidators filed an unsigned affidavit of the trustee Coppin together with the opposing affidavit and requested that his evidence albeit it hearsay be accepted as evidence in the light of the urgency. I will take cognisance of the contents in view of the extreme urgency with which the respondents were required to file opposing papers. Coppin says that the he is one of the trustees nominated by the home owners and a board meeting was held two weeks ago where the deponent Langenhoven was present. Transfer of the property was discussed and in particular whether consent from the Association is required for the transfer. Langenhoven pointed out that the sale is a “forced sale” and that consent is not a requirement for the transfer to the new owner. All the levies are paid in respect of the property and consent may be given, if the consent is required. The liquidator attached the written consent dated 21 April 2022 and signed by ST Bronèe.

- [17] In the replying affidavit Langenhoven states that he first had sight of the letter of consent when he considered the affidavit of the seventh respondent. He reiterated that it is fraudulent for the following reasons. Firstly, because the board of trustees never granted consent for the transfer and because the letter makes no reference to the restrictive conditions. Secondly, because the board has not authorised the signatory to sign the document. And thirdly, because the document is dated 21 April 2022. A board meeting was held on 22 April 2022 where Bronèe was present and has failed to disclose that the consent was signed by him. He maintains that the consent of the Association is a necessary prerequisite for the transfer of the property. Nor can the sale by the liquidators be regarded as a “forced sale” for purposes of transfer of the property.
- [18] The seventh respondent⁴ pointed out in the answering affidavit that the present application is yet another chapter in the long line of applications which involved the Hans Merensky estate the nature of which it has little knowledge. Indalo operates in the hospitality industry. As a result of the liquidation of the second respondent Indalo purchased the property on 11 March 2022 from the liquidators. The purchase price was paid on 10 May 2022 after Indalo first hesitated to pay as a result of the first urgent application which was designed to stop transfer of the property.
- [19] Counsel for Indalo maintained in argument that the sale by the liquidators constitutes a “forced sale” similar to a sale in execution of a

⁴ Hereinafter called “Indalo”.

judgment. Counsel relied on *Nel v Lubbe*⁵ as authority for that proposition. I will return to this issue.

[20] The relief claimed against the first respondent is firstly an interdict to restrain the transfer of the property. Secondly, the Association claims for a declaratory order that the restrictive conditions contained in the title deed are binding on all the respondents and a declaration that the sale is not a “forced sale” as envisaged by the Deeds Act nor that the deeds office practice manuals and accordingly applies to the transaction. It also seeks an order to declare the consent letter as *pro non scripto* and of no force or effect.

[21] When a company is liquidated ownership of the assets of the company remain vested in the company. The liquidator, although not vested with ownership of the company’s property, exercises all rights of ownership. The duty of a liquidator in realising an asset is a statutory duty cast upon the liquidator to realise the assets for the benefit of all the creditors and to distribute them. Liquidators perform their duties *in invitum* (against the will) of the company and its directors. The common cause facts are clear that the liquidators sold the property to the seventh respondent in the performance of their duties to liquidate the second respondent.

[22] The question to be answered, in my view, is not if the sale is a “forced sale” but rather if restrictive conditions embodied in a title deed prohibit transfer of the property in instances where such a property is sold at the direction of the liquidators. The expression “forced sale” in this sense is misleading and does not describe the duties of the liquidators. It is not the

⁵ 1999 (3) SA 109 (W).

validity of sale as such, that is disputed but the obligation of the first respondent to transfer the property to the seventh respondent without the written consent of the Association. In *Nel v Lubbe supra* the court held that a forced sale:

“[It] is a sale where the owner of the property sold is in distress, usually having no funds to pay his debts. The sale is conducted by the Sheriff. There is no reserve price. Advertisement of the sale is invariably inadequate and often the mortgagee, who attends the sale to protect his interest, succeeds with a bid which in money terms is derisive. In the case of a sale not in execution but by public auction on the direction of the trustees of an insolvent estate, I consider is no less than a forced one. While the advertisement of the sale is more extensive, there are many factors which do not attract a large number of bidders.”

[23] The passage is not helpful. The present issue does not relate to the price at which the property was sold, but whether the restrictive conditions prohibits the first respondent to transfer of a property to the seventh respondent. If the answer is that written consent of the Association is a necessary prerequisite, it is the end of the enquiry. The term “forced sale” is not an appropriate one. It is clear that the purpose of the restrictions in the title deed is to grant the Association the right to decide for reasons of their own who to allow to become members of the Association. A purchaser becomes a member once a property is transferred in to the name of such a member. A sale is normally subject to the restriction. There is no evidence that the property was sold subject to the condition that the Association must first consent to the transfer before the property may be transferred. I accept therefore that no such

condition is contained in the deed of sale. It seems to me that the restriction was considered to be applicable only to voluntary alienations.

[24] In *Heimann v Klempman & Jaspan*⁶ it was held that a trustee in an insolvent estate is not bound by a provision in a lease prohibiting assignment without a landlord's consent. The learned Judge referred to a judgment of the Chief Justice in *London and South African Exploration Co v Official Liquidator of North-Eastern Bultfontein and the Registrar of Deeds*⁷ which said:

"The deed authorises the lessees to transfer the claims during the term on condition that no such transfer shall be made unless all rent or licence moneys owing to the lessors on the claims shall have been duly paid. This condition is clearly applicable only to voluntary transfers, and not to transfers which are necessitated by the insolvency of the lessee for the purpose of distributing the proceeds among their creditors in due order of preference."⁸

[25] The question was extensively discussed after a review of the authorities in *Moseley Buildings Ltd v Bioscope Cafes Ltd*,⁹ almost a hundred years ago, in the contexts of whether a liquidator of an insolvent company is bound to a restrictive covenant in a lease agreement.

[26] The court stated the general principle to be:

"In my opinion, the guiding principle accepted by the court is that, both a trustee and a liquidator, notwithstanding the legal difference of their title to the control of the assets, have a statutory duty to perform, namely: to realise the assets for the benefit of the creditors as a whole... not so much for the benefit of the

⁶ 1922 WLD 115.

⁷ 1895 SC 12 225; Also *Himmelhoch v Liquidators Fresh Milk and Butter Supply Co Ltd and Others* 1925 TPD 958,

⁸ At 238.

⁹ 1923 WLD 189. The judgment was confirmed on appeal in *United Bioscope Cafes Ltd v Moseley Buildings Ltd* 1924 AD 60.

insolvent or the company...in other words, as stated by LE BLANC J, in *Doe v Bevan*, their disposal of the assets is in the nature of a “statutable execution”¹⁰

[27] It seems clear from these decisions that the court accepted that a liquidator in the exercise of its duties is generally not bound by restriction in a contract that bind the parties.

[28] The Appellate in *Division in Durban City Council v Liquidators Durban Icedromes Ltd and Another*¹¹ pointed out that since the amendment of section 37 of the Insolvency Act, that a trustee is bound to a stipulation in a lease which restricts or prohibits the transfer of any right under a lease. The court commented:

“There remains the question whether the liquidators are bound by the provision in the lease that the lessee shall not assign it without the consent in writing by the council. Before the amendment of sec 37 of the Insolvency Act, 1936, by sec 14 of the Insolvency Law Amendment Act 1943, neither a trustee nor a liquidator was, according to a number of decisions in our Courts, bound by a clause of that nature in a lease. (Cf *inter alia Heimann v Klepman and Jaspan* 1922 WLD 115. *Himmelhoch v Liquidators fresh Milk and Butter Supply Co Ltd and Others* 1925 TPD 958).”¹²

[29] The correctness of those decisions were not questioned by the court. The writers of *Meskin Insolvency Law and its Operation in Winding-Up*¹³ states:

“Since the sale is a compulsory one dictated by the provisions of the Insolvency Act, contractual or other non-statutory stipulations precluding or restricting the insolvent from selling or delivering the property concerned are not operative against the trustee (although in relation to a lease, this situation is modified by the provisions of section 37(5) of the Insolvency Act.) It is submitted that as a

¹⁰ At 199.

¹¹ 1965 (1) SA 600 (A).

¹² 612B-C.

¹³ Magid PAM *et al* Ed.

result of the *concursum creditorum* a stipulation which is intended also to bind the trustee and to prevent him from selling the property in accordance with the provisions of the Insolvency Act is as a general rule without force and effect.”¹⁴

[30] The restriction contained in the title deed cannot properly be allowed an impediment to the transfer of the property when it is sold by public auction by the liquidators in terms of their duties as liquidators. In *Heenop v Magaliesbergse Koringkooperasie Bpk*¹⁵ the question was whether the provisions of a statute prohibited a liquidator from selling crops by public auction. The court approved of the passage in *Moseley Buildings Ltd supra* and reiterated that it is the duty of a liquidator do all things as may be necessary for the winding-up the affairs of the company and distributing its assets under supervision and sanction by the court.

[31] The liquidators, in my judgment, were obliged in terms of section 82 of the Insolvency Act to sell all the property in the estate in such manner and upon such conditions as the creditors may direct as long as the sale of the property of the estate was not prohibited by statute or was unlawful.¹⁶ There is no suggestion in the papers that the sale of the property to Indalo is prohibited by statute nor that the sale was unlawful.

[32] I cannot imagine that the restrictive condition can have the same force of a statute to prohibit transfer of a property lawfully sold in the liquidation process by the liquidators, thereby nullifying the wishes of the body of

¹⁴ P10-3.

¹⁵ 1962 (4) SA 97 (T) 102D.

¹⁶ *Oertel and Others NNO v Director of Local Government and Others* 1981 (4) SA 491 (T). 508H.

creditors and render the *consensus creditorum* illusory, and the provisions of the Insolvency Act, sterile and ineffective.

[33] I have come to the conclusion that the liquidators are not bound by the restrictive conditions in the title deed. As a result the Association has not made out a case for an interdict. The court has a discretion to grant a declaration of rights. I am of the view that the Association has not succeeded to prove the right claimed.

[34] I accept that the question of consent was discussed at the meeting of 22 April 2022 over which Langenhoven presided. His failure to attach the minutes of that meeting to the replying affidavit is conspicuous. The probabilities point to him as the person who provided Cameron with that information. The whole issue of consent and the forced sale was discussed at this meeting where he himself pointed out that consent is not needed. This aspect was not denied in the replying affidavit. The application appears to be opportunistic and yet another attempt to prevent at all costs the transfer of the property.

[35] The resolution to institute the application was taken without the nominees from the home owners being present. There are in the region of 50 home owners who will have to make a contribution to the costs of this application without having being heard as a result. I do not consider it fair or in the interest of justice that they should subsidise the costs of the application. It is my *prima facie* view that the three trustees who made the decision should be given the opportunity to advance reasons why they should not pay the costs of the application. The question of costs, therefore, must stand over for argument.

ORDER.

- 1 The application is dismissed.
- 2 The question of costs is postponed to 10 June 2022 at 9h00 when CJ Langenhoven

S Matlala; and
- 3 Mrs Rinderknecht must advance reasons by means of affidavits why they should not be ordered to pay the costs of the application on the scale as between attorney and client, inclusive of the costs consequent upon the employment of two counsel.

GC MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARNCES

1. For the Applicant : Adv Morton
2. For the first Respondent : Adv Mohlabi
3. For the second : no appearance
4. For the third to sixth Respondent : Adv Scheepers SC
: Adv De Beer
5. For the seventh Respondent : Adv Pretorius