DEFAULTING PURCHASER SEEKS TO INTERDICT ON-SELLING

Fatmols Lodges Proprietary Ltd v Botha and Others (017800/2023) [2024] ZAGPJHC 30 (17 January 2024)

An anti-dissipation interdict is similar to an 'ordinary' interdict, but only to a certain extent. In a property law context, an application for such an interdict may be considered where a purchaser in a property sale agreement seeks to interdict the seller from dealing with the property because of the apprehension that the seller, who is leaving the country, might not return the deposit. Such an interdict will not be granted in the absence of proof of distinct facts, as this case illustrates. The summary below elucidates the requirements to succeed.

The Judgment can be viewed here

FACTS

During 2022, Ms Botha sold her property to Fatmols Lodges Proprietary Limited ('Fatmols'). At the time she was considering a move to Australia.

In January 2023, Fatmols paid a non-refundable deposit to Botha and thereafter made a further payment of R700 000 (apparently, as argued by Fatmols, by virtue of a supplementary oral agreement).

However, in the course of the transaction, it became apparent that Fatmols was not fulfilling its contractual obligations and failed to pay the balance of the purchase price timeously as required in terms of the agreement.

Botha's attorneys therefore sent a letter to Fatmols informing it of the breach and requiring it to remedy the breach, failing which the agreement would be cancelled. When Fatmols did not comply, a further letter followed giving it some more time, but still the breach was not rectified. Accordingly, at the end of March 2023, Botha cancelled the agreement.

Fatmols issued summons based on unjust enrichment ('the main matter') and thereafter brought the present application for an interdict prohibiting Botha from alienating or mortgaging the property.

The application for the interdict was based on the premise that it, Fatmols, will suffer irreparable harm if Botha does in fact sell the property and/or take up residence in Australia pending resolution of the main matter.

HELD

The nature of the interdict sought

- The requirements for an *interim interdict* are that there must be: (i) a *prima facie* right, even though it may be open to some doubt; (ii) a well-grounded apprehension of irreparable harm, if the interim relief is not granted and the ultimate relief is eventually granted; (iii) the balance of convenience for the granting of the interim relief favours the applicant; and that (iv) no other satisfactory remedy is available to the applicant.
- It was apparent, however, that what Fatmols sought in this application was an interim interdict *preserving Botha's asset* (the property) pending the finalisation of the main action. This is therefore, correctly identified, an application for an "anti-dissipation" interdict.
- The requirements that must be satisfied to obtain an anti-dissipation interdict are the same as for any other interim interdict, provided that there are some nuances, as this is a *sui generis* type of interdict (i.e., it has a unique nature).

- In this regard, previous judgments have explained that:
    - "The nature and effect of the anti-dissipation interdict is to establish or show a certain state of mind of the respondent, regarding his assets. The crucial consideration is that the debtor is in some way getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors. Accordingly, the anti-dissipation interdict is available to petitioners who seek to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in those assets. This is not a usual case where the purpose is to preserve an asset which is an issue between the parties. Here, the petitioners lay no claim to the assets in question."
    - Other courts have stated in addition, "that the remedy provided by an anti-dissipation interdict is available where an applicant has shown on the established basis for an interim interdict (a) a claim against the respondent; and (b) that the respondent is concealing or dissipating assets with the intent of frustrating the claim."
    - And also in such other cases: "The applicant's case is based on an anti-dissipation interdict, which would require her to show that the first respondent is likely to spirit away the proceeds from his sale of his property. In *Knox D'Arcy Ltd and Others v Jamieson and Others*, Grosskopf JA discussed the nature and effect of the so-called anti-dissipation interdict and found that what is required is for the applicant to show a certain state of mind of the respondent, ie that the debtor is getting rid of funds or is likely to do so, with the intension of defeating the claims of creditors. Grosskopf JA goes on to say that this interdict is sought-

        'By the petitioners … to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets … It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. Here, the petitioners lay no claim to the assets in question.'

      Grosskopf JA then turns to the effect of the interdict and finds that it is to "prevent the respondent from freely dealing with his own property to which the applicants lay no claim".
- These principles apply equally to the present matter. Fatmols' entire case is based upon an alleged oral agreement in terms of which some R800 000 was paid to Botha and by which the latter has been unjustly enriched. But no proof for these assertions has been provided to the Court. This apart, Fatmols also did not prove that Botha was getting rid of funds or is likely to do so with the intention of defeating the claims of creditors. It only alleged that Botha wished to sell the property and relocate to Australia, but provided no proof substantiating the allegation.
- Such broad allegations fall well short as to what is required to satisfy the requirement of an anti-dissipation interdict and those of an interim interdict in our law.

CONCLUSION

The application was dismissed.