

## *A POTENTIAL 'RIGHT TO ACQUIRE PROPERTY' AFTER MAKING A VALID OFFER, CAN BE PROTECTED BY WAY OF AN INTERDICT*

*Vumazonke and Another v Rheeder and Others (835/2024) [2024] ZAECELLC 35 (16 July 2024)*

*This judgment deals with a battle between two would-be property purchasers. The first offer was subject to a suspensive condition and also contained a 72-hour clause. It provided that, should the seller receive a second, unconditional offer before the suspensive condition in the first offer was met, the seller may accept that second offer unless the first offeror could make its offer unconditional within 72 hours. When the second, unconditional offer came in, the mechanisms of the 72-hour clause commenced. However, the first offeror stuck her heels in and advised the seller that her offer can be regarded as unconditional. This communication was not honest because the first offeror had, at the time, not yet received bond approval. The court granted an interim interdict in favour of the second offeror prohibiting transfer to the first offeror, stating that it had the right to protect its potential 'right to acquire property' flowing from the offer submitted. The judgment can be viewed [here](#).*

### FACTS

In March 2024, Rheeder engaged two estate agencies to market her property for sale. Palmer made an offer and this was accepted by Rheeder. The agreement was however made subject thereto that:

- Palmer secures a bond of R2,5 million from a financial institution;
- the remainder of the purchase price (R800 000,00) would come from the proceeds of the sale of Palmer's property ('the second property'); and
- should Rheeder receive an unconditional and acceptable offer for the purchase of the property prior the fulfilment of the suspensive conditions contained in the agreement with Palmer, Rheeder may give written notice to Palmer to waive the suspensive conditions within 72 hours, failing which the agreement with Palmer would fall away and Rheeder would be entitled to enter into a sale agreement with the subsequent offeror.

During the time that Palmer was attending to the suspensive conditions, Rheeder received an offer from Mr and Mrs Vumazonke ("the second offer"). This offer was made subject to a financial institution approving a loan of not less than R3,3 million in the Vumazonkes' favour. This condition was fulfilled on 16 April 2024 and the offer was therefore unconditional from that day onwards. The Vumazonkes presented this offer to Rheeder.

In possession of the unconditional offer, Rheeder gave written notice to Palmer on 18 April 2024 to waive the suspensive conditions contained in her offer, within 72 hours. Absent that waiver, Rheeder would be entitled to go ahead with the sale of the property to the Vumazonkes.

The 72-hour period was meant to expire at 12h00 on 19 April 2024. Before 12h00 on 19 April 2024, Palmer informed Rheeder that she was waiving all the suspensive conditions and that her offer was unconditional.

Subsequently it became apparent that at the time that Palmer waived the benefit of the suspensive condition, she had not received bond approval (although Palmer and the bank were in the final stages of negotiating the conditions for the granting of a mortgage loan).

When this state of affairs became known to the Vumazonkes they approached the court for assistance – amongst

other things, for an interim interdict to stop transfer to Palmer - alleging that Palmer was dishonest when she communicated the waiver because she knew as she was communicating the waiver that she did not have the full purchase price for the property.

The issue was not whether Palmer waived the suspensive conditions, but rather whether the waiver she communicated to Rheeder was honest and therefore not intended to mislead and to defeat the Vumazonkes' agreement of sale with Rheeder. This in view of the correspondence that shows that beyond 12h00 on 19 April 2024 there were ongoing engagements on the issue concerning the grant to her of a bond in the amount of R3,3 million.

The Vumazonkes argued further that they sought to protect their right to acquire property and hence sought, amongst other things, an order interdicting Rheeder from transferring the property to Palmer. They argued that their right to acquire property is a subset of the right in section 25(1) of the Constitution, 1996 - the right not to be arbitrarily deprived of property.

### HELD

- The requisites to claim an interim interdict are well established. They are: (i)
  - a) a prima facie right;
  - b) a well-grounded apprehension of harm if the interim relief is not granted and the ultimate relief is eventually granted;
  - c) absence of an alternative satisfactory remedy; and
  - d) the balance of convenience favours the grant of the interim interdict.
- Courts do not consider these requirements separately, but in conjunction with one another, so as to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought. Since the application (at present) is merely interlocutory and the effect of granting thereof only temporary and not finally decisive of either party's rights, the courts grant interim interdicts upon a degree of proof less exacting than that required for a final interdict. The right to be set up by an applicant for a temporary interdict must be prima facie established though open to some doubt.
- The prima facie right a claimant is required to establish is a right to which, if not protected by an interdict, irreparable harm would ensue. The stronger the prospects of success for the applicant, the less the need for the balance of convenience to favour him; the weaker the prospects of success, the greater the need for the balance of convenience to favour him.
- Have the Vumazonkes shown the existence of a prima facie right, even if open to some doubt? They have. That the right to acquire and dispose of property is protected in terms of s 25 of the Constitution was considered in *Ex Parte Chairperson of the Constitutional Assembly*, where it was stated that "[s]everal recognised democracies provide no express protection of property in their constitutions or bills of rights. For the remainder, a wide variety of formulations of the right to property exists. Some constitutions formulate the right to property simply in a negative way, restraining state interference with property rights. Other constitutions express the right in a positive way, entrenching the right to acquire and dispose of property. A further formulation frequently used is to state that "private property is inviolable" subject to expropriation in certain circumstances. This survey suggests that no universally recognised formulation of the right to property exists...we cannot uphold the argument that, because the formulation adopted is expressed in a negative and not a positive form and because it does not contain an express recognition of the right to acquire and dispose of property, it fails to meet the prescription..."
- This being the case, the right sought to be protected is a clear right. It vests on everyone. It is impossible to see how the Vumazonkes are excluded from the operation of the protections that are accorded to everyone

in section 25 of the Constitution. There are implications for this insofar as the Vumazonkes are required to show that they apprehend irreparable harm if the interdict is not granted. Having established a clear right - as distinct from a prima facie right open to some doubt - their apprehension of irreparable harm need not be established.

- In determining where the balance of convenience lies, the Court has to weigh the prejudice to the Vumazonkes if the interim interdict is not granted against the prejudice to Palmer if it is. The stronger the prospects of success, the less the need for the balance of convenience to favour an applicant, the weaker the prospects of success, the greater the need for the balance of convenience to favour him. In this regard, there can be no harm to Palmer if the interdict is granted.
- To the Vumazonkes, if the interdict is not granted, they will lose the opportunity to purchase the property in issue. It follows that they do not have an alternative remedy.

### CONCLUSION

On the facts, the case made out by the Vumazonkes appear solid and accordingly, the interim interdict was granted in their favour.

