REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 34695/2014

In the matter between:

LINKSFIELD NURSERY CC	First Applicant
EBENHAESER DE VILLIERS	Second Applicant
And	
AMANDA WICKSTROM	First Respondent
JAMES ANTHONY WICKSTROM	Second Respondent
SASHA WICKSTROM	Third Respondent
NICHOLIS WICKSTROM	Fourth Respondent
BASFOUR 3472 (PTY) LTD	Fifth Respondent
THINUS LABUSCHAGNE	Sixth Respondent

J U D G M E N T
MAKUME, J:

[1] In this matter the Applicants seek a final interdict against the Respondents interdicting them from demolishing any structure and/or removing any items fixed or unfixed on property described as Portion 1 situate at Rietfontein 61 IR (the property) and other ancillary relief. The Respondents are opposing the granting of the final order.

[2] This matter served before me in the Urgent Court on Friday the 19th September 2014. On that occasion only the Sixth Respondent entered appearance to oppose the application and filed a very brief affidavit in which he disassociated himself from the alleged actions complained of in the Applicants' founding affidavit. The Sixth

Respondent said that he was only a legal advisor and consultant of the Respondents. The Sixth Respondent requested that the application against him be dismissed with costs.

[3] Applicants' counsel did not at that stage ask that Applicants be given an opportunity to consider the Sixth Respondent's answering affidavit. In the absence of any contrary evidence I granted the Sixth Respondent's request and dismissed the application against the Sixth Respondent with costs.

[4] Shortly after granting the rule *nisi* the Applicant filed an extensive supplementary affidavit in which he dealt with the Sixth Respondent's involvement in the business affairs of the First, Second and Fifth Respondents. The affidavit clearly placed the Sixth Respondent at the centre of the happenings of the 17th and the 18th September 2014. Despite the application having been dismissed against him the Sixth Respondent filed a further answering affidavit which did not take the matter any further.

[5] It is my well-considered view that I should not have dealt with the Sixth Respondent's matter in isolation and without having granted the Applicants an opportunity to reply thereto. I do not have the power to *mero motu* join the Sixth Respondent in this application. My order still stands until set aside.

[6] The rule *nisi* was extended several times to afford the Respondents an opportunity to file their answering affidavit. The Second Respondent eventually filed an answering affidavit on behalf of himself and the other remaining Respondents. The Applicants subsequently delivered their reply and the matter was set down for hearing in the normal motion court roll. I must mention that I had already found on the 19th September 2014 that the matter was urgent.

BACKGROUND FACTS

[7] The facts giving rise to this application and which have a bearing on the question to be decided are largely not in dispute. I will narrate them as closely as possible as they emerge from the papers before me.

[8] The Second Applicant is the sole member of the First Applicant. He is duly authorised to depose to this affidavit on behalf of the First Applicant.

[9] On the 26th day of June 2001 and at Johannesburg the First Applicant entered into a lease agreement with the Gauteng Provincial Government in terms of which the

Provincial Government leased to the First Applicant Portion 1 situate at Rietfontein 61 IR (the property). The property was to be used by the First Applicant for purposes of conducting the business of a nursery. It was a further term of the agreement that it was to run from the 31st January 2002 until the 31st December 2004 whereafter it would continue and remain valid on a monthly basis. The Applicants are as at date hereof still in occupation of the property by virtue of that lease agreement.

[10] During the latter part of 2001 into 2002 Second Applicant and the Second Respondent entered into a verbal agreement whereby they established an entity known as Linksfield Nursery and Home Improvements CC as a partnership. The precise terms and purpose of that partnership are in dispute. The Second Applicant says the purpose was to run a nursery business in accordance with clause 5 of the lease agreement with the Provincial Government. The Second Respondent James Wickstrom says that the partnership agreement entailed that he could of his own

improve the leased property with the consent of the lessor for this purpose he had plans drawn up to erect a coffee shop, a florist as well as other buildings.

[11] It is common cause that after some time the partnership was dissolved when the Second Applicant resigned from the entity that had been set up to conduct the partnership business. The Second Respondent it would seem continued to conduct business for his own account as a coffee shop and florist from the same property. In other words the First Applicant conducted a nursery business on the property for which he had a lease agreement whilst the Second and First Respondents conducted business of a coffee shop and florist on the property without a lease agreement. The Second Respondent had out of his own funds erected structures from which he conducted his business. He says he did get the approval of the lessor to do the improvements.

[12] The Applicant alleges that they continued their businesses in this fashion until during the year 2008, when Second Respondent walked out of the property and relinquished all his rights and obligations in the partnership. Applicant says this was at the time when First and Second Respondents were engaged in divorce proceedings. He says further that in the year 2010 the coffee shop and florist were closed. He does not know why.

[13] The Second Respondent whilst admitting that he closed the coffee shop in the year 2010 says the reason was that the Second Applicant reneged on an earlier verbal agreement to sell to him the nursery business.

He says that thereafter their relationship soured in that the Second Applicant started to undermine his business by interfering with his customers. He would for instance lock the gates leading into the property whilst the Respondents' customers were still

on the premises. He concludes by saying that after numerous fights he was forced to leave the business.

[14] It is further common cause that during the year 2008 the Fifth Respondent whose sole director is the Second Respondent concluded an agreement of sale with the Gauteng Provincial Government in terms of which the Provincial Government sold to the Fifth Respondent the property which in the deed of sale is described as Portion 1 of the Farm Rietfontein 61 IR (Extension 1) held by virtue of Title Deed No 7/1998.

[15] It is not in dispute that the property that was being sold by the Provincial Government to the Fifth Respondent is the same property on which the First Applicant had a lease agreement which was still running albeit on a monthly basis.

[16] The salient terms of the deed of sale are the following:

"(3) <u>PURCHASE PRICE</u>

The Purchase Price for the property is the amount of R18 700 000,00 (Eighteen Million Seven Hundred Thousand Rand) excluding Value Added Tax.

(4) <u>TERMS OF PAYMENT</u>

The Purchase Price shall be payable as set out hereunder into the undermentioned bank account namely:

ABSA BANK ACCOUNT NAME:
ACCOUNT NUMBER: 40……
BRANCH: G……
BRANCH CODE: 63……

(9) SUSPENSIVE CONDITIONS

This agreement is subject to the following suspensive conditions and in the event of the failure of any of these conditions this agreement shall be of no force and effect:

9.1 The Purchaser shall furnish to the Seller a bank guarantee in respect of the sum of R21 318 000,00 (Twenty One Million Three Hundred and Eighteen Thousand Rand) within 180 (One Hundred and Eighty) days of signature of this deed of sale expressed to be payable on the date of transfer of the property into the name of the Purchaser.

9.2 The signature by the Seller to the Resolution marked "B" hereto and

9.3 The division of the land in respect of Portion 1 of the farm Rietfontein IR as referred to in the Resolution annexed hereto marked B and referred to in paragraph 10.2 above.

(10) BREACH

In the event of the Purchaser committing any breach of any of the provisions of this agreement and failing to remedy same within 14 (Fourteen) days of having been given written notice calling upon the Purchaser to do so, the Seller shall be entitled; without prejudice to any other rights which it may have at law and/or in terms hereof to:

10.1 Cancel this agreement and claim from the Purchaser such damages as the Seller may have sustained and pending the determination of such damages (whether by agreement and/or by a court of law) to retain on account thereof all monies paid by the Purchaser on account of the purchase price or

10.2 Claim immediate payment of the whole of the purchase price and costs and fulfilment of all the terms and conditions hereof whether or not the due date for performance shall otherwise have arrived

[17] The present status of the property is that it is still owned by the Provincial Government. The purported sale as pleaded by the Second Respondent became a nullity when Fifth Respondent failed to pay the purchase price. This evidence that the property is still owned by the Provincial Government was confirmed by the MEC of the Department of Infrastructure Development on the 19th September 2014.

[18] The Second and Fifth Respondents have been disingenuous and not frank with the truth. Second Respondent went about in circles in trying to explain why transfer of the property had not taken place even going as far as blaming it on the maladministration within the Provincial Government. However at no stage and nowhere in his affidavit does the Second Respondent tell the court that the purchase

price was paid into the "*suspect* banking account mentioned in the deed of sale. As I see it the version of the Respondents did not even attempt to answer the central case made by the Applicants but they sought to envelope this whole matter in a fog which distorts the truth.

[19] In my view the above facts set the matrix for the consideration of the issue which is dispositive of the present application, that issue is appropriately captured in the Applicants' heads in the following words:

" *The Applicant maintains that the Respondents do not have any rights to engage in any building activities or operations at the nursery or even be on the property. The Applicant submits that there is a valid lease agreement in effect that precludes the Respondents from having any right to the property. The First to Fifth Respondents appear to argue that they have a right to the property by virtue of an agreement of sale entered into between Basfour and the Gauteng Provincial Government. Our submission is that the Respondents have failed to show any real or personal rights to the property*."

CLEAR RIGHT OF THE APPLICANTS

[20] The first requisite to be established by the Applicants in order to succeed in being granted a final order is a clear right.

[21] The Respondents admit that the Applicants entered into a lease agreement with the Gauteng Provincial Government which ran from the 31st January 2002 until the 31st December 2004. The Respondents' case is that the lease agreement terminated in December 2007 alternatively that it came to an end on the 28th April 2013 in accordance with the notice of termination addressed to the Applicants by the Gauteng Provincial Government dated the 28th February 2013.

[22] It is so that notwithstanding the said letter the Applicants remained in occupation of the property beyond the 28th April 2013 and is still in occupation. The Applicants remain monthly lessees in accordance with clause 1 of the lease agreement dated 26 June 2001. There is nothing in the papers before me to suggest that the lease agreement ceased to exist.

[23] The Respondent has failed to prove a better right over the property than the

Applicants. It is only the Applicants who have a right to occupation of the property in terms of an existing monthly lease.

AN INJURY ACTUALLY COMMITTED OR IS REASONABLY APPREHENDED

[24] It is trite law that in order to succeed with an application for a final interdict an injury actually committed or reasonably apprehended must be proved

[25] The evidence in this matter reveals that the First and Second Respondents vacated the property in the year 2010 leaving the Applicants to continue running the nursery business. They returned in September 2014 to commence demolishing of structures built on the property. The Applicants say that the action of the Respondents is preventing his customers from accessing the nursery as there are broken paving stones in the driveway as a result he is losing business every moment that customers fail to access the nursing premises.

[26] The Respondents' defence is that what he is breaking belongs to him is legally not correct for in terms of the law such fixtures have now accrued to the owner of the land being the Gauteng Provincial Government. His Lordship Howie P writing for the majority in the matter of *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at page 258 paragraph [23] says the following:

"*[23] In the present case therefore the threatened invasion of the first appellant's rights under the lease constituted proof of reasonably apprehended injury. It was not necessary for the appellant's success to show that the Helicopter was unairworthy or what the chances were of a fatal or destructive crash."*

NO OTHER ALTERNATIVE REMEDY

[27] The Respondents chose not to deal with this requirement and rested their case on the first and second requirements of a final interdict. The alternative remedy must:

(a) be adequate in the circumstances;

(b) be ordinary and reasonable;

(c) be a legal remedy;

(d) grant similar protection.

[28] In general an applicant will not obtain an interdict if he can obtain adequate redress through an award of damages. Evidence is that the First Respondent is an insolvent. The Second Respondent was at the time acting as a Director of the Fifth Respondent a deregistered company. It is clear that to wait to prove damages against the Respondents will involve complex and worn out proceedings whilst in the meantime the injury will be perpetuating.

[29] I am satisfied that the Applicants have succeeded in proving the third requirement for a final interdict against First to Fifth Respondents subject to what I have earlier alluded to in respect of the Sixth Respondent. I accordingly make the following final order:

(a) The First, Second, Third, Fourth and Fifth Respondents or any person in their employment or contracted by them are interdicted from demolishing any structure and/or removing any items fixed or unfixed on the property described as Portion 1 situate at Rietfontein 61 IR (the property).

(b) The Respondents are ordered to repair or to bear the fair and reasonable costs of fixing or restoring damage done on the property.

(c) The Respondents are ordered to return all items unlawfully removed by them or their employees from the property, by them.

(d) The Second to Fifth Respondents are ordered to pay the costs of the application on a party and party scale.

DATED at JOHANNESBURG on this the 8th day of JULY 2015.

M A MAKUME

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING 13th April 2015

DATE OF JUDGMENT 8th July 2015

FOR THE APPLICANTS ADV P A WAYBURNE

INSTRUCTED BY LARRY MARKS ATTORNEYS

SCS House, No 77 - 5th Avenue Alberton

Tel: (087) 351 6532

Ref: Mr L Marks/OLM/D128

FOR THE RESPONDENTS ADV S VAN ASWEGEN

INSTRUCTED BY T SMIT ATTORNEYS

Boksburg