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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

**CASE NUMBER: 2022/20584
NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED
04.07.23**

CESLEY OLIVIER	First Applicant
MARIUS NICOLAS OLIVIER	Second Applicant
and	
STANLEY BLESSING MANZINI	First Respondent
NOLUTHANDO BEAUTY MANZINI	Second Respondent
GARY ROSS ATTORNEYS INCORPORATED	Third Respondent
THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	Fourth Respondent

JUDGMENT

WANLESS AJ

Introduction

- [1] This application and Claim - in - Reconvension ("*counter-application*") was heard by this Court as a Special Motion on the 5th of June 2023. It involves the purchase of a SPACING residential property situated at[...], Gauteng ("the property") by one CESLEY OLIVIER, an adult female ("*the First Applicant*") and MARIUS NICOLAS OLIVIER, an adult male ("the Second Applicant") from one STANLEY BLESSING MANZINI, an adult male ("*the First Respondent*") and NOLUTHANDO BEAUTY MANZINI, an adult female ("*the Second Respondent*"). For the sake of convenience and unless it is necessary to specifically refer to any of the foregoing persons in the singular the First and Second Applicants will be referred to jointly as "the Applicants" and the First and Second Respondents will be referred to jointly as "the Respondents" throughout the remainder of this judgment.
- [2] On the 2nd of July 2021 the Applicants and the Respondents entered into a written agreement of sale and purchase in respect of the property ("*the agreement*"). In terms of the agreement GARRY ROSS ATTORNEYS INCORPORATED ("*the Third Respondent*") was appointed as the transferring attorney to transfer the property from the name of the Respondents into the name of the Applicants. THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY is cited herein as the Fourth Respondent. ("*the Fourth Respondent*"). Whilst certain relief is sought by the Applicants against the Third and Fourth Respondents in the application, neither of these Respondents has opposed the application or filed any affidavits herein.
- [3] It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down thereof. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be "converted", or more correctly "transformed", into a written judgment and provided to the parties. In this manner, neither the quality of the judgment nor the time in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the delivery thereof on an *ex tempore* basis.

The relief sought by the parties

- [4] The relief sought by the parties in any matter is clearly fundamental to the approach adopted by the Court hearing that matter. This is particularly so in this case having regard to, *inter alia*, the nature of the relief sought in the Applicants' Notice of Motion;

that sought by the Respondents in response thereto in their counter-application and the decision finally reached by this Court.

The relief sought by the Applicants

[5] In terms of clause 10.2 of the agreement and in law the Applicants seek to claim specific performance of certain terms of the agreement and claim damages in terms thereof.

[6] The Applicants' Notice of Motion reads as follows:

- "1. The First and Second Respondents are ordered to obtain the services of a suitably qualified electrician to carry out electrical repairs at Portion 4 of Erf [...], Eastleigh, Township ("the property") within five (5) days of the date of this order and to produce a valid electrical compliance certificate within 14 days thereafter, subject to the approval of same by the Electrical Approved Inspection Authority ("EAIA").
2. In the event that, the First and Second Respondents do not comply with the relief in order 1 above, within 5 days, the Third Respondent is ordered to make payment to the Applicants of an amount of R135,900.00 from the monies held in trust by the Third Respondent (in *lieu* of the purchase of the property) in order for the Applicants to attend to the necessary repairs in order to obtain a valid electrical compliance certificate.
3. The First and Second Respondents shall within 5 days of the date of this order, apply to the Fourth Respondent for a valid clearance certificate and make payment of any amounts due in respect of such clearance certificate, within a period of 14 days thereafter, in order for same to be issued by the Fourth Respondent.
4. In the event of the First and Second Respondents failing to comply with the relief sought in order 3 above, within 5 days, the Third Respondent is hereby ordered to apply for clearance figures and to make payment to the Fourth Respondent of all sums due to obtain clearance in terms of Section 118 of the Municipal Systems Act 32 of 2000, from monies held by the Third Respondent in trust (and from the First and Second

Respondents' proceeds of sale), in order to process the registration of the transfer of ownership in and to the property, to the Applicants.

5. Upon registration of transfer of the property into the names of the Applicants, the Third Respondent shall make payment of all penalty interest calculated in terms of Annexure "X" attached to this notice of motion, which penalty interest as at the end of June 2022 amounts to R254,064.18, by deducting the penalty interest amount from the proceeds of sale due to the First and Second Respondents.
6. Upon registration of transfer of the property into the names of the Applicants, the Third Respondent shall make payment of an amount of R723 015,02 to the Applicants, in order for the Applicants to remediate the property's non-compliance with Section 14 of the National Building Regulations and Building Standards Act No. 103 of 1997, by deducting the amount of R723 015,02 from the proceeds of sale due to the First and Second Respondents.
7. In the alternative to order 6, it is ordered that the amount of R723 015,02 be retained in trust by the Third Respondent (and duly invested in an interest-bearing account), pending the final outcome of the proceedings herein contemplated (it was conceded by Adv Franck who appeared on behalf of the Applicants that this sentence which is underlined should be deleted from the Applicants Notice of Motion), alternatively, an action to be instituted by the Applicants against the First and Second Respondents within 30 days of the date of this order.
8. Upon registration of transfer of the property into the names of the Applicants, the Third Respondent shall retain an amount of R115 453,20 in trust (duly invested in an interest-bearing account) pending the final determination of an action to be instituted against the First and Second Respondents, in respect of the latent defects present at the property by deducting the amount of R115 453,20 from the proceeds of sale due to the First and Second Respondents.
9. The Fourth Respondent shall file answering papers to declare, whether the First and Second Respondents have complied with Section 14 of the National Building Regulations and Building Standards Act No. 103 of 1997.

10. In the alternative to order 9 above, should the Fourth Respondent fail to file answering papers, timeously or at all, the Fourth Respondent is ordered to disclose the contents of its municipal/building files relating to the property, to the Applicants and to provide the Applicants with copies of the contents of any and all documentation in its possession or under its control relating to the property, and the Applicants are given leave to supplement their affidavit, if necessary.
11. The First and Second Respondents shall pay the costs of this application jointly and severally, the one paying the other to be absolved on the scale as between attorney and own client. The Plaintiff will only seek costs against the Third and Fourth Respondents (jointly and severally together with the First and Second Respondents, the one paying the other to be absolved) in the event of opposition to the application.
12. Further and/or alternative relief.”

[7] From the foregoing, it is immediately apparent that the said relief is probably best described as a “*hybrid*” of mandatory interdicts and damages claims together with the inevitable costs award on the highest punitive scale. What is interesting are the referrals to trial; the recognition of potential disputes of fact and the anti-dissipation interdicts included therein.

The relief sought by the Respondents

[8] In the Respondents’ counter-application the Respondents seek an order declaring that the Applicants’ have repudiated the agreement, together with further orders that the agreement is cancelled and that the Applicants are to vacate the property with 60 days of the order of this Court. Here too a punitive order for costs is sought by the Respondents against the Applicants.

Opposition and disputes of Fact

[9] In very broad summary:

- 9.1 The Respondents oppose the relief sought by the Applicants on the existence of a voetstoets clause in the agreement;

- 9.2 It is also averred by the Respondents that in respect of the various damages claims these are mostly quotations and not proven damages;
- 9.3 The Respondents also raise the fact that the Applicants have failed to discharge the onus incumbent upon them to prove fraud on their (the Respondents') behalf (which is a difficult onus to discharge) in order to avoid the voetstoots clause;
- 9.4 The Respondents also aver there are many factual disputes on the papers, not only in respect of damages claims but in respect of the anti-dissipation interdicts sought; what defects, if proved to be defects, are latent or patent and which are covered by the voetstoots clause and which are not;
- 9.5 The Applicants aver that apart from various points *in limine* (in respect of the eviction order sought and lack of notice in terms of the Alienation of Land Act) the Respondents have not proven repudiation of the agreement by them in that any failure to transfer the property into their name is solely due to the actions of the Respondents (as set out in the Applicants' application) and not due to any actions on their behalf.

[10] On behalf of the Applicants, Adv. Franck did an admirable job in taking this Court through the application papers in an attempt not only to convince this Court that there was no actual or *bona fide* dispute of fact but also that the Applicants were entitled to the relief sought and that, as a corollary thereof, the Respondents' counter-application should be dismissed. On behalf of the Respondents, it was submitted that, as a result of, *inter alia*, the material disputes of fact on the application papers and the election of the Applicants to proceed by way of motion proceedings (a process designed for common cause facts) the application should be dismissed. However, the Respondents nevertheless persisted to seek the relief as set out in their counter-application. Importantly, neither party asked specifically, at any stage of the proceedings, that the matter be referred for the hearing of oral evidence, either in respect of certain issues or to trial.

The Law

[11] Most regrettably for both the parties and this Court, as noted by the learned authors in *Erasmus: Superior Court Practice* (“*Erasmus*”)¹:

*“The question whether the Court has the power to order a reference to trial mero motu has been described as “one” not free form difficulty by the Supreme Court of Appeal and has not yet been decided by that Court.”*²

[12] That said, it must be well-known to the legal representatives of both the Applicants and the Respondents in the present matter that Courts, as a matter of practice, often refer matters to trial when needed and where the parties do not specifically request such a referral. Moreover, it has been held that in certain circumstances (and exceptional cases) the Court may decide that a matter should be referred to oral evidence even where no application for such referral had been made.³ Also, as noted in *Ntsala*,⁴ as long ago as 1949, in the locus classicus of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,⁵ it was held that it is undesirable to attempt to settle disputes of facts solely on probabilities disclosed in contradictory affidavits as opposed to viva voce evidence. See also *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paragraphs [26] and [27]

[13] In the matter of *Pahad Shipping CC v the Commissioner for the South African Revenue Service* 2009 JDR 1322 (SCA) at paragraph [20] the Supreme Court of Appeal (“the SCA”) held the following; -

“[20] However, it has been held in a number of cases that an application to refer a matter to evidence should be made at the outset and not after argument on the merits (see Kalili versus Decotex (Pty) Ltd and another 1988 (1) SA 943 (A) at 981 D-F). As was stated by Corbett JA in Kalili at 981 E-F the rule is a salutary general rule. Unnecessary costs and delay can be avoided by following the general rule. But Corbett JA also stated that the rule is not inflexible. In Du Plessis and another NNO versus Rolfes Ltd 1997 (2) SA 354 (A) at 366 G-367A this court dealt with an application which was made for the first-time during argument in this court. The application was dismissed but it is

¹ At D1-80.

² See the cases at *Erasmus*, footnote 2 (D1-80).

³ *Ntsala v Rustenburg Local Municipality and Another* (North West Provincial Division, Mahikeng), case number M124/20 at paragraph [12].

⁴ *Ntsala* at paragraph [13].

⁵ *Room Hire Co (Pty) Ltd versus Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162.

implicit in the judgment that, in appropriate circumstances, this Court may decide that a matter should be referred to evidence even where no application for such referral had been made in the court below. It would naturally be in exceptional cases only that a court will depart from the general rule (Bocimar NV versus Kotor Overseas Shipping Ltd 1994 (2) SA 563 (A) at 587 C-D). In my view this is such a case."

- [14] Also, in the case of *Tryzone Fourteen (Pty) Ltd versus Batchelor N.O. and Others 2016 JDR 0531 (ECP)* at paragraphs [38] and [39] the court held:

"[38] Dismissing the application instead of referring it to oral evidence shall not be a solution. That shall necessitate the applicant perusing action proceedings. In terms of Rule 6(5)(g) of the Uniform Rules, a court has a wide discretion with regard to referring matters to oral evidence where application proceeds cannot be properly decided by way of affidavit. An application to refer a matter to evidence should be made at the outset and not after argument on the merits. However, in certain circumstances (and exceptional cases), the court may decide that a matter should be referred to oral evidence even when no application for such referral had been made in the court below."

The court then cited the matter of *Pahad* (supra).

"[39] I am satisfied that this is an appropriate case for this Court to refer the matter for hearing. The dispute is massive and insurmountable to be resolved on the papers. The dispute of facts goes to the heart of the issues between the parties. I am further of the view that the applicant has not established the allegations of fraud on the papers the matter should be referred to oral evidence."

- [15] These matters are useful in respect of the present matter since obviously in the present matter no application was made, as set out earlier in this judgment, to refer the matter to oral evidence. But more so, as decided in the matter of *Tryzone* and as will be dealt with later in this judgment, it is, in the opinion of this Court, that the disputes of fact in the present matter are insurmountable and numerous. Furthermore, the reference to the allegation of fraud in the matter of *Tryzone* is particular appropriate with regard to the present matter and the opposition of the Applicants to the voetstoots clause as raised by the Respondents.

- [16] Finally, it is fairly trite that subrule 6(5)(g) gives a Court a fairly wide discretion to refer a matter, where there is a dispute of fact, to either oral evidence or trial, depending on the nature of that dispute.

Conclusion

- [17] Having carefully considered all of the well-prepared arguments placed before this Court by both Counsel; the application papers before this Court and the legal principles in respect of all of the issues involved, it is the opinion of this Court that there are numerous material disputes of fact which have arisen in respect of both the application and counter-application in the present matter. As set out earlier in this judgment these disputes of fact are fundamentally linked to the nature of the relief sought. Furthermore, whilst they may not, at first, be strikingly apparent, they become more so when one realises that, once again by virtue of, *inter alia*, the nature of the relief sought, one dispute of fact is often related to another. Just one example of this is the following. The alleged failure or the Respondents to comply with the obligation to provide the relevant electrical compliance certificate is related to the claim for damages in respect of the penalty clause which, in turn, is related to the basis for the Respondents' counter-application, namely the repudiation of the agreement. This, of course, is putting aside, for present purposes, the precise nature of the relief sought in paragraph 1 of the Applicants' Notice of Motion.
- [18] The alternative to referring this matter to oral evidence or trial would be to dismiss both the application and counter-application and to order each party to pay their own costs. This would not, in the opinion of this Court, be in the best interests of either of the parties. It would certainly not be in the interests of justice. In the opinion of this Court the present matter is an "exceptional one" as envisaged by the authorities referred to earlier in this judgment and which justifies this Court making an appropriate order in terms of subrule 6(5)(g).
- [19] At this stage, it is appropriate to set out the provisions of that subrule. Subrule 6(5)(g) states that:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without effecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such

deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[20] It is clear that the issues in the present matter are far too numerous to warrant a referral to oral evidence on specific issues. In the premises, this matter must be referred to trial. With regard thereto, this Court is acutely aware that the parties have, regrettably, gone to considerable expense in the preparation of extensive affidavits in the matter. Normally, it is desirable to include the affidavits as part of the pleadings. In this particular matter, due, *inter alia*, to the volume and nature of the relief sought, this is not really possible. This Court is also well aware that the parties will probably have the need, *inter alia*, to call expert evidence. Having regard to all of the foregoing, it is the opinion of this Court that the order that this Court should make should be left as wide as possible. The affidavits will, of course, remain as part of the evidence to be used, where applicable, at the trial.

[21] With regard to the issue of costs, it is of course trite that costs fall within the general discretion of the Court. In this particular matter, whilst costs normally follow the result there has been no victor and it would be appropriate that the costs of this matter be reserved for decision of the court finally determining the trial. That court will be in a far better position at the end of that trial to make a decision as to who should ultimately pay the costs.

Order

[22] This Court makes the following order:

1. The application and counter-application under case number: 2022/20584 are referred to trial in terms of subrule 6(5)(g);
2. The First and Second Applicants are to serve and file their Particulars of Claim within thirty (30) days of this order;
3. Thereafter, the Uniform Rules of Court will apply to the action under case number: 2022/20584;
4. The costs of the application and counter-application under case number: 2022/20584 are reserved for the decision of the court determining the action under case number: 2022/20584.

B.C. WANLESS

Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 05 June 2023
Ex Tempore: 15 June 2023
Transcript: 04 July 2023

Appearances:

For Applicants: L Franck
Instructed by: Cherry Singh Inc.

For First and Second Respondent: N Sikhwivhilu
Instructed by: Sithia & Thabela Attorneys