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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D5105/2020

In the matter between:

JANE STUCKY (nee TALJAARD) **APPLICANT**

and

BRECHOOST CC
(Registration no. 2007/217839/23) **FIRST RESPONDENT**

JACOBUS FREDERICK IMPI BRECHER **SECOND RESPONDENT**

ORDER

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1. The application for condonation for the late filing of the applicant's replying affidavit and heads of argument, are granted;
2. Applicant is to pay the respondents' costs of opposition to the late filing of the replying affidavit;
3. The main application is dismissed with costs.

JUDGMENT

Chetty J

[1] This is an opposed application in which the applicant seeks the following relief: 'That the second respondent (Mr Impi Brecher) be compelled to sign the Offer of Purchase in respect of Portion […] of the Farm Pongola, Number […], Registration Division HU, KwaZulu-Natal, for and on behalf of the first respondent;

That the respondents co-operate and do all that is necessary to pass transfer of ownership of the abovementioned property to the Applicant.'

[2] The applicant is a town planner by profession who formed a business and personal relationship with the respondents. The first respondent is the registered owner of the immovable property that forms the subject matter of this application ('the property'). The applicant contends that she has concluded a valid agreement for the sale of the property. The issue to be determined is whether an oral agreement between the parties in May 2012, followed by a written offer signed only by the applicant in 2018, read conjunctively or cumulatively with a resolution by the members of the first respondent in 2018 directing the second respondent to sign all documents necessary to effect transfer the property, can in the face of opposition by the respondents that they agreed to sell the property to the applicant, constitute a valid and binding deed of alienation for the purposes of section 2(1) of the Alienation of Land Act 68 of 1981 ('the Act').

[3] A preliminary issue which arose was the determination of an application for condonation for the late filing of the applicant's replying affidavit, which was filed some 53 days out of time and the applicant's heads of argument which were filed two days late. Mr *Schaup*, for the respondents, took no issue with the late filing of the heads. However, he submitted that the explanation for the lateness was incomplete, sparse and did not satisfy the requirements set out in *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) 292 (SCA). Mr *Mullins*, who appeared for the applicant, conceded that the application for condonation could have gone further to deal with the complete timeframe and a detailed account of the delay, which is what the court in *Uitenhage* set as a standard. It is trite that an applicant seeking condonation is required to set out the full circumstances explaining the causes for the delay in order that the court may assess whether blame is to be attached to the applicant, his or her attorney, or some other party. It is equally well established that condonation is not to be had for the mere asking and our courts, in the exercise of their discretion, must determine whether good cause has been established for non-compliance with the rules.

[4] In attempting to meet this test the applicant explained that in light of the various annexures to the respondents' answering affidavit, she was required to undertake investigations to obtain copies of bank statements to counter some of the allegations made by the respondents. The delay was largely occasioned by the slow response from the bank, which had been operating with minimal staff due to the restrictions imposed by the onset of the Covid-19 pandemic. Strictly construed, the application for condonation contains a number of generalised averments without any attempt to explain the delay in terms of a timeframe, when the bank statements became available and why the affidavit could not have been filed sooner. On this basis it was submitted that the application for condonation should be dismissed and the replying affidavit should be struck out.

[5] It is unfortunate that much of the annexures which the applicant sought to reply to in her replying affidavit, in my view, are largely irrelevant to the issue to be determined by this court. She, however, was compelled to locate bank statements in order to rebut the allegations of the respondents. It is evident that the parties who once enjoyed a close relationship are now at loggerheads with each other, and that much of what is contained in the annexures put up by the respondents were intended as a character assassination in order to dent the credibility of the applicant as a litigant. For that reason alone, I am not inclined to strike out the replying affidavit. However, non-compliance with the rules by the applicant cannot simply be glossed over. Litigants are obliged to comply with the rules, unless good cause to indicate otherwise has been shown.

[6] The proper order to be made in the circumstances is that condonation is granted for the late filing of the applicant's replying affidavit. The applicant is however ordered to pay the cost of opposition thereto.

[7] Turning to the facts of the matter as set out in the founding affidavit, the applicant contends that an oral agreement was struck between herself, her late husband and the first respondent, who was represented at all times by the second respondent, for the purchase and consolidation of certain immovable property owned by the first respondent. In support of this oral agreement the applicant refers to a rather brief email dated 10 May 2012 addressed to one Jackie Oosthuizen. It is not clear

from the papers who the recipient is. The email refers to the cost of consolidating certain erven, supposedly including the farm which is the subject matter of this application, which I gather only by reference to the consolidation of the erven as '664 and 665'. The remainder of the email pertains to the cost of submission of plans to the surveyor general's office. This constitutes the full extent of the factual matrix pertaining to the oral agreement.

[8] The next significant development occurred in August 2018 when the applicant 'made an offer to purchase' the property for the amount of R50 000. The offer to purchase was made 'pursuant to [the] oral agreement' concluded between the applicant, her late husband and the first respondent in May 2012. According to the applicant, following the conclusion of the offer to purchase *,* various layout plans were drawn and submitted to the local authority for subdivision and consolidation. The applicant was tasked with attending to these matters on behalf of the first respondent.

[9] The purpose of this application, as submitted by Mr *Mullins*, is to compel the second respondent to sign the 2018 agreement, which was prepared at the instance of the applicant. The application, counsel submitted, is not to compel the respondents to conclude an agreement for the sale of the property. Despite the second respondent having been tasked in terms of a resolution passed by the members of the first respondent, being a trust, to sign the necessary papers in order for the applicant to take transfer of the property, the second respondent refuses to do so.

[10] The contention of the applicant is that she has already paid an amount of R25 000 to the respondent as an initial payment towards the purchase price. To the extent that this gives rise to a dispute of fact as to whether she has paid for the property in full, the applicant concedes that the full purchase price is payable on registration of transfer. I agree that this dispute does not justify a referral to oral evidence. In any event, it is not an issue material to the determination of the application.

[11] Apart from the 2018 offer to purchase signed by the applicant alone, counsel for the applicant submitted that the remaining parts of the jigsaw which constitute the deed of alienation is the resolution signed by all the members of the first respondent which records that the first respondent sells the property to the applicant for the

amount of R50 000 and that the second respondent is authorised to sign all papers necessary for the registration of transfer. The document is undated and it is uncertain where the meeting of the members of the first respondent was held when the resolution was passed.

[12] The respondents submit that while an oral agreement initially existed in 2012 to sell the property to the applicant and her late husband, the discounted price offered in respect of the property has now been overtaken by the passage of time. Furthermore, the first respondent is no longer desirous of selling the property, which it considers to be valued in the region of R250 000. Added to this is the strained relationship that has resulted between the applicant and the second respondent over the period 2012 to 2018. The last piece of the puzzle, according to counsel, is a power of attorney, dated 26 November 2018, in which the second respondent authorizes the attorney to proceed with the transfer of the property to the applicant. Mr *Mullins* directed the court to the wording of the power of attorney which records that 'the said property having been sold by me on 19 November 2018 to the said transferee for the sum of R50 000,00'.

[13] It was submitted on behalf of the applicant that viewed together, the 2018 offer to purchase, the resolution and the power of attorney, satisfy the essentials for the alienation of land in accordance with section 2(1) of the Act. Counsel submitted that although the resolution is undated, it constitutes a proper authorisation in which the second respondent is directed to sign the papers necessary to effect transfer of the property. Counsel stressed that the applicant did not place any reliance on the oral agreement in 2012. As such, it is contended that the resolution signed by the first respondent's members in 2018 together with the power of attorney is sufficient to have concluded an agreement in 2018,which passes muster in terms of section 2(1) of the Act which provides that:

'No alienation of land after the commencement of this section shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

[14] What is obviously lacking is the second respondent's signature to the 2018 offer to purchase. It was submitted on behalf of the applicant that the second respondent

has no right to unilaterally withhold his signature to the transfer documents in circumstances where the applicant has fulfilled her obligations. Insofar as the resolution is concerned, it was submitted that the members of the second respondent have not sought to set aside the resolution and neither has the power of attorney been revoked by the second respondent. All of the documents referred to earlier – the 2018 offer to purchase signed by the applicant, the resolution and the power of attorney – taken together, must be interpreted as the formulation of an intention on the part of the first respondent to sell the property in question to the applicant. To the extent that there may be a dispute as to the amount to be paid should it be found that the purchase price has not yet been paid in full, the applicant is satisfied to pay the remainder of the R50 000 purchase price on registration of transfer.

[15] Mr *Schaup* however submitted that the case as sketched out by counsel for the applicant is not one which the respondents have come to court to meet. It was contended that indeed it is not a case made out in the applicant's founding papers. In argument Mr *Mullins* steered clear of relying on the oral agreement which took place in 2012. However, if one has regard to the founding affidavit, it is evident that this in fact is the bedrock on which the applicant's case is built. She states in her affidavit that the agreement drawn up in 2018 was made 'pursuant to an oral agreement' in 2012. She accuses the respondents of acting *mala fides* in reneging on the oral agreement, alleging that the second respondent has acted unjustly and unreasonably in withholding his signature 'of the offer to purchase made pursuant to the oral agreement'.

[16] I agree with Mr *Schaup* that the recurring theme throughout the applicant's founding papers is that a binding agreement was concluded in May 2012. The problem which the applicant realised, as a professional town planner, is that an oral agreement does not meet the requirements for the alienation of land. It is for that reason that she now contends that her application is not based on the oral agreement but the subsequent documentation drawn in 2018. What is, in essence, being contended for by the applicant is to convert the *de facto* oral agreement of May 2018 into a *de jure* agreement, for which the second respondent's signature must be secured through this application. As a fall-back position, the applicant relies on the common law principle that a party should be held to agreements which have been concluded, as to do

otherwise would offend public policy. The question of necessity which arises is which agreement is the applicant referring to? On her own version, she now jettisons in argument, reliance on the oral agreement. It is for this reason that the respondents contend that the applicant has not established in her papers a cause of action.

[17] In *Northview Shopping Centre (Pty) Ltd v Revelas Properties Johannesburg CC and Another* 2010 (3) SA 630 (SCA); [2010] 3 All SA 422 (SCA), para 26, it was held that the object of s 2(1) of the Act is to 'ensure certainty in respect of contracts for the sale of land'.

[18] In her replying affidavit, obviously having regard to the grounds on which the relief was being opposed by the respondents, the applicant now contends that the purpose of the application is to hold the first respondent to the terms of the resolution, compelling him to discharge his mandate and sign the transfer papers. This stance is adopted having regard that to the fact that courts will not order parties to contract with each other.

[19] In my view, however the applicant may wish to categorise her claim, the essence of the application is that the applicant seeks for the court to declare the 2018 offer, in light of surrounding factors, to constitute a valid deed of alienation. The relief sought in the notice of motion is essentially consequential relief flowing from the validation of the oral agreement. Even if I am wrong in categorising the applicant's case in those terms, on the basis of the argument presented, I am unable to conclude that all three written documents which the applicant now seeks to rely on as the basis of her claim, can be interpreted as evidence of the intention on the part of the respondents to sell their property to the applicant.

[20] It would have been an entirely different scenario had the respondents entered into a written agreement of sale with the applicant, only for the second respondent to refuse to comply with the provisions of a resolution which authorise him to sign the necessary documents to enable transfer to take place. The situation in the present matter is entirely different in that there is no written agreement between the parties as required in terms of Act. As the oral agreement does not hold weight to constitute

alienation, the applicant relied on the 2018 offer to purchase, signed by her alone, together with the power of attorney and the resolution.

[21] In G B Bradfield *Christie's Law of Contract* 7 ed (2016) at 389 the following is stated with regard to the conclusion of contracts:

'A document that is invalid because it fails to comply with the statutory requirements cannot be validated by rectification, and even if this rule leads to anomalous results it must be maintained so that the statutory requirements are not subverted. Nevertheless rectification can be granted if the written contract as it stands complies with the statute . . .'

See also P M Wulfsohn Formalities of Sale of Land Act (71 of 1969) at 219 and *Magwaza v Heenan* 1979 (2) SA 1019 (A).

[22] The applicant, in bringing this application, is attempting to secure through the courts what she has been unable to achieve through the normal process of bargaining with a seller to purchase immovable property. The Act refers to 'a" deed of alienation" indicative of a single document which satisfies the requirements in section 2(1). What is contended by the applicant is a novel approach of taking a collective of documents – none of which on their own would meet the requirements of the Act – but which must be seen as a collective, from which the intention must be inferred that the respondents intended to sell the property to the applicant. A contract of sale is a consensual agreement by which one of the contracting parties (the seller) binds itself to the other (the buyer) to exchange a thing for a definite sum of money (the price) which the buyer promises to pay to the seller. The essentials of the contract are agreement upon the *merx*, the price and the obligation of the seller to deliver the *merx* to the buyer. The approach contended for by the applicant in my view would side-step and circumvent the provisions of the Act.

[23] In light of the above, I am satisfied that the following order should issue:

1. The application for condonation for the late filing of the applicant's replying affidavit and heads of argument, are granted;
2. Applicant is to pay the respondents' costs of opposition to the late filing of the replying affidavit;
3. The main application is dismissed with costs.

M R Chetty

Appearances

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Date reserved:	13 August 2021
Date of Judgment:	18 August 2021