

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 16011/2022P

In the matter between:

VICTORIA IVY MTHEMBU

APPLICANT

and

PHINDILE EUNICE MPUNGOSE

FIRST RESPONDENT

THE REGISTRAR OF DEEDS

SECOND RESPONDENT

ORDER

The following order is granted:

1. The applicant's application, which includes the application for referral for oral evidence, is dismissed with costs.
2. The respondent's counter-application succeeds.
3. The applicant is directed to return the keys and title deed in respect of the property described as Erf 6[...] e[...], Registration Division FU, situated in the Dolphin Coast Local Authority Area, Province of KwaZulu-Natal, measuring 300 (three hundred) square metres, and held by Certificate of Registered Title No T 7[...], within 5 (five) days of service of this order.
4. The applicant is directed to pay the costs of the counter-application.

JUDGMENT

E Bezuidenhout J

Introduction

[1] This matter came before me as an opposed motion. The applicant, Mrs V Mthembu, sought the following relief:

(a) That the first respondent be ordered to sign all documents and to do everything necessary to effect the registration of transfer of Erf 6[...], e[...], Registration Division FU, which is situated at e[...], Dolphin Coast, KwaDukuza, KwaZulu-Natal.

(b) That, should the first respondent fail to sign the documents or to do anything which is necessary for the transfer of the property into the name of the applicant within ten days after being requested to do so by the applicant's conveyancers, the sheriff be authorised and directed to sign all documents and to do anything necessary to transfer the property to the applicant on behalf of the first respondent.

(c) That the costs of the application should be borne by any of the respondents who unsuccessfully opposes the application, otherwise, the cost should be borne by the applicant.

[2] The first respondent, Mrs P Mpungose, filed a counter-application wherein she sought the following relief:

(a) That the applicant be directed to return the title deed for Erf 6[...], e[...], to the first respondent, upon the granting of this order.

(b) That the applicant be directed to return the keys for the property to the first respondent, upon the granting of this order.

(c) That the applicant pay the costs of this application on an attorney and client scale.

[3] The first respondent also raised three points in limine, which I will deal with in due course.

[4] No relief was sought against the second respondent, the Registrar of Deeds.

[5] At the commencement of the hearing before me, counsel for the applicant, Mr P A Dlamini, indicated from the bar that he wanted to apply for the matter to be referred for the hearing of oral evidence. This was the first time that the issue of a referral was raised. No mention was made of it in his heads of argument or practice note. He sought the following order:

(a) That the matter be referred for the hearing of oral evidence on the issue of whether the payment of R12 000 to the first respondent by the applicant was a loan or was in respect of the purchase of the first respondent's immovable property, described as Erf 6[...], e[...].

(b) The applicant be directed to pay the wasted costs for the day.

[6] Counsel for the first respondent, Mr D Moodley, indicated that the first respondent was opposed to the referral to oral evidence, mainly because it would delay the finalisation of a case which has no prospects of success. The first respondent raised the issue of a material dispute of fact in her answering affidavit, which now formed the subject of the proposed referral to oral evidence by the applicant. More about this later.

[7] The main issue to be determined is the nature of the agreement entered into between the applicant and the first respondent, whether it was valid in law and in conclusion, whether the applicant is entitled to any relief. Once this has been determined, the relief sought in the counter-application will follow the result.

Factual background

[8] The applicant stated in her affidavit that during 2009 and at e[...] in KwaDukuza, she and the first respondent entered into an agreement in terms of which she bought Erf 6[...], e[...] (the property). The purchase price was R12 000, which was paid in cash in two tranches. An amount of R6 000 was paid at first and thereafter the remaining R6 000 was paid over consecutive weeks.

[9] The alleged sale agreement was concluded in the presence of Mrs Khumbuleni Irene Hadebe, the first respondent's mother, who is now deceased, and Mr Themba Mbongeniseni Mthembu, the applicant's husband. Mrs Hadebe allegedly introduced the applicant to the first respondent after she told the applicant that the first respondent was selling her property. The applicant alleged further that it was agreed between her and the first respondent that transfer of the ownership and registration of the property 'shall take effect after a period of five years'. It was also allegedly agreed that the sale agreement was to be signed by the applicant and the first respondent after the expiry of the five-year period. The reason for the five-year waiting period was apparently due to the property being a so-called subsidised low cost house, which could not be disposed of within the five-year period.

[10] It therefore appears that the applicant and the first respondent had agreed to enter into an agreement after a period of five years.

[11] The applicant alleged that after she paid the purchase price, the first respondent handed the original title deed of grant as well as the keys of the property to her. She, however, did not take physical occupation of the property because she wanted to allow the five-year period to expire.

[12] The applicant alleged that she approached the first respondent upon the expiry of the five-year period in 2014 in order to finalise the registration of the transfer of the property into her name. The first respondent allegedly refused to sign the purchase and sale agreement, despite being requested to do so by the applicant's erstwhile attorneys, Nadine Perumal Attorneys. The sale agreement was not attached to the applicant's affidavit nor was any confirmatory affidavit by the attorneys.

[13] Perhaps most importantly, the applicant stated in her founding affidavit that the first respondent disputed that she sold the property to the applicant. She apparently ‘concocted’ a story that the applicant had loaned her money and that they accordingly only entered into a loan agreement and that the deed of grant and keys were kept by the applicant because of the loan.

[14] At this early stage, it was therefore already known to the applicant that the first respondent disputed that she sold her property to the applicant.

[15] The applicant also stated that the first respondent had in the meantime sold the property to another person. The applicant received a letter dated 24 May 2022 from the attorney representing Mr Wonderboy Mzwandile Dlamini, informing her that he had entered into a sale agreement with the first respondent and that he was in the process of transferring the property into his name. He was granted a right to occupy the property by the first respondent. The applicant was requested to desist making threatening statements to Mr Dlamini, and it was stated, in particular, that ‘[i]t is common knowledge that you are not the owner of the property’.

[16] The applicant was accordingly aware from at least 24 May 2022 that Mr Dlamini had purchased the property from the first respondent. The applicant stated that Mr Dlamini is adamant to have the property transferred into his name and has taken occupation of the property. Mr Dlamini paid R45 000 for the property, so his actions are perhaps understandable. The applicant chose not to join Mr Dlamini to these proceedings, which is the subject of one of the first respondent’s points in limine, namely the non-joinder of Mr Dlamini.

[17] The applicant insisted that the first respondent agreed to sell her the property and that the first respondent is being deceitful as she has to date not paid back or offered to pay back the alleged loan of R12 000. The application was issued on 18 November 2022. Two confirmatory affidavits of Mr Mthembu and Mrs Hadebe also formed part of the application papers.

[18] As mentioned before, the first respondent raised three points in limine. They were firstly, noncompliance with the provisions of section 2 of the Alienation of Land Act 68 of 1981 (the Alienation Act); secondly, the applicant's noncompliance with Uniform rule 41A; and lastly, the non-joinder of Mr Dlamini. I will return to these points in limine below when necessary.

[19] The first respondent stated that during or about 2009, she was experiencing financial difficulties as a result of family responsibilities. She required funds to pay for her mother's medical treatment and had to resort to obtaining a loan. She was introduced to the applicant by Mrs Hadebe, whom she understood to be related to the applicant. She met with the applicant and they agreed that the applicant would advance her the sum of R12 000 as a loan which had to be repaid. As security, the applicant would keep the title deed and in lieu of paying interest, the applicant would hold the keys and would collect rentals from tenants she allowed to occupy the property. Upon repayment of the R12 000, the applicant would return the keys and title deed to the first respondent.

[20] The first respondent alleged that both parties complied with the terms of their verbal agreement. For a prolonged period, the first respondent was unable to procure the R12 000 to pay off her debt to the applicant. During February 2022, she acquired the full amount and approached the applicant to repay the loan and to retrieve her keys and the title deed. The applicant refused to accept the money from the first respondent and insisted that she had bought the property from the first respondent. The first respondent alleged that she pleaded with the applicant to accept the repayment and to return the title deed and keys to her but the applicant refused and became aggressive towards her.

[21] The first respondent stated that she sold the property to Mr Dlamini on or about 12 October 2021.

[22] After receiving the current application papers in November 2022, the first respondent instructed her attorneys to attempt to resolve the matter with the applicant and her attorneys. They were unsuccessful.

[23] The first respondent denied that Mrs Hadebe had been present when the loan agreement was concluded, neither was her mother nor the applicant's husband, as claimed by the applicant. The first respondent also denied that the applicant had approached her and provided her with a purchase or sale agreement at any time. She further stated that the applicant had usurped her property unlawfully.

[24] As far as her counter-application was concerned, the first respondent stated briefly that notwithstanding having sold the property to Mr Dlamini, transfer has not yet taken place because the applicant holds the keys and the title deed of the property. It is evident from the title deed, which is attached to the applicant's founding affidavit, that the first respondent is indeed depicted as the owner of the property.

[25] In her replying affidavit, the applicant dealt with the points in limine raised by the first respondent in a very dismissive way, which lacked substance. As far as the non-joinder of Mr Dlamini was concerned, she simply stated that if he believed that he was somehow entitled to ownership and occupation of the property, he is entitled to institute legal proceedings against the applicant. The applicant clearly missed the point of non-joinder completely or was badly advised.

[26] Apart from the denying the verbal loan agreement, as alleged by the first respondent, her affidavit was a repetition of the allegations made in her founding affidavit and she insisted that an agreement in respect of the sale and purchase of the property was entered into between herself and the first respondent and that when she approached the first responder to sign the written agreement, she refused to do so. The alleged written sale agreement was again not attached to the applicant's replying affidavit.

Referral to oral evidence

[27] As mentioned above, counsel for the applicant applied for the matter to be referred for the hearing of oral evidence. He was hard-pressed to explain why the applicant had commenced proceedings by way of an application instead of an action, when the applicant, already in her founding affidavit, referred to the version of the first respondent regarding the loan agreement. It could therefore not come as a

surprise to the applicant that the first respondent raised the same issue in her answering affidavit. The high-water mark of his argument was that the applicant had two affidavits supporting her version, whereas the first respondent had none.

[28] Mr D Moodley, appearing for the first respondent, objected to any possible referral for oral evidence and submitted that it would lead to unnecessary legal costs and a delay in the finalisation of the matter. It was submitted that the applicant had no prospects of success in respect of the relief being sought, especially in light of the obvious non-compliance with section 2(1) of the Alienation Act.¹

[29] It was also submitted by Mr Moodley that the non-joinder of Mr Dlamini was fatal to the applicant's application. He further emphasised that the applicant only resorted to litigation 13 years after the alleged agreement was concluded and only after the first respondent attempted to repay the alleged loan.

[30] As far as disputes of fact and the referral to oral evidence is concerned, *Erasmus: Superior Court Practice*² states the following:

'As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied that there is no real and genuine dispute on the facts in question, or that the one party's allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers, or that *viva voce* evidence would not disturb the balance of probabilities appearing from the affidavits. This rule applies not only to disputes of fact, but also to cases where an applicant seeks to obtain final relief on the basis of the undisputed facts together with the facts contained in the respondent's affidavits. In the latter regard it has become known as the "*Plascon Evans* rule", referred to by the Constitutional Court in *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* as follows:

¹ Section 2(1) reads: 'No alienation of land after the commencement of this section shall, subject to the provisions of section 28, 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.'

² DE van Loggerenberg *Erasmus: Superior Court Practice* (RS 22, 2023) at D1-Rule 6-39 to D1-Rule 6-40, and the authorities referred to therein.

“The *Plascon-Evans* rule is that an application for final relief must be decided on the facts stated by the respondent, together with those which the applicant states and which the respondent cannot deny, or of which its denials plainly lack credence and can be rejected outright on the papers.” (Footnotes omitted.)

[31] It is important to remember that

‘[a] referral to oral evidence or trial is not merely there for the taking. A case ought to be made out for such a referral and satisfactory explanation provided as to why the applicant did not institute action instead of motion proceedings and whether the applicant did not foresee the possibility of dispute of fact not capable of resolution on paper.’³

[32] The following was further held in *IClear Payments (Pty) Ltd v Honeywell*:⁴

‘In my view, to simply allow a litigant to resort to a referral to oral evidence when the shoe pinches in motion proceedings, would be to condone irregular procedure. The applicant elected to proceed by way of motion proceedings when it ought to have been clear to it and its legal representatives that a dispute of fact was bound to emerge, which a court would not be able to decide on the papers.’

[33] In *Kalil v Decotex (Pty) Ltd and another*⁵ the court said the following with reference to the discretion to allow oral evidence in the case of an application for a provisional winding-up order:

‘Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less

³ *Richardson and others v Fernandes and others* [2017] ZAGPJHC 166 para 8.

⁴ *IClear Payments (Pty) Ltd v Honeywell* [2023] ZAKZDHC 5 para 17.

⁵ *Kalil v Decotex (Pty) Ltd and another* 1988 (1) SA 943 (A) at 979H-I.

likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent.⁶

[34] In my view, there is nothing far-fetched about the first respondent's version but the applicant's prospects of success is perhaps a more important issue to be considered when deciding on the application for a referral to oral evidence, in addition to the other issues mentioned above.

The validity of the agreement

[35] The applicant's counsel agreed that the nature of the alleged agreement between the applicant and the respondent was in fact an oral agreement to enter into a written agreement in five years' time.

[36] An agreement to agree is generally not enforced in our law. In *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC*⁷ the following was said:

'Thus, although the position in relation to "agreements to negotiate in good faith" remains a complex one in Australia in the light of *Coal Cliff Collieries*, courts there, like other comparable jurisdictions, will not enforce "an agreement to agree". That accords as well with the position in our law.' (Footnote omitted.)

The court continued as follows:

'The proper approach in an enquiry such as the present depends upon the construction of the particular agreement. Accordingly, it becomes necessary to analyse the relevant paragraph to decide whether its proper characterisation is merely an agreement to agree or whether it contained legally enforceable obligations.'⁸

⁶ In *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 587F-G the court held that these observations are also applicable to applications in general.

⁷ *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* [2019] ZASCA 178; 2020 (2) SA 419 (SCA) para 16.

⁸ *Ibid* para 17.

[37] In *Bon Com (Pty) Ltd and another v Services Sector for Education Training and Authority and others*⁹ the following was held:

‘Each of the initial agreements represents nothing more than “an agreement to agree”. An agreement of that kind is not binding under South African law and in the circumstances the First Plaintiff’s conduct in not concluding the subsequent agreements cannot, with respect, be said to be wrongful (as to the enforceability of an agreement to agree see *Schwartz NO v Pike and Others* 2008 (3) SA 431 (SCA) at paragraph 17). This stems from the fact that it was not obliged to conclude the subsequent agreements.’

[38] It is in my view clear that what the applicant is seeking to enforce falls squarely within the agreements described above, which is clearly not recognised in our law. The applicant, at best, has a claim against the first respondent for the repayment of the R12 000, which the first respondent has tendered to repay.

Non-joinder

[39] As far as the issue of non-joinder is concerned, I will only deal with it briefly considering my finding above. There can be no doubt that Mr Dlamini has a direct and substantial interest in the outcome of these proceedings and the order being sought by the applicant will most certainly affect his interests. Counsel for the applicant submitted in this regard that Mr Dlamini had knowledge of the matter, as was conveyed in the letter from his attorneys, and he could have brought an application to intervene if he wanted to. Counsel perhaps lost sight of the provisions of Uniform rule 10, which deals with joinder. In *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*¹⁰ the authors deal with joinder of necessity, as opposed to joinder of convenience as per rule 10 and state the following:

‘A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried

⁹ *Bon Com (Pty) Ltd and another v Services Sector for Education Training and Authority and others* [2023] ZAGPJHC 1156 para 7.

¹⁰ AC Cilliers, C Loots and HC Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009) at ch6-215.

into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined.’ (Footnote omitted.)

[40] In *Civil Procedure: A Practical Guide*¹¹ the authors cautioned that a legal practitioner who contemplates instituting legal proceedings, must always consider who is likely to be affected by the order or relief being sought and then ensure that such a party is joined, unless the party has specifically waived his right to be joined. This has clearly not happened in the present matter and to simply say that Mr Dlamini should have intervened if he wanted to, borders on reckless.

[41] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and others*¹² the following was stated at para 91:

‘At common law courts have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. A court could, mero motu, raise a question of joinder to safeguard the interest of a necessary party and decline to hear the matter until joinder has been effected.’

[42] A court would however be fully entitled to dismiss an application due to a material non-joinder where an applicant has made a deliberate decision not to join another party.¹³ In my view, the applicant clearly made a deliberate decision not to join Mr Dlamini, which would justify a dismissal, but even if she didn’t, and in light of my finding above, it would serve no practical purpose to adjourn the matter for the joinder of Mr Dlamini.

Conclusion

[43] I do not deem it necessary to deal with the other points raised in limine. In my view, it is clear that what the applicant sought to enforce is simply not part of our law

¹¹ S Peté *et al Civil Procedure: A Practical Guide* 3 ed (2017) at 441.

¹² *Matjhabeng Local Municipality v Eskom Holdings Ltd and others* 2018(1) SA 1 (CC)

¹³ *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and others* [2017] ZASCA 131 para 16. See also *Umdeni (clan) of Amantungwa and others v MEC, Housing and Traditional Affairs and another* [2011] 2 All SA 548 (SCA) para38 and *Golden Dividend 339 (Pty) Ltd and Another v Absa Bank Ltd* [2016] ZASCA 78 para10 where it was held that non-joinder was fatal to the relief sought.

and no amount of oral evidence will resolve that issue. The applicant clearly has no prospects of success. Even if I am wrong in this regard, the applicant clearly should have foreseen the material dispute of fact and should have proceeded by way of action from the outset. No satisfactory explanation for this course of action has been provided.

[44] As far as the first respondent's counter-application is concerned, and in light of my finding that the agreement relied upon by the applicant is not recognised in our law, and that the applicant has no prospects of success, the counter-application must therefore succeed. The first respondent is in my view entitled to the return of the title deed and keys.

Costs

[45] As far as costs are concerned, I have no reason to deviate from the usual approach, namely that costs should follow the result. The first respondent has asked for costs on a punitive scale against the applicant in her counter-application. I am not convinced that such an order is justified and exercise my discretion against such an order.

Order

[46] I accordingly make the following order:

1. The applicant's application, which includes the application for referral to oral evidence, is dismissed with costs.
2. The respondent's counter-application succeeds.
3. The applicant is directed to return the keys and title deed in respect of the property described as Erf 6[...] e[...], Registration Division FU, situated in the Dolphin Coast Local Authority Area, Province of KwaZulu-Natal, measuring 300 (three hundred) square metres, and held by Certificate of Registered Title No T 7[...], within 5 (five) days of service of this order.
4. The applicant is directed to pay the costs of the counter-application.

E Bezuidenhout J

Date of hearing: 26 February 2024

Date of judgment: 28 March 2024

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