



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 84931/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

08 February 2022

Date

K. La M Manamela

In the matter between:

MALEBANA SILAS SELLO

Applicant

and

PHILLIP JORDAN NO

1st Respondent

VAN HEERDENS INCORPORATED

2nd Respondent

ELIZA MALEBANA (born Mtengwe)

3rd Respondent

REGISTRAR OF DEEDS

4th Respondent

DATE OF HEARING : 08 NOVEMBER 2021

DATE OF JUDGMENT : This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 10h00 on **08 FEBRUARY 2022.**

JUDGMENT

KHASHANE MANAMELA, AJ

Introduction

[1] The applicant, Mr Silas Sello Malebana (Mr Malebana), was married to the third respondent, Mrs Eliza Malebana (born Mtengwe) (Ms Malebana) in community of property until their divorce on 24 April 2018. Their decree of divorce incorporated a settlement agreement concluded between them. Pursuant to the settlement agreement the first respondent, Mr Phillip Jordaan (Mr Jordaan, although he is evidently cited as Jordan), was appointed a liquidator and receiver for purposes of the division of the joint estate of Mr and Ms Malebana.

[2] On 06 September 2018, Mr Jordaan sent an electronic mail or email to the parties in the execution of his duties as the liquidator and receiver. I shall henceforth refer to this email as the “Terms Email”. The Terms Email was accompanied by an offer to purchase to be completed individually by Mr and Ms Malebana. The material part of the Terms Email is as follows:

“... the first party to deliver guarantees and or funds to purchase the property to the Conveyancing Attorneys appointed will be the party who will retain the property”¹

[3] The property referred to above is described elsewhere in the papers as Erf No 18722, Mamelodi East, Pretoria, Gauteng Province (the Property). Mr and Ms Malebana appear to still be residing at the Property despite the formal termination of their matrimonial relationship in 2018. They are both interested in retaining the Property as their individual asset. Mr Jordaan had intended to resolve this issue through the mechanism in the Terms Email. But instead a dispute has arisen regarding whom between Mr and Ms Malebana had timeously complied with the requisite terms of the Terms Email. In the main, there are contending views as to who had furnished the required guarantee of the purchase price or funds for the purchase of the Property.

¹ See annexure “SSM1” to the founding affidavit and annexure “EM5” to the answering affidavit.

[4] Mr Malebana approached this court seeking relief to the effect that Mr Jordaan and the law firm Van Heerdens Incorporated, cited as the second respondent, be interdicted not to register the Property in the name of Ms Malebana with the Registrar of Deeds. The latter is cited as the fourth respondent. Mr Malebana sought that instead this Court direct that the Property be registered in his name. Evidently, the application is opposed by Ms Malebana. Mr Jordaan, Van Heerdens Incorporated and the Registrar of Deeds have decided not to enter the fray. I have no reservations about the decision of the latter two not to take part in these proceedings, but have more to say about the impact of Mr Jordaan's absence or rather silence under the circumstances. I will say more below. Therefore, where I refer to a party or parties it will be reference to Mr Malebana and/or Ms Malebana as indicated by the context.

Applicant's (i.e. Mr Malebana's)case

[5] Mr Malebana's case is briefly as follows. He signed and submitted the offer to purchase the Property to Mr Jordaan on 13 September 2018. Mr Jordaan confirmed receipt thereof on 14 September 2018. On 19 September 2018 his attorneys wrote to Mr Jordaan advising him that they were in possession of the purchase price in their trust account. The material part of the attorneys' letter, in my view, is the following:

“ we are in possession of the purchase price in our trust account which you have stipulated in your offer to purchase ready to be transferred to the transferring attorneys...”²

[underlining added for emphasis]

² See annexure “SSM3” to the founding affidavit.

[6] There was no response by Mr Jordaan to the letter by Mr Malebana's attorneys. It is stated that Mr Jordaan was expected to furnish the details of the trust account of the transferring attorneys of the Property to Mr Malebana's attorneys should he have responded. On 08 October 2018 Mr Malebana's attorneys sent a reminder to Mr Jordaan. There was still no response.

[7] Also included in the papers is an email of 08 October 2018 by Mr Jordaan sent to the law firm Van Heerdens Incorporated (the Transferring Attorneys). Mr Malebana says that this email is proof that Mr Jordaan is about to transfer the Property to Ms Malebana. I hasten to point out that this starkly differs with my reading of the email, especially when one considers the following part of the email:

“Kindly note that both Mr and Ms Malebana would like to purchase the same property and thus the party that guarantees or payment [sic] first to your office is the party whom will retain the property.”

[underlining added for emphasis]

[8] I will deal with the abovementioned email, including the significance of the underlined part of the quotation, when I discuss the submissions made on behalf of the parties below.

[9] Mr Malebana says that on 08 October 2018 his attorneys wrote to Mr Jordaan demanding to be furnished with his offer to purchase. Thereafter, his attorneys requested details of the trust account from the Transferring Attorneys and “*then deposited the purchase price into the trust account in the amount of R150 000-00*”. [italics added] The payment was confirmed with the Transferring Attorneys by Mr Malebana's Attorneys on 10 October 2018.

[10] On 18 October 2018, the Transferring Attorneys by way of email confirmed that Mr Malebana was the first to make payment on 09 October 2018. Mr Malebana states that Ms Malebana only paid her deposit amount on 17 October 2018. But, when Mr Jordaan was asked to confirm the alleged state of affairs, instead he stated that Ms Malebana paid on 17 September 2018 and not 17 October 2018. Mr Malebana's view is that Mr Jordaan had meant to prejudice him by this statement.

[11] On 19 October 2018, the Transferring Attorneys wrote to Mr Malebana's attorneys offering a refund of the purchase price.

[12] Mr Malebana states that the *bona fides* of Mr Jordaan ought to be placed in doubt, as he "attempts to side with" Ms Malebana, despite it being "clear and proven" that Mr Malebana was the first to pay and Ms Malebana's payment was late. Mr Jordaan's provisional report regarding the transfer of the Property to Mrs Malebana ought to be declared of no force and effect and consequently set aside, Mr Malebana concludes.

Third Respondent's (i.e. Ms Malebana's) case

[13] Ms Malebana denies that Mr Malebana is entitled to the relief sought. She submits that she paid the purchase price on 17 September 2018 and furnished proof. I note from the document furnished as proof that the payment or transfer of the funds was made to Shapiro and Ledwaba on 17 September 2018 in an amount of R150 000-00. Shapiro and Ledwaba are Ms Malebana's own attorneys of record.

[14] Ms Malebana acknowledges the terms by Mr Jordaan, as the liquidator, contained in the Terms Email, including that the party (i.e. either Mr Malebana or herself) who was first to

deliver the guarantee or payment of the purchase price would have been entitled to retain the Property as that party's exclusive property. Further, she states that the offer to purchase was signed by Mr Malebana and her on 13 September 2018 and 10 September 2018, respectively. She thereafter on 17 September 2018 paid the purchase price into her attorneys' trust account. The attorneys for Mr Malebana confirmed the receipt of the purchase price into their trust account made on 19 September 2018. Ms Malebana argues that this was 2 (two) days after she had already made payment into her own attorneys' trust account.

[15] She further submits that her attorneys paid the purchase price into the trust account of Mr Jordaan on 08 October 2018, upon the latter's request. On the other hand, Mr Malebana made the payment into the trust account of the Transferring Attorneys on 09 October 2018. She contends that this made her the first in time to make the payment of the purchase price, considering that the monies had also been paid into the trust account of her attorneys on 17 September 2018, prior to Mr Malebana making the payment into his own attorneys' trust account.

[16] Ms Malebana also takes issue with the fact that there appears to be proof of the refund of the purchase price back to Mr Malebana. She prays for the dismissal of Mr Malebana's case with punitive costs on the scale of the attorney and client.

Submissions made on behalf of the parties and applicable legal principles

[17] At the hearing of this matter on 08 November 2021 Mr E Lebeko appeared for Mr Malebana, whereas Ms M Fabricius appeared for Ms Malebana. Both counsel had gratefully also filed written argument or heads of argument in terms of the practice of this Court. I reserved this judgment after listening to their oral argument.

[18] I commence this by confirming that it is acknowledged on behalf of Mr Malebana or even directly by him that Mr Jordaan's directive (as contained in the Terms Email) that a party who paid or provided the guarantee of the purchase price first will be the party to retain the Property.³ It is further his case that he paid the purchase price in the amount of R150 000.00 into his attorneys' trust account on 19 September 2018 or that his attorneys advised Mr Jordaan of the receipt of the monies in their trust account on 19 September 2018. But the money was only paid into the Transferring Attorneys' account on 09 October 2018.

[19] Mr Malebana contends that because Ms Malebana paid the purchase price into Mr Jordaan's trust account and not the Transferring Attorneys' account, Ms Malebana failed to follow Mr Jordaan's directive regarding to whom the payment of the purchase price or furnishing of the guarantee was to be made.

[20] On the other hand, Ms Malebana's case seems to only acknowledge that Mr Jordaan's directive to the parties was that the first of the parties to deliver the guarantee or pay the purchase price would be the party entitled to retain the Property. There is no mention of the remainder of the directive that the guarantee or payment was to be made or paid to the Transferring Attorneys. Obviously, this is very significant, in as much as it may be decisive of the dispute in this matter.

[21] I consider it to be common cause that Ms Malebana paid the purchase price of R150 000.00 into her attorneys' trust account on 17 September 2018. Evidently, this was two days before Mr Malebana's attorneys informed Mr Jordaan of the receipt of the purchase price from

³ See par [14] above for the acknowledgement of Ms Malebana.

Mr Malebana into their trust account. But I hasten to point out that this step alone was insufficient for purposes of compliance with Mr Jordaan's directive.

[22] On 08 October 2018 Ms Malebana's attorneys paid over the purchase price to Mr Jordaan. Ms Malebana acknowledges that Mr Malebana paid over to the Transferring Attorney on 09 October 2018. This was obviously one day after Ms Malebana had made the payment to Mr Jordaan. It is submitted on behalf of Ms Malebana that this would make her the one entitled to retain the Property as her payment was made first. But – with respect - the correct position emerges from the review of the facts in this matter, below.

[23] In my view Mr Jordaan set the terms on which the parties were to participate regarding who was to retain the Property. The material terms and conditions of the sale are common cause between the parties as follows:

[23.1] the amount of the purchase price of the Property which was to be paid or the guarantee to be furnished in respect of the purchase price of the Property is R150 000.00;

[23.2] the party who paid the purchase price or furnished the guarantee first was to be the party entitled to have the transfer of the title of the Property into that party's name, and

[23.3] the payment of the purchase price or furnishing of the guarantee was to be made to the nominated Transferring Attorneys.

[24] Mr Jordaan's terms and conditions appear to have been contained in more than one document. In other words the terms were not only contained in the Terms Email. As mentioned above the Terms Email appears to have been accompanied by an offer to purchase. And a "provisional Report". The Terms Email was sent to Ms Malebana's attorneys with exactly the same terms and conditions, as well as the attachments.

[25] The material term or condition for current purposes is what appears under paragraph [23.3] above. Further, the following term or condition appears in the Provisional Report/Liquidation and Allocation Account dated 05 September 2018:

"... the first party whom [sic] provides to the Conveyancing Attorney with the required guarantee or payment will be the party whom [sic] will retain the property"

[underlining added for emphasis]

[26] In the offer to purchase the issue of the guarantee was dealt with as follows:

"2.1 Approved guarantees for the full or balance purchase price shall be furnished by the PURCHASER to the Attorneys herein mentioned before or within 30 (THIRTY) days after the Mortgage Bond hereinafter referred to, has been granted;

2.2 In the event of the full or balance purchase price requiring to be guaranteed, the SELLER shall be entitled to stipulate which and in whose favour the guarantees shall be issued, and the said guarantees shall have to be approved the Attorneys herein mentioned."

[underlining added for emphasis]

[27] But none of the parties appear to have considered the contents of clauses 2.1 and 2.3 of the offer to purchase. Suffice to state that the offer to purchase also refers to the guarantee being furnished “to the Attorneys herein mentioned”.⁴ Under Clause 9 of the offer to purchase the name and contact numbers of the “Attorneys” to attend to the transfer of the property is given. But no further details are provided.

[28] From the above it is notable that none of the documents provided furnished any banking details, be it those of the Transferring Attorneys or those of Mr Jordaan. This means more was required of the parties in order to fully comply with the Terms Email or the directive by Mr Jordaan.

[29] The learned author of the part or volume *Contract* in *LAWSA*,⁵ expresses the following opinions which I consider relevant to the issues in this matter:

“The terms of a contract are the provisions which set out the nature and details of the performances due by the parties: the manner, time and place of performance, and such other stipulations as the parties may agree upon.”⁶

[30] Further the learned author of the textbook *Christie's Law of Contract in South Africa*⁷ expresses the following opinion which I also consider relevant to the issues in this matter, albeit with regard to auctions:

“The terms on which the auction is to be held ... may be set out in an advertisement announcing the sale, in which case they will be binding on the seller and auctioneer. ... In most cases the

⁴ Par 2.1 of the offer to purchase, quoted under par [26] above.

⁵ Van Rensburg, ADJ. 2014. ‘Contract’. In: *Law of South Africa (LAWSA)*, vol. 9, 3rd ed. LexisNexis (online version, last updated: 31 October 2014) (hereafter *Van Rensburg Contract*).

⁶ Van Rensburg *Contract* at 352.

⁷ Bradfield, GB. 2015. ‘Christie's Law of Contract in South Africa’, 7th ed, LexisNexis (online version, last updated: 31 December 2015) (hereafter *Christie's Law of Contract*).

seller and auctioneer could probably be held to it on the basis of fraud, but an advertisement that sets out the terms on which the auction is to be held must also be regarded as binding on bidders, since it would be absurd to hold the seller and auctioneer to the terms of their advertisement without also holding bidders, who attended the sale in response to the advertisement, to the same terms. It must be, therefore, that all parties are contractually bound to conduct the auction according to the terms of the advertisement.”⁸

[quoted without accompanying footnotes]

[31] From the above authorities it is clear that terms or the notice (i.e. an advertisement in auctions) are binding on all the parties involved. In this matter this means that not only were Mr and Ms Malebana bound by the contents of the Terms Email, but Mr Jordaan too. Mr Jordaan cannot set the terms on how the parties were to compete for the purchase of the Property and then act contrary to those terms. He acted contrary to the Terms Email, in view, when he directly accepted the payment by Ms Malebana instead of either referring her to the Transferring Attorneys or immediately passing on the monies to the latter.

Conclusion

[32] In this matter compliance with the terms and conditions of the sale of or bidding for the Property was upon meeting all three terms contained in the Terms Email, as quoted in paragraphs [23.1] to [23.3] above.

[33] The term quoted in paragraph [23.3] above clearly requires that the payment of the purchase price or the furnishing of the guarantee was to be made to the nominated Transferring Attorneys. This is unequivocal. Therefore, when the required payment is made or the guarantee of the purchase is furnished to someone else other than the nominated Transferring Attorneys,

⁸ *Christie's Law of Contract* at 55-56.

this term is unmet or the term remains unmet until such payment is transferred to the nominated Transferring Attorneys.

[34] The above simply means that payment made into the bank account of Mr Jordaan was not in compliance with the term in paragraph [23.3]. With respect, I do not agree with Ms Malebana or her counsel Ms Fabricius that payment into the bank account held by Mr Jordaan complied with all the requisite terms. Payment made to Mr Jordaan was to a wrong recipient or destination. The correct recipient or destination was the nominated Transferring Attorneys.

[35] Further, it does not really matter whether some information, such as the details of the bank account of the nominated Transferring Attorneys, were outstanding. Any party requiring more information could have obtained the required information by the exercise of reasonable care including through the office of Mr Jordaan.

[36] Counsel for Ms Malebana made submissions on what a “guarantee” entails in a matter of this nature or related matters. I do not – with respect – think it is necessary to pursue any matters to do with interpretation. It is incontrovertible that a “guarantee” (whatever meaning a party attached to this term) had to be furnished or delivered to the Transferring Attorneys, apart from the actual payment of the purchase price. The party who furnished the guarantee (or made the payment) of the purchase price in an amount of R150 000.00 to the Transferring Attorneys first would have been the one to comply with all the three terms in the Terms Email, stated above.

[37] But I do not consider it necessary to finally determine which of the parties should retain the Property. With respect, the developments in this matter do not appeal to my sense of justice.

The role played by Mr Jordaan, both before and after issuing the terms and conditions for the sale, in my view, is material. Mr Jordaan issued the Terms Email or directive. But yet he saw it fit to directly receive the payment from Ms Malebana. He does not appear to have paid it over - at the first possible moment - to the Transferring Attorneys. This affected the timing of Ms Malebana's compliance with the term in paragraph [23.3] above.

[38] But, Mr Jordaan, despite being served with the papers of this application, elected not to file an affidavit or report to explain his role, especially regarding the averments by the parties, some of which are critical about his role in the matter. Mr Jordaan ought to have explained and offered clarity where needed regarding the specific statements by the parties. This is not the same as opposing the application or the relief sought. With respect, this is not a typical matter where he is required to remain quiet in the quest of being or being seen as neutral and independent. In other words, his silence is not golden under the circumstances of this matter. Ultimately, his role has affected the subject matter of this application in a way that such cannot be imputed to either of the parties.

[39] The Property in this matter constitutes a home to both parties. It is not a typical house subject of a bidding at an auction. Therefore, I consider the interests of justice to dictate that the matter be referred back to Mr Jordaan for the handling of the sale through another method, including considering selling the Property to the highest bidder. The latter method may not be appropriate, but Mr Jordaan's expertise would avail him the proper solution to the current impasse. Mr Jordaan is also not precluded from embarking on the same method of disposition of the Property, whilst heeding the comments made in this judgment.

[40] Therefore, the relief sought in terms of the current application will not be granted. But this is not a reflection of the Court's view on the merits of the application. As already indicated the determinative issue(s) lie(s) elsewhere: the involvement of Mr Jordaan after the dispatch of the Terms Email. Overall, I consider the interests of justice to demand that the sale of the Property, which is a primary residence or home to Mr and Ms Malebana, be handled in a more efficient, just and equitable method than what has prevailed in this matter. Also none of the parties will be burdened with the liability of each other's costs in this matter.

Order

[41] In the premises, I make the following order:

- a) application is refused with no order as to costs.


Khashane La M. Manamela
Acting Judge of the High Court
08 FEBRUARY 2022

Appearances:

For the Applicant	:	Mr E Lebeko
Instructed by	:	Molefe Attorneys, Pretoria
For the Third Respondent	:	Ms M Fabricius
Instructed by	:	Shapiro & Ledwaba Inc, Pretoria