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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

CASE NO: 3149/2022

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

SANDRA-ANN HATTINGH N.O.

1st Applicant

LEONARD JOHANNES HAASBROEK N.O.

2nd Applicant

[As Trustees on behalf of **DRIEFONTEIN TRUST-
IT 000825/2016 (B)**]

and

LEONARD JOHANNES HAASBROEK

1st Respondent

[Identity number: [...]]

THE REGISTRAR OF DEEDS, BLOEMFONTEIN

2nd Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

3rd Respondent

HEARD ON: 08 SEPTEMBER 2022

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLI. The date and time for hand-down are deemed to be at 16h30 on 19 September 2022.

Introduction

[1] The applicants seek an order compelling the respondents to transfer two farms situated in the district of Ladybrand into their names as the trustees of the Driefontein trust.

[2] The first respondent opposes the application on the basis that there are material factual disputes in the application which render it fatally defective. The applicants were informed that the application and the relief sought would be contested on this basis and that the applicants' claim could not be dealt with by means of motion procedure¹.

[3] The first applicant (and the deponent to the founding affidavit) stated that:

3.1 The first respondent, a farmer in the district of Ladybrand, owned various farms in that area. He accumulated a huge debt over the years and approached the second applicant, his son, to lend him money. Over a period of 18 months, the loans amounted to R 1 774 909.31².

3.2 By March 2022, the first respondent's financial position deteriorated to such an extent that he was unable to repay the loans. The first respondent resigned as a trustee of the Driefontein trust and his son, the second applicant, became a trustee in his place³. In April 2022, the first respondent and the second applicant agreed to an arrangement as to the repayment of the loans and entered into a deed of sale which stipulated that the two farms,

¹ Paragraph 5 of the Answering Affidavit.

² Paragraph 6.2 of the Founding Affidavit.

³ Paragraph 6.3 of the Founding Affidavit.

Hoogbron 535 and Mooifontein 534, held by deed of transfer T6469/2014, would be transferred to the applicants in *lieu* of the repayment of the loans⁴.

3.3 The first applicant was involved in the negotiations and she made a calculation of the total amount of loans which amounted to R 1 774 909.31. A reconciliation of these loans was attached as annexure “D3” having as heading “*Rekonsiliasie van lenings*”.

3.4 A deed of sale for the two farms, reflecting the purchase price of R 1 774 909.31, was signed on 6 April 2022 by the second applicant as the trustee of the Driefontein trust, and the first respondent. It was recorded in the sale agreement that the purchase price was paid by the seller to the purchaser prior to the conclusion of the agreement⁵. On 9 June 2022, the first respondent caused a letter to be addressed to the applicants, terminating the said sale agreement.

[4] The first respondent stated in his answering affidavit that the applicants sought to enforce an invalid contract. The applicants had prevailed on him to donate the farms to the Driefontein Trust, of which they were trustees. The beneficiaries of that trust were his natural heirs. He fell into debt during the pandemic and the applicants feared that the farms would be attached and sold in execution if they were not protected against his creditors. Despite the clause in the deed of sale that the purchase price was paid, it was not. He denied that the trust or the second applicant lent him the money. He agreed to the transaction because he could not find a willing and able buyer for the farms. On finding such a buyer, he revoked the donation and sold the farm to a third party. It was never the intention of the parties to conclude a contract of sale as the trust did not have, and never had, the means to buy the farm.

[5] Furthermore, the first applicant failed to append any proof of the purported loans,⁶ loan agreements, proof of payment or letters of demand which was an indication that the purported facts deposed to by the first applicant, did not fall within

⁴ Paragraph 6.4 and 6.5 of the Founding Affidavit.

⁵ Paragraph 7.3 of the Founding Affidavit.

⁶ Paragraph 19.2 of the Answering Affidavit.

her own personal knowledge. The second applicant's confirmatory affidavit was not appended to the application even though he was alleged to have provided the information to the first applicant. It was only appended to the applicants' replication and was dated 16 August 2022.

[6] In their replying affidavit, the applicants maintained that the first respondent relied on the cancellation of the contract and nothing more in his negotiations with the applicant.⁷ He only changed tack in his answering affidavit when he introduced various new contradictory defences which were fictitious and improbable⁸. It was therefore clear that the intention of the respondent was to muddy the waters in an effort to move for the dismissal of the application on the basis of a dispute of fact. The first respondent's only defence before the application was brought, was that the contract was cancelled, but in his opposing papers, he relied on eight different defences of which the cancellation of the contract was but one.

[7] It was suggested in the replying affidavit that the court should take into account that a dispute, based on fictional evidence (not a real dispute), was before the court.⁹

[8] The first respondent's opposition is that it was foreseeable that material disputes of fact would arise, that such material disputes of facts emerged from the papers, and that they cannot be resolved without the advantages of a trial. I was referred to various authorities in this regard of which I shall mention but a few.

[9] In *National Director of Public Prosecution v Zuma*¹⁰ it was held that "*motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine their probabilities.*" In *Buffalo Fright Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and another*,¹¹ it was held that "*a court must always be cautious about deciding*

⁷ Para 3.1 of the replying affidavit.

⁸ Paragraph 3.2 of the Replying Affidavit.

⁹ Paragraph 8 of the replying affidavit.

¹⁰ [2009] All SA 243 (SCA); 2009 (2) SA 277 (SCA).

¹¹ 2011 (1) SA 8 (SCA).

probabilities in the face of conflict of fact in affidavits. Affidavits are settled by legal advisors with varying degrees of experience, skill and diligence and a litigant should not pay the price for an advisor's shortcomings. Judgment on credibility of the deponent, absent direct and obvious contradictions, should be left open." In *Tamarillo (PTY) Ltd v B N Aitken (Pty) Ltd*,¹² it was held that *"a litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril, for the court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but do dismiss the application."*

[10] In oral address, the applicant's counsel conceded that before the application was launched, there were already two disputes in existence. On 29 June 2022, the first respondent's attorneys addressed a letter to the applicant's attorneys requiring proof of payment of the purchase price in the sum of R 1 774 909.31 on/or before 6 April 2022.¹³ It was stated in the letter that the attorneys were instructed that the parties entered into what appeared to be a contract, but that there was no consideration paid for the *merx*. Therefore, the contract could not be formed legally or be binding, and as a result, the parties' statement was worthless as there was no binding contract.

[11] The applicant's attorneys responded to the letter as follows¹⁴:

"2. With reference to your paragraph 1 we kindly refer your attention to clause 5 of the deed of sale, also annexed hereto for your convenience and confirm that the seller confirmed that he had received the entire purchase price before the agreement was concluded."

This letter elicited the following response from the first respondent's attorneys¹⁵:

"Your letter dated 30 June 2022 refers.

¹² 1982 (1) SA 398 (A)

¹³ Annexure D8 to the indexed papers.

¹⁴ Letter dated 30 June 2022 as per annexure "D9" of the indexed papers.

¹⁵ Annexure "D10" of the indexed papers.

You are being disingenuous or your client is lying to you. Your client has not paid the purchase price and your response confirms that there never was a serious intent to conclude an agreement.

Any application of whatever nature will be vigorously defended and met with a punitive cost order. All our client's rights are reserved."

[12] It is evident from the contents and the language used in the correspondence that the parties were spoiling for a fight and that any legal steps taken would be vigorously opposed.

[13] The aspect of the reconciliation of the loans is also another point of concern. The document, annexed as annexure "D3" to the application reads as follows:

REKONSILIASIE VAN LENINGS

LEONARD		LEO
Leo Betalings		1,127,103,27
Plaas transaksie koste		131,667.18
Ander Inkomste		
Kalwer aankope	-18.200.00	-59.725.00
Kalwer verkope	26,250.00	96,790.00
Kalwer Uitgawes	-40,282.67	-51,248.75
Bestuursfooi 25%	24, 197.50	24, 197.50
Huurinkomste Theo	35,000.00	
Huur van Leo Bakkie		17,500.00

Min Salarisse Brdy		187,002.00
Huur van Trekker	-28,000.00	-28,000.00
Versekering Leo	20,850.00	-20,850.00
Diesel plant		-20,680.00
Uitgawes Brdy/Plant	-39,589.50	-39,589.50
SARS	-43,708.65	-43,708.65
		<u>1,272,063.05</u>
Rekenmeesterfooie		92,950.00
Prof Fooie		211,200.00
Ander uitgawes (Fisies)		198,696.26
	<u>-63,483.32</u>	<u>1,774,909.31</u>

[14] This document serves as the centrepiece of the calculation of the purchase price. There are no descriptive notes to indicate the source and computation of the figures. SARS is mentioned but is allocated no corresponding monetary value in the columns. Amounts are allocated in two columns under the headings: Leo and Leonard. It is neither clear whom the names refer to nor how and why the amounts have been so allocated. At the time of the filing of the application, the second applicant filed neither an affidavit nor a confirmatory affidavit. His affidavit was only attached in replication. His affidavit was crucial at the inception of the application as he is alleged to have advanced the loans to the first respondent.

[15] The bulk of the submissions and arguments on behalf of the applicants was aimed at the eight defences allegedly raised by the first respondent. These refer to the first respondent denying to have received the purchase price; donating and revoking the donation of the farm; the donation being disguised as a sale in order to circumvent the provisions of the Insolvency Act; no contract having come into existence between the parties and that the trust did not have the necessary funds to buy the farms. It was submitted that these allegations did not make sense whatsoever and should be rejected as far-fetched and untenable. The court was urged to adopt a robust approach in bringing finality to the case as a real dispute was not shown to exist.

[16] Even if it is accepted that the first respondent acted as stated, that does not assist nor rescue the applicants from the very first hurdle of their choice to initiate motion proceedings instead of action proceedings against the first respondent. It was clear from the word go that there was a dispute of fact between the parties. The applicants' counsel conceded during oral argument that a dispute already existed before the application was launched. A litigant who seeks relief by way of notice of motion, chooses that procedural form at his peril if he has reason to believe that the essential facts to the success of his claim will probably be disputed.¹⁶

[17] The reconciliation statement was drafted by the first applicant in her capacity as the financial advisor from the information supplied by, *inter alia*, the second applicant. The reconciliation statement is at the core of the dispute. It determined the purchase price which apparently represented the loan capital advanced to the first respondent by the second applicant. The calculation of the purchase price and/or the validity of the reconciliation statement was in issue before the application was launched. The exchange of correspondence between the respective legal representatives was clearly indicative of a serious dispute of fact, incapable of resolution on the papers.

[18] I, therefore, come to the conclusion that this matter cannot be resolved on the papers as they currently stand. The dispute is of such a nature that it cannot be

¹⁶ *Tamarillo, supra.*

satisfactorily determined without the advantages of a trial to estimate the credibility of witnesses and observe their demeanour.¹⁷ I find that a real dispute, and not a fictitious one, does exist *in casu*. The application stands to be dismissed for the reasons stated above.

[19] The successful party is entitled to the costs.

[20] I make the following order:

The application is dismissed with costs.

MHLAMBI, J

On behalf of the applicant:

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¹⁷ *Da Matta v Otto NO 1972(3) SA 858 (A)*.