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

CASE NO: D1943/2016

In the matter between:

SIBUSISO GOOD-ENOUGH NHLAPHO

PLAINTIFF

and

THEMBA OLIVER LANGA

DEFENDANT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 09 September 2022 (Friday) at 11h00.

ORDER

In the result, the following order is made:

1. The plaintiff's claim is dismissed with costs;
2. The defendant's claim is upheld;
3. The plaintiff is ordered to pay the defendant the sum of R1 000 000 being the purchase price, plus interest thereon at the rate applicable in law from 1 January 2011 to date of payment.

JUDGMENT

Mlaba AJ

[1] On or about October 2009 the parties herein entered into an oral purchase and sale agreement in terms of which the plaintiff sold to the defendant the immovable property described as No. [....] F[....] G[....], [....] E[....] Road, P[....], KwaZulu- Natal, held under Deed of Transfer number [....]and registered under Sectional Title Deed number [....], situated at eThekweni Municipality, herein referred to as the "property". The copy of the Title Deed was submitted and admitted into evidence as part of the plaintiff's bundle of documents.

[2] It is common cause that the agreed purchase price was a sum of R1 050 000 and that, as at end 2010, the defendant had paid the plaintiff a total amount of R1 million towards the said purchase price. It was further agreed by the parties that the oral purchase and sale agreement was unenforceable as it was not reduced to writing in terms of the Alienation of Land Act 68 of 1981 and that the oral agreement is therefore void ab initio.

[3] The plaintiff avers that the defendant owes him an amount of R554 090.86 being outstanding rental as well as levies payable by the defendant

for the duration of his occupation of the property. The defendant on the other hand avers that the plaintiff owes him the return of the R1 million that he paid him towards the purchase price, together with interest thereon.

[4] The parties agree that upon cancelation of the agreement there ought to have been a set-off however that was not done and therefore the parties are not in agreement with the amounts that each party owes to the other.

Issues to be decided

[5] The court is called upon to determine the amounts that each party owes to the other, if any.

Summary of evidence

Plaintiff's Case

[6] The plaintiff was the only witness. He testified that he grew up in the same area as the defendant and they were family friends. He had decided to go and study at the University of Cape Town and the defendant needed a place to stay as his home was in Newcastle but he was working in Durban. They agreed that the defendant would stay at his property and accordingly the defendant took occupation of the property in November 2009. At that time there was no mention of a sale of the property and from November 2009 to April 2010 the defendant was in occupation of the property and was not paying any rent.

[7] They discussed and agreed that the defendant would purchase the property for R1 050 000 and that payment would be effected within six months of the agreement where after registration of transfer into the defendant's name would then be undertaken. They further agreed that the defendant would pay occupational rent in the sum of R6 000 per month, as well

as utilities, for as long as the full purchase price was outstanding. The defendant however paid a total amount of R1 million in three instalments and over a period longer than six months and failed to pay the balance of R50 000 as well as the rental amount. The R1 million was paid directly into the plaintiff's bond account as the plaintiff did not want to handle that amount of money.

[8] The plaintiff demanded payment of the balance but upon realising that same was not being paid he suggested to the defendant that he sell the property and refund the money that he would have owed to the defendant at that time. The defendant did not show that he cared considering the strain that the situation was putting on the plaintiff. The relationship between them soured and the defendant still did not pay the balance of R50 000.

[9] Accordingly, the plaintiff cancelled the purchase and sale agreement and instituted eviction proceedings leading to the eviction of the defendant from the property. At the time that the eviction order was granted the defendant was no longer residing at the property and had gone back to Newcastle but had sub-let the property to a certain Dr Masuku, without the knowledge and approval of the plaintiff.

[10] The plaintiff testified further that the defendant occupied the property for three years without paying rental which they had agreed would be R6 000 per month, and further that he failed to pay levies while he was in occupation of the property. He therefore was indebted to the plaintiff in the amount of R554 090.86.

[11] He further submitted that the amount owed to the defendant ought not to include interest as there was no requirement that it be deposited in an interest-bearing account, and was paid into the plaintiff's bond account which was in terms of their agreement. He submitted that if interest were to be paid it would be mora interest calculated from the date on which demand was communicated to the plaintiff, being 20 June 2016.

[12] The plaintiff further submitted that he had eventually sold the property three years ago for an amount above R1 million (he could not recall the exact amount) however he had to re-paint the house prior to selling it as the state that it was in was bad and filthy.

[13] The plaintiff submitted, in closing, that the defendant failed to pay the full purchase price within the agreed period and that he failed to pay the occupational rent as well as levies. The defendant could not reasonably be allowed to stay for free in the plaintiff's property for a period of three years. Accordingly, the plaintiff sought payment of the claim amount being R554 090, 86.

Defendant's Case

[14] The defendant was the only witness and his evidence is summarised hereunder: He testified that he was friends with the plaintiff and sometime in October 2009 while both of them were in Cape Town, the plaintiff expressed to him that he was under financial strain as he had decided to continue with his studies in Cape Town and could not service his bond because the tenants in his apartment were not paying accordingly.

[15] The defendant had previously visited the plaintiff in P[...] at this apartment and he liked the place. He informed the plaintiff that he had approximately R2.9 million that he had recently been paid by the department of education. He stated that he could purchase the apartment if the plaintiff agreed so that he could have money to ease his financial strain. They both agreed on the purchase price and that an amount of R1 000 000 would be paid and then the balance of R50 000 would be paid as soon as the plaintiff completed his studies, and also that registration of transfer into the defendant's name would be done after the payment of R50 000. The agreement was oral.

[16] Accordingly, on the following day they both proceeded to Standard

Bank, in Cape Town, to arrange for the withdrawal and payment of the money to the plaintiff. They had agreed that the defendant would withdraw R500 000 and pay R400 000 into the plaintiff's personal account and R1 million directly into the bond account. Unfortunately, the bank advised that it needed to clear the money first before paying it over to the defendant therefore the transactions could not be effected on the Saturday.

[17] The defendant returned to Durban and on the following Monday, 19 October 2009, he went to the bank and managed to pay the plaintiff according to their agreement. The plaintiff gave the tenants two weeks' notice to vacate the property and the defendant thereafter took occupation on 1 November 2009. After approximately two months the plaintiff requested the defendant to pay R200 000 and he did. He again paid another R200 000 two months from then and the last payment of R100 000 was made sometime before the end of 2010. The total amount of R1 million was paid to the plaintiff by the end of 2010.

[18] The defendant stated that they had agreed that the plaintiff would continue to pay the levies as the property was still under his name but that the defendant would pay for the utilities. There was no mention of rental to be paid by the defendant as he had already paid the plaintiff R500 000 towards the purchase price when he took occupation and the balance was to be paid whenever the plaintiff called for it and the balance of R50 000 to be paid upon the completion of his studies.

[19] The defendant further testified that when he took occupation the electricity and water supply had been cut off from the property as there was a debt owing to the municipality. He paid the outstanding amount after informing the plaintiff. He also spent a total of R10 000 on improvements on the property in that he installed automated garage doors and also painted the property.

[20] The defendant contacted the plaintiff after learning that he had

completed his studies with the aim of paying the balance of R50 000 so that the property could be registered in his name. The plaintiff however ducked and dived, he would not answer his calls. The defendant then was served with summons, the plaintiff was claiming arrear rental and levies. This was a surprise to him as there had been no mention of rental at all between him and the plaintiff. He was further evicted by the plaintiff. He believes that the plaintiff instituted action against him because he did not want to transfer the property into his name even though he had accepted almost the whole amount of the purchase price.

[21] The defendant was not at the property when the eviction was effected as he had been transferred to Newcastle and he had informed the plaintiff that he would be going back to Newcastle but would get Dr Masuku to stay at the property. The plaintiff did not inform the defendant that he was not happy with the arrangement. To him the defendant regarded the property as his own as he had paid the bulk of the purchase price and was just waiting for the plaintiff to indicate that he had completed his studies and would then accept the R50 000 for the registration of property to be transferred to his name.

[22] The defendant submitted that it would not make sense and he would not have agreed to pay occupational rent for the property as he had already paid the plaintiff a million rand towards the purchase price. He further submitted that at no stage did the plaintiff demand payment of R50 000 from him, the plaintiff was supposed to have indicated to the defendant that he had completed his studies and then call for the R50 000 to be paid. He stated that he would not risk cancellation of the sale for a mere R50 000. The defendant vehemently denied that he had failed to pay R50 000 when he was called upon to do so, instead the plaintiff evicted him and sold the property to someone else thereby gaining financially at the defendant's expense.

[23] The defendant further denied that any rental and levies are due to the plaintiff, and if at all they were due, that claim had accordingly prescribed. The defendant claimed payment of the purchase price together with interest.

The defendant submitted that the plaintiff had been unjustly enriched for selling the property twice.

[24] In conclusion, the defendant submitted that the plaintiff's claim be dismissed and the plaintiff be ordered to pay him his purchase price with interest from 1 November 2009 to date of this judgement.

Analysis of evidence

[25] The parties both had the onus to prove their claims against each other.

[26] The plaintiff claims outstanding rental and levies from the defendant. The plaintiff submits that in terms of the agreement the defendant was to pay occupational rent of R6 000 per month for as long as the purchase was not paid in full.

[27] There is no proof that there was ever a single payment of R6 000 rental by the defendant. There is no proof that the plaintiff once demanded the payment for rental from November 2009 to the date of the issue of summons.

[28] The plaintiff's version is that the defendant was to pay the full purchase price within six months from May 2010 however the defendant took longer than six months to pay and payment was made in three instalments.

[29] It is strange and highly improbable that any party would agree to pay the purchase price of R1 050 000 within six months and still pay rental monthly. It makes no sense at all if the agreement is for the purchase of the property. Occupational rent would be expected if no purchase price is paid.

[30] The defendant denied the plaintiff's version during cross examination that why would he agree to pay rental when he had already paid half of the purchase price to the plaintiff. Even if the plaintiff's version is accepted regarding payment of the purchase price within six months, it would still not

make sense for someone to agree to pay both the rent and the purchase price.

[31] During the period from November 2009 and the date of the issue of summons, not once did the plaintiff claim or receive the rental of R6 000. His evidence is that they were still on good terms as friends however even if that is so, nothing prevented the plaintiff from reminding his friend to pay rental if that had been part of the agreement.

[32] The plaintiff's version in this regard is highly improbable.

[33] For the plaintiff to have evicted the defendant and sell the property to someone else when he had already accepted R1 million from the defendant and when the only outstanding amount was R50 000, his intentions are highly suspicious. His version is highly improbable. It is improbable that someone who had paid the plaintiff R1 million would refuse or fail to pay R50 000 in order to gain transfer of the property.

[34] When comparing the two versions, the defendant's version is logical and more probable than that of the plaintiff. The defendant's version however with regards to the improvements is not supported by any proof and therefore is rejected.

[35] The defendant's version, however, with regards to the terms of the agreement is accepted for the following reasons:

- (a) It would be unreasonable and improbable for one to agree to pay occupational rental when one has already paid the purchase price or at least half thereof;
- (b) It is acceptable and logical that one would not pay levies if the property is still under another person's name;

(c) It would be reasonable and acceptable for one to pay for utilities as they would be benefiting therefrom whilst in occupation of any property;

(d) Having paid R1 million towards the purchase price, it would not make sense not to pay the balance of R50 000 especially when one has an amount in the region of R2.9 million; one would not risk losing R1 million over R50 000;

(e) Not once did the defendant pay the R6 000 rental, which is in line with his version that payment of occupational rent was not a part of the agreement;

(f) The plaintiff is the one that gained over R2 million for selling the same property to two different people, having received the purchase price from two different sources;

(g) There was no reason for registration of transfer not to be passed over to the defendant at end 2010 when he had paid a total of R1 million, almost the whole purchase price, even back then the plaintiff seems not to have had the intention of transferring the property to the defendant, it seems as if all he wanted was money to service his bond and take care of his financial needs while he was studying;

(h) The plaintiff failed to produce bank statements to show the money was paid into his bond account, even though the defendant could have shown the accounts to which payments were made, however irrespective of the above, there is no doubt that the plaintiff benefited from the R1 million paid to him by the defendant, even though he denied that he benefited from the defendant's R1 million;

(i) The defendant on the other hand did not benefit because he had

intended to purchase the property with the aim of owning same, he paid R1 million to the plaintiff and paid for the utilities to the municipality including arrears (this was not disputed by the plaintiff) but at the end he was evicted from the property that he paid R1 million rand for and is currently without ownership thereof;

(j) The defendant also paid arrears in utilities for the in respect of the plaintiff's property and the plaintiff benefited therefrom.

(k) The plaintiff argued that the defendant stayed in property for free. I do not see how this is true, in fact the defendant paid R1 million for staying in someone's property for three years when he could have purchased the property and gained ownership of that property for that amount;

(l) The plaintiff sold the property again three years ago for an undisclosed amount which he submitted is over a million rand, after having accepted a million rand from the defendant;

(m) The plaintiff, at the time of the subsequent sale, ought to have refunded to the defendant the amount that he had accepted as the purchase price, he admitted that he ought to have done so, however, to date he has failed to do so;

(n) The defendant, according to his version, intended to invest the money in the property and, but for the agreement between him and the plaintiff, he would and could have invested in any other property and would have gained benefit from the purchase;

(o) For the above reasons, the plaintiff's conduct appears to have been disingenuous and his version is rejected.

[36] In the circumstances, I find that the defendant's version is more

probable than that of the plaintiff. I further find that the plaintiff failed to discharge his onus and the defendant succeeded.

Order

[37] In the result, the following order is made:

1. The plaintiff's claim is dismissed with costs;
2. The defendant's claim is upheld;
3. The plaintiff is ordered to pay the defendant the sum of R1 000 000 being the purchase price, plus interest thereon at the rate applicable in law from 1 January 2011 to date of payment.

MLABA AJ

Appearances

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Date of Judgment reserved: 29 August 2022
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