

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 54675/2018

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

Date: 20/4/2020 Signature: *ES. Schaff*

In the matter between:

HODOUL: ROLAND CHARLES

APPLICANT

and

ELZAAN INVESTMENTS CC

FIRST RESPONDENT

W D SAAYMAN INC

SECOND RESPONDENT

JUDGEMENT

Van der Schyff, J.

Introduction

- [1] The applicant seeks an order to the effect that the first respondent is ordered to pay him an amount of R800 000,00 together with *mora* interest and costs.
- [2] No order is sought against the second respondent as he was only joined in so far as he may have a direct and substantial interest in the application.

- [3] The first respondent requested the court to condone the late filing of its answering affidavit. The answering affidavit was filed one day late. No objection was raised and the late filing of the respondents' answering affidavit was condoned.

Common cause facts

- [4] The first respondent bought an immovable property at an auction. The property had a basic building structure on it which was damaged by fire. The first respondent assessed the basic structure and initiated rebuilding the structure in accordance with approved building plans. The applicant and the first respondent concluded a Sales Agreement on 24 August 2017 and a Building Contract on 25 August 2017.
- [5] During September and October 2017 the applicant made payments in the amount of R800 000.00 to the first respondent.
- [6] The first respondent cancelled the contracts between the parties and retained the R800 000.00.

Dispute of fact

- [7] The applicant contends that the payments were made in terms of the Sales Agreement and represented the purchase price of the property. Payment was done with the aim of effecting transfer of the property into the name of the applicant. The first respondent contends that transfer of the property would only have taken place after payment of the purchase price and the costs incurred in terms of the Building Contract.
- [8] The applicant *inter alia* annexed the Offer to Purchase, its acceptance, and two e-mails respectively dated 4 September 2017 and 18 October 2017 wherein the applicant authorised the second respondent to pay certain monies to "Elzaan Construction".

- [9] The first respondent avers that in addition to the Sales Agreement and the Building Contract, a further oral agreement was concluded between the parties pertaining to further renovations.
- [10] The first respondent contends that the applicant was in breach of the agreement between the parties and as a result both the Sale Agreement and the Building Contract were cancelled. In reply, the applicant denied that the agreements were validly cancelled.
- [11] I have no doubt that a reading of the papers reveal that several material disputes of fact exists on the papers.
- [12] The two e-mails attached to the applicant's founding affidavit that authorises the second respondent to pay out funds to "Elzaan Construction", cannot on face value be taken to indicate that the payments were made to settle the purchase price to bring about the transfer of the property in the name of the applicant, as opposed to payments made towards the construction and renovations agreed upon by the parties.
- [13] Although the applicant tries to set ringfence the Sales Agreement and set it apart from the Building Contract, it is evident from the terms of the Sales Agreement and correspondence between the applicant and the first respondent that the two agreements were linked to a certain extent.
- [14] The Sales Agreement additionally provides for the purchase price of R800 000.00 to be paid in two instalments of R400 000.00 – the first to be deposited with the conveyancer or estate agent, which amount would only be payable to the first respondent on registration of transfer of the property in the name of the applicant, and the second to be paid to the first respondent upon the date of registration of transfer to the applicant. The payments referenced in the two e-mails were thus not on face value made in accordance with the Sales Agreement. The first respondent additionally avers that the applicant paid an amount of R900 000.00. This is not disputed in reply.

- [15] The first respondent avers that it was entitled to cancel the agreements between the parties and to retain the R800 000,00 as a *rouwkoop*. Applicant claims to have complied with the Sales Agreement and denied that the respondent had any grounds to cancel the Sale Agreement.
- [16] It is trite that the so-called *Plascon Evans*-principle applies when a Court decides an application on motion proceedings. Final relief can only be granted if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such order. It is equally trite that respondents often attempt to create disputes of fact where there are none and Southwood, in *Essential Judicial Reasoning*, urges Courts to adopt a 'robust approach' where spurious disputes of facts are concocted.
- [17] I am not of the view that the respondents in this application created a fictitious dispute of facts. A real dispute exists, and in the circumstances the applicant should have foreseen the factual disputes and should have approached the Court by way of action proceedings.
- [18] As to the applicable cost order that should be made, no case has been made out for the general principle that costs follow suit, not to apply. In addition, no basis has been laid for the court to consider a punitive costs order.

ORDER

As a result, the following order is made:

1. The matter is referred for trial.
2. The notice of motion shall stand as a simple summons and the respondents' notice of intention to oppose, as a notice to defend the action.
3. The applicant shall deliver a declaration within 20 days of the date of this order, whereafter the normal rules relating to the filing of further pleadings shall apply.
4. Costs shall be costs in the action.



E van der Schyff

Judge of the High Court, Gauteng Division, Pretoria

Counsel for the applicants:

Adv T Jacobs

Instructed by:

Stopforth Swanepoel and Brewis Inc.

Counsel for the first respondent:

Adv WJ van Wyk

Instructed by:

Vogel Inc.

Date of the hearing:

29 January 2020

Delivered:

20 February 2020