



**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Saakno: / Case number: **1532/2018**
 Datum verhoor: / Date heard: **16/08/2019**
 Datum gelewer: / Date delivered: **30/08/2019**

In the matter between:

SETLHODI MOSES MAGANO

First Applicant

GLORIA MASEGO MAGANO

Second Applicant

and

THEMBA HOPE DIPHEKO

Respondent

Coram: Sieberhagen, AJ

JUDGMENT

SIEBERHAGEN, AJ

Introduction

[1] The Applicants lodged an urgent application seeking the following relief:

- "1. *That the Respondent shall within fourteen days of the date of the order of this Honourable Court take all necessary steps and sign all necessary documents in order to pass transfer of*

the following immovable property to the First and Second Applicants:

*ERF 18105, GALESHEWE
SITUATED IN THE SOL PLAATJE MUNICIPALITY, DISTRICT OF
KIMBERLEY, NORTHERN CAPE PROVINCE
IN EXTENT 251 SQUARE METERS
HELD BY DEED OF TRANSFER NUMBER T1890/1999*

2. *Should the Respondent fail to adhere to the provisions of paragraph 1 above, the Registrar of this Court be authorised to take the necessary steps and to sign all the necessary documents on the Respondent's behalf in order to pass transfer of the immovable property to the First and Second Applicants;*
3. *That the Respondent be ordered to pay the costs of this application."*

[2] The Second Applicant is the wife of the First Applicant and they are married in community of property. The Respondent opposes the application.

Factual Background

[3] It is the Applicants' case that the Respondent and they concluded a written Deed of Sale on the 5th of January 2015 in respect of the immovable property known as Erf 18105, Galeshewe, Kimberley (hereinafter referred to as the "*immovable property*"). A copy of the Deed of Sale is attached to the Applicants' founding papers.

[4] In terms of the provisions of the Deed of Sale, the parties agreed that:

- 4.1 the purchase price of the immovable property is R40,000.00;

- 4.2 the purchase price is payable in cash on the date of registration of the property into the name of the Applicants;
- 4.3 the Applicants would pay all costs of and incidentals to the registration of transfer of the immovable property, including transfer duty and the costs of obtaining any permit or consent from any statutory authority required for the purposes of such registration;
- 4.4 the Applicants would be liable for the payment of all rates, taxes and other charges levied in respect of the immovable property;
- 4.5 the Applicants would be entitled to receive transfer of the immovable property once they had delivered guarantees for payment of the purchase price and had paid the transfer costs in respect of the immovable property.

[5] According to the Applicants they duly complied with their obligations in terms of the Deed of Sale by effecting payment of the purchase price as well as the deposit for the transfer costs in respect of the registration of the immovable property to the conveyancers, Duncan & Rothman Attorneys on 9 and 12 January 2015 respectively.

[6] Despite having complied with their obligations, the Respondent to date has refused and/or failed to cause transfer of the immovable property in terms of the Deed of Sale. On 17 January 2017, Duncan & Rothman Attorneys addressed a letter to the Respondent which reads as follows:

"We refer to the abovementioned matter and confirm that we have received instructions from the Purchaser to proceed with the registration of the transfer in terms of the Deed of Sale as signed by you dated 5 January 2015."

We hereby give you notice of our intention to re-lodge the deeds at the Kimberley Deeds Office within the next seven (7) calendar days. Should your instructions still be that the matter may not proceed we urge you to obtain independent legal counsel and to bring the required court application to stop us from proceeding.

KINDLY NOTE THAT THIS IS A FINAL NOTICE."

- [7] The Applicants have tendered payment of any further costs that may be payable to the conveyancers in order to have the immovable property transferred into their names and submit that they are entitled to an order for specific performance in terms of the provisions of the Deed of Sale. The Applicants indicated in their papers that their attorney will ensure that notice of all proceedings during the course of this application is provided to the Registrar of Deeds, Kimberley, in terms of section 97 of the Deeds Registries Act, Act 47 of 1937.
- [8] In response to the Applicants' founding papers, the Respondent in his opposing papers stated that he was previously incarcerated at the same prison at which the First Applicant was stationed as prison warden and that they had become friends. In January 2015, after the Respondent was released, he fell ill and his eardrum had to be removed. At that stage he was awaiting trial and needed money for doctors and legal fees.
- [9] He then approached the First Applicant enquiring whether the First Applicant would lend him R10,000.00 towards his medical costs and legal fees. The First Applicant agreed to such a loan amount on condition that they approach the First Applicant's attorneys, Duncan & Rothman Attorneys, to sign an Acknowledgment of Debt. According to the Respondent, an agreement was reached with

regard to the terms upon which he would repay the First Applicant prior to him attending the offices of Duncan & Rothman Attorneys.

- [10] On his attendance at the offices of the Applicants' attorneys, a lady brought a stack of papers for him to sign and she merely indicated that he was to initial at the bottom of each page and sign the last page of the document in full. As a result of the aforementioned agreement and the terms of the loan, he did not read through the documentation.
- [11] It is the Respondent's case that it was his understanding and belief that the document he was signing, was an acknowledgement of debt. He was desperate for the money and had no reason to distrust the First Applicant. Subsequent to this the First Applicant then withdrew R5,000.00 cash and gave it to the Respondent. A week thereafter the Respondent received another R5,000.00 from the First Applicant as agreed.
- [12] He only became aware of the fact that he had indeed signed a Deed of Sale in respect of his immovable property and not an acknowledgment of debt, when he received the Applicants' application. He informed Duncan & Rothman Attorneys that he had signed the Deed of Sale due to a misrepresentation. He would never have sold his immovable property for an amount of R40,000.00, because he has five children and the immovable property must be available for them to live in, because he cannot afford to maintain them if he is in prison.
- [13] The Respondent avers that he was never provided with any transfer document to sign in respect of the immovable property and had he been provided with same before the Applicants' had brought this application, he would have taken the necessary steps to cancel the

agreement. He denies that he received the letter from Duncan & Rothman Attorneys referred to in paragraph 6 *supra*.

[14] In reply the First Applicant denies being friends with the Respondent. According to him, the Respondent had informed him that he wanted to sell his immovable property, but that he owed an amount of approximately R26,000.00 to the Sol Plaatje Municipality for outstanding property services and rates. The Respondent requested him to settle the amount owed to the Sol Plaatje Municipality, whereafter the remainder of the purchase price would be paid to the Respondent.

[15] The Applicants and the Respondent went to the offices of Duncan & Rothman where the contents of the Deed of Sale were explained thoroughly to them by a representative of the firm. According to the First Applicant there could have been no misunderstanding regarding the contents of the Deed of Sale and the conditions thereof. The Applicants attach a statement of Duncan & Rothman Attorneys, dated 3 March 2017, indicating that the Applicants had paid a total amount of R80,049.83 to Duncan & Rothman Attorneys during January 2015. An amount of R26,101.08 was paid to the Sol Plaatje Municipality and R 19,833.00 to the Respondent during January and February 2015 as well as an amount of R651.37 for a copy of the deed and sheriff's fees leaving a balance of R33 464.38 due to the Applicants.

Arguments on behalf of the parties

[16] Adv Labuschagné, on behalf of the Applicants, submitted that the Applicants had complied with all the requirements as set out in the Deed of Sale in respect of the immovable property and are therefore entitled to the transfer of the immovable property.

- [17] She submitted that the Respondent had not raised any issues to indicate that the Deed of Sale is void or unenforceable or that the relief claimed cannot be granted and therefore the Applicants are entitled to the relief as set out in the Notice of Motion.
- [18] With regard to the Applicants' compliance in terms of the provisions of section 97 of the Deeds Registries Act, Act 47 of 1937 as set out in paragraph 7 *supra*, she submitted that the Applicants had obtained a report from the Registrar of Deeds, Kimberley, but that the report could not be filed timeously and therefore did not form part of the papers placed before Court.
- [19] Adv Jankowitz, on behalf of the Respondent, argued that the Respondent should have been placed in *mora* before specific performance may be claimed¹. According to him, the letter dated 14 February 2017 from Duncan & Rothman Attorneys does not indicate what the breach is that needs to be cured nor does it indicate before which date the said breach must be cured and therefore the Applicants' application was brought prematurely and should be dismissed on this basis alone.
- [20] He also submitted that the Applicants had failed to indicate that they had provided the necessary bank Guarantees as stipulated in the agreement and there exists only a vague statement that the applicants had complied with their obligations.
- [21] According to Mr. Jankowitz, the misrepresentation as set out in the Respondent's opposing papers complied with the essential allegations for an innocent misrepresentation and therefore no valid contract came into effect between the parties. In addition, thereto, he submitted that the Applicants' application cannot properly be decided on the papers, as a result of a factual dispute which should

¹ Musgrove & Watson (RHOD) (PVT)LTD v ROTTA [1978] 3 All SA 203 @

have been foreseen by the Applicants and that the Court cannot decide this matter without external evidence. He requested the Court to dismiss the Applicants' application with cost.

Applicable Law and application of Law to the facts

[21] It is quite clear that the version of the events as portrayed by the Applicants are quite at odds with the version of the Respondent. The Applicants will only be entitled to the relief sought where the factual disputes as stated by the Respondent together with the admitted facts in the Applicants' affidavits justify such an order.²

[22] Although Mr. Jankowitz argued that the Respondent had complied with the essential allegations for avoiding a contract on the ground of an innocent misrepresentation and that no valid contract came into existence, I do not agree with this submission. The Applicants deny the existence of an innocent misrepresentation as alleged by the Respondent. The *Plascon-Evans* rule is not affected by the fact that the onus relating to the disputed fact is on the Respondent³. In the case of a counter-application, even if related to the main application, the converse applies and it is the Applicants' version together with the Respondent's allegations that are admitted or not denied which must be considered⁴.

[23] I am of the view that the disputes between the parties in relation to the signing of the Deed of Sale and the Respondent's alleged innocent misrepresentation cannot be resolved on the papers as set out in Rule 6(5)(g) which reads as follows:

² PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD [1984] 2 All SA 366 (A) at page 367

³ United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T) at 348

⁴ The South African Post Office Ltd v van Rensburg [1997] 4 All SA 523 (E) at 533

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the afore-going, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

[24] An application cannot properly be decided on affidavit if there is a potential witness whose affidavit cannot be obtained or, more commonly, there are factual disputes which need to be resolved but which cannot or should not in the absence of oral evidence. Unless the application is dismissed, the Court should adopt the procedure that is best calculated to ensure that justice is done with the least delay⁵.

[25] In this matter both counsel agreed that the evidence of the conveyancer and "lady" who had brought the stack of papers to the Respondent as set out in his opposing affidavit, would have assisted the Court in adjudicating the disputes between the parties. It is also unclear from the papers, why almost two years have lapsed without any progress after the Applicants had made payment to Duncan & Rothman Attorneys during January 2015.

[26] It is accordingly undesirable to endeavor to decide the application upon the affidavits filed by the parties where there are a material dispute of facts as set out in the matter of **Manuel v Sahara Computers (Pty) Ltd and another**⁶:

⁵ Johannesburg City Council v The Administrator Transvaal (1) 1970 (2) SA 89 (T)

⁶ [2019] 2 All SA 417 (GP) – at para [88] and [89]

"[88] In terms of rule 6(5)(g) of the Uniform Rules of Court:

"Where an application cannot properly be decided on affidavit the court maydirect that oral evidence be heard on specified issues with a view to resolving any dispute of fact. . ." [Emphasis added]

[89] This sub-rule does not only apply where there is a true dispute of fact on the papers. It also applies in circumstances where one party casts doubt on the relevant allegations of another. Although not contradicted by direct evidence, those averments are thus in dispute, and "cannot properly be decided on affidavit" in terms of the sub-rule."

[27] I am therefore of the view that it would be preferable that oral evidence be led in this matter to enable the Court to see and hear the witnesses before coming to a conclusion.

[28] The remaining question is whether the dispute of material facts should have been foreseen by the Applicants. Had such a dispute been foreseen, the Court may dismiss the application.⁷

[29] The letter from Duncan & Rothman Attorneys, dated 14 February 2017 addressed to the Respondent, does make mention of the fact that the Respondent gave instructions that the matter may not proceed, but there is no indication in the papers as to the reason for his instructions and I am therefore of the view that the Applicants could not have foreseen that the Respondent would rely on an innocent misrepresentation in respect of the Deed of Sale.

[30] As a result of the order I intend to make, I do not deem it necessary do deal with the issues raised by Mr. Jankowitz in paragraphs 19 and 20 *supra* in this judgment, as the Court hearing oral evidence on behalf of both parties would be in a much better position to adjudicate upon these aspects.

⁷ Harilal v Rajman and Others [2017] 2 All SA 188 (KZD)

[31] The factual disputes between the parties are not only in relation to the Applicants' averments in respect of the Deed of Sale, but also in respect of the Respondent's reliance on an innocent misrepresentation. As a result thereof, I do not deem it necessary to award costs against any of the parties at this stage. The costs of the application should be reserved for the Court hearing the oral evidence.

I make the following order:

- 1. THE MATTER IS REFERRED FOR ORAL EVIDENCE IN TERMS OF THE PROVISIONS OF RULE 6(5)(g).**
- 2. EITHER PARTY SHALL BE ENTITLED TO CALL ANY OTHER WITNESS TO GIVE EVIDENCE, PROVIDED THAT, IF SUCH WITNESS HAS NOT DEPOSED TO AN AFFIDAVIT IN THIS MATTER, A SUMMARY OF SUCH WITNESS'S EVIDENCE IS FURNISHED TO THE OTHER PARTY 10 DAYS PRIOR TO THE HEARING.**
- 3. COSTS OF THE APPLICATION IS RESERVED FOR THE COURT HEARING THE ORAL EVIDENCE.**


**AS STEBERHAGEN
ACTING JUDGE**

Obo the Applicants:

Adv. J.M. Labuschagné (oio Engelsman Magabane Inc)

Obo the Respondent:

Adv. D.C. Jankowitz (oio Haarhoffs Inc)