



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

CASE NO: 795/2017

Heard on: 16 March 2018

Delivered on: 15 June 2018

- REPORTABLE: **NO**
- CIRCULATE TO JUDGES: **YES**
- CIRCULATE TO MAGISTRATES: **NO**
- CIRCULATE TO REGIONAL MAGISTRATES: **NO**

15 June 2018

DATE

SIGNATURE

In the matter between:

IGNATIUS MOSIMANEOTSILE MOTONE

BOITUMELO ANGELIQUE MOTONE

1st APPLICANT

2nd APPLICANT

and

FRANCE SIYAPHI

THE REGISTRAR OF DEEDS

1st RESPONDENT

2nd RESPONDENT

JUDGMENT

VUMA, AJ

INTRODUCTION

[1] This is an opposed application issued by the applicants in which they seek for an order in the following terms:

- '1. Cancellation of the deed of sale entered into by the applicants with the first respondent on 2 February 2016.*
- 2. That the First respondent be ordered to pay the applicants the amount of R150 000-00 together with all the damages suffered by the applicants as a result of the deed of sale entered into by the parties, within 15 (fifteen) days from the date of order; and*
- 3. That the first respondent be ordered to pay the costs of the application'.*

[2] In her opening address Ms Tyuthuza, counsel for the applicants, submitted that the Amended Notice of motion dated 3 November 2017 is the basis upon which this application has been brought. She further stated that the applicants were now abandoning the first relief sought, that is cancellation of the Deed of sale concluded between the parties on 2 February 2016 and that approach this was in view of the fact that in July 2017 the parties had entered into a cancellation agreement cancelling the February 2016 Deed of sale. She submitted that in light hereof prayers 2 and 3 of the Amended Notice of motion still persist.

FACTUAL BACKGROUND

[3] On 2 February 2016 the first and second applicant entered into a written Deed of sale with the first respondent ("the parties") for the purchase of property known as "Erf

25258, Galeshewe, Kimberley". It is not in dispute that the applicants paid the purchase price of R150 000-00 in two installments into the bank account of the first respondent.

[4] The material term of the deed of sale was that the applicants will take occupation of the property upon its registration by which date the first respondent or any other person occupying the property would be obliged to vacate the property.

[5] It is not in dispute that at all material times relevant thereto the first respondent was representing himself as the owner of the said property.

[6] In December 2016 the applicants established through a deed search that the property does not exist. It thus becomes common cause that the property was never transferred to the applicants nor was anything ever done to effect transfer of the property into the applicants' names.

[7] Following the above, pursuant to a Notice of Motion filed in March 2017 by the applicants, an application for the cancellation of the 2 February 2016 deed of sale and for an order of specific performance was brought on 26 May 2017.

[8] On 28 July 2017 the applicants and the first respondent concluded an agreement titled "Deed of cancellation of sale" ("the 2nd Agreement"). The material term of the deed of cancellation was that the first respondent is liable for the wasted costs occasioned by the "purchase of the property" and also that he shall refund to the applicants the purchase price of R150 000-00 within 21 days of the signing of the deed of cancellation.

[9] On 3 November 2017 the applicants filed the so-called Amended Notice of motion. The first respondent did not oppose the Amended Notice.

[10] In response to the above the first respondent filed his opposing affidavit on 14 December 2017 to which he deposed on 13th thereof. The nub of what he alleges therein is that on 11 August 2017 the first applicant confronted and physically assaulted him, swore at him and extensively damaged his motor vehicle which damage resulted in smoke coming out of his car engine. He alleges that the total damages in respect of the above actions by the first applicant amount to R388 243-00. The breakdown of the said heads of damages is as follows:

10.1 Pain and suffering: R150 000-00.

10.2 Reputational damages: R150 000-00

10.3 Patrimonial damages in respect of the Engine of his car: R88 243-00

[11] In respect of the car damages he further alleges that following the first applicant's actions, he took his car to Isolimo Panel Beating and General Works who established that the car engine was damaged beyond repair which led to the car engine being replaced. He attached a quotation totaling an amount of R88 243-00, with the engine quote stated as R75 000-00.

[12] He alleges that as a result of the above damages he entitled by the law to refuse to pay any amount to the applicants since he is also entitled to a set-off against the applicants' claim given the fact that his claim far exceeds the amounts he admits he owes the applicants, that is R150 000-00. He further alleges that he will institute a civil claim against the first applicant as a result of the latter's actions as stated above.

[13] Regarding the car engine damage, the first applicant attached an Affidavit marked "MM3" deposed to by one Mr Neville Baatjies who is employed as a police official at the South African Police Service ("SAPS"). He stated therein that he was assigned as the Investigating Officer in the criminal case opened by the first respondent against the first applicant following the alleged altercation that ensued between the parties on or about 11 August 2017. That after the case was investigated it was sent to the Senior Prosecutor who declined to prosecute on 13 September 2017. He further stated that upon being questioned about the quotation, the panel beater stated that he gave same on the basis of the engine that had overheated and resultantly borrowed the first respondent his

engine and further that no car was damaged on the day of the incident, at least according to the panel beater.

SUBMISSIONS BY THE APPLICANT

[14] The applicant's counsel conceded the first respondent's point *in limine* argument that the applicants based their application on an agreement which had ceased to exist by virtue of its cancellation following the conclusion of the 2nd Agreement between the parties. She further conceded the respondent's counsel's submission that based on the cancellation of the first agreement, the legal *causa* (that is the deed of sale) upon which this application has allegedly been brought as per the applicants' Amended Notice of motion is incompetent. She further conceded that in light thereof the legal *causa* upon which the applicants should have based their application should have been liability arising out a breach of contract, that is, the 2nd agreement concluded between the parties.

[15] Regarding the first respondent's alleged counterclaim, she submitted that the first applicant denies the account by the first respondent regarding the events on 11 August 2017, adding that the first applicant denies ever assaulting, insulting or even damaging the first respondent's car. It was further submitted that the first respondent has also failed to make a case for a set-off since he failed to meet the necessary allegations regarding the requirements to be satisfied for such a prayer. It was further submitted that there was

no basis for this court to refer the issues arising from the disputed facts to trial since they were not related to the application at hand.

SUBMISSIONS BY THE RESPONDENT

[16] As already alluded to above, the first respondent opposed the application on merits and by raising a point *in limine*, namely, that the prayer sought by the applicants is incompetent in that the applicants rely on the terms of the initial deed of sale which was cancelled by the parties on 28 May 2017 and had thus ceased to exist. He submitted that the application must thus be dismissed.

[17] On the merits of the application, the first respondent admitted his indebtedness to the applicants in the amount of R150 000-00 arising out of the terms of the second agreement, but submitted that he has a *bona fide* counter claim in the amount of R388 243-00 following the damages he suffered at the hands of the first applicant on 11 August 2017. On his behalf it was submitted that from the applicants' submissions and affidavits, it was common cause that a factual dispute in respect of the events surrounding the 11 August 2017 existed and that such factual dispute means that this application could not be properly decided on affidavits or papers. He submitted that the said factual disputes can therefore not be resolved in the absence of oral evidence. He further submitted that the applicants should have foreseen the eventuality of the disputed facts and that in the result either the application must be dismissed or the matter be

referred to trial for oral evidence since the first respondent intends to institute a damages claim based on the events of 11 August 2017.

ISSUES

[18] Based on the above, this court is called upon to make a determination in respect of the following issues, namely:

18.1 Whether the application was brought on a wrong cause of action; and

18.2 Whether there exists a reasonable foreseeable dispute of fact.

THE LAW

[19] Ad LAWSA (3ed) Volume 4 Civil Procedure in Superior Courts, Factual Disputes, 2017, wherein it is stated that “*unless the application is dismissed, the court should adopt the procedure that is best calculated to ensure that justice is done with the least of delay. In this regard it exercises a discretion*”.

CASE LAW

[20] In instances where factual disputes arise between the parties, the court may follow the principle established by the Supreme Court of Appeal in the matter of Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), (“Plascon-Evans approach”) where it was held that when factual disputes arise, relief should be granted

only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order'. Simply put, the court will grant the relief sought only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavit(s), justify the order sought.

ANALYSIS

[21] It is common cause that applicants' counsel submitted that the applicants were abandoning the first relief sought considering the July 2017 cancellation agreement of same. Accordingly this court will not labour in respect thereof. It is further common cause that the first respondent's counsel raised a point *in limine* that the applicants' cause of action is in terms of a *causa* (that is the deed of sale which had ceased to exist due to its subsequent cancellation by the parties and that since there is a concession in this regard, that the application falls to fail and must be dismissed with costs.

[22] What is further common cause is that the first respondent does not dispute his indebtedness to the applicants in the amount of R150 000-00 and the fact a Deed of cancellation in terms of which he acknowledges his indebtedness to the applicants also incorporates the terms in respect of which he would be repaying the debt.

[23] It is common cause that the Deed of sale is the original *causa* which resulted in the applicants paying the amount of R150 000-00 to the first respondent. It is further common cause that the contention by the first respondent is that the applicants should

have based their application and prayer for the specific performance of payment pursuant to the 2nd Agreement and not the original Deed of sale.

[24] When regard is had in respect of prayer number 2 which is the basis of the respondent's point *in limine*, which reads thus: '*That the First Respondent be ordered to pay the applicants the amount of R150 000-00 together with all the damages suffered by the applicants as a result of the deed of sale entered into by the parties.....*' (My emphasis), the concession made by the applicants' counsel becomes questionable. From the wording highlighted above, the interpretation that can be attached to same is that the applicants' averment is that 'had it not been for the deed of sale which the parties had entered into, the applicants would not have suffered the damages in the claimed amount as they did'. Put differently, the interpretation is that the deed of sale is what caused us to pay the first respondent an amount of R150 000-00 which led to our loss or damages. The respondent's counsel seems to suggest that the wording thereof avers that the claim is based on the deed of sale whereas it should have been based on the Deed of cancellation.

[25] Despite the applicants' counsel concession, I am of the view that there is nothing untoward about the wording of prayer 2 (two) since it is common cause that the applicants' damages were occasioned by them paying the claimed amount on the strength of the deed of sale. It is a fact that the applicants' damages were not caused by the Deed of cancellation, otherwise that submission and the conclusion being contended

for by the respondent would not be sustainable. The fact that the Deed of sale was cancelled does not negate the fact that the amount of R150 000-00 was paid in respect thereof and that is exactly what prayer number 2 reads. It is my view that upon the deed of sale being cancelled, it still left the repayment of the R150 000-00 pending.

[26] Cancelled or not, the fact of the matter remains that the applicants' loss arises from the deed of sale which fact is not eroded by its subsequent cancellation. The effect of the cancellation simply affirm the inoperableness of the agreed transfer and occupation of the parties given its non-existence, otherwise the debt due to the parties thereby still subsists.

[27] It is in instances of this nature that the trite adage that form should never take precedence over substance holds true.

[28] In the premise I find that the respondent has not make a case for his point *in limine* and accordingly his point *in limine* is dismissed.

[29] Regarding the question of the alleged factual disputes between the parties *re* the respondent's 'counterclaim', the respondent's counsel submits that since the intended counterclaim by the latter against the first applicant exceeds the debt owing to the applicants, in light of the factual dispute emanating from the parties' account of the

events in respect of the 11 August 2017 events, that this matter be referred to trial for oral evidence. In this regard I am of the view that even before the court orders that the application be referred to trial to address the factual disputes, what needs to be determined is whether the court is satisfied whether *ex facie*, the first respondent has made out a case *re* the 'counterclaim' which is triable, so to speak.

[30] Looking at the Affidavit of Mr Baaitjie, the Investigating Officer in the criminal case opened by the first respondent against the first applicant following the events of 11 August 2017, there are material differences in respect of allegations in his Opposing Affidavit that the first applicant damaged his car engine. It is common cause that the first applicant denies the first respondent's allegations in total. From Mr Baaitjie's affidavit, he avers that the panel beater who attended to the first respondent's car after the alleged altercation informed him that there was no car that was damaged on the date in question, hence even the Senior Prosecutor declined to prosecute.

[31] On the basis of the above, I am not persuaded that *prima facie*, the first respondent has a triable case against the first applicant which justifies this matter being referred for trial. The reason is because already the respondent's version has been countermanded by Mr Baaitjie under oath. Coupled with that is the fact that whereas the application was heard on 15 March 2018 and the Opposing affidavit wherein the first respondent alleges that he would be instituting a damages claim against the first applicant was deposed to on 13 December 2017, the first respondent had not instituted

the said claim yet, this despite the fact that the said damages were suffered in August 2017. This court is well aware of the three years prescription period within which the first respondent is entitled to institute his claim against the first applicant, however so, its view is that the applicants' constitutional right to a speedy expedition to their right should not be encumbered flimsily. This finding is however not a bar for the first respondent to pursue an action against the first applicant as he has stated.

[32] In light of the facts of this matter, coupled with the fact that the allegations raised in the first respondent's 'counterclaim' do not necessarily have anything to do with the undisputed payment of R150 000-00 due to the applicants, I am of the view that the 'defence' raised by the first respondent ought to fail. I am satisfied that the applicants have make out a case for the prayers they seek.

[33] In the result the following Order is made:

ORDER

1. Applicants succeed in their application.
2. Prayers 2 and 3 in terms of the Amended Notice of Motion dated 3 November 2017 are granted.


L Vuma
Acting Judge

Northern Cape High Court

Heard on: 16 March 2018
Delivered on: 15 June 2018

Appearances

For Applicant: Adv. T. Tyuthuza
Instructed by: Matthews and Partners

For 1st Respondent: Mr R. Bode
Instructed by: Engelsman Magabane Inc.