REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

(1)	REPORTABLE: ~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED.

13.02.2015 ....

DATE SIGNATURE

CASE NO: 69254/2011

DATE: 13/02/2015

In the matter between:

<u>IN CONVENTION</u>:

PHILEMON NDALA	1ST APPLICANT
NELLY NDALA	2ND APPLICANT
And	
MICHAEL LESONYA MOLEELE	1ST RESPONDENT
SHIRLEY SHUBI ELSIE MOLEELE	2ND RESPONDENT
JOHN SEBELANE MABUA	3RD RESPONDENT
RESHOKETSWE EMILY MABUA	4TH RESPONDENT
CITY OF TSHWANE MUNICIPALITY	5TH RESPONDENT

<u>IN RECONVENTION</u>

SHIRLEY SHUBI ELSIE MOLEELE N.O	
As Executrix in Estate Late	
MICHAEL LESONYA MOLEELE	**1ST APPLICANT (In reconvention)**
SHIRLEY SHUBI ELSIE MOLEELE	**2ND APPLICANT (In reconvention)**
And	
PHILEMON NDALA	**1ST RESPONDENT (In reconvention)**
NELLY NDALA	**2ND RESPONDENT (In reconvention)**
JOHN SEBELANE MABUA	**3RD RESPONDENT (In reconvention)**
RESHOKETSWE EMILY MABUA	**4TH RESPONDENT (In reconvention)**
CITY OF TSHWANE MUNICIPALITY	**5TH RESPONDENT ((In reconvention)**
REGISTRAR OF DEEDS, PRETORIA	**6TH RESPONDENT (In reconvention)**
CONVEYANCER NAKKIE DU TOIT	**7TH RESPONDENT (In reconvention)**
ATTORNEY AO NDALA	**8TH RESPONDENT (In reconvention)**

JUDGMENT

RAULINGA J,

[1] This application concerns the eviction of the first and second respondents (in convention) from a residential property known as Erf 1426, Mabopane Unit U, held by Deed of Grant No 1722/91 (hereinafter referred to as the ("the property"). The property was transferred into and is registered in the names of the first and second applicants. It also concerns contempt of court order against the first applicant (in convention) and the third and fourth respondents (in convention).

[2] The parties herein are referred to as follows for purposes of clarity and ease of reference:

(i) The first and second applicants in convention, also being the first and second respondents in reconvention, as the "Ndalas";

(ii) The first and second respondents in convention, also being the first and second applicants in reconvention as the Moleeles;

(iii) The third and fourth respondents in convention, also being the third and fourth respondents in reconvention, as the "Mabuas"; and

(iv) The eighth respondent in reconvention as "Attorney Ndala".

[3] It can be mentioned that Mrs Moleele N.O (the second respondent in convention, also appears as the first respondent, in convention in her capacity as Executrix in the Estate of the late Michael Lesonya Moleele since the demise of her husband.

[4] This matter is more than 10 years old and has been repeatedly to court with numerous court orders made by different judges.

[5] The chronology of events in this matter is as follows:

On the 16 September 2001 the Moleeles and Mabuas concluded a Deed of Sale. It is prudent to mention that the first Deed of Sale for the purchase price in the sum of R179 705.51 is incorrect because this was the amount that was owed to Standard Bank by the Mabuas. The correct amount of the purchase price is to be found in the second Deed of Sale in the sum of R300 000.00. In terms of this Deed of Sale the payment of the purchase price was to be made as follows:

"*3.1 An amount of R200 000.00 shall be paid to the bank being Standard Bank as the full and final settlement of the bond plus water, rates and taxes and electricity expenses;*

3.2 The remaining balance (sic)of will be paid as follows: The house situated at 715 Block U Mabopane which is worth R80 000.00 will be used as a form of payment;

3.3 The amount of R20 000 shall be paid to the sellers in cash during the end of November 2001."

[6] On the 2 March 2006 the Mabuas and the Ndalas concluded a Deed of Sale on the same property for the purchase price in the sum of R380 000.00. The sum of R295 000.00 was paid on the same day as a deposit. This Deed of Sale preceded a sale in Execution by Standard Bank against the Mabuas after the Moleeles had omitted to make a payment on the property.

[7] On the 7 July 2006, having learnt of the Deed of Sale between the Mabuas and the Ndalas, the Moleeles launched an interim interdict on the 7 July 2006, against the Mabuas. As a consequence, on the 19 June 2008 the Moleeles and the Mabuas concluded a Deed of Settlement still for the purchase price in the sum of R300 000.00.

[8] The Deed of Settlement of 19 June 2008 was made an order of Court. Clause 1 of the Deed of Settlement provides as follows:

"1. The parties shall perform afresh in terms of the second deed of sale dated 16 September 2001 between the parties, for which purposes the parties confirm that defendant (the Mabuas respondents) shall be regarded as having sold the property situated at 1426 U, Mabopane ('1426 U') currently occupied by the plaintiffs (the Moleeles respondents) to the plaintiffs for an amount of R300 000.00 (three hundred thousand rand) payable by the plaintiff –

1.1 by means of the property situated at 715 U Mabopane (715 U), currently occupied by the defendants (Mabua respondents) at the agreed price of R80 000.00 (eighty thousand rand), transferable into the name of the defendants (Mabua respondents) or any possible buyer from them as provided for infra, plus

1.2 R220 000.00 (two hundred and twenty thousand rand) cash against transfer of 1426 U into the names of the plaintiffs (the cash amount)

2. The plaintiffs shall within 30 days(thirty days) from the date of this settlement secure the payment of the said Cash Amount with bank guarantee payable against transfer of 1426 U into the name of the plaintiffs, which bank guarantee shall be acceptable on the face value thereof".

[9] Despite the Court Order of the 19 June 2006, which interdicted the transfer of the property and the Deed of Settlement of 30 July 2008, the Mabuas and Attorney Ndala proceeded to transfer the property in terms of a Deed of Sale dated 2 March 2006. One must be mindful of the fact that in terms of the Deed of Settlement, the attorneys for the Moleeles were to handle the transfers of both properties. It was not incumbent upon Attorney Ndala to handle the transfers.

[10] As matters stand, the Mabuas and Moleeles sold their houses to each other and moved to and from both sides prior to transfer having taken place. The Mabuas occupy the Moleeles' house and in turn the Moleeles occupy the Mabuas' house.

[11] The Ndalas contend that the Moleeeles have failed to effect payment of the balance of the purchase price in the sum of R220 000.00. That under the circumstances the settlement agreement dated 19 June 2008 has lapsed in terms of clause 8 of the deed of settlement and the parties are entitled to retake possession of their respective properties.

[12] I agree with counsel for the Moleeles that the application in convention is essentially and predominantly dependent –

(a) on three very simple and basic factual questions, namely whether in fact there had been proper performance in terms of the prevailing deed of settlement of 19 June 2008 which on 19 June 2008 was made an order of court; and

(b) the legal question, namely –

(i) whether the Moleeles in fact had paid R220 000.00 into the relevant transfer attorney's trust account – attorney Nel still holds the funds on trust as the conveyancer for the two simultaneous transfers concerned.

(ii) whether such payment (if found to have been made) complies with the said deed of settlement;

(d) accordingly whether the said deed of settlement and Court Order remained and are still operative requiring Erf 1426, Mabopane U – the "Mabua Property" to be registered in the name of the Moleeles; and

(e) whether the transfer of the property into the names of the Ndalas was irregular, or not, and if so, had been void or voidable, and if so, the application in convention should be dismissed and the application in reconvention should be granted.

[13] A considered view I have taken is to deal with the matter holistically and not piece-meal in terms of Rule 33(4) as suggested by Counsel for the Moleeles. There is also no need to embark on a point of limine concerning the question of fact.

[14] However, again, I agree with Counsel for the Moleeles that, the Mabuas' court settlement did not and could not have prescribed payment of R220 000.00 prior to registration of transfer, but required the delivery of a bank guarantee for R220 000.00 payable against transfer of the property in the name of the Moleeles. The claim that such non-payment caused the settlement with its court order to have lapsed is thus unfounded, irrational and irrelevant in the application in convention. The letter of 30 July 2008 from Mr Dibakoane to Nel &Claassen Attorneys who were the Moleeles' attorneys confirms that timeous in terms of clause 2.2(a) meant on or before 14H00 on 30 July 2008:

"You are further notified that, since your clients have failed to meet their obligations in terms of the settlement agreement, more specifically clause 8 (eight) thereof, the order shall lapse 14H00 pm the 30th July 2008.

In the event your clients fail to provide us with a bank guarantee by 12H00 pm on the 30 July 2008, your clients should vacate our clients' property with immediate effect *before 14H00 pm 31 of July 2008 since our clients would like to retake possession and occupy their property being 1426 Unit U Mabopane".*

[15] The fact that the payment was made timeously is attested to by a letter from Nel &Claassen to Dibakoane Attorneys c/o Ndala Attorneys dated 31 July 2008 in which Mr Nel states that the Moleeles deposited a Bank Guarantee cheque in the amount of R220 00.00 into their Trust Account on 28 July 2008, and also attached their Trust receipt. It is immaterial whether the Moleeles provide a Bank Guarantee or a Bank Guarantee Cheque. In fact a Bank Guarantee cheque is equivalent to a cash payment. It is also irrelevant whether the cheque was issued by the Bank or the Trust. The issue is that the bank had originally issued a Bank Guarantee Cheque to the Conveyancer.

[16] It must also be noted that at the time the Mabuas raised this issue, a Deed of Sale was already concluded between them and the Ndalas on the 2 March 2006. Further there existed a Deed of Settlement which was made an order of court on the 19 June 2008. The interim interdict of 7 July 2006 was still in force. Since the payment was made timeously, the interim interdict and the Deed of Settlement never lapsed. The Ndalas were therefore not entitled to have proceeded with any transaction to acquire the property against the said Deed of Settlement that was made an order of court. The Mabuas – Ndalas' Deed of Sale and subsequent transfer thus violated the Mabuas - Moleeles Deed of Settlement and is irregular which must be set aside. It is therefore not just and equitable for the Ndalas to obtain an eviction order against the Moleeles.

[17] I now turn to deal with the application in reconvention. Since some of the substantial issues in the application in reconvention have been dealt with in the application in convention above, in this part I will concentrate only on issues that I think were not considered in the application in convention.

[18] In their affidavit, dubbed "Replying and Answering Affidavit", the Ndalas state (sic) 'the reason for this is that the respondent has launched a counter –application and this affidavit will serve both as an answering affidavit to the counter-application and as a replying affidavit to those aspects that bear a reply to my application'.

However, this constitutes an irregularity because they conveniently sneak new evidence into the application in convention, which they are not entitled to do – See paragraph 3 page 123-132 of the record- Volume 1. New aspects intended to apply as answer to the counter application cannot be argued in favour or in respect of the application in convention if and when they were not raised in the founding affidavit. The new matters raised in this affidavit are rejected. In the same vein, the triplicating affidavit cannot be allowed because it does not comply with Rule (6)(5)(e) which provides that a Court may in its discretion permit the filing of further affidavits. The

Registrar is not empowered to exercise discretion and a party cannot take it upon himself to simply file further affidavits without first having obtained the leave of the Court to do so. It has been held that where further affidavits are filed without leave of the court, the court can regard such affidavits as *pro non scripto*. See Erasmus et al "Superior Court Practice" at B 147. The triplicating affidavit is accordingly disallowed.

[19] The argument by the Ndalas that the Moleeles were unable to pass transfer of their property to the Mabuas because it was registered in the City of Tshwane Municipality names, has been overtaken by events. The Moleeles obtained transfer of erf 715 Mabopane Unit U on the 17 February 2012. They are now able to transfer that property to the Mabuas. I agree with Counsel for the Moleeles that the previous onus where an owner had to prove his ownership with proof of occupation of his property by a respondent upon which the respondent carried a severe onus that his occupation was lawful, no longer prevails. It is the defendant and not the owner – plaintiff who relies on the lease, and if the lease itself is denied by the defendant, as in the present case, the allegation of the lease is surplusage – *Letty v Naidoo 1947(3) SA13 (A)*. In casu, ownership, if any, was obtained irregularly and such ownership is artificial. The transaction between the Mabuas and Moleeles *is res iudicata* and unassailable. It is governed by a Court Order which prevails over any other dealings.

[20] The Ndalas contend that the agreement concluded between the Moleeles and the Mabuas on 19 June 2008 is not a bona fide agreement. They rely on the maxim qui prior est tempore, which they aver has not been elevated to the status of a rule of law. However, the Moleeles submit that the law in terms of the choice of preference between double contracts of sale in the respect of the same property has become well developed. I agree with this submission. The deciding question is whether transfer of the property has taken place or not. Prior to transfer the *maxim qui priori est tempore potior estiure* normally prevails. See *Wahloo Sand Bk en Andere v Trustees, Humbly Parker Trust, en Andere 2002(2) SA 776(SCA)*. The principle was not applicable only to double sales but also to conflicting personal rights in general. The law construes fraud by the transferee that obtained transfer of the property with the knowledge of another prevailing deed of sale, yet only mere knowledge of such prevailing deed of sale is all that is required to be proven for the setting aside of the transfer. If a seller concludes a contract of sale with a third party contrary to a pre-emptive right the purchaser can step into the shoes of the third party by a unilateral declaration of intent. A Contract of Sale will then be deemed to have been concluded between the seller and the holder of the pre-emptive right. Should delivery already have taken place, the holder of the right would not be able to pursue the merx in the hands of the third party with his personal right, unless the latter was aware of the existence of the pre-emptive right – *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backeiselen (Pty) Ltd en Andere 1983(3)893 SA (AA).* I am minded

to mention that the *qui priori est maxim* is not inflexible as it is subject to fairness between the parties. The maxim should not be applied unfairly.

[21] In the present scenario, the Ndalas, the Mabuas and the Attorney Ndala were aware of the transactions that had been concluded between the Moleeles and the Mabuas. They were aware that the Deed of Settlement of the 19 June 2008 was made an order of court. They were also offaire with the existence of the interim interdict of the 7 July 2006. Therefore the Mabuas –Ndalas' transfer was conducted irregularly and is void.

[22] For the civil contempt of court order to survive constitutional scrutiny in a form of a motion court application, the applicant must prove the requisites of contempt (the order, service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt. Once the applicant has proved the order, service or notice and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides. *Fakie NO v CC11 Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at para 42.*

[23] My observation in this matter is that both the Mabuas and Ndalas might have seen the woods for the trees. They misinterpreted the Deed Settlement and Court Order of 30 July 2008 and misunderstood the implications of the interim interdict of 19 June 2006. I am not convinced that the Moleeles, as applicants in this instance, have proved beyond reasonable doubt the presence of wilfulness and mala fides. I am however convinced that the Mabuas and Ndalas committed a serious irregularity but that may not amount to contempt of court.

[24] In the premises I make the following order:

(a) The application in convention is dismissed as a whole.

(b) Prayer (a) in the notice of motion in reconvention is granted in the following terms:

That the Deed of Transfer number 00167211 dated January 2011 in respect of Erf 1426 Mabopane –U township herein "the Property") in favour of the 1st and 2nd Respondents(in reconvention) be cancelled;

(c) Prayers (b), (c) (d and (e) in the notice of motion in reconvention are granted.

(d) Prayers (f)(g)(h)(i)(j)(k)(l)(m) and (n) are dismissed.

(e) The costs of the application in convention are to be paid by Attorney Ndala in the firm Ndala Attorneys, de bonis propiis, including the reserved costs.

(f) The 1st, 2nd ,3rd, 4th and 8th respondents (in reconvention) shall bear the costs of the application in reconvention, jointly and severally the one paying the other to be absolved in respect of the paid portion, on an attorney and own client scale.

TJ RAULINGA

JUDGE OF THE NORTH GAUTENG HIGH COURT