

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 2840/2013

In the matter between:

RICHARD WILLIAM PARKER

Applicant

and

PARADIGM INVESTMENTS 444 (PTY) LTD
(IN LIQUIDATION)

First respondent

(REGISTRATION NUMBER 2001/012281/2007)

ABSA BANK LIMITED

Second Respondent

THE REGISTRAR OF DEEDS, KING WILLIAMS
TOWN

Third Respondent

THE MASTER OF THE FREE STATE HIGH COURT,
BLOEMFONTEIN

Fourth Respondent

CORAM:

MONALEDI, AJ

HEARD ON:

21 NOVEMBER 2013

DELIVERED ON:

20 MARCH 2014

MONALEDI, AJ:

- [1] The Applicant herein gave notice of his intention to make an application seeking the following orders:

1. An order declaring the sale of the immovable property known as and described as Erf 602 Cintsa, Local Municipality of Great Kei, Division of East London, Eastern Cape Province situated at 602 Seagull Street, Cintsa East, Eastern Cape (in extent: 973 square metres) (hereinafter "the property") in terms of a written deed of sale concluded between the Applicant and the First Respondent on or about the 13th of April 2012 in Bloemfontein in the Free State Province (hereinafter "the deed of sale"), null and void;
2. An order directing the First Respondent to pay within five (5) days of granting of this order by this honourable Court and then specifically, from the purchase price received by the First Respondent in terms of the deed of sale, all and any monies due and payable by the Applicant to the Second Respondent in respect of bond loan account number 807 645 1487/001 to a maximum amount of R 861 052-00 in settlement in full, of the outstanding loan amount and/or bond amount owing by the Applicant to the Second Respondent and which loan has been secured by way of a bond over the property;
3. An order directing the First Respondent to pay within five (5) days of granting of this order by this honourable Court to the Applicant, all and any monies in excess of the amount already paid by First Respondent to the Second Respondent in terms of prayer 2 supra, but then limited to an amount not greater than R 861 052-00;

4. An order instructing the Third Respondent upon payment by the First Respondent to Second Respondent of any and all monies due and payable by the Applicant to the Second Respondent in terms of bond account number 8076451487/001, to cancel the bond held in favour of the Second Respondent over the property and thereupon, to cancel the transfer of ownership of the property in terms of the deed of sale so as to reflect the First Respondent as the registered owner and title holder of the property;
5. An order instructing the First Respondent to pay all and any costs in order to enable the Third Respondent, upon payment by the First Respondent to Second Respondent of any and all monies due and payable by the Applicant to the Second Respondent in terms of bond account number 8076451487/001, to cancel the bond held in favour of the Second Respondent over the property and thereupon, to cancel the transfer of ownership of the property in terms of the deed of sale so as to reflect the First Respondent as the registered owner and title holder of the property;
6. Leave be granted to the Applicant to institute action against the First Respondent in due course for damages suffered as a result of the void deed of sale (as referred to in prayer 1 above) once the Applicant is in a position to quantify his damages in full;
7. An order directing the First Respondent to pay the costs of this application.

- [2] Only the first Respondent opposed the application.
- [3] The issues herein revolves around a property described in paragraph 1 of the Notice of Motion and are the contentions of the applicant that:
- a) That the transfer of the property in question in terms of an agreement of sale which is void or voidable;
 - b) a completed house was pointed out to the Applicant by a representative of the First Respondent;
 - c) Applicant took occupation of a different property to that described in the Deed of Sale and had in fact, in terms of the written Deed of Sale, purchased a different property to that pointed out to him by First Respondent's representative;
 - d) Applicant did not have the intention or would have purchased the property as described and referred to in the Deed of Sale as it was incomplete;
 - e) The liquidators of First Respondent were only appointed as provisional liquidators of the First Respondent by the Fourth Respondent and did not have the authority to conclude a sale agreement.
- [4] The first respondent counters with the following arguments in relation to the facts:
- a) The First Respondent denies that its representative introduced the applicant to the property and avers that it was the Applicant whom had identified and pointed out a

property to the First Respondent's representative and thereafter indicated that he wishes to make an offer on Erf No. 602;

- b) that the liquidators of First Respondent was appointed as provisional liquidators on the 23rd of March 2012;
- c) that even if the agreement of sale is void or voidable due to the liquidators of First Respondent's failure to comply with section 18(3) of the Insolvency Act, 24 of 1936, then in terms of the abstract system of acquiring ownership of immovable property in South Africa, the Applicant is bound by the agreement of sale.

[5] The court considered the contentious issues herein as amplified in court with the respective arguments from council. The foremost disputes herein are

- a) The question of the property and the identification thereof by the parties which raises the possibility of mistake (*justus error*) ;
- b) the question of authority to act in relation to the sale agreement.

[6] In **National and Overseas Distributors Corporation (Pty) Ltd v Potato Board** 1958 (2) SA 473 it was held that:

“Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into

which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (*justus*) and it would have to be pleaded.”

- [7] The question to be asked in cases such as this has been formulated as follows:

“Did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?

To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party’s intention; secondly, who made that misrepresentation; and thirdly, was the other party misled thereby? The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?”

See Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis 1992 (3) SA 234 (A) at 239I-240B.

- [8] Both parties alluded to the possibility of a dispute of fact arising from the papers. From the arguments it is clear that there is a real dispute of fact regarding the identification of the property.

- [9] In such a case the general rule was stated in **Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd** 1957 (4) SA 234 (C) at p 235 E-G, to be:

".... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

- [10] The aspect of a dispute of fact has been the focus of numerous decided cases and this court will refer to the most important ones.

- [11] In **Wightman v Headfour (Pty) Ltd** (66/2007) [2008] ZASCA 6 (10 March 2008) it was held that a real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.

- [12] In dealing with disputes of fact in motion proceedings, Conradie J in **Cullen v Haupt** 1988 (4) SA 39 (C) held:

"I have consulted some of the better known decisions concerning the referral of applications to evidence or to trial. The leading decision in this regard is, of course, *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162, where Murray AJP said that if a dispute cannot properly be determined it may either be referred to evidence or to trial, or it may be dismissed with costs, 'particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop'."

[13] The court considered the contents of the opposing affidavit. The respondent's allegations do not prima facie amount to "bald or uncreditworthy denials, raises fictitious disputes of fact, are not palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on papers", as stated in **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA).

[14] It is the view of this court, having regard to the legal principles stated in this judgment that the disputes of fact referred to are not capable of determination on affidavits alone. Neither are the disputes of fact capable of resolution by a common-sense or robust approach as suggested in **Soffiantini v Mould** 1956 (4) SA 150 (E).

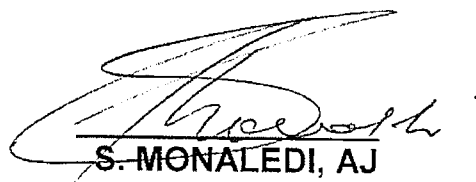
[15] It is the contention of the Respondent that the dispute was

foreseeable and the Applicant should not have followed the application procedure. For that reason it is submitted that the application must fail. I had regard to this and the importance of the matter to the parties, as well as the amount involved and the property involved, and in the exercise of my discretion, finds it will be prejudicial to merely dismiss the application.

ORDER

[16] The following order is made:

1. The application is referred to trial;
2. The notice of motion and the founding affidavit shall stand as simple summons and the answering affidavit as entry of appearance to defend;
3. The applicant shall file his declaration within twenty (20) days of this order;
4. Thereafter the applicable provisions of the Uniform Rules of Court are to apply;
5. The costs of the proceedings to date are reserved.



S. MONALEDI, AJ

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