FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 858/2013

In the matter between:

NAPE WELCOME HLABANE	1st Applicant
KESELEPELE LOUISA HLABANE	2nd Applicant

versus

LEBOGANG LESLEY SEBOTSA	1st Respondent
THE REGISTRAR OF DEEDS, BLOEMFONTEIN	2nd Respondent
J L JORDAAN ATTORNEYS	3rd Respondent

HEARD ON:	23 MAY 2013
JUDGMENT BY:	LEKALE, J
DELIVERED ON:	6 JUNE 2013

INTRODUCTION AND BACKGROUND:

[1] The applicants, a couple married in community of property, effectively moves this court for an order in the following terms:

> **"2.1 That First Respondent be prohibited from selling,- otherwise alienating and transferring the property**

known as Erf 55123, Mangaung, Extension 4, Bloemfontein (the property), to any person other than Applicants or in any way whatsoever encumbering the property;

2.2 That First Respondent be ordered to immediately instruct Third Respondent to finalize the conveyancing process of transferring the property into the Applicants' name, subject to the Applicants paying the prescribed transfer costs;

2.3 That First Respondent be ordered to immediately sign all necessary documents and do all things necessary in order to give effect to the order contained in 2.2 above;

2.4 That failing compliance by First Respondent with the terms of the orders contained in 2.2 and 2.3 above, the Registrar of this Court is authorised to sign all necessary documents and generally to do all things necessary and take whatever steps might be necessary to effect transfer of the property into the name of Applicants and to comply with the First Respondent's obligations arising out of the orders contained in 2.2 and 2.3 above;

2.5 That Third Respondent be ordered to immediately repay to Applicants the amount of R150 000.00 paid by First Applicant into Third Respondent's trust account by way of electronic funds transfer on 17 January 2013;

2.6 That the First Respondent pays the costs of this application."

[2] During or about April 2012 the applicants responded to an advertisement which marketed Erf 55123 Moshoeshoe Road, Bochabela, Bloemfontein (the property) for sale and,

eventually, signed a Deed of Sale in respect thereof with the first respondent, at the offices of the estate agent who was mandated to market the property viz. Retika Property and Development (Retika) in terms of which:

2.1 they purchased the property for R324 000.00 inclusive of estate agent's commission;

2.2 the purchase price was payable on demand.

[3] On 4 May 2012 the applicants paid the full purchase price into the bank account of Retika by way of electronic funds transfer (EFT). On 10 May 2012 the first respondent, *inter alia*, acknowledged, in writing, receipt of payment of R150 000.00 and, further, confirmed that the balance of the purchase price shall be paid over to him on receipt of a title deed from the municipality.

[4] The property was transferred to the first respondent by the municipality on the 2nd August 2012 and, on the 7th December 2012, the first respondent caused a letter to be directed to the applicants by Legal Aid SA demanding payment of the balance of the purchase price by no later than 28th December 2012. On the 21st December 2012 the first respondent caused an e-mail to be directed to Retika by Legal Wise requesting cancellation of the Deed of Sale on the ground of alleged breach of contract on the part of the applicants.

[5] On the 17th January 2013 the applicants paid an amount of R150 000,00 into the trust account of the third respondent, who was appointed by the first respondent to attend to the transfer of the property into the names of the applicants. On the 18th January 2013 the first respondent terminated the mandate of the third respondent as the transferring attorney. In response the applicants caused a letter to be directed to Legal Wise by their attorneys pointing out that the full purchase price had been paid to Retika and, further, demanding transfer of the property. On the 27th February 2012 the applicants' attorneys directed a letter to the attorneys appointed by the first respondent to attend to the transfer of the property into the name of a third party confirming that state of affairs and, further, recording that the latter had undertaken to hold back the transfer pending the outcome of the present application, which the applicants eventually launched on the 4th March 2013 as a semi-urgent application for a rule *nisi* and an interdictory relief of interim nature. The parties, however, reached agreement on filing dates and the first respondent, further, undertook not to sell, transfer or alienate the property in any manner whatsoever pending the finalisation of the instant application. The parties have since filed opposing and replying papers and the applicants, thus, effectively seek a final relief. No papers have been filed for and on behalf of the second and third respondents although the applicants also seek relief against the third respondent.

ISSUE IN DISPUTE

[6] In the heads of arguments filed and oral submissions before me the parties are at variance on whether or not payment of the purchase price to Retika constitutes payment to the first respondent in the sense that the former was mandated by the latter to receive and retain payment on his behalf. The parties are, further, in dispute over whether or not there exists a genuine dispute of fact, on the papers, warranting either the dismissal of the application or the referral of the relevant issue for oral evidence.

CONTENTIONS FOR THE APPLICANTS

[7] Mr Louw, for the applicants, submits that it is clear from the papers that a verbal agreement was concluded, after the deed of sale was signed, dealing with outstanding issues such as the method and place of payment. That payment of the R150 000,00 to the first respondent was made through Retika and it was the intention of the parties that payment was not to be made directly to the first respondent by the applicants insofar as the written consent signed by the first respondent employs the phrase "**will be paid over**". There exists, according to the applicants, no genuine dispute of fact warranting dismissal of the application or referral to oral evidence of the question whether or not the estate agent was mandated to receive payment for and on behalf of the first respondent. Even in the face of such an alleged dispute the court is entitled to adopt a robust approach and to have

regard to the probabilities in order to determine the matter. The circumstances of the instant matter, according to Mr Louw, justify the inference that Retika was empowered by the first respondent to receive the purchase price for him.

CONTENTIONS FOR THE FIRST RESPONDENT

[8] Mr Pienaar contends, for the first respondent, that there exists a dispute of fact which justifies the referral of the issue to oral evidence and that this dispute was foreseeable to the applicants who, nevertheless, chose to proceed by way of motion rather than action. For the aforegoing reason the matter should, in his view, be dismissed. The power to sell does not, *per se*, include the power to receive payment on behalf of the seller. The purchase price was *ex contractu* payable on demand and directly to the first respondent. It is clear from probabilities that Retika was the applicants' agent for payment to the first respondent insofar as their consent was necessary when R150 000,00 was paid to the first respondent. It is, further, clear from the first applicant's conduct of laying a charge with the police against Retika in respect of the balance of the purchase price that he did not regard payment to Retika as payment to the first respondent. The first respondent is and was entitled to cancel the sale because of breach of contract on the part of the applicants. No oral agreement was concluded between the parties authorising payment of the purchase price to Retika. Payment of R150 000,00 *viz* balance of the purchase price to the third respondent by the applicants, after the dispute with

regard to payment of the balance of the purchase price had already arisen, is further proof of the fact that monies paid to Retika were held on behalf of the applicants. That the application should be dismissed with costs alternatively the dispute regarding Retika's authority to receive payment on behalf of the first respondent be referred for oral evidence.

APPLICABLE LEGAL PRINCIPLES

[9] It is correct, as the parties effectively submit, that material disputes of fact in motion proceedings, where a final order is sought, are dealt with on the basis that the order sought is justified by facts which are common cause between the parties and those facts which are alleged by or on behalf of the respondents. The courts are cautious about deciding probabilities in the face of conflicts of facts in affidavits. (See **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) at p 634 – 635 and **BUFFALO FREIGHT SYSTEMS (PTY) LTD v CRESTLEIGH TRADING (PTY) LTD AND ANOTHER** 2011 (1) SA 8 (SCA) at p 14 D – F.)

[10] As Mr Louw correctly submits, 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 papers, seriously and unambiguously addressed the facts alleged to be in dispute. Where the allegations regarded as raising the dispute are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are farfetched or

clearly untenable the court is justified to reject them merely on the papers. (See **Wrightman t/a J W Construction v Headfour (Pty) Ltd** [2008] 2 ALL SA 512 (SCA).)

[11] As the parties correctly submit, the power to sell property on behalf of another does not, as a general principle, confer on an agent the power to receive the purchase money. Circumstances may, however, exist which justify the conclusion that such a power is implied. (See **Tank v Jacobs (1) SC 289 and R v Visagie** 1954 (4) SA 50 (O) at 51 G – H.)

[12] **The Estate Agency Affairs Board – Code of Conduct** (the Code) of the 1st April 1993 provides, *inter alia*, as follows:

> "**9. Trust Money and Interest**
>
> **An estate agent:**
>
> **9.1 ...**
>
> **9.2 ...**
>
> **9.3 ...**
>
> **9.4 shall not include, or cause to be included, or accept the benefit of, any clause in a contract of sale of immovable property negotiated by him, providing for payment to the seller, prior to registration of transfer of the property in the purchaser's name, of any portion of the purchase price entrusted to the estate agent by the purchaser: provided that the aforegoing shall not apply if**
>
> **(aa) good cause exists: and**

(bb) **the purchaser has prior to his signature of the contract in question consented in writing in a document executed independently of the said contract, to such payment: and**

(cc) **such document contains an explanation of the implications and financial risks of such payment for the purchaser, and**

(dd) **such document is signed by both the seller and the purchaser and the estate agent in question.**"

[13] Section 32 of Estate Agency Affairs Act 112 of1976 (the Act), just like section 78 of Attorneys Act 53 of 1979 in respect of attorneys, inclusive of conveyancers, on its part, obliges an estate agent to open a trust account into which all monies received in his business from, *inter alia*, purchasers of property sold by him should be deposited and to pay over the interest generated therefrom to the Fidelity Fund in the absence of a written agreement to the contrary.

[14] Funds entrusted to the estate agent by the purchaser of an immovable property are, generally, held on behalf of the latter until transfer of the property has taken place unless the contrary is apparent from the sale contract or from any written instrument in the same way in which trust funds held by attorneys are for the credit of depositors in the absence of any agreement to the contrary. (See generally **Frikkie Pretorius Inc and Another v GG** 2011 (2) SA 407 (KZP).)

APPLICATION OF THE LAW AND FINDINGS

[15] I am satisfied that there exists no genuine dispute of fact on material aspects of the matter insofar as the parties are in agreement on the central point of their dispute. The dispute, in my view, relates to interpretation and implementation of the agreement between the parties as evinced by the consent signed by the first respondent and witnessed by the agent who assisted the parties at Retika, one Tisetso Mosebo (Mosebo) and the principal estate agent on the 10th May 2012. The aforegoing prevails because, although the parties are in dispute over the existence of oral agreement empowering Retika to receive and keep the purchase price for and on behalf of the first respondent, they are ad idem about the existence of the consent in question. The sale contract provides for payment of the purchase price on demand and, as correctly pointed out by Mr Louw, does not specify the method and place of payment. In my judgment, the parties, eventually, concluded an agreement on, at least, the terms reflected in the relevant consent. The consent stipulates the event, upon which occurrence, payment of the balance of the purchase price shall fall due and, further, provides proof of early payment of half of the purchase price to the first respondent. I shall return to the consent later in the judgment.

[16] Mosebo deposed in support of the application to, *inter alia*, the effect that he was mandated and expressly instructed by the first respondent to act as his agent in receiving the

purchase price from the applicants. A close perusal of the papers, however, reveals that his continuing conduct and attitude, effectively, gainsay his deposition insofar as he treats and regards the purchase price paid as belonging to the applicants until transfer has taken place in their favour. This is borne out by the fact that he secured the applicants' consent before half of the purchase price could be released to the first respondent as *quid pro quo* for allowing the applicants to commence with construction work on the property. His e-mail to Legal Wise on the 7th January 2013, further, buttresses this view insofar as it reads as follows in part:

> **"It is very strange to me that the seller can be paid his money in full before registration."**

Retika's attitude and conduct in this regard accord with the letter and spirit of the Code insofar as the retention of the funds, in its account, until registration of transfer of the property in the applicants' names has taken place safeguards the applicants' interests, as purchasers, by minimising the financial risks to them. This is, further, the same reason why conveyancers, as practitioners in terms of Attorneys Act, keep monies entrusted to them, as consideration for the sale of immovable properties, in trust until registration has taken place in favour of the purchasers in the absence of any agreement or instruction to the contrary. The Code regards registration of transfer in favour of purchasers as a payment-triggering-event and requires the purchaser, if he is so advised, to consent to earlier payment to the seller "**in writing in a document executed independently of the... contract**".

[17] In my view, the answer to the real dispute between the parties lies in the consent, which evidently constitutes proof of an underlying agreement providing for earlier release of the funds to the first respondent and which, ***ipso facto***, alters the default position provided for by the Code and contemplated by the Act. The said consent provides, inter alia, for payment of the second half of the purchase price after the first respondent has secured the title deed from the municipality. The first respondent, further, declares in the consent that the same constitutes a collective agreement between himself, the applicants and Retika as the estate agent mandated by him. Although the consent is, *stricto senso,* not in compliance with the Code, it, in my view, nevertheless provides proof of the existence of a trilateral agreement among the first respondent, the applicants and Retika on the terms set out therein which are not in dispute. It is clear, *ex facie,* the consent that it is a product of such an underlying oral agreement, which provided for all the things reflected therein, as Mr Louw correctly and effectively submits. The first respondent's version is, in my view, untenable insofar as it is not compatible and consistent with the consent although it, in the same breath, embraces the same. I, therefore, reject it on the papers as such. After the first respondent secured the title deed from the municipality on 2 August 2012, he was entitled to receive payment of the

balance of the purchase price in accordance with the consent. Retika was clearly mistaken in the e-mail to Legal Wise because the applicants had already consented to earlier payment to the first respondent. In my opinion Retika was, legally and professionally, obliged to hold the funds on behalf of the applicants, as the purchasers, until the payment-triggering-event had occurred. The agreed payment-triggering-event in casu occurred on 2 August 2012.

[18] The real question in the instant matter is whether or not after the 2nd August 2012, Retika kept the funds for and on behalf of the first respondent as his mandated agent. An answer to this question depends on the answer to the question as to whether or not, after the date in question, in law and ethics Retika needed the applicants' consent before it could release the relevant funds to the first respondent. A positive answer to this question would simply mean that Retika was still holding the funds for the applicants and was, as such, not the first respondent's mandated agent *vis-à-vis* the funds in question, while a negative answer would signify that Retika held and continues to keep the funds for the first respondent.

[19] The effect of the Code, as I have already pointed out, is that, in general, registration of transfer in the name of the purchaser signifies the due dâte for payment of the purchase price to the seller. After registration the purchaser, in law and logic, no longer has a say or interest in the purchase price because he has taken transfer of the *merx* which is,

from thence, his property. Payment to the seller is made by the agent without reference to him. If the agent fails to release the funds to the seller, after registration in favour of the purchaser, the former has no recourse against the purchaser and can only look to the agent for satisfaction unless the full purchase price has not been paid to the agent by the purchaser. *In casu* the due date for the release of the balance of the purchase price was anticipated and brought forward to the date of receipt of transfer by the first respondent from the municipality. Once the first respondent had received the title deed from the municipality, the applicants fell out of the picture in the matter of payment to the first respondent insofar as they had already placed Retika, as the estate agent, in receipt of the full purchase price. It follows, therefore, that the first respondent was barking up the wrong tree when he demanded payment from the applicants after 2 August 2012 with full knowledge that Retika was placed in funds. Retika was his agent and was keeping the funds for him after that date.

[20] The fact that the first applicant laid a charge, with the police, against Retika or Mosebo is of no consequence in the instant matter because, as at December 2012, the funds were effectively in the first respondent's coffers insofar as Retika was his chosen pocket. The first respondent's case is that he was not aware that the full purchase price was paid to Retika. The aforegoing can, with respect, not be correct when regard is had to the fact that it is, effectively, not in dispute that the first respondent received half of the

purchase price from Retika insofar as the first applicant clearly and undisputedly transferred funds into Retika's account on the 4th May 2012. It is, further, admitted by the first respondent that the first applicant informed him accordingly after the applicants received a letter of demand from Legal Aid SA. The first respondent, further, clearly acknowledged, in the consent, that the same constitutes a collective agreement between himself, the applicants and Retika as the estate agent mandated by him. At that stage *viz* the 10th May 2012 the Deed of Sale had already been signed and Retika's mandate to advertise and market the property for sale had already been completed. The only mandate the first respondent was, reasonably possibly, referring to was one to receive and keep funds on his behalf after receipt, by him, of the title deed. It can, thus, not be correct, in my view, that Retika's mandate was limited to marketing the property. The first respondent was and still is not entitled to cancel the sale.

<u>CLAIM AGAINST THE THIRD RESPONDENT</u>

[21] There exists no reason for continued retention of the R150 000,00 by the third respondent insofar as the full purchase price has already been paid to the first respondent in terms of the trilateral agreement underlying the consent and through Retika. The funds in question are held for the

applicants and they are entitled to the same as depositors. (See **Frikkie Pretorius Inc and Another v GG**, *supra.*)

ORDER

[22] An order is, therefore, granted in terms of prayers 2.1; 2.2; 2.3; 2.4; 2.5 and 2.6 in the Notice of Motion.

L.J. LEKALE, J

On behalf of applicants:	Adv MC LOUW Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of first respondent:	Adv CD PIENAAR Instructed by: McIntyre & Van der Post BLOEMFONTEIN
On behalf of second respondent:	Registrar of Deeds: BLOEMFONTEIN
On behalf of third respondent:	J L Jordaan Attorneys BLOEMFONTEIN

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