FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2387/2013

In the matter between:-

HASSAN MAHOMED VALODIA	Applicant

and

COOPER BEZUIDENHOUT INC	1st Respondent
DONOVAN THEODORE MAJIEDT N.O.	2nd Respondent
BRIAN ITUMELENG NAKEDI N.O.	3rd Respondent
NORMAN KLEIN N.O.	4th Respondent
JAICHAND HARIPERSAD N.O.	5th Respondent
VIDHIAWATHIE HARIPERSAD N.O.	6th Respondent
THE MASTER OF THE HIGH COURT	7th Respondent

HEARD ON:	15 AUGUST 2013
JUDGMENT BY:	DE WET, AJ
DELIVERED:	29 AUGUST 2013

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[1] The applicant brought an urgent application on the 25th of June 2013 for an order

1.1 restraining first, second, third and fourth respondents from transferring, alienating or otherwise disposing of the amount of R3 393 750.00 together with any interest that might have occurred thereon held in first respondent's trust account in respect of the sale of the immovable property described as Erf 24957 (on which the shopping centre is situated) corner of Barkley Road and Seochoreng Road, Galeshewe, Kimberley, Northern Cape.

1.2 That the second, third and fourth respondents and the applicant are declared to have concluded a valid and binding agreement for the purchase and sale of the immovable property described as Erf 24957, Galeshewe (on which the shopping centre is situated) physically situated at Barkley Road and Seochoreng Road, Galeshewe, Kimberley, Northern Cape, which has not been cancelled by such respondents.

1.3 That the first, second, third and fourth respondents are directed to pay the amount referred to in 1.1 above to the applicant.

1.4 That the first, second, third and fourth respondents are jointly and severally liable for the costs of the application, the one paying the other to be absolved.

1.5 That the order set out in 1.1 above is prayed as an interim interdict with immediate effect pending the finalisation of the application.

[2] On the 25th June 2013 the following order was made by agreement between the parties, (fifth and sixth

respondents not having filed any notice of opposition and seventh respondent indicating that he abides by the order of court.)

2.1 The application is postponed for hearing on 15 August 2013.

2.2 Pending the outcome of the application, the first, second, third and fourth respondents undertake not to alienate transfer, pay out or dispose of the amount of R1 778 990.37 together with interest thereon.

2.3 The first, second, third and fourth respondents file an opposing affidavit by not later than 19 July 2013.

2.4 The applicant file a replying affidavit, if any, on or before 2 August 2013,

2.5 Costs to stand over.

[3] On 13 August 2013 the fifth and sixth respondents filed an answering affidavit without any notices of opposition or any indication that they intend applying for condonation as a result of their late filing of the affidavits.

[4] On 14 August 2013 first, second, third and fourth respondents

gave notice to fifth and sixth respondents of a number of irregularities to which notice the fifth and sixth respondents replied on 15 August 2013 alleging that the notice by first, second, third and fourth respondents in terms of rule 30 of the Uniform Rules of Court is only a stratagem by first, second, third and fourth respondents to prevent the proper ventilation of the real issues between the parties.

[5] At the hearing of the application on 15 August 2013 the court enquired from Mr Johnson, on behalf of fifth and sixth respondents, whether he intends applying for condonation in view of the opposition to the late filing of the fifth and sixth respondents' opposing affidavits and he was referred to the decision of Poswa J in **Waltloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd and Others** 2008 (5) SA 461 (T).

[6] Mr Johnson then advised the court that he is not moving for condonation and that he will remain in court on a watching brief only.

[7] The attempt of the fifth and sixth respondents to place at the very late stage opposing affidavits before court without any condonation application were dismissed. The fifth and sixth respondents are ordered to pay the costs occasioned by the aforesaid attempt on a party-and-party scale.

[8] On 25 June 2013 as aforementioned, applicant was ordered to

file his replying affidavit on or before 2 August 2013, but filed his replying affidavit only on 6th August 2013 necessitating a condonation application which was not opposed by first, second, third and fourth respondents and condonation was granted and applicant is ordered to pay the costs occasioned by the condonation application on an unopposed basis.

[9] The following are important:

9.1 The application is presently an application for final relief and a final order can be granted only if the facts averred in the founding affidavit which have been admitted by the respondents … together with the facts alleged by the latter, justifies such order.

See **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634E – 635C; **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at 290D – 291B.

9.2 The legal issues must be resolved based on common cause facts.

The following facts are common cause between the parties:

9.2.1 Second, third and fourth respondents “the trustees” are the duly appointed trustees of the insolvent estate of the Barkly Road Development Trust.

9.2 Park Village Auctions Central (Pty) Ltd was appointed by the trustees to conduct and auction of the fixed property, the property of Barkly Road Development Trust.

9.3 The applicant participated in the auction by means of telephonic bids and its final bid in the sum of R22 625 000.00 was accepted by the auctioneer.

9.4 Pursuant to the auction the terms and conditions of the sale of the property by public auction were forwarded to the applicant, he duly signed same and returned it to the auctioneer.

9.5 A duly completed and accurate version of the aforementioned document was annexed to the respondents' papers and contains the signature of not only the applicant as purchaser, but also those of the auctioneer and the trustees as sellers.

9.6 Pursuant to the sale agreement being signed, payment of the deposit in the sum of R3 393 750.00 was made on 19 December 2012 directly into the account of Park Village Auctioneers. From the telefax simile sent to the auctioneer as proof of payment of the deposit it was not possible to discern who had made the deposit payment.

9.7 On the 21st December 2012 an email from one Vishal: West Mead Group was forwarded to the auctioneer:

"Hi John please see attached documents for the shopping centre purchased at Kimberley. I would appreciate it if all information need for the transfer to be forwarded to me and any further instructions will be done by me. (The Haripersad Family Trust)
And Barry will not be included in the further development of this transaction. The deposit was made from the Haripersad Family Trust and not Barry.
Regards,
Vishal"

Attached to the said email was a copy of the Trust Deed of the Trust, the letter of authority of the trustees of the Trust and a copy of the identity of the fifth and sixth respondents.

9.8 On the 10th January 2013 first respondent was advised by the fifth respondent that hence forth the sale agreement was to be concluded with the Haripersad Family Trust (the trust) and that all documentation had to make provision for signature by fifth respondent on behalf of the Trust as the Trust was now going to purchase the property.

9.9 Mr Cooper, on behalf of first respondent, then instructed the auctioneer to obtain a sale agreement in terms whereof the Trust is in fact the purchaser.

9.10 Pursuant thereto and between 10 January 2013 and 12 February 2013 a fresh purchase agreement, as well as relevant affidavits were signed on behalf of the Trust in this regard.

9.11 On the 12th February 2013 the first respondent, acting on behalf of the trustees, addressed a letter to the Trust and also send a copy of the letter to the applicant informing them that they being the Trust have not complied with section 2.3 of the said agreement of sale by not delivering a guarantee for the balance of the purchase price as provided for in the agreement within the period mentioned therein or at all. The trust is further advised that they have not signed and returned the transfer documents sent to them, which were requested on numerous occasions and they have also not paid the transfer costs as provided for in paragraph 9.1 of the agreement despite numerous requests and they are therefore informed that unless the above breaches are remedied within four days of date of the notice, the seller will cancel the agreement and retain all amounts paid by the Trust as “rouwkoop”.

9.12 Thereafter on 14 February 2013 the transfer costs in the amount of R91 633.40 was paid by the Trust.

9.13 On 18 February 2013 a further email was directed to the Trust only by Me Adele Norval, secretary of the first respondent, informing fifth respondent:

“I have not heard anything from you about the guarantee. It is my instructions from the liquidators that if we do not receive the guarantee by close of business today, they will cancel the agreement and you will forfeit all monies already paid, as breach of the contract. The property will then be put back on auction. Please let me know.
Regards,
Adele
Coopers Bezuidenhout”

9.14 Subsequently on 19 February 2013 a letter addressed to the Haripersad Family Trust by email (a copy of which was sent to the applicant’s email address) informed the Trust that

“We therefore inform you herewith in terms of paragraph 5 of our said letter as read with clause 15 of the said agreement of sale, that the sellers herewith cancel the said agreement of sale, between our clients, as the sellers, and you the purchaser and the sellers retain all amounts paid by you as rouwkoop which you forfeit to our clients as provided for by the said agreement."

[10] It is clear that the agreement entered into between the trustees and the applicant had never at any stage been cancelled in terms of the provisions of the agreement or otherwise. The only contention of the respondents regarding cancellation of the agreement with the applicant, were that the applicant had stepped away from the agreement, thereby apparently abandoning it, according to the respondents.

[11] The following disputes of fact exist *inter alia* on the papers:

11.1 The applicant alleges that he sought and obtained a loan from the Trust for the deposit amount in the sum of R3 393 750.00 and although there was some delay in securing the deposit, it was ultimately paid to the auctioneer. He then attaches a copy of the deposit slip reflecting the transfer of the funds "from the party from whom I had loaned such funds namely the Trust". He further attaches a copy of the confirmation letter from the auctioneers.

11.2 The respondents reiterate that as is confirmed by the auctioneer he could not see from the proof of payment who had paid the deposit and thought at that stage that it was the applicant, but it only later turned out that the deposit was paid by the Trust. Neither the auctioneers nor the respondents have any first-hand knowledge of how, why and by whom the deposit was paid. The respondents clearly rely for their believe on the letter of 21st December 2012 (referred to above) by the Haripersad Family Trust instructing that the deposit was paid by the Haripersad Family Trust and not by the applicant.

11.3 The fifth and sixth respondents tried to file opposing affidavits as referred to above, but their attempt were opposed by the first, second, third and fourth respondents and the attempt without a condonation application was turned down by the court. There is therefore no evidence except that of the applicant in regard to the deposit payment.

11.4 Although the first, second, third and fourth respondents attempt to deny that the payment was made on behalf of the applicant and criticises the applicant for not giving more and fuller details regarding the loan that he alleges he received from the Trust, there is nothing on the papers except the aforesaid letter gainsaying what the applicant alleges and his version must therefore be accepted.

12.1 The respondents allege that during the course of the morning of 21 December 2013 and after being advised by the auctioneer that the deposit had been paid, the conveyancing secretary employed by first respondent, Me Adele Norval, contacted the applicant who then informed her that he has nominated the Haripersad Family Trust as the purchaser. She then requested from the applicant the necessary documentation relating to the Trust to enable the first respondent to draft the necessary documentation for the conveyancing process and the applicant then by way of email produced a copy of a letter of authority from the Trust, a copy of the Trust Deed, as well as a copy of an identity document. Norval then prepared the necessary conveyancing documentation which was sent by email for the perusal and signature of the applicant, but the duly signed documents were never received nor was the account of the first respondent paid and as a result Norval phoned the applicant on 9 January 2013 to find out the whereabouts of the signed documents.

12.2 Applicant then informed Norval that he did not receive documents for signature. More copies of the same documents were then sent to the applicant for signature, but on 10 January 2013 the fifth respondent called Norval informing her that the purchaser is in fact the Trust and that he is a duly appointed trustee of the Trust. The necessary documents were forwarded thereafter to the fifth respondent for signature.

[13] In the replying affidavit the applicant points out that as stated in his founding affidavit, he was looking for an opportunity to sell the immovable property in what would effectively constitute a back to back transaction. The purchaser under the second

transaction was to have been the Trust. The applicant furthermore alleges that he learned from the answering affidavit that the trustee of the Trust effectively attempted to exclude him by signing a separate purchase and sale agreement and instructing the respondents, alternatively the first respondent from not having any further dealings with him.

[14] The applicant alleges that at the end of the day he will be liable to the Trust for the repayment of the deposit in accordance with the loan and he points out that the respondents cannot gainsay his contention that the deposit was paid on his behalf. The applicant denies the allegation by Me Norval that he nominated the Trust as the buyer and states that he never agreed to step away from the transaction as suggested by the respondents. He points out that the Trust imposed itself as the purchaser and the respondents agreed to this effectively side-lining the applicant in the process. He admits to sending the aforesaid documentation to the respondents but alleges that it was for the purposes of furnishing the necessary documentation pertaining to the party to whom he would sell the property. He alleges that at that stage he was unaware that the fifth respondent had instructed the respondents to have no further dealings with him and he was only made aware of this after receipt of the answering affidavit.

[15] The applicant points out that Me Norval persisted in contacting him as the purchaser of the property, notwithstanding her

allegations of what was alleged to have taken place on 21 December 2012.

[16] I find it stange that after Me Norval was informed by the applicant about the nomination of the Trust as purchaser that she would still continue sending him documents for signature as well as a statement of account for payment. Clearly if he had informed her as she alleges about the Haripersad Family Trust being the nominated purchaser there was no need for further communication with the applicant.

[17] Even if Me Norval's version is accepted, namely that the applicant orally informed her that the Trust was nominated by himself as purchaser of the property, it seems strange that neither Me Norval nor first respondent ever requested confirmation of that decision by the applicant in writing.

[18] Without cancelling the agreement with applicant or receiving applicant's written confirmation of the nomination of the Trust as alleged, a new agreement was subsequently entered into between the trustees and the Haripersad Family Trust.

[19] The relevant clauses of the agreement read:

> "14.1 Where the purchaser is acting as an agent or a nominee for a principal, the purchaser shall be entitled, by notice in writing to that effect addressed to the seller or auctioneer, to nominate its principal in its place as a purchaser, upon the

following terms and conditions.

14.2 …

14.3 Should the purchaser fail to nominate the principal by close of business on the date of acceptance by the seller, then it shall be bound to perform all his obligations as purchaser in terms of this agreement.

15. Cancellation

15.1 Should the purchaser fail to comply with any provisions of this agreement, and the parties irrebutably agree that each and every term and condition of this agreement of sale, creating an obligation for the purchaser, is a material term and condition, the seller shall be entitled to give the purchaser written notice to rectify such term and condition, and on failure of the purchaser to do so within the period of four days after receipt of such written notice the seller shall, without prejudice to any of its other rights, be entitled to either 15.1.1 cancel the agreement in which event, the seller shall be entitled, in the seller's sole discretion, either to retain all the amounts paid by the purchaser in terms thereof as rouwkoop or …

22. Whole agreement (no amendment)

22.1 This agreement constitutes the whole agreement between the parties relating to the subject matter hereof.

22.2 No amendment of this agreement or any provision or term of the agreement, or any other document issued or executed pursuant to or in terms of this agreement and no settlement of any disputes arising under this agreement and no extension of time, waiver, relaxation of suspension or consensual cancellation of any of the provisions or terms of this agreement or of any agreement or other document issued pursuant to or in terms of this agreement shall be binding unless recorded in a written document signed by the relevant parties. Any such extension, waiver, relaxation, suspension or the like which is so provided or made will be strictly construed as relating strictly to the matter in respect whereof it was made or provided.

22.3 No extension of time, or waiver, or relaxation of any of the provisions in terms of this agreement or any agreement or other document issued or executed pursuant to, or in terms of this agreement, will operate as an estoppel against the seller and/or the auctioneer in respect of any rights under this agreement, nor shall it operate so as to preclude the seller and/or the auctioneer thereafter from exercising any rights strictly in accordance with this agreement.

22.4 …"

[20] It is clear from the agreement that a written instruction to nominate a purchaser of the property involved is prescribed.

See **Brisley v Drotsky** 2002 (4) SA 1 (SCA).

[21] There might have been ample reason for the respondents to properly cancel the agreement with the applicant, but it is also clear that the provisions of the aforesaid cancellation clause had to be strictly adhered to.

See **Van Zyl v Rossouw** 1976 (1) SA 773 (NC) at 776 – 777;

De Wet NO v Uys NO en Andere 1998 (4) SA 694 (T) at 706; **Kragga Kamma Estates CC and Another v Flanagan** 1995 (2) SA 367 (A) at 374D – E.

[22] The respondents in the absence of any written confirmation and/or authority from the applicant in terms of the agreement, simply decided to ignore the first agreement and concluded a second deed of sale with the Trust on 12 January 2013 and after cancellation of the second agreement concluded an agreement with the third party to whom the property was eventually transferred.

[23] It is clear from the respondents' papers that it never sought to invoke the provisions of clause 15 of the sale agreement relating to cancellation vis-a-vis the applicant.

[24] The actions of the respondents are clearly a repudiation of the agreement between the sellers and the applicant, as purchaser, and such repudiation was accepted by the applicant, thereby cancelling the agreement between him and second, third and fourth Respondents (The sellers).

See **Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd** 2001 (2) SA 284 (SCA).

[25] It follows from the cancellation of the sale agreement between Applicant and the sellers of the property that the applicant is

entitled to restitution of the deposit in the amount of R3 393 750.00. It was alleged and argued on behalf of the respondents that the applicant is acting in cahoots with the fifth and sixth respondents in the present matter. The argument was considered and although there may be a suspicion that they are so acting, there is nothing in the papers on which the court can rely for such a finding.

[26] I accordingly make the following order:

1. The second, third and fourth respondents are declared to have concluded a valid and binding agreement for the purchase and sale of the immovable property described as Erf 24957, Galeshewe (on which a shopping centre is situated) physically situated in Barkley Road and Seochoreng Road, Galeshewe, Kimberley, Northern Cape with the applicant and that the agreement has not been cancelled by the respondents, but by the applicant after such agreement was repudiated by the aforesaid respondents and the repudiation was accepted by the applicant.

2.1 Second, third and fourth respondents are directed to pay the amount of R3 393 750.00 to the applicant.

2.2 Second, third and fourth respondents are directed to pay interest at the rate of 15,5% per annum *a tempore morae* to the applicant.

3. Second, third and fourth respondents are jointly liable for the costs of the application, including the costs of 25 June 2013.

P.J.T. DE WET

On behalf of applicant:	Adv. P.U. Fischer Instructed by: Lovius Block Attorneys BLOEMFONTEIN
On behalf of respondents:	Adv. Steyn Instructed by: Christo Dippenaar Attorneys BLOEMFONTEIN

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