

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Case No: CA&R 3/2011
Heard: 21/11/2011
& 11/02/2013
Delivered: 26/03/2013

In the matter between:

REGINALD MOSEKI MEREMENTSI

Applicant/Plaintiff

v

ANDREW MOSEKIMANG VISSER

Respondent/Defendant

Coram: Kgomo JP; Williams J et Pakati J

ORDER

1. The appeal is upheld with costs on a party and party scale.
2. The order of the Court below is set aside and replaced with the following order:
 - 2.1 The defendant is ordered to pay the plaintiff damages in the amount of R25 000.00.
 - 2.2 The defendant is ordered to pay interest on the R25 000.00 at the rate of 15% from the date of this order to the date of payment.
 - 2.3 The Cape Law Society is requested to investigate whether the firm of attorneys Robertson Du Toit attorneys acted ethically by interdicting the transfer of Stand No 9400, House No 6005, Seleke Street, Mankurwane, Kimberley,

from the name of the defendant (Andrew Mosekimang Visser) into the name of the plaintiff (Reginald Moseki Merementsi); and what has happened to the amount of R11 421-00 that has not been accounted for; and to ascertain to whom the amount of R16 270-00 lodged with attorney Van Vuuren should be paid; and to ensure further that it is done. The Cape Law Society is requested to report back their findings to the Judge President through the Registrar of the High Court, not later than 27 June 2013."

JUDGMENT

KGOMO JP

(concurring in the judgment of Pakati J. Williams J dissenting).

INTRODUCTION AND HISTORY

1. I have had the advantage of reading the judgment of Pakati J (the scribe) and the separate judgment of Williams J and concur in the judgment of Pakati J. The case emanates from the District Court. The appeal was heard on 21 November 2011 by the two judges. Pakati J produced an initial judgment from which Williams J dissented.
2. I was then approached by the judges to constitute a Full Court (three judges) to break the stalemate. Several dates to re-argue the appeal were not suitable to counsel. Eventually counsel were given a date of hearing in August 2012. Just before the appeal was re-heard by a panel of three, counsel approached me and requested a postponement because

settlement negotiations were taking place. When the parties did not revert I called in their legal representatives and allocated 11 February 2013 for the re-hearing.

3. On 11 February 2013 the respondent (defendant), Mr Visser, terminated his counsel's (Mr Anderson of Legal Aid South Africa's) mandate. Notwithstanding our persuasion to retain Mr Anderson, explaining that the legal issues may be complex to a lay person, the respondent persisted in his attitude. He adopted the same attitude in the magistrate's court. We availed both sets of Heads of Argument to him to familiarize himself with the issues and to indicate whether he was ready to proceed or ask for a postponement. We adjourned for this purpose and proceeded when he intimated that he was ready to proceed. Needless to say, Mr Visser argued outside the record. Nevertheless, to his benefit, we had regard to the Heads of Argument prepared by Mr Anderson.

ON THE MERITS OF THE CASE

4. Pakati J has written a comprehensive judgment (paras 10-37). There is no need for a repetition. I allude to a few peripheral matters on the merits.
5. Williams J does not state that the parties hereto had entered into a valid agreement of the sale of the immovable property described by Pakati J in the opening paragraph of her judgment (para 10). It is therefore incomprehensible on what basis or legal principle it is suggested by Williams J that the respondent could alter arbitrarily and orally the terms of a binding written

agreement of the sale of immovable property.

6. In para 41 Williams J states, inter alia:

"As a result thereof the full purchase price of R21 000, 00 was handed to the defendant's guardian, Mr Maropong. Hereafter the defendant approached the plaintiff with a request to increase the purchase price by R4000, 00 bringing the total purchase price to R25 000, 00, in order for the defendant to discharge his increased financial obligation towards the municipality. The plaintiff refused to pay the additional amount requested, which in turn led to the defendant's refusal, despite numerous requests, to sign the transfer documents."

This aspect is concluded by Williams J as follows in para 47:

"As outlined herein-above, it became clear shortly after entering into the agreement, that the defendant was demanding a higher purchase price and was steadfast in his refusal to sign the transfer documents unless the plaintiff complied, thus clearly evincing an intention not to be bound by the contract."

7. A seller of property cannot evade its obligations under a valid sale agreement because such seller reckons that a more commercially lucrative deal is to be had from another potential purchaser. See **Pillay and Another v Shaik and Others** 2009(4) SA 74 (SCA) at 81B where the following statement in a letter did not absolve the seller:

"[O]ur client has decided that it will not accept these offers by Mr S Pillay and Dr Motlanthe respectively. If they are interested in increasing the offering price, our client may be prepared to

consider their offers.

We are making arrangements for the deposits to be refunded to these two purchasers together with the interest which has accrued thereon.”

Whereas the Pillay case deals with quasi mutual assent the consequences of a valid agreement are no different when a party attempts to resile from the terms thereof. I can therefore, with respect, not reconcile myself with the approach by Williams J.

8. At paras 17, 18, 31, 32 and 33 Pakati J deals with a debt owed by Mr Visser (the defendant) to his attorneys Robertson Du Toit Attorneys for fees owed to them for services rendered in a criminal matter. This debt has nothing to do with the appellant/plaintiff (Mr Merementsi) or the sale agreement aforesaid between the parties in this appeal. I am unable to fathom why Robertson Du Toit Attorneys did not simply allow the sale of the property to go through and recover their fees from the proceeds of the sale as soon as the property had been transferred to the appellant.
In my view it appears that these attorneys impermissibly stole a march, interfered with a valid agreement and prevented its consummation.
9. From Pakati J’s judgment (paras 17 and 18) she points out that it is not all too clear how, following the sale in execution initiated by Robertson and Du Toit, the balance was disbursed or distributed after these attorneys arrogated payment to themselves. Hence the order at para 2.3 which I am in agreement with. Magistrate Adams, the court a quo, was also

concerned on how the proceeds of the sale were dealt with.

PAKATI J (MAJORITY JUDGMENT)

10. The appellant, Mr Reginald Moseki Merementsi (the plaintiff), instituted an action against the respondent, Mr Andrew Mosekimang Visser (the defendant), for damages in the amount of R25 000-00 for failure to sign transfer documents pertaining to immovable property situated at Stand 9400, House No. 6005 Seleke Street, Mankurwane, Kimberley (the property), into the name of the appellant. The appeal is from the judgment of Ms CM Adams, a district magistrate of Kimberley.
11. The defendant does not dispute that he refused to sign the documentation to allow transfer. He admitted that the plaintiff suffered damages but denies that it was due to any fault on his part. According to him the sale of his property at the auction took place in his absence and was not instigated by him.
12. At the conclusion of the trial the Magistrate made the following order:
"The plaintiff's claim is dismissed with costs. The Clerk of the Court is directed to forward the matter to the Law Society of the Cape of Good Hope and the South African Board for Sheriffs in order to investigate the transfer of funds in trust and immovable property situated at stand 9400, house number 6005 Seleke Street, Mankurwane, Kimberley."
13. The plaintiff was aggrieved by the Court a quo's order and appealed to this Court on the grounds which are summarised in

his counsel's Heads of Argument as follows:

"2.1 THE RESPONDENT'S PLEA:

2.1.1 The first ground for the appeal relates to the Respondent's plea.

2.1.2 The Respondent admitted in his plea to the appellant's particulars of claim that:-

2.1.2.1 the immovable property was sold; and

2.1.2.2 the appellant suffered damages.

2.1.3 The Respondent did not raise the defence in his plea that the Appellant had not complied with the provisions of the agreement of sale.

2.1.4 The Respondent also did not raise the defence in his plea that it was the fault of Robertson Du Toit Attorneys that the property had been sold in execution and that it was Robertson Du Toit Attorneys who had caused the Appellant's damages.

2.1.5 The Respondent's plea was never amended to record the new defences.

2.1.6 The Court a quo found that the Respondent's defence to the Appellant's claim was that it was the fault of Robertson Du Toit Attorneys that the property had been sold in execution and that it was Robertson Du Toit Attorneys who had caused the Appellant damage[s].

2.1.7 The court a quo erred in finding that it was hearsay evidence that the Respondent had refused to sign the transfer documents.

2.1.8 Paragraph 6 of the Appellant's particulars of claim states as follows:

"The Respondent failed and refused to sign any documentation with Van de Wall & Partners to allow transfer of the property to be effected to the Appellant."

2.1.9 The Respondent pleads to paragraph 6 in paragraph 3 of his plea that he had not signed any documentation at Van de Wall and Partners for transfer to be effected."

14. A synopsis of this matter is that on 26 September 2003 the plaintiff and the defendant entered into a written sale agreement for the purchase of the immovable property. The terms of the agreement read as follows:

"This is a binding, amicable and mutual agreement between **Mr Andrew Mosekimang Visser** (ID No, 6202045859085) who is the owner and seller of ERF 00/00003/694 – Stand 9400 house number 6005 Seleke Street P.O Mankurwane Vergenoeg, Kimberley Municipal district – Account no: 072157081528 on the day (Friday) 26 September 2003 at Kimberley Prison.

Between **Reginald Moseki Merementsi** ID No: 68058045740087 who is the purchaser or buyer of house number 6005 Seleke Street, Vergenoeg, Kimberley, ERF 694 Stand 9400, with the total [voetstoots] cost price of R21, 000, 00 but with the first payment of R16, 000, 00 in cash through our local government structure namely the Sol Plaatjie Municipality Private Bag 5030 Kimberley 8300 Tel: (053) 830 6911 – Housing Section – Mr Jerry Majinja.

I, **Reginald Moseki Merementsi**, requested and agreed with Andrew Mosekimang Visser to pay him the outstanding amount [of] R5, 000, 00 within a period of six months as from the date of the first payment of R16, 000, 00.

Mr Merementsi will occupy the property immediately upon payment of R16,000,00. **The transfer of ownership** must be effective immediately upon receipt of the outstanding amount (full amount) of R5, 000, 00 which succeeds the R16, 000, 00.

Failing to honour this kind, humble, honest and friendly agreement will nullify the selling transaction and the final transference of the above mentioned property to Mr R M Merementsi. (cell no. 082 6792433).

BUYER: Reginald Moseki Merementsi ID No. 6805045740087....

Created by R M Merementsi & A M Visser."

15. It is common cause that there was a valid written agreement between the parties. The plaintiff paid the purchase price of R21 000-00 to Mr Maropong, the defendant's relative, as per instructions of the defendant whilst the defendant was in prison. After payment of the purchase price the plaintiff effected some improvements to the building without notifying the defendant and later moved into the property. The occupation is in accordance with the written agreement.
16. The defendant alleged that he refused to sign the transfer documents because the plaintiff had to add R4 000-00 to the purchase price of R21 000-00 to make it R25 000-00. The additional demand of R4000-00 was made orally after the valid

sale agreement had been concluded and also after the R21 000-00 was already paid to Mr Maropong, in terms of the defendant's instructions.

17. It transpired that during March 2002 Mr Robertson, an attorney in Robertson and Du Toit Attorneys in Kimberley, represented the defendant in a criminal matter. As a result of these rendered services the defendant owed the firm R12 000-00. Mr Robertson apparently requested some form of security from the defendant because the latter was not in a financial position to pay his legal fees immediately. The defendant undertook to settle this account from the proceeds of the sale of the property. He thereafter signed a special power of attorney in favour of Mr Robertson to do the conveyancing or to see to it that this was done. When he failed to pay the said fees Ms Du Toit obtained an interdict against the defendant which prevented the sale of the property, and at the same time issued summons against him for the payment of R12 000-00. The firm obtained default judgment against the defendant in the magistrate's court on 03 March 2003 after the defendant failed to enter an appearance to defend. He also failed to bring an application for rescission of the default judgment even though he was aware of the judgment. The property was then advertised for sale and subsequently sold in execution for R46 000-00.
18. The plaintiff testified that he read about the sale of the property in a newspaper on 14 January 2005. He enquired from Robertson and Du Toit Attorneys concerning the sale of the property and was informed that the sale was going ahead as

advertised. He recovered the purchase price of R21 000-00 that he paid to Maropong and added a sum of R25 000-00 and bought back the property on 27 January 2005 for R46 000-00. Robertson and Du Toit Attorneys received R18 309-00 inclusive of the ancillary costs and interest realised from the proceeds of the sale. The balance of R16 270-00 was paid over to Mr Van Vuuren, the defendant's attorney at that stage, where it is still kept in trust. According to Ms Du Toit there was an outstanding amount of R5 594.40 due to them by the defendant which they wrote off as a bad debt. It is not clear from the record what gave rise to that debt. It is also not clear what happened to the balance of R11 421-00 to tally up to R46 000-00.

19. Adv A Stanton, for the plaintiff, argued that the defendant conceded in his plea that the property was sold and that the plaintiff indeed suffered damages. She argued further that the defendant did not raise it in his plea that Robertson & Du Toit Attorneys were responsible for the sale of the property and therefore caused the plaintiff to suffer damages. There was also no allegation that the plaintiff did not comply with the terms of the agreement.
20. Mr WW Anderson of Legal Aid South Africa, who prepared the Heads of Argument which the defendant supposedly used after he inexplicably terminated Mr Anderson's mandate, had contended that the plaintiff failed to prove who caused the damages; when it had occurred and to what extent. He contended further that the damages were not limited in this case and there was no agreement between the parties that the

plaintiff should effect improvements to the property.

21. The plaintiff stated that he bought the house at the auction sale because he would have lost all the money he invested in renovating the property and contended that the defendant breached the contract by refusing to sign the documentation allowing transfer of the property into his name. The defendant confirmed in para 3 of his plea that he did not sign the documentation.

22. The court a quo in deciding the matter made the following findings:

"Subsequent to the signing of the agreement in 2003 the plaintiff unilaterally amended the terms of the agreement. The plaintiff failed to act in accordance with the agreement in that the terms regarding the payment of the purchase price was made to a guardian of the defendant instead of the local municipality, specifically a certain Mr Majinja, as the agreement provided.

The plaintiff testified that he indeed met with Mr Majinja, but when he attempted to pay the municipality the R16 000 as agreed in the contract, the municipality refused to accept it. The plaintiff conceded that the terms of the contract were not performed as agreed, stating in answer to a question by the defendant that the written agreement had now been transformed into a verbal agreement.

Later, the exact date being unknown, the plaintiff appointed a [conveyancer] to attend to the transfer of the property, albeit

that the agreement was not fulfilled according to the conditions of how payment should be effected therein.

Ms Du Toit who was called to testify on behalf of the plaintiff, stated in her evidence that transfer of the property would not have been possible because an interdict had been registered against the property on 09 June 2004, this being 9 months after the parties entered into the sale agreement for the property in question, as her firm obtained judgment and attached the property for the debt due to them by the defendant which has been mentioned early on in the judgment...

I am of the view that the court is not in a position to decide whether the debt to Robertson Du Toit was indeed due to them and whether Robertson and Du Toit Attorneys were correct to proceed with the sale in execution.

I find that the defendant is not liable for the payment of damages to the plaintiff as he did not cause the plaintiff to pay an additional R25 000 in order to become the owner of the property for an amount of R46 000 at a sale in execution.

I find that the transfer of the property as per the agreement between the parties never materialised because there was no valid agreement between the parties. The conditions of the agreement were not fulfilled by the plaintiff. When the conditions in the agreement were not fulfilled, the sale was nullified as per the agreement and transfer of the property could not be effected.

Furthermore, the verbal agreements between the parties were never reduced to writing in order to comply with the prerequisites for the sale of immovable property, namely that a contract of this nature must be in writing.

The plaintiff alleges that his damages were caused by the defendant due to the latter's refusal to sign certain transfer documents. The plaintiff led hearsay evidence as to this. According to the plaintiff he instructed an attorney to attend to the drafting of another agreement and the transfer of the property. The plaintiff testified that he did not read the agreement that was drafted by the attorney but annexed his signature to the document in any event. The attorney was not called to testify about the alleged refusal of the defendant to sign the transfer documents or other documents."

23. From the above it is clear that the magistrate was, unfortunately, out of her depth. She failed to focus on the law, both statutory and the common law principles. She did not consider the fact that the alleged subsequent oral and unilateral attempt to change a valid written agreement offends against the parole evidence rule. The magistrate lost sight of the fact that a matter admitted by a party need not be proved by the opponent. The judgment is also full of contradictions.
24. The defendant did not amend his plea to include the new defences raised in the Heads of Argument. The court a quo nevertheless found that it was Robertson and Du Toit Attorneys

who caused the plaintiff damages. In **FPS LTD v TRIDENT CONSTRUCTION (PTY) LTD** 1989 (3) SA 528 (A) at 541I - 542B Eksteen JA held:

"One of the prime functions of pleadings is to clarify the issues between the parties. To this end the Rules of Court require a defendant in his plea to: 'Admit or deny, or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent...' (Rule 22 (2)). A defendant must therefore give a fair and clear answer to every point of substance raised by a plaintiff in his declaration or particulars of claim, by frankly admitting or explicitly denying every material matter alleged against him."

25. See also Rule 17(2) of the Magistrates' Court Rules. The magistrate therefore committed a misdirection in allowing the defendant to lead evidence advancing the two new defences that were not raised in his plea.
26. S 2 of the Alienation of Land Act, no. 68 of 1981, provides:
"No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority."
27. In **FRASER AND ANOTHER v VILJOEN** 2008 (4) SA 106 (SCA) at 110 F-G Combrinck JA had this to say:
"The reason for adopting this approach [written contract] is not

difficult to find. It is sought to obviate disputes about the terms of agreement, exclude the possibility of fraud and perjury and avoid unnecessary litigation --- the very mischief these types of statutes are aimed at." See in this regard **Johnston v Leal** 1980 (3) SA 927 (A) at 946H per Corbett JA:

The other possible obstacle to the admission of extrinsic evidence in this case is s 1(1) itself and the policy underlying it, viz as already indicated, the prevention of uncertainty and disputes concerning the contents of contracts for the sale of land and of possible malpractices in regard thereto. The main effect of the section is to confine the parties to the written contract and to preclude reliance on an oral consensus not reflected therein."

28. The following principles as propounded in the following authorities are also relevant to this case:

28.1 In **HOLMDENE BRICKWORKS (PTY) LTD v ROBERTS CONSTRUCTION CO LTD** 1977 (3) SA 670 (A) at 687B-C Corbett JA held:

"The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by payment of money and without undue hardship to the defaulting party..."

28.2 **RH CHRISTIE IN THE LAW OF CONTRACT IN SOUTH AFRICA, 5th edition**, at page 543 makes the following principled comment:

"Unlike damages for delict, damages for breach of contract

are normally (and this word must be emphasised) not intended to recompense the innocent party for his loss, but to put him in the position he would have been in if the contract had been properly performed."

28.3 In **TROTMAN v EDWICK** 1951 (1) SA 443 (AD) at 449B-C Van den Heever JA held:

"A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind."

28.4 Innes CJ in **VICTORIA FALLS AND TRANSVAAL POWER CO LTD v CONSOLIDATED LANGLAAGTE MINES LTD** 1915 AD 1 at 22 had this to say:

*"The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, **and without undue hardship to the defaulting party.**"* (My emphasis).

29. The Magistrate further misdirected herself when she found that the plaintiff led hearsay evidence to prove that the defendant defaulted in signing the documentation to effect transfer. It is a rule of evidence that no evidence need be adduced to prove an admitted fact. The defendant, as already stated, admitted in his plea that he failed or refused to sign the transfer documentation. At that stage the purchase price had already been paid by the plaintiff, which means that the plaintiff complied with all the terms of the agreement. The defendant also could not change the purchase price unilaterally.

30. The court a quo further committed a misdirection in having stated that the plaintiff failed to comply with the terms of the agreement in that he paid the R16 000-00 to the defendant's "guardian" instead of the municipality. The place where and to whom the purchase price was to be paid is not an essentialia of a contract of sale of immovable property. See **RH CHRISTIE THE LAW OF CONTRACT IN SOUTH AFRICA, 5th edition** supra at pp111 to 123. The Sol Plaatjie Municipality was not a party to the agreement and there was nothing the appellant could have done when Mr Majinja refused to accept the purchase price. In **BREYTENBACH v VAN WIJK** 1923 AD 541 at 547 Wessels JA had this to say:

*"The purchaser cannot know at what exact moment the registration is effected in the Deeds Office and therefore he cannot be in attendance with his money. Now in theory it is his duty to tender the purchase price at the moment that delivery of the immovable is given to him and that delivery occurs at the moment his name is entered on the register as the new dominus of the property. In practice, however, this is impossible and therefore the law requires that the purchaser should satisfy the seller, at the latest, when the deeds are ready and handed in at the Deeds Office that he will receive the purchase price when the transfer is effected. **It is not enough for the purchaser to say that he has money and that he is in a position to pay: he must either pay the money over or hand it to a party agreed upon or else he must give some satisfactory guarantee.**"* (My emphasis)

31. The record shows that Ms Du Toit obtained the interdict against

the defendant on 09 June 2004, nine months after the contract was signed. Ms Du Toit said in her testimony:

"Mr Visser informed us that he was in the process of selling his house. But as that was not finalised, he undertook – we requested him to provide us with some form of security that in the event that his house is not sold, that we will be in a position to act on his behalf and sell the house then and that – and he agreed to that and that is when he signed the Special Power of Attorney. Mr Visser was well aware of the fees. It was quoted to him. An estimate was provided to him and there was no misunderstanding about that."

32. Ms Du Toit intimated that she was aware that there was a Deed of Sale concluded by the parties and that her firm was going to be paid out of the proceeds of the sale. When she was asked whether she had contact with the attorneys Van de Wall and Partners who prepared the transfer documents she said:

"Yes, I was in contact with them as we had an interdict registered against the property. So they were not in a position to continue without us uplifting the interdict."

33. This means that Van de Wall and Partners were not in a position to register transfer of the property without Robertson and Du Toit Attorneys lifting the interdict they had imposed against the property at that stage. Mr Fletcher, the attorney for the plaintiff in the court a quo, asked this of Ms Du Toit:

"Question: Would you agree or – just give me your opinion on what I am going to say now. Is that, in fact, as a conveyancer, there was a Deed of Sale that had been signed and that if Mr

Visser had signed such Deed of Sale, the transaction would have gone through for R21 000-00 and with the interdict that you had against the property, Van de Wall would not have been able to register that property unless you had been paid the monies that were due and payable to you and normal transfer would have been effected? Answer: That is correct."

34. The facts of the case show that the plaintiff discharged his obligation in terms of the contract by paying the purchase price as agreed between the parties. The plaintiff alleged that he suffered damages in the sum of R25 000-00 being the adverse difference between the agreed value, being the value of the house had there been no breach of contract, and the selling price of the house of the sale in execution. **SILBERBERG AND SCHOEMAN'S THE LAW OF PROPERTY 5th edition** at p267 para 11.2.1.6 comments as follows:

"The requirements are that the defendant must be enriched, the plaintiff must be impoverished, the defendant's enrichment must be at the expense of the plaintiff and the enrichment must be unjustified."

35. In the instant case the defendant breached the contract by not signing the transfer documents and the plaintiff was impoverished as he had to buy the property at a price much higher than the agreed price. Had the defendant performed in terms of the contract no enrichment problem would have arisen. The defendant's enrichment was at the plaintiff's expense. It must be borne in mind that the property fetched the higher price because of the improvements that the plaintiff had effected. He

therefore paid twice for the improvements and was therefore impoverished. The written contract permitted the plaintiff to occupy the property as soon as the purchase price was paid. He was therefore not an unlawful occupier when he enhanced the value of the property by making the necessary improvements.

36. To sum up. The valid and binding written agreement between the parties was for R21 000-00. The house was sold to the plaintiff for R46 000-00 at the sale in execution. If the defendant discharged all his obligation the plaintiff would not have been out of pocket by R25 000-00. The appeal must therefore succeed with costs. I also endorse the comments of Kgomo JP.
37. In the result the following order is made:

ORDER

1. The appeal is upheld with costs on a party and party scale.
2. The order of the Court below is set aside and replaced with the following order:
 - 2.1 The defendant is ordered to pay the plaintiff damages in the amount of R25 000.00.
 - 2.2 The defendant is ordered to pay interest on the R25 000.00 at the rate of 15% from the date of this order to the date of payment.
 - 2.3 The Cape Law Society is requested to investigate whether the firm of attorneys Robertson Du Toit attorneys acted ethically by interdicting the transfer of Stand No 9400, House No 6005, Seleke Street, Mankurwane, Kimberley, from the name of the defendant (Andrew Mosekimang Visser) into the

name of the plaintiff (Reginald Moseki Merementsi); and what has happened to the amount of R11 421-00 that has not been accounted for; and to ascertain to whom the amount of R16 270-00 lodged with attorney Van Vuuren should be paid; and to ensure further that it is done. The Cape Law Society is requested to report back their findings to the Judge President through the Registrar of the High court, not later than 27 June 2013.

BM PAKATI
JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

I concur.

F DIALE KGOMO
JUDGE PRESIDENT

NORTHERN CAPE HIGH COURT, KIMBERLEY

WILLIAMS J (MINORITY JUDGMENT)

38. I have read the judgment of Pakati J in which Kgomo JP concurs. I agree with the basic background information as set out therein but respectfully disagree with the conclusions reached.
39. The plaintiff's claim is not based on enrichment and all references in the main judgment to the plaintiff's impoverishment on the one hand and the defendant's

enrichment on the other are unfounded and not informed at all by either the pleadings or the evidence for that matter. It is also quite understandable why enrichment was not pleaded - and that is that the defendant's liability would then be confined to the amount by which he was enriched at the time of the action. In this unique set of circumstances this would have created a dilemma for the plaintiff in that the purchase price fetched at the sale in execution was utilized firstly to defray the auctioneer's fees, thereafter the judgment debt and outstanding municipal charges, which according to attorney Ms Du Toit totalled close to R3000, 00, whereafter the balance of about R16 000, 00 was paid over to the defendant's attorney at the time, Mr Janse Van Vuuren. It would appear from the record of the proceedings that the defendant, at the time of the trial, had no knowledge of the whereabouts or the amount of the balance of the purchase price after expenses had been met. Mr Fletcher, the attorney for the plaintiff however, in passing during cross-examination of Ms Du Toit, made mention that he had received the balance from Mr Janse Van Vuuren and was holding the money in his trust account. This state of affairs is what prompted the magistrate to order, in addition to dismissing the plaintiff's claim with costs, that the Law Society of the Cape of Good Hope and the South African Board for Sheriffs investigate the transfer of the funds in trust.

40. The plaintiffs' claim is simply for damages suffered as a result of the defendant's breach of contract and the matter should be adjudicated purely on this basis.

41. It, had, or should have, become clear to the plaintiff very soon after the agreement of sale was entered into, that performance in terms of the agreement would be problematic. Firstly, on the plaintiff's own version the municipal official, Mr Majinja who is referred to in the agreement, refused to accept the R16 000, 00 payment earmarked for the Sol Plaatjie Municipality as stipulated in the contract. As a result thereof the full purchase price of R21 000, 00 was handed to the defendant's guardian, Mr Maropong. Hereafter the defendant approached the plaintiff with a request to increase the purchase price by R4000, 00 bringing the total purchase price to R25 000, 00, in order for the defendant to discharge his increased financial obligation towards the municipality. The plaintiff refused to pay the additional amount requested, which in turn led to the defendant's refusal, despite numerous requests, to sign the transfer documents.
42. This situation persisted until January 2005, some 16 months later, when the property was auctioned off. In the meantime the plaintiff had renovated the property – the costs of the renovations are not disclosed – without the permission of the defendant and with the knowledge that the defendant was refusing to sign the transfer documents.
43. There can be no doubt that the defendant's refusal to sign the transfer documents constituted a fundamental breach of the contract which entitled the plaintiff to either claim specific performance or cancel the contract and claim damages in lieu of performance. In **Holmdene Brickworks (Pty) Ltd v Roberts Constructions Co Ltd** 1977 (3) SA 670 (A) at 687 C-F, Corbett

JA states the fundamental rule in regard to the award of damages for breach of contract as such:

" . . . that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party (see Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd., 1915 A.D. 1 at p 22; Novick v Benjamin, 1972(2) S.A. 842 (A.D) at p. 860). To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage (ibid.) and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (Shatz Investments (Pty.) Ltd. V Kalovyrnas, 1976 (2) S.A.545 (A.D.) at p. 550)."

44. It is clear from the above extract that the determination of damages is not merely a simple arithmetical exercise. The plaintiff in a claim for damages has to prove a causal link between the breach and the damages, that the damages claimed

are reasonable in the circumstances and that the loss is not too remote to recover.

45. In my view the plaintiff has failed to prove his damages on all levels. As far as causation is concerned the question to be asked is whether it was the failure or refusal of the defendant to sign the transfer documents which resulted in the plaintiff having to pay the higher purchase price at the auction or whether it was in fact the improvement of the property by the plaintiff which caused the increased auction price on which he bases his claim for damages. Although the plaintiff has not given any evidence as to the costs incurred by him in effecting the improvements it can be gleaned from his evidence that the improvements were not insubstantial. His evidence in this regard was that *"I repaired the floors because there were cracks on the floors, the walls were – had cracks. I changed the window frames. I put on ceramic tiles. I plastered the house and painted the whole house."*

46. It is in fact the plaintiff's case in his particulars of claim that *"having regard to extras and additions that he had done to the property (he) was compelled to purchase the property on the particular sale."*

The converse of this contention is that he would not have been compelled to buy the property at the auction if he had not made renovations to the property. The plaintiff's own actions being one of the major factors contributing to his loss, he cannot expect the defendant to pay for it.

47. Even if I am wrong in the above regard, the next question that can be asked is whether the plaintiff, in the circumstances of this case, had acted reasonably in bringing about the renovations to the property. As outlined herein-above, it became clear shortly after entering into the agreement, that the defendant was demanding a higher purchase price and was steadfast in his refusal to sign the transfer documents unless the plaintiff complied, thus clearly evincing an intention not to be bound by the contract. The plaintiff's obvious course was to cancel the contract and mitigate his loss. He cannot recover a loss which results from his failure to take such steps as were reasonable in the circumstances in which he found himself.
48. The next question is whether it could ever have been in the contemplation of the parties, at the time the contract was entered into, that a breach of the agreement would lead to the particular loss suffered by the plaintiff. The contract makes provision for the plaintiff to take occupation immediately upon payment of R16000, 00 to the municipality. This not having been possible but accepting that the appellant was entitled to take occupation after handing over the full contract price to Mr. Maropong, it can never be said that the defendant should have foreseen that the plaintiff would feel himself compelled, as a result of his renovations, to buy the property at the auction, at the price that he did. The risk of these damages could not reasonably have been foreseen and the defendant should therefore not be answerable for it. See *Lavery & Co Ltd v Jungheinrich* 1931 AD 156.

49. In my view the plaintiff would at best for him, have been entitled to damages in the amount of his expenses incurred in renovating the property, that being the damages suffered at the time when he accepted the defendant's repudiation of the contract by claiming back the contract price from the defendant's guardian. Unfortunately for the plaintiff he failed to prove even these expenses.

For the above reasons I would have dismissed the appeal.

C C WILLIAMS
JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

<u>On behalf of the Appellant:</u>	ADV A. STANTON
Instructed by	Fletcher Attorneys
<u>On behalf of the Respondent:</u>	IN PERSON