IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 10978/2011

In the matter between:

SEELAN MOODLEY	**APPLICANT**

and

MOHAMED AFZAL EBRAHIM	**FIRST RESPONDENT**
ROOKAYA EBRAHIM	**SECOND RESPONDENT**
THE REGISTRAR OF DEEDS	**THIRD RESPONDENT**

JUDGMENT Delivered on 10 October 2012

SWAIN J

[1] This matter originally served before me as an opposed motion on the return day of a *rule nisi*, in terms of which the applicant sought the enforcement of a contract for the sale of an immovable property, which it is common cause, was concluded between the applicant and the first respondent.

[2] The first respondent resisted the application on the basis that he did not have the legal right to sell the property when he concluded the sale agreement. He averred that the second respondent, who is his

common law wife, had the sole legal right to sell the property and had not conferred upon him the necessary authority to do so, when he signed the sale agreement.

[3] It is common cause that the first respondent was the successful bidder at a sale in execution, in respect of the property which forms the subject matter of the sale agreement between the applicant and the first respondent. The first respondent contends that in doing so he represented the second respondent, who is accordingly entitled to take transfer of the property from the execution debtor. The applicant attached to his founding affidavit copies of two agreements in respect of the sale of the immovable property at the sale in execution. It appears from the papers that Annexure “J” was obtained by the applicant from Fortune Properties, being the estate agents acting for the first respondent and that Annexure “K” was obtained by the applicant’s attorney from the Deputy Sheriff. In the one agreement (Annexure “J”) the first respondent is reflected as the purchaser, whereas in the other agreement (Annexure “K”) the first respondent is reflected as acting on behalf of the second respondent. A power of attorney was also furnished to applicant, in which the first respondent was appointed as the agent of the second respondent to purchase the property in question (Annexure “L” to applicant’s founding affidavit). Both the contracts of sale appeared to have been signed by the Sheriff. The response of the first respondent to these allegations was to admit that he concluded the agreement Annexure “K” to the applicant’s founding affidavit, acting on behalf of the second respondent. The first respondent stated that he could not explain the origin of the agreement being Annexure “J” to the applicant’s founding

affidavit, except to point out that it was incomplete and different to Annexure "K".

[4] I therefore referred the matter for the hearing of oral evidence "on the issue whether or not the first respondent was the purchaser of the property situated at 2 Tureen Place, Westville at the sale in execution held on 27 July 2011". Because the Sheriff had on the face of it, signed both contracts, I ordered the applicant to ensure that the Sheriff was subpoenaed to attend the hearing.

<u>The *onus* of proof</u>

[5] At the outset Mr. Joubert, who appeared for the applicant, and Mr. Troskie S C, who appeared for the first and second respondents, advised me that they were in disagreement as to which party bore the *onus* of proving the central issue, namely whether the first respondent possessed the legal right to sell the property to the applicant.

[6] Mr. Joubert submits that the applicant relies upon the agreement of sale and it is the first and second respondents who raise as a special defence, that the first respondent had no authority to conclude the agreement. Mr. Troskie however submitted that the *onus* must be determined by the application of the principle enunciated in

Kriegler v Minitzer
1949 (4) SA 821 (A)

In Kriegler, it was held that the plaintiff had to prove all the express and implied terms of a contract relied upon by him, even where the defendant has put in issue an alleged term which is denied by the plaintiff. It made no difference that the plaintiff might have to prove a negative, being the non-existence of the alleged facts relied upon by the defendant. However, although "the plaintiff has to establish the pre-requisites for the defendant's liability" this "does not necessarily require him to prove or disprove every disputed fact. If the defendant has put in issue a fact preventing the enforceability of plaintiff's claim, such as his own lack of contractual capacity, fraud perpetrated by the plaintiff, the contract's illegality or a provision rendering it contrary to public policy, the defendant will have to prove his allegation. These are seen as facts relied upon by defendant and falling outside plaintiff's cause of action".

Law of Evidence – Schmidt and Rademeyer at pg 2 – 16

The applicant's cause of action is based upon the first respondent's entitlement in law to sell the property as principal. The first respondent's defence is that he did not possess the legal right to sell the property which right was possessed by the second respondent. The first respondent has accordingly raised his own lack of contractual capacity, as a fact preventing the enforceability of the applicant's claim. That the first respondent also alleges that he did not possess the authority of the second respondent to sell the property, is simply an additional ground upon which he relies, for his alleged lack of contractual capacity.

[7] I accordingly disagree with the submission of Mr. Troskie that the applicant is obliged to prove the first respondent's legal right to sell the property, as part of the applicant's cause of action. I agree with

the submission of Mr. Joubert that the defence raised is in the nature of a special defence, which must be proved by the first and second respondents.

[8] Although there was a dispute between Counsel as to which party bore the *onus* of proof, Mr. Troskie volunteered that the first and second respondents would begin leading evidence. The issue for determination is accordingly whether the first and second respondents proved on a balance of probabilities that the first respondent acted as an agent of the second respondent, when he successfully bid for the purchase of the property at the sale in execution conducted by the Sheriff, with the result that the second respondent was possessed of the legal right to re-sell the property.

<u>The applicability of the Alienation of Land Act No. 68 of 1971 and the issue of agency</u>

[9] Before dealing with the merits of the matter, it is necessary to deal with the extent to which the provisions of the Alienation of Land Act No. 68 of 1971, are of relevance in determining the present dispute, and the issue of whether the first respondent (if not entitled to sell the property as principal) was authorised by the second respondent to sell the property on her behalf. Mr. Troskie submitted that "the agreement relied upon does not comply with the Alienation of Land Act in that it is not signed by the seller. This aspect is central to the dispute between the parties". However, a resolution of the dispute between the parties, as to whether the first respondent had the legal right to sell the property as principal, also determines whether the requirements of the

Act were fulfilled. This is because if the first respondent possessed such a right, he signed the agreement as seller, in accordance with the Act. If he did not possess such a right, the sale agreement is unenforceable without any further need to consider the requirements of the Act.

[10] As regards the issue of whether the first respondent was authorised by the second respondent to sell the property on her behalf (if the first respondent did not have the legal right to sell as principal) the applicant alleges in the papers that the "overwhelming implication" is that the first respondent possessed such authority. Mr. Joubert accordingly submitted that it could be inferred that because of the relationship between the first and second respondents, the first respondent possessed implied authority from the second respondent, to conclude the sale agreement with the applicant and that the second respondent is estopped from denying the first respondent's authority to enter into the sale agreement on her behalf. This submission however overlooks the requirement that the deed of alienation in terms of the Act must be "signed by the parties thereto or by their agents acting on their written authority". It is clear that the applicant in seeking to enforce such a contract, must allege and prove compliance with the statutory requirements. This is because the act provides that no alienation of land shall be of any force and effect, unless the specified requirements have been complied with

Christie – The Law of Contract in South Africa
6th Ed pg 357 n 36

No evidence was led by the applicant to prove that the first respondent possessed the written authority of the second respondent to sell the property and consequently the applicant cannot enforce the sale agreement on the basis that the first respondent was authorised by the second respondent to do so.

[11] I see nothing anomalous in the *onus* being placed upon the first and second respondents, to prove that the first respondent did not have the necessary contractual capacity to sell the property as principal, whereas the *onus* to prove compliance with the Act, namely that the first respondent signed the agreement as seller, rests upon the applicant. This is simply because the contract is valid if "from the contract as a whole it would be clear to the other party that the signature indicated the assent of the buyer or the seller to the contents of the document".

Christie at pg 120

The first respondent admits signing the sale agreement as the seller and assenting to its contents, but denies he had the legal right, or the capacity to do so.

The documentary evidence relevant to the merits

[12] Turning to the merits of the dispute. The documentary evidence which is relevant to the issue in dispute is the following:

[12.1] A copy of the sale agreement which the applicant says was supplied to him by Fortune Properties, the estate agents representing the first respondent, in which the first respondent is reflected as the purchaser (Annexure “J”). The first respondent said in his answering affidavit, that he had no knowledge as to the origin of this document and although this document was relied upon by the applicant in his founding affidavit, Mr. Joubert stated that he had abandoned any reliance upon this document and now relied upon the agreement referred to in paragraph [12.3] below.

[12.2] A copy of the sale agreement which the applicant says was obtained by his attorney from the Sheriff, in which the first respondent is reflected as the buyer on behalf of the second respondent (Annexure “K”). The first respondent said in his answering affidavit, that this was the agreement that he concluded. The applicant was also furnished with the power of attorney, in terms of which the first respondent was authorised to represent the second respondent in purchasing the property (Annexure “L”).

[12.3] A copy of the sale agreement which was handed to the legal representative of the execution creditor, eThekwini Municipality at the sale, Chantal Ottino (Annexure “CO1”) in which the first respondent is reflected as the purchaser of the property as principal.

[12.4] A copy of the sale agreement which appears to be identical to Annexure “K”, save that the description of the first respondent, has been qualified in an additional location as “o.b.o. R. Ebrahim” and the signature of the first respondent is qualified in a similar fashion, appears as part of the applicant’s bundle of documents (Exhibit “A” pgs 77 – 83). The first respondent confirmed that he had qualified his name in his own handwriting and that the final page of this agreement was identical to the final page of Annexure

“K”, save that he had qualified his signature with the designation “o.b.o. R. Ebrahim”. The first respondent stated that this must have been his copy which he had given to his attorney.

[13] It is a misnomer to speak of these agreements as copies, in the sense that there was an original agreement from which copies were made, because the first respondent explained that because there was no photo copying machine where the sale was conducted, three copies of the agreement were completed and signed. One copy was retained by the Sheriff, one copy was handed to the attorney representing the execution creditor and one copy was retained by the buyer, namely the first respondent.

[14] Before analysing each of these contracts it is necessary to determine whether the applicant is restricted to relying upon Annexure “J” to the applicant’s founding affidavit in support of his contention as the agreement concluded by the first respondent acting in his personal capacity, or whether the applicant may now rely upon the agreement which Ms Ottino says she was handed at the sale (Annexure “CO1”) in which the first respondent is also reflected as acting in his personal capacity. The fact that the applicant as a layman said that this was the agreement he relied upon cannot be decisive of this issue.

Record pg 81 lines 5 – 6

That the applicant should wish to rely upon Annexure ”CO1” is apparent from an examination of Annexure “J”. From a comparison of this agreement with the other copies of the agreement, it is readily apparent that it could not have been one of the copies completed at the sale in execution. This is because it refers to an incorrect location where the sale was held, the incorrect conveyancing attorneys are reflected and it contains no description of the property. As pointed out above, Mr. Joubert stated that he did not rely upon this copy of the agreement but relied upon Annexure “CO1” in support of the applicant’s contention that the first respondent purchased the property in his personal capacity. Mr. Joubert submitted that the applicant never sought a declarator that Annexure “J” was the agreement that the first respondent had concluded to buy the property, but that Annexure “J” was simply a part of the evidence which the applicant had been able to obtain, together with Annexures “K” and “L”, at the time the urgent application was launched. The agreement, Annexure “CO1”, was only subsequently obtained by the applicant and put up in reply, together with the affidavits of Ottino and Shewbaran, confirming its authenticity. Mr. Joubert submits that the conclusion of the agreement of purchase by the first respondent at the sale in execution, is simply part of the *facta probanda* to prove that the first respondent bought the property in his personal capacity and was consequently able to resell the property to the applicant acting in the same capacity. Mr. Troskie submitted that the applicant could have changed his reliance upon Annexure “J” in reply, but did not do so. This is correct as the applicant alleged in reply, that the first respondent had failed to give a satisfactory explanation for the existence of Annexure “J”. However, the applicant did state that he had been placed on terms by the first and second respondents to file his replying affidavit, which he did so out of the period specified in the Rules. Thereafter the applicant filed supplementary affidavits by

Ottino and Shewbaran relating to the additional agreement of sale (Annexure "CO1") now relied upon by the applicant. The applicant sought condonation for the late filing of these affidavits explaining that he was not aware that there were witnesses to the sale in execution and had only managed to contact Ottino on 16 May 2012, as she had left the employ of Ndamase Incorporated, the conveyancing attorneys. It was at this stage that Annexure "CO1" came to light. No objection was however raised by the respondents to the admission of these affidavits. Although it is clear that an applicant will not be allowed to introduce a different claim, based upon a different cause of action in reply

Triomf Kunsmis (Edms) Bpk v A E & C I Bpk
1984 (2) SA 261 (W) at 270 A

this is not what the applicant did. The applicant's cause of action remained the same i.e. that the first respondent bought the property in his personal capacity, all that was altered was the documentary evidence the applicant relied upon, in support of that assertion. The applicant only discovered this documentary evidence after launching the application in the circumstances described by the applicant in the supplementary replying affidavit accompanying the affidavits of Ottino and Shewbaran. Having referred the dispute to the hearing of oral evidence, the respondents were well aware that the evidence of Ottino and Shewbaran would be led and that Annexure "CO1", which the first respondent admitted having completed, would be tendered in evidence in support of applicant's contention, that first respondent purchased the property in his personal capacity. When regard is had to the disadvantage the applicant suffers from in not having been present at the sale in execution, and the absence of any prejudice to the respondents, in the applicant now placing reliance upon Annexure “CO1” in support of his assertion, rather than Annexure “J”, I can see no basis for holding that the applicant is precluded from relying upon Annexure “CO1” and not Annexure “J”, as evidence in support of applicant’s contention, that the first respondent purchased the property in his personal capacity.

[15] Turning to an examination of the three agreements of sale. As regards Annexure “CO1” it should be noted that this agreement was also annexed to the affidavit of Shewbaran as Annexure “BS1”. Because Annexure “BS1” was however the copy which was referred to during the trial, I will for the sake of consistency also do so. The first respondent admitted that he had completed the details of the purchaser appearing at page 114 of the application papers.

Record pg 56 lines 20 – 25

The first respondent also admitted that he had completed what appears at page 115 of the application papers.

Record pg 60 lines 1 – 10

The first respondent also admitted that there were two witnesses to the signature of this agreement, but was unable to say who they were.

Record pg 58 line 6
Record pg 63 line 18

The first respondent agreed that this agreement did not reflect that he was acting on behalf of the second respondent

Record pg 63 lines 15 – 16

and that it was his signature at page 115 of the application papers

Record pg 58 line 2

and that it was one of the agreements that was completed at the auction

Record pg 58 line 20

and did not dispute that this was the copy of the agreement that was taken away from the sale in execution by Ottino

Record pg 57 line 24 - pg 58 line 2
Record pg 61 lines 2 – 3

but could not remember whether he had given the agreement to the attorneys.

Record pg 10 line 17

Ottino stated that this was the document she received after the property had been sold at the sale in execution

Record pg 93 lines 1 – 10

and Shewbaran stated that this was the document she received from Ottino.

Record pg 85 lines 6 – 15

[16] Turning to a consideration of Annexure "K" to the applicant's founding affidavit. First respondent stated that he wrote the details of the buyer appearing at page 51 of the application papers.

Record pg 7 line 23
Record pg 51 lines 1 and 12

The first respondent stated that the Sheriff had written in all of the details on pg 52 of the application papers, except for the signature of the single witness and the signature of the first respondent.

Record pg 8 lines 23 – 24
Record pg 60 line 25

The first respondent agreed that he had not written "on behalf of" the second respondent when he completed the details of the purchaser.

Record pg 53 lines 7 – 14

The Sheriff had however added "o.b.o. R. Ebrahim" to the description of the purchaser "M.A. Ebrahim" at page 52 of the application papers.

[17] Turning to a consideration of the third copy of the sale agreement, appearing at pages 77 – 83 of the bundle Exhibit “A”. The first respondent agreed that it was his handwriting which appeared at page 82 completing the details of the purchaser which included his having written “o.b.o. R. Ebrahim”.

Record pg 53 line 8
Record pg 53 line 14
Record pg 53 line 21

The first respondent agreed that there was only one witness to this agreement

Record pg 58 line 6

and that this must be his copy which he had given to his attorney.

Record pg 53 lines 13 – 14
Record pg 53 line 19

[18] What this reveals is that Annexure “BS1” is the only copy of the sale agreement in which all of the details of the purchaser were completed entirely by the first respondent in his own handwriting, and in which he is reflected as the purchaser. This is also the only agreement witnessed by two witnesses, whose signatures differ from the signature of the single witness, which appears on both Annexure “K” and the agreement forming part of Bundle “A”. Annexure “BS1” is the only agreement whose provenance, namely that it was handed to

the representative of the conveyancing attorneys after the sale and kept by them, is not subject to dispute. As regards Annexure “K” the first respondent in completing the details of the purchaser reflected himself as the purchaser, his status as an agent for the second respondent, being added by the Sheriff on the following page. As regards the agreement forming part of Bundle “A”, the first respondent qualified the details of the purchaser appearing on both pages as acting on behalf of R. Ebrahim, the second respondent. What is striking is that when Annexure “K” and the agreement forming part of Bundle “A” are compared they appear to be identical, except that the status of the first respondent as agent for the second respondent, has been qualified in the manner referred to above. When I put this proposition to Mr. Troskie he responded that although they looked similar, it would be dangerous to draw such a conclusion, as they were all photocopies. What is clear however is that the agreements which the first respondent says were in the possession of the Sheriff and himself after the sale, reflect him as the purchaser on behalf of the second respondent, whereas the agreement in possession of the conveyancing attorneys, has no such limitation of his capacity.

[19] Whether any inference may be drawn from this distinction must await a consideration of the evidence of the first respondent and the applicant, as well as the evidence surrounding the power of attorney, which appears as Annexure “L” to the founding affidavit.

<u>The evidence of relevance to the merits</u>

[20] The first respondent stated that a power of attorney was given to

the Sheriff before the auction, being Annexure “L” to the applicant’s founding affidavit.

Record pg 53

First respondent says he personally handed this document to the Sheriff before the auction

Record pg 9 lines 16 – 19

and that he had completed the power of attorney in his handwriting

Record pg 24 lines 24 – 25

except where his wife “R. Ebrahim”, the second respondent, had placed her signature.

Record pg 25 lines 1- 5

The power of attorney also appears at page 84 of Exhibit “A” and the first respondent said he was telephoned by Shewbaran two days after the auction to sign transfer documents and he told her that the purchaser was his wife, the second respondent.

Record pg 11 line 15 – pg 12 line 4

The first respondent said he told her “Contact Mrs R. Ebrahim she will liaise with you for documentation to be signed”

Record pg 57 lines 20 -22

and that "she needs to consent to transfer"

Record pg 64 lines 23 - 25

and that the name "Bharti" written at the top of this document, was the name of this person who had contacted him.

Record pg 64 line 15

Shewbaran confirmed that she had contacted the first respondent on 29 July 2011 to confirm that they would be proceeding with the transfer of the property he had bought, having obtained his contact number from "BS1" (page 114)

Record pg 85 line 16 to pg 86 line 1

and confirmed that the first respondent said he had "signed on behalf of R. Ebrahim" and she asked him to bring in the power of attorney, which he said he would do by 02 August 2011, but she did not see him because she had already left the firm by then.

Record pg 86 lines 5 – 9
Record pg 88 lines 10 – 12

She also confirmed that the name "Bharti" on the power of attorney at page 116 of the application papers, meant that the power of attorney was marked for her attention, but she was not sure on which date it came through, because she left the next day.

Record pg 88 lines 15 – 25

[21] Turning now to a consideration of the evidence of the first respondent. The first respondent was a most unsatisfactory witness, who looked uncomfortable whilst giving evidence, interrupted before questions were fully put to him, did not complete his answers to questions in a coherent fashion, dropped his voice in doing so, and because of this it became difficult to hear his complete answer at times. As will become apparent his evidence was replete with contradictions and improbabilities.

[22] It is necessary to note at the outset that the first respondent said that his occupation was a "property speculator"

Record pg 5 line 9

and that he bought and sold properties at a profit, which he from time to time bought at auction sales by the Sheriff. He agreed that this was his business.

Record pg 5 lines 9 – 16

He said that he bought and sold between ten to fifteen properties per month.

Record pg 15 lines 20 – 21

and Fortune Properties, who rented space from him in the building where his office was located, would act as agent to look for buyers for these properties. He said most of his dealings were conducted through Fortune Properties, but that he had no financial interest in this business.

Record pg 15 lines 8 – 24

The first respondent agreed it was quite a big business.

Record pg 16 line 5

[23] The first respondent said that the second respondent, stayed at home to look after their three children and when it was put to him by Mr. Joubert, that she was essentially a housewife he replied "If you want to put it like that" and when asked whether there was any other way to put it replied "No" but then after a great deal of vacillation added "No, no, no, I am saying if she wants a property she will tell me to buy and I will be happy to buy"

Record pg 16 line 16 – pg 17 line 3

The first respondent then stated that the second respondent had no financial interest in his business and when Mr. Joubert put to him "so she is a housewife, you do the business?" he replied "That is right".

Record pg 17 – lines 4 – 7

[24] The first respondent agreed that the second respondent did not know which properties he bought and sold, because there were so many of them and that he used his wife as the principal, when buying properties about twenty percent of the time.

Record pg 17 lines 8 – 15

First respondent said that this was done for tax purposes because as first respondent explained "I mean under the tax law in certain limits you are allowed to buy for trading purposes and so [inaudible]".

Record pg 18 line 7

First respondent said that any profit on sales where she was reflected as the buyer, was reflected as her income and were paid for by her from her own income, which she got from her family. He added that she also had her own family funds.

Record pg 18 line 16
Record pg 19 line 5

The second respondent would be obliged to pay for any property he bought in her name and he accordingly discussed with her in advance, what he was going to buy on her behalf and would obtain her approval before buying a property on her behalf at a Sheriff's auction. The second respondent would not attend any auctions and that is why she furnished him with a power of attorney, but she would go and check on the property before the auction.

Record pg 19 lines 8 – 21

Record pg 20 lines 4 – 7

The second respondent would accordingly pay the tax on any profit she made.

Record pg 19 line 15

First respondent was adamant that he and the second respondent ran entirely separate businesses and his purchase of properties on her behalf, was not merely an arrangement to reduce his taxable income and thereby reduce his tax payable.

Record pg 20 line 19
Record pg 21 line 5

[25] This was in direct conflict with his earlier answer that the reason why he bought twenty percent of properties in second respondent's name was for tax purposes. I find the inference irresistible that the reason for this conflict is that the first respondent feared that his original answer could be regarded as a form of tax evasion, and then set out to counter this danger, by stating that the second respondent was effectively running her own business by buying the properties out of her own funds, taking the profits and paying her own tax. A further inference which may be drawn from this direct conflict, is that the first respondent appreciated that the likelihood of whether he had acted on behalf of the second respondent in buying the property in question, would be enhanced by the second respondent being depicted as a businesswoman in her own right, buying and selling properties for

profit, rather than simply a housewife whose name the first respondent used for tax purposes. This evidence of the first respondent was also in conflict with his earlier statement that second respondent was a housewife and he did the business. When this latter contradiction was put to the first respondent the transcript is illuminating:

" So your wife on her own is a fully fledged businesswoman? -- she is – okay ... [inaudible].
Not a housewife .....? ---. It is a housewife ... [inaudible] she sells prop – okay, ... [in audible] businesswoman, you can put it that way"

Record pg 21 lines 6 – 9

[26] In amplification of the second respondent's rôle in running her own business, the first respondent said that the second respondent obtained a list from the Sheriff's office a week in advance of the sale of the properties for sale and would then inspect the properties between 11 a.m. when she finished her housework and 2.30 p.m. when she fetched their children from school.

Record pg 21 line 10 - pg 22 line 4

First respondent agreed that second respondent would scout for properties and tell him which property she wanted to buy and she would determine the price she wanted to pay, based on the market value because "she does her homework on the stats for the area" and would instruct him not to bid above a certain price.

Record pg 22 lines 7 – 18

The first respondent would look at any properties she heard about and which she was interested in purchasing and would then give him a power of attorney for that particular property, because that was required by the Sheriff.

Record pg 23 line 24 - pg 24 line 1

He would accordingly go to the sale with the necessary power of attorney which at times he made out in his handwriting, but at other times in her handwriting.

Record pg 24 lines 13 – 18

If he filled out the power of attorney she would have to tell him the address of the property to be included in the power of attorney.

Record pg 25 lines 6 – 10

[27] In the present case the second respondent had seen the property and had said to the first respondent she wanted him to bid on the property. First respondent said he had not seen the property and consequently went and bid without knowing what the property was.

Record pg 25 lines 16 – 25

The second respondent had told him he should bid to R1.6M. She had seen the property from the outside and had said she liked the area and her family was close by, but did not say to him that she wanted it as the family home, because she had not seen the inside of the home. First respondent said he did not question her at all about this, just accepted what she said and was not puzzled by what she had said.

Record pg 26 line 7
Record pg 26 line 12 – pg 27 line 25

[28] The first respondent said that he and the second respondent went to see the property on the afternoon of the sale, when they were able to gain access to the interior of the house, because the tenant or the previous owner was there. First respondent said the second respondent was excited about the property and when asked whether she liked it as an investment to be sold for a higher price, or whether she liked it for a different reason he replied

"-- My impression at that time, was – it was like a fifty/fifty, meaning I did not get a true - you know what I am trying to say, [intervention]

No you have to say things --- All right. Basically it was, 'Yes I like this property because it is a nice property, it is what we require, you understand what I am saying ?'

No it is what we require for ....? If you can carry on there. -- Like a family. A family home

So on the afternoon when the property was sold to you at the auction, you already knew that your wife wanted it as a family home and she was excited --- It was a day after that, that is right, you are correct..."

Record pg 29 line 21 – pg 30 line 7

Mr. Joubert however then put to him that he had said earlier that it was the same afternoon, to which he replied that she had said she liked the property but “we did not put a timing to it to say, yes want to move it there, it was not like that. Because to get a home and to move, it is a big thing. But you do not just say ‘I want this house and move in tomorrow’ it is not like that”

Record pg 30 lines 8 – 14

and when he was again asked to explain what the second respondent was excited about he replied “The house itself”

Record pg 30 line 18

and when asked again whether she liked the house as an investment to be sold at a higher price or as a possible family home he replied

“I could not answer that at that time, it was – it was her property, you know, it was bought on behalf of her. I cannot answer for her what she wanted at that time”

Record pg 30 lines 19 – 22

First respondent then when questioned by me said that at the time of their visit that afternoon, the second respondent was excited by the house as their family home and wanted to move the family there, but there was no decision taken to move in straight away “because it is a big move, you know, there is nothing in buying a house and moving in tomorrow”.

Record pg 31 lines 15 – 21

It is therefore clear that on the first respondent’s evidence, on the day he bought the property at the sale in execution, he knew that the second respondent was excited about the property as a family home, to which she wanted to move their family, but no decision was taken as to when the move would take place. When Mr. Joubert then asked him "And the next day, you said something about the next day something happened, or did – or am I wrong" to which first respondent replied "No, no, no" and Mr. Joubert repeated "Nothing happened" to which the first respondent replied "No".

The first respondent had however previously said that it was the following day he was aware that the second respondent was excited about the house and wanted it as a family home.

Record pg 30 line 7

[29] The issue of when the first respondent became aware of the second respondent's wish for the property as a family home, is of great significance in relation to the time when and circumstances under which, the first respondent gave a mandate to Fortune Properties, to sell the property.

[30] It is clear from a reading of the evidence of the first respondent, that he appreciated the illogicality of Fortune Properties having a mandate to find a buyer for the property, if the second respondent wished to keep the property as their family home, right from the day upon which he bought the property at the sale in execution. This was graphically illustrated by his reluctance to admit that they had such a mandate. Mr. Joubert asked first respondent

"In order for Fortune Properties to market the property they need a mandate – not so?" to which he replied "No mandate, no ....[inaudible] sell any properties....

[inaudible] properties...[inaudible]".

Record pg 36 lines 14 – 16

After a great deal of vacillation he admitted that the agent at Fortune Properties telephoned him on the day of the sale and asked him whether he had bought this property and he told them that he had bought it. First respondent said he knew that the agent had telephoned him, so that he could go and sell the property

Record pg 38 lines 1 – 8

but he did not tell the agent that the second respondent wanted to keep the property and when asked why he replied "I did not tell him - I mean I did not tell him that the wife is keeping, because normally we just buy, we sell".

Record pg 37 lines 3 – 8

Later however after a great deal of vacillation he said that the agent telephoned at 10.30 a.m. after the sale to find out which properties he had bought and when asked again why he did not tell him it was not for sale, he replied "At that time we did not –it was not a hundred percent that the wife is keeping it".

Record pg 39 lines 5 – 15

He then added that at this stage the second respondent had still not seen the inside of the house.

Record pg 39 – line 16

It is quite apparent that the first respondent's vacillations and evasiveness about the precise time the second respondent made it clear she wished to keep the property as a family home, as well as a similar degree of vacillation and evasiveness by the first respondent as to when the agent was given a mandate to sell the property, was caused by the contradiction between the reason given by the first respondent as to why he could not sell the property, namely that the second respondent wished to keep it as a family home and the fact that the property was nevertheless marketed by Fortune Properties and ultimately sold by the first respondent to the applicant.

[31] Having sought to explain this contradiction in this manner, the first respondent was then faced with the problem of explaining why the agent however continued to market the property, after the first respondent knew the second respondent, wished to keep it as the family home.

[32] The first respondent was accordingly asked whether between the date that he bought the property, being 27 July, and the date that the agreement was signed with the applicant, being 09 September, the property was marketed to which he replied "No, no, it was not at that time. Probably two days it was – till she made her mind up, two or three days, till she made her mind up that she wants to keep the property".

Record pg 41 lines 3 – 8

He was then asked by me whether he then told the agent that they were no longer selling it, to which he replied "That is right, that is – in fact to be honest, I did not tell him at that time because it was not necessary for him to market the property".

Record pg 41 lines 13 – 15

He then said however that he had told the agent three to four days after this that the particular property was no longer on the market.

Record pg 41 lines 16 – 25

The first respondent then agreed that the agent must have been "confused", because he still carried on marketing the property, even though he had been told not to.

Record pg 42 lines 1 – 4

It is quite obvious that the agent would not have continued marketing the property, if he had been told not to do so by the first respondent. The first respondent has quite clearly been untruthful in making this assertion. That he has been dishonest in this regard also undermines his assertion that he did not wish to sell the property, because the second respondent wished to keep it as a family home.

[33] Allied to this is the difficulty the first respondent experienced in explaining why he concluded a contract of sale with the applicant, for the sale of the property, if he knew the second respondent did not wish to sell it. The first respondent said that he would not think of selling the property without the second respondent's express consent.

Record pg 32 lines 4 -6

Record pg 32 lines 12 – 13

Mr. Joubert then put it to the first respondent that it logically followed that he must have sold the property to the applicant, with her permission to which he replied “No”.

Record pg 32 lines 14 – 15

After a great deal of vacillation and obfuscation, when asked to explain why he sold the property without the second respondent’s permission he volunteered the following explanation:

“It was – they mentioned which house, but it as a misunderstanding for another property, but which I accept negligence there”.

Record pg 34 lines 8 – 10

I then asked the first respondent whether he was saying that he did not realise he was selling the property that the second respondent wanted he replied “That is so ....[inaudible] That is right”.

Record pg 34 lines 11 – 13

When I put it to him that because he was speculating on the property, he would have to know which property it was, in order to know how much he paid for it and how much he could get for it, he agreed.

Record pg 34 lines 16 – 20

He said he was only alerted to his error when he was telephoned by the attorney to sign the transfer documents.

Record pg 34 lines 23 – 25

He agreed that the property was correctly described in the agreement of sale

Record pg 35 lines 16 – 17

and when I asked him what alerted him to the fact that it was the wrong property he replied as follows

"When she told me actually the physical – when she told me to come and sign documents I asked her 'Now which property?' and she told me the buyer – the agreement was sent by the agent to the buyer"

Record pg 35 line 23 – pg 36 line 2

His response was "....sorry it is on the wife's name and I cannot sell the property".

Record pg 35 line 1

When I asked first respondent whether he looked at the agreement before signing it to see what the address was he replied as follows:
"To be honest, at that time, we are signing document [inaudible] we just sign and send it, as an agent we just ...[intervention]".

Record pg 43 lines 12 – 14

When I asked him how he decided the price offered was a reasonable price and that to do so he had to know what he had paid for the property on the auction, to decide whether it was a good business deal he replied "It was totally on the profit margin of it, which we .... [intervention]".

When I then put it to him that he then had to know exactly which property he was selling he replied "That is right "

Record pg 43 lines 17 – 23

but maintained that he thought it was another property he was selling.

Record pg 44 line 1

However, when I pointed out to him that the explanation he had given as to why he signed the agreement had not been advanced anywhere in his affidavits, he agreed that the reason he had signed the agreement in his personal capacity and did not get his wife's consent, was that he thought he was selling a property other than the property his wife wanted for a family home.

Record pg 44 line 8 –pg 45 line 25

When I asked why this explanation was not put in his affidavit and that it was not simply that he had forgotten the property was bought by his wife, he did not answer and simply said "I do understand that".

Record pg 45 lines 22 – 25

When I asked him what the address of the other property was he replied it was 6 Tedford Place, Westville

Record pg 47 lines 4 - 5

and that he had bought it on his own name at the same auction.

Record pg 47 lines 15 – 16

The property in question in the present matter is situated at 2 Tureen Place, Westville

Application papers pg 18

[34] The following conclusions may be drawn from the analysis of the first respondent's evidence:

[34.1] The first respondent was dishonest concerning the extent to which the second respondent conducted her own business, in speculating on the purchase and sale of properties. The original explanation tendered by the first respondent as to why he purchased twenty percent of properties in second respondent's name for tax purposes, was quite plainly correct. The reason why the first respondent fabricated the nature and extent of the second respondent's business was quite plainly to avoid any inference that he was involved in tax evasion and to bolster his statement that it was bought in second respondent's name, and that she was not prepared to sell the property which was hers.

[34.2] The first respondent was dishonest in maintaining that the second respondent wished to keep the property as a family home, as the reason for refusing to sell the property. If this was true he would not have permitted Fortune Properties to market the property for six weeks, culminating in finding the applicant as a buyer.

[34.3] The first respondent was dishonest in maintaining that he was mistaken as to the identity of the property when he sold it to the applicant. This explanation was never advanced in the first respondent's affidavit and in order to agree upon the price, the first respondent as an astute businessman, whose sole occupation is property speculation, would have to have known precisely what he paid for the property, and consequently the identity of the property.

[35] These conclusions undermine the credibility of the first respondent's evidence as to the involvement of the second respondent in the purchase of the property, as well as her involvement in the first respondent's refusal to sell the property and the reasons advanced for refusing to sell. Mr. Troskie in reliance upon the decision in

Body Corporate of Dumbarton Oaks v Faiga
1999 (1) SA 975 (SCA)

submitted that even if the first respondent's evidence was found to be unreliable in regard to why the property was marketed by the estate agents, that the second respondent was not simply a housewife and that he made a mistake as to the identity of the property when selling it, that this did not justify a rejection of his evidence in its totality. In Faiga the Supreme Court of Appeal stated the following at pg 979 I to 980 A

"The Judge's failure to decide the case without regard to the wider probabilities is a clear misdirection and entitles us to reassess Mrs Shiloane's evidence. It was also wrong of the Judge to consider that a non-acceptance of her evidence of necessity requires a finding that she is a deliberate liar and perjurer (at 661B-C). That is an emotional approach. In a civil trial the question is whether her evidence is, on the probabilities, correct. Few witnesses whose evidence is not accepted can be described as deliberate liars and perjurers".

Mr. Troskie submitted that the evidence of the first respondent had to be considered together with the copies of the agreement of sale, the power of attorney and the statement of the first respondent to the conveyancing attorney, three days after the sale that the second respondent was the buyer. I agree that the evidence of the first respondent obviously has to be considered together with this evidence, in deciding whether the respondents have discharged the *onus* of proving on a balance of probabilities that the first respondent did not possess the legal right to sell the property to the applicant.

[36] The documentary evidence is not determinative of this issue, but must be weighed together with all of the evidence. As pointed out above, the only copy of the agreement whose provenance, meaning its origin and that it was kept after the sale by a party who has no interest in the dispute, is Annexure "BS1", whose authenticity was confirmed by Shewbaran and Ottino. As pointed out above, this is the only copy of the agreement which according to the first respondent was completed entirely by him and in which he is reflected as the buyer. There is no mention of his buying on behalf of the second respondent. I find the first respondent's explanation for this to be unconvincing. If the first respondent was buying the property on

behalf of his wife, he had not seen the property and which he had been expressly authorised to buy on her behalf in terms of the power of attorney, why would he fail to simply qualify his status as the buyer? The first respondent's explanation that this was caused by the urgency in completing the copies of the sale agreement before the next sale, I find unconvincing. Such urgency did not prevent him from completing this agreement with all the other necessary details. Turning to the other two copies of the agreement, namely Annexure "K", which it appears is the Sheriff's copy, and the copy appearing at pages 77 – 83 of Exhibit "A", which it appears is the first respondent's copy. It is quite obvious that the Sheriff's evidence on what occurred at the auction sale, particularly with regard to the completion of the agreements of sale was both relevant and necessary. It was for this reason that I directed that he be subpoenaed and be present at the hearing. I was informed by Counsel that the Sheriff was at Court. Mr. Troskie in fact, after the first respondent had completed giving his evidence, asked for a short adjournment to enable him to speak to the Sheriff and decide whether he wished to call him to give evidence or not. After the adjournment Mr. Troskie advised me that the first respondent would not present any further evidence. Mr. Joubert submits that an adverse inference should be drawn against the first respondent, for failing to call the Sheriff and to a lesser extent, the second respondent and the estate agent, Mr. Raath.

[37] In the case of

Sampson v Pim
1918 AD 657 at 662

Solomon J A had the following to say:

"There is only one other observation I desire to make. It is very significant that Van der Bijl, who was in the sidecar attached to the plaintiff's cycle, was not called as a witness by him. He had been subpoenaed, and was available, but was not put into the box. The inference is irresistible that his evidence would not have supported the plaintiff's case. It might of course have been negative, as he may not have been keeping a look-out and so may not have been able to assist the Court one way or the other. But if he could have given evidence favourable to the plaintiff it is inconceivable that he should not have been called".

In the case of

Elgin Fireclays Ltd. v Webb
1947 (4) SA 744 (A) at 749 – 750

Watermeyer C J said the following:

"Counsel for the applicant relied upon the fact that the shepherd was not called to give evidence, and, from respondent's omission to call him as a witness, asked the Court to draw the inference that his evidence was in some way unfavourable to the respondent. With regard to this request, it is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial Court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him. See *Wigmore* (secs. 285 and 286.) But the inference is only a proper one if the evidence is available and if it would elucidate the facts".

However, in

Munster Estates (Pty) Ltd.v Killarney Hills (Pty) Ltd.
1979 (1) SA 621 (A) at 624 D – F

Wessels J A in commenting upon the decision in Elgin, had the following to say:

"In my opinion, however, it is to be doubted whether WATERMEYER C J intended laying down a general and inflexible rule to be applied without more in every case where a party fails to call as his witness one 'who is available and able to elucidate the facts'. Whether the inference, that the party failed to call such a person as a witness because he 'fears that such evidence will expose facts unfavourable to him', *should* be drawn could depend upon the facts peculiar to the case where the question arises. It was pointed out in *Werbranchek v L K Jacobs & Co. Ltd*. 1948 (4) SA 671 (A) at 682 that it might appear that the person concerned was equally available to both parties, and that the inference could then be drawn against both parties. VAN DEN HEEVER J A also stated:

'After all, plaintiff was entitled to rest his case upon evidence which he considered adequate to discharge the *onus* which lay upon him'

[38] In my view the following factors are relevant in deciding whether to draw such an inference.

[38.1] The Sheriff in disposing of the property at a sale in execution does not act as the agent of anybody but as an executive of the law

Schoerie N O v Syfrets Bank Ltd. & others
1997 (1) SA 764 (DCLD) at 773 E

When an immovable property is sold by the Sheriff in terms of Rule 46 "he becomes a party to the contract *suo nomine* and he is bound to perform his obligations thereunder, which includes the giving of transfer of the property to the purchaser, which when effected is considered done as validly and as effectually as if he were the owner of the property".

Schoerie at pg 773 J – 774 B

[38.2] It is self-evident therefore that the parties to the agreement were the Sheriff and the first respondent. It seems patently obvious that his evidence would elucidate the issue as to whether he contracted with the first respondent in his personal capacity, or on behalf of the second respondent. His evidence could have been decisive in resolving the present dispute.

[38.3] The Sheriff should have been able to elucidate the differences between the three sale agreements and should also have been able to say whether the power of attorney was presented to him by the first respondent at the sale.

[39] On the particular facts of this case I am satisfied that because of the failure by the first respondent to call the Sheriff, who was available and able to elucidate the facts, an inference should be drawn that the first respondent "fears that such evidence will expose facts unfavourable to him", with regard to the completion and conclusion of the two copies of the agreement, being Annexure "K" (the Sheriff's copy) and the copy appearing at pages 77 – 83 of Exhibit "A" (the first respondent's copy), as well as the presence and significance of the power of attorney.

[40] Although the Sheriff was also available to the applicant to be called as a witness, but did not do so, in my view a similar inference should not be drawn against the applicant for the following reasons.

On the facts of the present case, the applicant was not present at the sale in execution and has no direct evidence as to whether the first respondent concluded the sale in his personal capacity, or acting on behalf of the second respondent. As opposed to this the first respondent knows exactly what transpired at the sale. Should the applicant have called the Sheriff the applicant would not have been able to discredit the Sheriff as a witness and would not have been able to cross-examine him.

[41] Consequently, whether the respondents have discharged the *onus* resting upon them of proving on a balance of probabilities that the first respondent purchased the property on behalf of the second respondent at the sale in execution and consequently did not have the legal right to sell the property, must be determined not only by considering the shortcomings in the evidence of the first respondent, together with the provisions of the three agreements of sale, as well as the power of attorney and the statement by the first respondent to Shewbaran three days after the sale, that the second respondent had purchased the property, but also the adverse inference to be drawn by virtue of the failure of the first respondent to call the Sheriff as a witness.

[42] This enquiry does not require an assessment of the applicant's evidence because his evidence can have no bearing upon the central issue of the capacity in which the first respondent bought the property at the sale in execution. Consequently, the fact that I was not impressed by his demeanour in the witness box, as he appeared uncomfortable and continually dropped his voice to the extent that he was inaudible and directly contradicted himself as to whether he

offered the first respondent R100,000.00 more for the sale to go through

Record pg 71 lines 12 – 14
Record pg 78 lines 4 – 7

can have no bearing upon this central issue. The fact that he has lied concerning whether he offered the first respondent R100,000.00 more for the sale to go through, is not of relevance in deciding the central issue.

[43] The issue is whether the first respondent when he bought the property did so intending to act as the agent of the second respondent or personally. The enquiry is whether the first respondent has misrepresented his state of mind in this regard. The presence of the power of attorney is not decisive, because in the light of the first respondent's untruthfulness concerning the extent to which the second respondent was involved in the business of speculating in the buying and selling of properties, and his untruthfulness concerning the interest that the second respondent had in the property, I am satisfied that he has not told the truth when he said he had not seen the property before he bought it, and that he bought it on behalf of the second respondent. The inference is irresistible that if and to the extent, that he may have used second respondent's name as a purchaser at the sale in execution, this was simply a convenience for tax purposes as and when he wished to rely upon her description as a purchaser, and was never intended to limit and define his status as the purchaser. In addition, the Sheriff was not called when his

evidence could have been expected to elucidate the presence and significance of the power of attorney. As regards the agreement of sale, Annexure "K" to the application papers, Annexure "BS1" to the application papers and pages 77 – 83 of Exhibit "A", when the untruthfulness of the first respondent is considered, together with the absence of any evidence by the Sheriff to explain the contradictions between these documents, as well as the fact that the only copy of the agreement which has been in the possession of an independent third party, since the sale, reflects the first respondent in his own handwriting as the buyer, I am satisfied that the agreements when considered as a whole, do not provide reliable evidence in support of the first respondent's contention that he purchased the property on behalf of the second respondent. The statement by the first respondent to Shewbaran that the second respondent was the purchaser of the property at the sale in execution, is directly contradicted by his conduct thereafter in allowing the property to be marketed and in signing the agreement as the seller, which he sought to explain by a further lie, namely that he had made a mistake as to the identity of the property.

[44] When all of the above is considered I am satisfied that the respondents have failed to discharge the *onus* of proving on a balance of probabilities, that the first respondent bought the property at the sale in execution on behalf of the second respondent, and not personally and that the first respondent consequently had no legal right to sell the property to the applicant.

[45] In the result the *rule nisi* issued by Mokgohloa J on 01 December 2011 falls to be confirmed. At the hearing I directed that the evidence be transcribed and I was advised by Counsel that the parties were agreed that the costs incurred would be shared equally, but that I should make an order in favour of the successful party, directing that such costs may be recovered from the unsuccessful party.

[46] In addition to confirming the rule I deem it necessary to refer this matter to SARS for the tax affairs of both the first and second respondents to be investigated, particularly with regard to the conduct of the first respondent in buying immovable properties on behalf of the second respondent, for re-sale, apparently for the purposes of reducing the tax payable by the first respondent.

I grant the following order

a) The rule is confirmed.

b) In addition to the costs order forming part of (a), the respondents are ordered to pay the applicant's share of the costs incurred in transcribing the record.

c) A copy of the application papers, a transcript of the evidence led, as well as this Judgment are referred to SARS for the tax affairs of the first and second respondents to be investigated, particularly with regard to the conduct of the first respondent in buying immovable properties on behalf of the second respondent, for re-sale, with the object of reducing the tax payable by the first respondent.

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SWAIN J

Appearances /…

Appearances

For the Applicant : Mr. D.B. Joubert

Instructed by	:	Randles Incorporated Pietermaritzburg
For the Respondent	:	Mr. A. J. Troskie S C
Instructed by	:	Mohamed Khan & Associates C/o Sergie Brimiah & Associates
Date of Hearing	:	28 August 2012
Date of Filing of Judgment	:	10 October 2012